



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

Misc Appli 272 OF 2006

EVELYNE ABUGA.....APPLICANT

Versus

PERMANENT SECRETARY MINISTRY OF EDUCATION.....RESPONDENT

GLOBAL INSTITUTE OF TOURISM &

MANAGEMENT STUDIES.....INTERESTED PARTY

JUDGMENT

This is an Application for Judicial Review. The Applicant seeks the following orders against the Permanent Secretary Ministry of Education;

- (1) That the court do issue an order of mandamus to compel the Respondent to perform their duty to shut down the Interested Party from operating illegally without due registration;
- (2) That the Court do issue an order of prohibition stopping the Respondent from permitting the Interested Party from continuing to operate without a licence;

Mr. Nduhiu who urged the Application on behalf of the Applicant relied on the Affidavit sworn by the Applicant on 6th June 2006. Mr. Waudo who held brief for Ms Munyi was not able to argue the Application because he lacked instructions. The Respondents had filed a Notice of Preliminary Objection dated 25th October 2006 and filed in court on 30th October 2006 which the court will take into account in arriving at its decision.

Mr. Osiemo, argued the Application on behalf of the Interested Party, Global Institute of Tourism and Management Studies. He relied on the affidavit of Polycap Nandi dated 16th June 2006 and filed in court on the same date.

The Applicant's complaint is that she registered with the Interested Party for a course in Travel Operations. She registered and was issued with a receipt for Kshs.4000/= on 15th May 2006 (EA1). She was denied a copy of her Application form and was not shown the structure of the courses offered at the institution.

She was promised a token of Kshs.2000/= if she introduced a student. That evening the Applicant decided to check with the Ministry of Education after she read in the newspaper with Ministry of Education requirements. Upon enquiry with the Ministry of Education she found that the Interested Party was not registered nor was it registered with the Registrar for Schools. She then instructed her lawyers. The Advocate wrote to the Permanent Secretary who did not respond. That the institution purportedly

offers international examinations and must be reaping off unsuspecting citizens and she wants the institution closed until it gets the requisite registration.

Mr. Nduhiu submitted that S.17 of the Education Act allows the Minister to make Regulations regarding registration of schools and the manner of Registration which Regulation the Permanent Secretary has not adhered to but has merely exhibited inspection reports of the institution. Counsel urged that the notice issued by the 1st Respondent in the Daily Newspapers dated 21st May 2004 listed conditions that must be met before registration of an institution including the Interested Party. They are;-

- 1) All schools and institutions be registered under the Education Act in accordance with Ss. 13 to 16 of the Act;
- 2) All courses offered be approved and indicated on certificates.
- 3) Any person managing the institution without approval commits a crime.

It is the Applicants submission that the Interested Party has not complied with the conditions set forth and that so far not even a provisional licence has been issued by the Minister under S. 15 of the Education Act.

Mr. Osiemo first submitted that the Notice of Motion is defective and incompetent because it is brought in the name of the Applicant when the Applicant should have been the Republic.

According to the averments in Polycap Nandi's Affidavit, the Application is brought in bad faith because the Applicant runs a similar institution and sent her secretary to collect forms for Application from the Interested Party.

Mr. Osiemo further submitted that by the prayers sought, the Applicant wants the court to make an order on behalf of the 1st Respondent but such order cannot be granted. He relied on the case of **R V KIAMBU LAND CONTROL BOARD ex parte BURNARY PROPERTIES LTD MISC APPLICATION 1488/05**

He urged the court to dismiss the Application for lack of good faith by the Applicant.

I have noted that the Notice of Motion is brought in the name of the Applicant, the Respondent is Permanent Secretary Ministry of Education and the Interested Party is Global Institute of Tourism & Management Studies. In Judicial Review, the Chamber Summons seeking leave is brought by the ex parte Applicant as the Applicant but the Notice of Motion is brought in the name of the Republic on behalf of the affected party or ex parte Applicant. This has been the practice in Judicial Review proceedings and has been accepted as the law. See the case of

1. FARMERS BUS SERVICES & OTHERS V THE TRANSPORT LICENSING APPEALS TRIBUNAL (1959) EA 779

2. JOTHAM MULATI WELAMONDI V ELECTORAL COMMISSION OF KENYA

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The courts have held that a Notice of Motion which is not brought in the name of the Republic is incompetent. I therefore hold that the Notice of Motion herein is incompetent and it is hereby struck out.

Is there any merit in the Application? The first issue I would consider is whether the Applicant has locus standi in the matter. The Interested Party argued that she does not.

