



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 140 of 2004**

D K C PLAINTIFF

VERSUS

KENYA FLUORSPAR CO. LIMITED DEFENDANT

JUDGEMENT

The Plaintiff, a parent brought this suit on 11th November, 2004 on behalf of his four (4) children under the Children's Act No. 8 of 2001.

The children are going to be referred to as AR, VR, MR and HR all having been pupils at Fluorspar Primary School which at all material times was owned, managed and run by the Defendant, the Kenya Fluorspar Company Limited.

In their amended Complaint dated 4th August, 2006 the Plaintiffs contended that:-

- The Defendant is a duly registered body corporate with its principal offices situated at Kerio Valley and at all material times to the suit was the registered proprietor of Fluorspar Primary School.
- That the first three (3) children were enrolled at Fluorspar Primary School in April, 2002 and have since their enrolment attended to their learning smoothly without any interruptions.
- HR was enrolled at Fluorspar Primary School into baby class in January, 2003 and do not have school fees arrears and have been promptly paid by their father.
- The four (4) children do not have any school fees arrears and have never defaulted in payment of school fees and assert that they were legally enrolled in Fluorspar Primary School from April 2002 and February, 2004.
- On or about 17th March, 2004 without justifiable cause or reason the Headmaster to the institution did unlawfully expel the Plaintiffs, the four (4) children without any reasonable grounds or cause to dismiss them after being in attendance in the said institution for two years.
- By reason of the said expulsion, the children have suffered harm.

The particulars of harm pleaded are:-

- (a) Denying the four (4) children an opportunity to learn within a favourable environment.
- (b) Failing to give notice to the four children.

- (c) Unilaterally expelling all the four children from the school in which they were learning.
- (d) Failing to dissociate the four (4) children from activities of D K C, their father.

That the “stringent” relationship was between the parent and one of the Administrators of the School.

The Plaintiff children sought the following reliefs from the Court:-

- (a) A declaration that the expulsion of the children from Fluorspar Primary School was unlawful.
- (b) That the children be reinstated in Fluorspar Primary School in their respective classes.
- (c) Preservation of the children vacancies in their respective classes.
- (d) Costs of the suit.
- (e) Any other remedy that the Honourable Court may deem fit and just to grant.

In its Defence, the Defendant while denying the claims responded, inter alia, that:-

- The Headmaster to the Institution was justified in expelling the Plaintiff’s four (4) children for the children had not procedurally been admitted to the institution and further that the Plaintiff adamantly refused or failed to adhere to the laid down school rules.
- The Plaintiff does not raise any cause of action against the Defendant.
- The suit is bad in law as the same is Res judicata for having been determined between the same parties in this Honourable Court over the same subject matter in Eldoret Children’s Court Case No. 36 of 2004.

The Plaintiffs called one principal witness, their father, D K C while the Defendant called the Personnel Officer of the Company, Mr. James Kipkemoi Bogong and the Head Teacher of the School, Mr. Mathias Mukiibi Kibiranga.

With regard to the question as to whether the issues in question in this suit are Res Judicata, I do find that the Defendant did not pursue this point of law during the trial and in its submissions. In any case having read the proceedings and the Ruling of the Children’s Court in Eldoret Children’s Court Case No. 36 of 2004, I do find that the said suit was struck out on jurisdictional issues and the matter was not heard and determined on its merits.

From the evidence on record and as a matter of fact the four (4) children, AR, VR, MR and HR were admitted and enrolled at Kenya Fluorspar Primary School as follows:-

AR into Class 5 in April 2002.

VR into Class 3 in April 2002.

MR into Class 2 in April, 2002.

HR into Baby Class in January, 2003.

They duly attended their respective classes and sat for their termly examinations from time to time. Their father duly paid school fees and at no time were they in any arrears of school fees. There is no allegation on indiscipline or misconduct on the part of the children until March, 2004. The first three (3) children were at the school for two (2) years without any incident or problem while the last child was in the school for over a year similarly without any disputes or differences with the school.

On the 26th January, 2004, the then Head teacher one Mr. Sande Olocho, wrote a letter to the children's father in the following terms:-

“Dear Parent

Mr. David Cheruiyot

RE: FORMALISATION OF SCHOOL ADMISSION

You are kindly requested to formalize your child's/children's admission to the Company school. This you will do by presenting a formal application with your details and the details of the children to the Personnel Officer, KFC on or before Wednesday January, 28, 2004.

Failure to comply with this procedural request may result in the discontinuation of your child/children at the school.

Please comply with this standard procedure of the Company School.

Sande Olocho

HEADMASTER

C.C. Personnel Officer

K.F.C.”

The Plaintiff Children's father replied in writing on 28th January, 2004 and said as follows:-

DC,

P.O. Box 3,

Kimwarer.

