



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 1187 of 2007

ST PATRICK HILL SCHOOL LTDAPPLICANT

Versus

THE PERMANENT SECRETARY

MINISTRY OF FOREIGN AFFAIRS RESPONDENT

JUDGMENT

The Notice of Motion dated 6/11/07 was filed by the exparte applicant, St Patricks Hill School seeking judicial review orders against the Permanent Secretary (PS) Ministry of Foreign Affairs. The applicant seeks an order of Certiorari to remove into this court and quash the decision of the PS Ministry of Foreign Affairs made on 15/10/07 suspending indefinitely and without reason payment of school fees for the Ministry's employees' children in the applicant school and asking parents to have alternative arrangements to go to other schools. The second prayer is for an order of Prohibition to issue to the PS Ministry of Foreign Affairs prohibiting him, his servants and/or agents from interfering, suspending halting or in any other manner interfering with payment of school fees to the applicant school by the employees/parents or in any other way interfering with the learning of the children of the Ministry's Employees in the said applicant school. The applicant also asks for costs of the application.

The application is premised on grounds found in the statement of facts and the verifying affidavit of Ellen Karwitha Kangethe, dated 31/10/07. The applicant also filed skeleton arguments on 7/12/07. The Respondent filed grounds of opposition on 23/4/08 dated 10/3/08 and skeleton arguments.

The applicant is a school registered under the Education Act and among students admitted at the said school are children of employees of the Ministry of Foreign Affairs. The Ministry was responsible for payment of the school fees after a contract is signed between the parents of the students and the school. Vide a directive issued on 15/10/07, the PS directed that all fees payable to the said school be suspended. Those affected were asked to make alternative arrangements. A sample of the letter is (EKK 3). It is the applicant's contention that the circular is administrative in nature as it is made by a public officer and that they have been denied about Kshs 7 million and that the said decision was high handed and ultra vires the powers of the PS. That the applicant was denied a chance to be heard contrary to Rules of natural justice. That the facts deponed to by the Director of the school have not been controverted.

The applicant relied on the following authorities

1. MATIBA V. AG C.A NO. 42/1994 – that the school having been an interested party should have been given a hearing.

2. REP V. COMMISSIONER OF CO-OPERATIVES C.A.39/1992 in which the court held that statutory powers need to be exercised reasonably but that in this case the decision was made in bad faith as no reasons were given.

3. ONYANGO V. AG C.C. 152/1986 where it was held that in a decision that affected the rights of parties one had to be given a hearing.

The Respondent filed grounds of opposition which are inter alia that the application is misconceived, bad in law and an abuse of the court process that the notice of motion has no legal basis and there is no contract between the applicant and Respondent that the applicant has no locus standi to make this application.

Mr. Kirori opposed the motion on behalf of the respondent and relied on the case of **LAW SOCIETY OF KENYA V COMMISSIONER OF LANDS AND OTHERS HCC 464 of 2000** where the court held that for one to have locus standi in a matter he ought to show that his own interest particularly has been prejudiced or about to be prejudiced and if it is a public interest, then the litigant should show that the matter complained of has injured him over and above injury suffered by the rest of the public.

It is not in dispute that it is the parents of the students who attend the Applicant school who had signed a contract with the said school as to how fees would be paid. There existed no contract between the Applicant and the Respondent on how fees was to be paid. That is evidenced annexure EKK 1 and 2. There existed no relationship between the applicant and the Respondent on how the fees for children of employees of the Respondent would be paid.

It is the employees of the Respondent who had an arrangement with the PS on how the fees should be paid but this court is not aware exactly what the terms were. At least the applicant did not point to any such agreement or arrangement or any statutory provision binding the Respondent to pay the fees of the ministry's employees children. The grounds upon which the applicant brings this application are that they were not given a hearing before the directive of 15/10/07 was made and that the said decision flies in the face of section 46 of the Anti Corruption and Economic Crimes Act 2003 and section 4 (2) of the Children, Act 2001 and is therefore illegal, unlawful null and void.

The impugned decision of 15/10/07 reads as follows:

“15 Oct 2007

Mr John K. Njeru

Thro’

The Ambassador

Kenya Embassy

Tokyo

PAYMENT OF SCHOOL FEES

Payment of school fees for children attending school in St. Patrick’s Hill School has been put on hold until further notice.

In view of this, you are advised to make alternative arrangements.

