



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Petition 306 of 2008**

**IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70 AND 75(1) & (2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE EDUCATION ACT CHAPTER 211 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT CHAPTER 212 LAWS OF KENYA**

**IN THE MATTER OF SACHO HIGH SCHOOL**

**BETWEEN**

- 1. KIPKOECH KANGOGO**
- 2. ERIC TOROITICH**
- 3. ANDREW C. KANGOR**
- 4. MICHAEL TOROITICH**
- 5. STEPHEN TOROITICH**
- 6. KIDOGEO KAGOGO**
- 7. KIPINYAGAN TOROITICH**
- 8. CHELIMO CHEPYATOR**
- 9. DAVID NGENO**
- 10. STEPHEN KOSGEI**
- 11. RENOS CHEROGONYI**

12. ZAPHANIA NGENO
13. MICHAEL K. KIPROP
14. MOROP CHELIMO
15. STEPHEN G. KEBUT
16. JACKSON K. KIBOGOGE
17. REUGEN CHEBOR
18. SAMSON TOROITICH
19. CHARLES K. NGENO
20. WESLEY K. KIPSANG
21. EVANS K. LIMO
22. JOSEPHAT K. NGENO
23. JOHN K. KIPSANG
24. DANIEL K. KEITANY
25. ALRED K. KEITANY
26. RICHARD KIPKOECH
27. WILLY K. KONG'A
28. KEMBOI J. KONG'A
29. KIPYATOR CHEKONG'A
30. NOEL K. JACKSON
31. DANIEL K. KOECH
32. BRIAN K. KONG'A
33. PAUL K. KIPROTICH
34. JACOB K. KIPRONO
35. DANSON C. KANDAGOR
36. CHERUTICH KIPTIM
37. DICKSON KIPTIM
38. KIPSOI KIPTIM
39. KIPYEGON KIPTIM

40. JAMES KIPLIMO
41. MOSES KIPTARUS
42. WILLIAM CHERUTICH
43. WILSON CHERUTICH
44. DAVID CHERUTICH
45. WILSON KIPKOECH
46. JOHN KIPKOECH
47. JONATHAN KIPKOECH
48. KIBOR CHELIMO
49. EVANS CHELIMO
50. KOPNGENO KIARUS
51. SAMUEL KEITANY
52. KIPCHUMBA KEITANY
53. RICHARD KEITANY
54. CHERUTICH KEITANY
55. KIPTUI KEITANY
56. REUBEN KEITANY
57. LUKA KEITNAY
58. KIPYEGON KIPNYAGAN
59. KIMUTAI KIPSOI
60. WILLIAM KIPSOI
61. PHILIP KIPSOI
62. CHERUTICH KIDOGO
63. KIPYGEN KIDOGO
64. MUSA KIDOGO
65. MUSA K. KIPSAMBU
66. SERECH S. NIXON
67. SERECH K. HOSEA

68. **BENARD K. KOECH**
69. **KANDIE CHEPYEGON**
70. **WILLIAM K. KIPYEGON**
71. **CHELIMO KIPYEGON**
72. **DANIEL LIMO**
73. **SOLOMON K. TUITOEK**
74. **TUITOEK KIPYEGON**
75. **DICKSON K. YATICH**
76. **DAVID K. CHELIMO**
77. **KENGOR CHEPYATOR**
78. **CHARLES K. CHELIMO**
79. **SYMON T. CHELIMO**
80. **JAMES K. KANGOR**
81. **DICKSON K. KANGOR**
82. **HILARY K. LIMO**
83. **LABAN K. LIMO**
84. **KIPKOECH KANGOGO**
85. **EDWIN K. CHELANGAT**
86. **RICHARD CHELIMO**
87. **SAMSON K. KIBOSA**
88. **KIPLAGAT KIRUI**
89. **RONGUMOI TILILEI**
90. **WILSON TALLAM**
91. **JOHN CHEBET**
92. **ISAAC KIPYEGON**
93. **ISAAC K. ROTICH**
94. **RUTOH JOEL**
95. **MARY CHEMOBO**