28th January, 2004.

The Head Teacher

Fluorspar Primary School

C/O KFC

Private Bag

Eldoret

Dear Sir,

RE: FORMALISATION OF SCHOOL ADMISSION

I received your above referred letter and I have the following remarks to make:-

(a) I applied for the admission of my four children in April 2002. They were interviewed and admitted into classes VII, V, III and II. All the details of my children were entered in both application and admission forms. My younger child was admitted into Baby Class in January, 2003. He is now in Senior

Class. Details are with you.

(b) I am one parent who has been prompt in fees payment. I have no arrears.

(c) It is openly known that I have been vocal in agitating for the rights of lease area squatters and it is my prayer that my participation in it will not prejudice my children in their educational pursue.

Trusting to continue being a parent in Fluorspar Primary School.

Yours faithfully

D KC

CC:

The Defendant then on 16th February, 2004 through its Personnel Officer wrote back to the Children's father stating:-

“

RE: FORMALIZATION OF SCHOOL ADMISSION

You were requested to formalize your children's admission to KFC Primary School. Please do so or otherwise the admission of your children shall be revoked.

Take note that this is a private school and the sponsor override all its operations. To date the Management does not understand how the Headmaster granted you admission without following the company policy. This is urgent and it is our wish that you personally or through your representative, if you so wish clears the matter before 17/3/04.

Yours faithfully,

James Bogong

Personnel Officer

C.C. H.M. – Prepare to refund all his school fees”

The dispute was not resolved by 17.3.04 as demanded by the Defendant and though no letter of expulsion was tendered it is common ground and an agreed fact that the four (4) children were expelled from the school with effect from 17th March, 2004.

DW 1 on behalf of the Defendant testified that the expulsion was done procedurally on the ground that the children's father did not comply with the School Rules. That this was a bad example for the children and a bad precedence for the school.

In cross-examination the said witness stated that the Headmaster had not complied with the school regulations and policy in admitting the children. That he had become “law unto himself”. That although the children had paid school fees they had still broken the school laws by being admitted unprocedurally and refusing to formalize subsequently. He added that the school fees was not refunded after the children's expulsion and that the Headmaster was fired from his employment due to this matter.

I have considered the pleadings, the evidence on record and the submissions by Counsel.

I do find that the Kenya Fluorspar Primary School had an established entry guidelines for children wishing to join the school. They are all set out in Exhibits 1 and 2 which inter alia required that:-

“1. The parents/guardians wishing to join the school must apply to the school administration through the management board.

2. Upon the approval of the application letter of admission of children the parents/guardians fill the forms detailing the following:-

(a) Name of the child

(b) Age

(c) Class applied

3. Parents details: Name of parent/guardian, mobile number, marital status, identification number, place of residence.

4. Parents to state previous schools, if any, reasons for leaving.

5. The Headmaster, representative from the Company management and the class teacher must assess all children admitted to the school.

6. All parents must fill forms and attach relevant document (Birth Certificates) Clinic Cards, Transfer letter, report forms.

7. All forms duly filled must be signed by the parent/guardian and approved by the Company Management.

8. School fees payments to be made upon production of school admission letter.

9. KFC Primary School is a fully private school sponsored by the Kenya Fluorspar Company and reserves the right to approve or reject application for admission.”

The School in one of its flyers (Exh. 2) declares that:-

“1. Fluorspar Primary School is a registered private

school No. 13822, 1978.

2. Mission Statement

To provide an all-round quality education to the children of Kenya Fluorspar Company employees (and the surrounding community).

3. School Administration

(a) The Fluorspar Primary School shall be headed by the Head Teacher who shall be appointed by the Kenya Fluorspar Company Management.

(b) The Head Teacher will be answerable to the school.

4.

5.”

The first three children Plaintiffs could not produce any

documents to establish how they were admitted. On behalf of the last child, HR, was produced a letter of

admission dated 13.11.2002 and which was not disputed by the Defendant.

With regard to the first three children it is a matter of fact that they were duly admitted and commenced classes. They attended classes for a period of two years and received education accordingly. They duly paid school fees and were not in any arrears. There were no allegations of any direct indiscipline by any of the four (4) children.

This Court deems that the three (3) children must have applied to join the school, that they were interviewed and formally admitted to join the school. The documents to prove this must have existed as suggested in the Plaintiff's father's letter dated 28.01.04 (Exhibit 8). The school must have had these documents.

Even if the admission was not recorded, I deem that the children were admitted by the Headmaster and the Defendant for they could not be at the school for two years unless they were formally admitted. One cannot "steal" into a school and receive educational services without the consent and authority of a school. Such presence and attendance was open and mutually consensual.