Signed

J.G. Kabuthia

FOR: PS”

The letter was addressed to an individual by name John Njeru, may be a parent with a child at the applicant school. It does not address the Applicant at all. I believe because the applicant had no direct relationship with the school save that it received fees in respect of children of the ministry’s employees. In the letter, the addressee was asked to make alternative arrangements, I believe to pay school fees. The applicant has not demonstrated to this court that it was the duty of the ministry to pay school fees and therefore owed the Applicant a duty to hear them or that the ministry is bound by any statutory provision to pay school fees for the children of its employees at the said school. None has been alluded to.

Though the applicant invoked the provisions of section 46 of the Anti-Corruption and Economic Crimes Act of 2003, no reference was made to it and how it has been flouted. Section 46 provides that a person who uses his office to improperly confer a benefit on behalf of anyone else is guilty of an offence. The Respondent has not demonstrated how the PS used his office improperly in the circumstances. The applicant also invoked the Children’s Act, section 4 (3) and 12. Section 4 (3) provides that all judicial and administrative institutions and all persons acting in the name of these institutions when exercising powers conferred by the Act, should treat the interests of the child as first and paramount in order to safeguard and promote the rights and welfare of the child. Sections 12 (1) and (2) of the same Act deal with protection of the child from abuse; both physical and psychological abuse, neglect or exploitation as a result of the said directive of the PS. The letter was addressed to the parent who is responsible for payment of fees, who was asked to make alternative arrangements. If that parent failed to do so, that is when the applicant could invoke these provisions to have the Child protected. The Applicant has not shown that the duty rested on the Respondent and not the one to whom the letter was addressed nor was it shown that any child had been the subject of abuse or neglect.

Judicial Review as a public law remedy which will only be invoked if the Respondent was performing a public duty. (See Hasburys Laws of England 4th Edition Re-issue Vol I (1) what spells out the scope of Judicial Review.

“64 The scope of Judicial Review

The traditional test for determining whether

A body of persons is subject to Judicial Review is the

source of the power If the duty is a public duty

the body in question will be subject to the Public Law”

“possibly the only essential elements” giving rise to the exercise of the supervisory functions of the court are what can be described as a public elements which can take different forms and the exclusion from the jurisdiction of bodies whose sole source power is consensual submission to its jurisdiction. A public body suggests a government or quasi-governmental element If the source of power is a statute or subordinate legislation under a statute, then the body in question will be amenable to judicial review, ...

The crucial consideration will be whether a particular decision of the body is made under a statutory power where any person or body exercises a power conferred by a statute which affects the rights or legitimate expectations of citizens and is a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power. If the source of power is contractual as in the case of private arbitration then the arbitrator is not subject to Judicial Review. Thus members of trade unions, business associations and local clubs and also students in universities and colleges who have contractual rights based on contracts of membership should in appropriate cases seek the private law remedies of declaration and injunction and not the remedy of Judicial Review”.

In the instant case the ministry is a government body performing public duties. The question hence is whether the PS was performing a public duty in relation to the applicant or over the parents and what is the source of power. The relationship between the employees of the ministry and the ministry is contractual. The source of power is a contract between employer and employee. As pointed out earlier it is not clear on what terms the ministry paid fees to the applicant. Since there is no agreement or statutory provision authorizing the Permanent Secretary to pay fees, it seems what was in place was an arrangement between the employer and employee to what the applicant is not a party.

The Permanent Secretary would only be subject to the public remedies of Judicial Review if he was in breach of a statutory duty or failed to act fairly in regard to the employees, or made an error but not in relation to the Applicant. I find in the instant case, that the Applicant lacks the necessary standing and his interest of receiving fees from the employees of the ministry is very remote.

The applicants seek orders of certiorari and prohibition. When can Judicial Review orders issue? The court of appeal in **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96** ably set out the scope and efficacy of judicial review orders. The court of appeal said:

“These remedies are only available against public bodies such as the council in this case. What does an ORDER of PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. (See Halburys Law of England, 4th Edition Vol 1 at page 27 par 128). Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons”.

In the instant case, it has not been demonstrated that the Respondent is in breach of any statutory provision or that he acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Consequently, none of the above orders of Judicial Review can issue. The Applicant is in my view a stranger in these proceedings because if fees are not paid he could pursue the parents or those responsible for the children’s fees but not the Respondent.

In sum, I find that the applicant lacks the necessary standing in this matter and the whole motion lacks merit and is hereby dismissed with the applicant bearing the costs.

Dated and delivered this 11th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Njoroge for Applicant

Ms Muriithia for Respondent

Daniel: Court Clerk