If indeed the Applicant was aggrieved by the actions of a public body performing public duties then

she would have the locus standi. In Judicial Review, the class of persons who can bring actions in which they are not directly affected is wider than any other jurisdictions and the courts will normally hear anyone once affected in some way. Sir William Wade and Forsyth on Administrative Law 7th Ed, state as follows (P 701); “the court is prepared to act at the instance of a mere stranger, though it retains the discretion to refuse to do so if it considers that no good would be done to the public.”

In his submissions Mr. Nduhiu said that he relied on the affidavit of the Applicant, dated 6th June 2006. Though no objection was taken to this, under Order 53 R 4 (1), it is the statement accompanying the Application for leave and copies of Affidavits accompanying the Chamber Summons Application which are relied upon at the hearing of the Motion.

There is no provision of filing the Notice of Motion with any other Affidavits. If a party wishes to file further affidavits they can do so with leave of the court under Order 53 R 4 (2) Civil Procedure Rules. No leave of the court was sought to file the affidavit dated 6th June 2006 which accompanied the Notice of Motion. I however noticed that the affidavit dated 6th June 2006 is similar to that which accompanied the Chamber Summons and there would be no prejudice suffered by the Applicant’s reliance on an affidavit that is irregularly on record.

Under Order 53 R 4 (1) Civil Procedure Rules, only the relief set out in the statement can be granted by the court. The Applicant sought two prayers in the Notice of Motion, Mandamus and prohibition, but the statement only sought a prayer of mandamus to compel the Permanent Secretary to perform his duty to shut down the Interested Party. It follows that the only prayer that the court can consider whether or not to grant would be the prayer of mandamus.

An order of mandamus is a command from the High Court to a statutory body or authority commanding it to perform its statutory duty. Under Section 15 of the Education Act, the Minister shall cause an unaided school to be provisionally registered for 18 months if he is satisfied that it is consistent with the needs of Kenya, the accommodation is suitable and it has a suitable person to manage it. Under S.16 of the Act, the Minister has the power to close an unaided school if it does not conform to provisions of Section 15; that efficient and suitable education is not provided; It is not well managed; does not provide qualified teachers, and does not conform with the requirements made under S.19. Section 19 gives the Minister the discretion to close the school or institution if the school does not conform to certain conditions set out in that section.

In the present case, there is no evidence that the Interested Party has ever been registered by the Ministry of Education or issued with a provisional licence under S.15 of the Education Act. The Interested Party exhibited a permit issued by City Council of Nairobi on 28th April 2006, a letter showing that the Ministry of Education had also carried out an inspection. The letter is dated 11th May 2006 and the letter did indicate that the registration process was on going and they would be informed. The Respondents did not file any reply nor did they file any arguments. They were not in a position to confirm whether or not the Interested Party is registered under the Education Act, either provisionally or otherwise. However, the letter of 11th May 2006 issued about a week before the Applicant filed her application is indicative of the fact that the Ministry was considering registration and the Interested Parties had duly complied with the Act by making the relevant Application. The Applicant cannot be blamed for the delay by the Respondent in issuing or refusing to issue a Registration Certificate.

Can the remedies sought lie?

Apart from the fact that the Application is incompetent, the Applicant seeks an order of mandamus to compel the Respondent to perform the duty to shut down the Interested Party from operating irregularly. Under S. 15 of the Education Act, the Minister has a discretion to issue a registration or deny it. The Applicants cannot therefore ask the Respondent to act in a particular manner there being a discretion vested with Permanent Secretary. For good reason he can decide either way.

The court can only make an order that the Respondent do comply with the law. The order of mandamus would therefore not issue in the circumstances and I do adopt and endorse Justice Nyamu's finding in **R v KIAMBU LAND CONTROL BOARD MISC APPLICATION 1488/05**, that it is not the function of this court to make the decision on behalf of the targeted body as the Applicant has sought to do. The decision must come from the body vested with the authority to decide.

It was submitted that the Application is brought in bad faith because the Applicant was found to be working for the counsel who filed this application and who was Counsel for M/s Air Travel & Related Studies Center, the former employers of Polycap Nandi, the director of the Interested Party. These allegations of bad faith or ill motive on the part of the Applicant in filing these proceedings have not been refuted or challenged. The court expects those who come to court to do so with clean hands and the Applicant has not demonstrated that he is clean.

In sum I, find the Notice of Motion dated 6th June 2006 incompetent and unmerited and it is hereby dismissed with costs to the Interested Party.

Dated and delivered this 18th day of June 2007.

R.P.V. WENDOH

JUDGE