How can one demand that the children formalize their admission by submitting a formal application yet they had been admitted and had attended the school for two (2) years each for the first three (3) children and one year for the last child. The last child, HR, on his part had a formal letter of admission which was produced in Court. The demand clearly was unusual, and unreasonable and was ill-motivated. The school certainly had a hidden agenda which was actuated by ill motive and malice towards the children and their father.

The father promptly responded to the demand letter for formalization setting out his position on the matter which was naturally expected. He declared that his children had already been admitted that after compliance with the school entry guidelines.

The Defendant did not allow the Headmaster to take the matter to the next level in accordance with all expectations, principles of natural justice and a fair inquiry into the matter.

In the Education Act, Chapter 211 under the Education (School discipline) Regulations, there is a stringent procedure to be followed before pupil in an-assisted or maintained school is suspended or expelled.

The Defendant's school is a private school but it is registered under the Education Act and must have school regulations that provides for a fair hearing of any matters of indiscipline or misconduct of on the part of the children. In the present case, however, the question did not even relate to the indiscipline or misconduct of any of the four (4) children.

It is clear that if there was any irregularity then it was the negligence of the School Headmaster and/or the management in admitting the children to the school without recording the process. This surely cannot amount to any indiscipline or misconduct on the part of the children.

The Personnel Officer of the Defendant Company before exhaustion of the due process expected from the Headteacher, set a near deadline for the children's father's response namely, 17.3.04. The contents of the said letter is revealing. He stated, inter alia:-

"..... To date the management does not understand how the Headmaster granted you admission without following the Company policy"

This issue would be between the Company and its Headmaster unless there was an allegation of corruption or dishonesty against the children's father. This was purely an internal matter and this Court cannot see how the children could be brought into the dispute or matter. In any case, the father was entitled to be heard as to the allegations of any impropriety in the admission of his children to the school.

If there was any doubt in the mind of the Court that there was some ill-motive and malice by the Defendant Company, this was dispelled by the direction to the Headmaster in the said letter by the Personnel Officer. He said:-

“C.C. H.M. – Prepare to refund his school fees.”

The letter was giving a deadline for compliance with the demand for formalization by 17.3.04 yet the Headmaster on the 16.02.04 was being told to refund all the Plaintiff’s school fees. This demonstrates that the Company had already decided on the children’s expulsion long before. It was a foregone issue and the letters giving notices were insincere, dishonest and a façade to give the impression that the children had been given an opportunity to comply with the demand. For the fees for two (2) years to be refunded meant that the Company wanted the children out of the school at any cost including refund of the school fees. A refund of school fees meant the children had to go.

I do hold that in fact by 16th February, 2004, the Defendant Company had already decided to expel the children from the school. This was not due to any indiscipline or issue of formalization of their admission.

Upon consideration it comes out clear and I do find that the Defendant Company had differences with the children’s father. The children’s father was involved in agitation for redress or compensation of the local community in respect of the acquisition of the land on which the Company’s premises and mines were situated. Apparently the Company could not accept his conduct and activities which were directed against the Company’s interest while his children were enjoying educational facilities at their school.

The expulsion of the children was due to completely extraneous matters outside the school rules, regulations or Education Act. It also had nothing to do with the children directly. The Defendant was settling scores with the children’s father. As a result the children were used as weapons in a battle that was not theirs. They are victims and have therefore been victimized.

Under the Children’s Act, No. 8 of 2001, Section 2 – “education” means “the giving of intellectual, moral, spiritual instruction or other training to a child.”

Under Section 7 (1) the child’s is given the right to education –

“7 (1) Every child shall be entitled to education. The provision of which shall be the responsibility of the Government and the parents.”

In the present case, the father had discharged his parental obligation under this provision by obtaining admission of his children to the Defendant’s school and ensuring due payments of the fees.

The Defendant has claimed that the Kenya Fluorspar Primary School is a “Private School” suggestive of a jurisdictional issue though this question is not one of the agreed issues to be decided by the Court. It is common ground that the school was registered under the Education Act Cap. 211 of the Laws of Kenya. The main objective of the Act is to provide for the regulation and progressive development of education. Under Section 3 (1) it is provided that:-

“3(1) The Minister shall promote the education of the people of Kenya and the progressive development of institutions devoted to the promotion of education and shall secure the effective co-operation, under his general direction or control of all public bodies concerned with education in carrying out the national policy for education.”

Section 15 of the Act provides for the registration of unaided schools i.e. those not receiving grants out of public funds. This includes “private schools” in my view. Section 16 gives power to the Minister to close such unaided schools if, inter alia, it is:-

“(a)

(b)

(c) is being conducted or managed in a manner

which is in the opinion of the Minister, prejudicial to the physical, mental or moral welfare of the pupils of the school or to the peace, good order or good government of Kenya,

(d)

(e)

(f)"

All the foregoing provisions demonstrates that a "private school" is not above the law. It is regulated by the Education Act and the regulations made thereunder which refer to them specifically. A "private school" therefore runs its affairs and management under the auspices of the Education Act and is obligated to gear towards objectives of the Act. It carries out its work under registration and name of the Education Act.