**96. ISAAC KIBET**

**97. FRNACIS KOIMA**

**98. WYLCIFFE MATINI**

**99. EMMAUEL K. MUTAI.....PETITIONERS**

**AND**

**THE BOARD OF GOVERNORS**

**SACHO HIGHT SCHOOL.....1<sup>ST</sup> RESPONDENT**

**THE MINISTERS FOR EDUCATION.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

### **RULING**

Before us is the application dated 8/8/08 which is brought pursuant to S 3A of the Civil Procedure Act, and Order 1 Rule 10 (2), R. 13 and 22 of the Civil Procedure Rules. The petitioners Kipkoech Kangogo and 98 others, seek the leave of this court to enjoin Daniel Toroitich Arap Moi, Jonathan Kipkemboi Moi and Joshua Kulei as parties to this suit in their own capacity and being the Registered Trustees of Sacho High School Trust. The Applicants also pray for any other order that the court deems fit to grant. The application is founded on grounds found in the body of the application and the affidavit of Michael Toroitich dated 8/8/08. The application was opposed and Harun Bomett, who describes himself as a trustee of Sacho High school, filed an affidavit dated 16/6/09. Mr Kipkoge, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also opposed the chamber summons by adopting submissions of the 1<sup>st</sup> Respondent's counsel Mr. Kiplenge. He also filed grounds of objection dated 20/7/09.

This petition was filed by 99 petitioners who claim that their fundamental rights under Ss 70, 75 (1) and (2) of the Constitution have been contravened by the Board of Governors, Sacho High School, The Minister of Education and the Hon. The Attorney General and they seek several declarations inter alia, that their rights to property over Sacho High School and its assets have been breached. The petitioners claim to be the original owners of the parcel of land upon which the school stands but that the land was compulsorily acquired by the Trustees of the school without any compensation. That it is therefore necessary to enjoin the Trustees of the school to the petition for better determination of all the issues in this petition. The petitioners contend that they came to learn of the existence of the Trust and the Registered Trustees when Messrs Kiplenge Advocate, Counsel for the 1<sup>st</sup> Respondent filed the Replying affidavit to the petition, sworn by Richard Cherutich Moindi on 4/6/08 and the annexures which included the Trust deed. That it is the Trustees who manage the school's property and it is therefore necessary to enjoin them to the suit. That the Respondents will not suffer any prejudice. In addition, Mr. Letangule counsel, for the Petitioners urged that they had not been in possession of this information until Richard Toroitich Moindi, the Headmaster of the school filed the replying affidavit dated 4/6/08 in which he deponed that the school records show that the school is owned by the Registered Trustees of Sacho High School and exhibited a copy of the Trust Deed dated 17/7/1985 ('RCMI'). Counsel further said that the preamble of the Trust Deed shows that it is an irrevocable charitable Trust. That a trust is a Corporate body capable of suing and being sued and since the petitioners have become aware of the Trustees, it is only fair that they be allowed to enjoin the trustees. As regards the objection to the provisions of law under which the petitioners have come to court, counsel urged that the court can even on its own motion order joinder of a party if it deems it necessary to do so. That the deponements by Mr. Bomett that the Trustees have changed is a new development that should have been confirmed by some documentary

evidence.

Mr. Kiplenge opposed the application on behalf of the 1<sup>st</sup> Respondent. Counsel urged that the application is incompetent having been brought as a chamber summons instead of a notice of motion. That order 1 of the Civil Procedure Rules does not apply to Constitutional applications. That order 1 R 10 applies to a suit but what is before the court is a petition and that the same should be struck out. As regards the merits of the application, counsel submitted that records have changed and it is Silas Yego, Henry Kiplangat and Bomet who are now trustees. He submitted that President Moi registered an irrevocable Trust and appointed Trustees in July 1995. That Article 8 allowed the Board of Governors of the School to appoint and remove Trustees. That if trustees are enjoined, they will increase the costs of this petition and the application should be rejected.

Mr. Kipkogei opposed the application on grounds that it is incompetent as it was not brought under the Rules promulgated under S 84 of the Constitution. That a certificate of registration of the school was exhibited at pg. 102 of the petition and shows the manager of the school to be the Board of Governor and that it is a requirement under the Education Act that the Board of Governors (BOG) be the manager. That S 10 (2) of the Act provides that the Board is a body corporate capable of suing and being sued. That all the issues raised can be answered by the B.O.G otherwise it will be a muddle if all persons are enjoined.