Section 4 (2) of the Children's Act provides as follows:-

"(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

This means that even a "private school" is bound by law to protect the best interests of the child while carrying out its functions or affairs. I agree with Counsel for the Plaintiff that being a private school does not give the Defendant and its school the exclusive right to decide on the affairs of the children at the school and this is more so where such decisions or rights are in blatant violation of the rights and best interests of the child. Fluorspar Primary School has no exclusive rights to victimize the children because it is a private school.

The Defendant claims that the father of the children and perhaps the Headmaster of the school did not follow the right or correct procedure when the children were admitted to the school. The Defendant wanted them now to formalize the position. However, the Defendant did not invite the children to seek their opinion on the matter before expelling them from the school. This was in clear breach of Section 4 (4) of the Children's Act which provides:-

"4. In any matters of procedure affecting the child, the child shall be accorded an opportunity to express his opinion and that opinion shall be taken into account as may be appropriate taking into account the Child's age and the degree of maturity."

(emphasis mine)

In the present case, the Defendant did not invite any of the children to express his/her opinion regarding the question of the procedure of admission and whether any school rules had been violated. Since there is no definition given in the Act of the word "procedure", I wish to give it its natural, usual and simple meaning in the English language. In the Longman – Dictionary of Contemporary English, 2003 edition Procedure is defined as – "a way of doing something especially the correct or usual way" – one of the examples it gives is – "All schools have disciplinary procedure they must follow."

One of the issues before the Court for determination is whether this Court can grant the orders sought. The answer lies in Section 22 (1) and (2) of the Act which provides:-

"22 (1) Subject to Subsections (2), if any person alleges that any of the provisions of Sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to

any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.

(2) The High Court shall hear and determine an application made by a person in pursuance of subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the Section 4 – 19 inclusive.”

I therefore hold that this Court has the jurisdiction and powers to grant the orders sought in this suit. Since the Honourable Chief Justice has yet to make rules of practice and procedure under Section 22 (3), I deem that the procedure in instituting this action is proper and competent in the circumstances. I have also considered that this matter involves the rights of children where the Court is required to proceed without undue technicalities.

I find that the expulsion of the four (4) children was unreasonable, arbitrary, high-handed and callous. It was also unlawful and I find that the Defendant Company as sponsor of the school may be managing the affairs of the school in breach of the Education Act. In this school, there was no reference to the existence of any Board of Governors where the dispute could have been referred to. Instead, it appears that the Personnel Manager of this mining Company has more powers and authority over the Headmaster in respect of the management of the school. It appears that the management of the Company and in particular the Personnel Manager has been given powers to override the discretion and authority of the Headmaster.

The net result is that I do hereby declare that the expulsion of the children from Fluorspar Primary School was unlawful. The children seek the Court to reinstate them into the school in their respective classes. In considering this, the Court must ask itself whether this would be in their best interest considering the lapse of time and all circumstances.

The father told the Court at the close of the trial that AR sat for Standard 8 examinations in 2005 and that she did not do well. She went to Muskot Primary School where she passed and is now at Moi University Secondary School. Her cause of action has been overtaken by events now. VR is in Class 8 at Muskot Primary School. He is a candidate and bound to sit for examination in a couple of months. I do not think that it would be in the best interest of VR to be up-rooted from his current school. His education and concentration will be interrupted and this will certainly affect his performance in the national examination.

MR is in Standard seven (7) in Muskot Primary School while HR is in Class four (4) in Muskot Primary School. The children still desire to go to the Kenya Fluorspar Primary School. It is said to be still the second best school in the Division. They have been away but unlawfully and unfairly. I think that in the circumstances it is possible for the two latter children to re-adjust and rejoin their former school. They are Kenyan children who have the right to be at the school.

It is appreciated that the school is owned by the Defendant Company and that the school administration and management may not welcome them back and even be hostile. This is a challenge that the parents of the children and the children must face if they decide to go back. This Court as a matter of law and principle would allow the children to go back and it shall be the duty of the school Headmaster and Teachers as professionals to protect the rights of the children as required under the Children’s Act. This Court believes that the law of the land relating to the children shall be respected and complied with by the Defendant Company and the school.

I therefore do hereby order that the two children, MR and HR be re-instated and readmitted to the Kenya Fluorspar Primary School in their respective Classes with immediate effect.

I hereby direct the District Education Officer of the area to ensure the enforcement of this Order.

The Defendant shall pay the costs of the suit to the Plaintiffs.

DATED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF SEPTEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Machafu for the Plaintiff

No appearance for the Defendant