The petitioners came to this court seeking enforcement of their rights under the Constitutional provisions. It is trite law and there is ample case law that has held that it is the Government that guarantees fundamental rights of individuals but not individuals or private entities. In the case of *TEITWINANG V ARIONG (1987) LRC (CONSTITUTION) 517* which was adopted in the Case of *KENYA BUS SERVICES V AG (2005) IKLR AND MARTHA KARUA V RADIO AFRICA T/a Kiss FM*. Maxwell C.J held as follows:

**“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or individuals under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”**

In our view, it would be futile enjoining the said trustees as Respondents to this petition because the final orders sought can not issue against them. However, they can be enjoined to this petition as persons interested in the outcome of the case or as persons who may be affected by the court’s orders.

The application has been opposed as having been brought under the wrong provisions of the law. This application arises in a petition brought pursuant to the Constitutional provisions and there are indeed Rules made pursuant to S 84 (6) of the Constitution which guide parties who wish to approach this court for reliefs. The Respondents have not pointed this court to any section or regulation that provides for joinder of parties. Since the Rules are silent on the issue of amendment, I believe that this court would not fold its hands and declare that it is helpless to assist an aggrieved party who wishes to have a party enjoined. This court has inherent powers to intervene where the law is silent or when there are no specific statutory provisions to cover a particular situation in order to do justice to the parties. We do agree that Order 1 of the Civil Procedure Rules may not be applicable to petitions under the Constitutional provisions but this court can exercise its discretion under its inherent powers to do justice. The right of access to the court under S 84 of the Constitution is a fundamental right and though an amendment is not specifically provided for, a party can not be denied full access to court to have their matter fully articulated and argued on merit to serve the ends of justice which is one of the objectives of

the Constitution, that is, to ensure that justice is done. We have in mind the case of **REP V AG ex parte MUIITE 2005) IKLR 238** where Nyamu J allowed an amendment of a Constitutional Reference. He also held that the Constitution presumes the existence of the law of evidence and the Rules of Civil Procedure in so far as is practicable in the circumstances of the case and the Rules are in conformity and do not violate specific provisions of the Constitution. It has not been shown that the joinder of the Trustees will prejudice the Petitioner or that they will violate any provisions of the Constitution.

In the instant case, it is the Respondent who actually mentioned the trustees and exhibited the Trust deed to the replying affidavit of Richard Cherutich Moindi who at para. 4 thereof deponed that Sacho High School is owned by the Registered Trustees of the Sacho High School Trust (RCMI) dated 17/7/1985. At para. 8 and 9, of the Trust Deed, the Board of Governors is given the mandate to appoint or remove a trustee. Mr. Bomett has deponed that there are new Trustees namely, Bishop Silas Yego, Mr. Harun Bomett and Henry Kiplang'at. However, However

HHHHhhhhh there is no evidence that the Trustees named in the replying affidavit of Moindi have been removed. It would be expected that minutes of the Board of Governors would be availed or some documentation from the Board of Governors to confirm the change in the Trustees. It is only the Respondents who can avail that evidence and the allegation that there has been a change is not substantiated. The affidavits of Mr. Moindi and Mr. Bomett are obviously contradictory.

The Trustees being the owners of the school are parties with a direct interest in this matter and its outcome and in our considered view, they should be enjoined to these proceedings as Interested parties. Mr. Kiplenge had come on record for the Interested parties and had no objection to the trustees named by Mr. Bomett being enjoined. However since it is not clear whether or not the first trustees have ceased to be such or not, it is only proper that all of them be named as interested parties in this matter. We hereby allow the application by the petitioner to enjoin Daniel Toroitich Arap Moi, Jonathan Kipkemboi Moi and Joshua Kulei as interested parties to this petition. The Respondents have not demonstrated what kind of prejudice they will suffer if the orders are granted. In exercise of the inherent powers of

this court, we therefore allow prayer 1 of the chamber

summons dated 8/9/08 and direct that costs abide the petition.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of September.**

**2009.**

**R.V.P. WENDOH**

**JUDGE**

**G. DULU**

**JUDGE**

**Delivered in the presence of:**

Mr. Letangule for Petitioners

Mr. Kiplenge for 1<sup>st</sup> Respondent

Mr. Ombwayo for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Court clerks - Muturi, David Mutisya