



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civil Appli 239 of 2007

IN THE MATTER OF AN APPLICATION BY THE SCHOOLMANAGEMENT BOARD AND PARENTS TEACHERS ASSOCIATION (PTA) SACRED HEART CATHOLIC PRIMARY SCHOOL, KERICHO (APPLICANTS) FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, AND PROHIBITION

AND

IN THE MATTER OF THE EDUCATION ACT, CAP 211 LAWS OF KENYA

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF THE TRUSTEES ACT, CAP 167 LAWS OF KENYA AND IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 LAWS OF KENYA

AND

IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA

AND

IN THE MATTER OF GOVERNMENT LANDS ACT, CAP 290 LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION OF THE DISTRICT EDUCATION BOARD, KERICHO MADE ON THE 11TH DAY OF OCTOBER, 2006 TO CLOSE SACRED HEART CATHOLIC PRIMARY SCHOOL

AND

**DISTRICT EDUCATION BOARD KERICHO1ST
RESPONDENT**

**ATTORNEY GENERAL 2ND
RESPONDENT**

AND

**BOARD OF TRUSTEES CATHOLIC DIOCESE OF KERICHO.....1ST INTERESTED
PARTY**

**BOARD OF TRUSTEES CATHOLIC DIOCESE OF NAKURU.....2ND INTERESTED
PARTY**

**BISHOP EMMANUEL OKIOMBO..... 3RD INTERESTED
PARTY**

**FR SAMUEL KARANJA 4TH INTERESTED
PARTY**

THE TOWN PLANNING COMMITTEE

**MUNICIPAL COUNCIL OF KERICHO.....5TH
INTERESTED PARTY**

JUDGMENT

The ex-parte applicants namely the School Management and the Parents Teachers Association (PTA) of Sacred Heart Catholic Primary School, have brought these proceedings seeking the judicial orders of certiorari and prohibition. They seek to have the decision to close the school by the District Boards Kericho District quashed and also to have the respondent Board (hereinafter called the DEB) prohibited from interfering with the applicants possession of the school and the land upon which the school is built.

According to an affidavit filed in these proceedings by Dr Vincent Sudoi the applicants manage and run both the school and the Nursery known as Sacred Heart Catholic Primary School and have done so for the last 8 years on a parcel of land known as Kericho Municipality 631(v) 34 and have done so with the knowledge of the Board of Trustees of the Catholic Diocese of Nakuru. The applicant filed skeleton arguments on 26th March 2007 in support of the application.

It is contended that the 3rd and 4th interested parties who are Bishop and priest respectfully did participate in the deliberations which led to the resolution of the DEB which resulted in the challenged closure. The IPs it is claimed are both prosecutor and judge at the same time having being on the frontline in having the school closed in their respective capacities and as members of the Board. The applicants contend

- (a) the decision is illegal since the respondents had no powers of closure under the Education Act
- (b) the right of hearing was not accorded
- (c) the DEB acted outside its powers in basing their decision on ownership. They had no capacity to adjudicate.

The application is opposed by Father Samuel Karanja's replying affidavit filed in court on 22nd January 2007. The 1st to 4th Interested Parties "IPs" have also in opposition to the application filed skeleton

arguments dated 19th March 2007.

They contend inter alia that the decision to close the school was based on an experts inspection report.

The court has considered the facts and the grounds including the applicable law relied on both in support and against the grant of the relief sought.

It is trite law that the general grounds of intervention in judicial review are the three “I’s” namely illegality, irrationality and impropriety of procedure. I now wish to tackle the points arising as follows:-

1. STANDING

A sponsor or manager of a school has a sufficient interest to institute judicial proceedings touching the school

2. ILLEGALITY

(a) Although some faint reference has been made by the DEB that they did an inspection of the school it is clear to me that no reference has been made to the wishes of the parents on the issue of closure. This contravenes section 8(4) of the Education Act

(b) The DEB has no powers to close any school falling under its District. Section 16 of the Education Act vests the power of closure of unaided school on the Minister for Education. The process of the closure starts after the Minister serves the Manager of a School with a notice in writing specifying the respects in which the School is objectionable and requiring the Manager to remedy those matters within a specified period not exceeding 6 months – unless for urgent reasons it is necessary to close the school forthwith in which event the Minister may order the closure.

(c) Under Section 31 of the Education Act Cap 211 the functions of the Board have been set out in extenso and they do not include the power to close. The Board acted ultra vires s 31 of the Education Act – by making the decision to close.

3. PROCEDURAL IMPROPRIETY

(a) Although not brought out by Counsel closure of a school is a drastic action that should be proceeded by consultations with the stakeholders including parents, teachers and the manager of the school affected. I find that the inspection visit prior to the closure did not in the circumstances of the case constitute sufficient consultation and hearing.

(b) Adequate consultations did not in the view of the court take place and obviously both the Manager and the PTA have a substantive legitimate expectation that they should have been consulted.

(c) The 3rd and 4th respondents who had a direct interest in the closure also sat in the Board that resolved to close the school. It is trite law that one cannot be a judge in ones own cause. I find and make an inference of perceived bias in the circumstances.

(d) The subject matter of the school was and is pending before HCC No 128 of 2005 – High Court Kericho. The Board cannot simultaneously deal with a matter in court in the face of knowledge that such matter is pending. This is contemptuous of the court’s jurisdiction.

On the issue of illegality in the case of *R v KAJIADO LAND DISPUTES TRIBUNAL ex parte LILIAN MURIRANJA JR.* I adopted with a approval the principle enunciated in the landmark case of *ANISMINIC v FOREIGN COMPENSATION 1969 2 AC 147*:

“If a tribunal mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question ie one into which it was not empowered to inquire and so had no jurisdiction to

determine its purported determination not being a determination within the meaning of the empowering legislation was accordingly a nullity.”

I also added as follows:

“It follows that both the award and the purported entering of the judgment in terms of the award were nullities. This is because the maxim exhibitio nihil fit applies – out of nothing comes nothing.”

Applying the above principle to this case it is as clear as the light of day that the DEB acted ultra vires the Education Act by usurping powers of closure which are not vested in it. It is also clear that the DEB did not address the relevant law and therefore its decisions were not informed by the relevant law – and in particular s 16 and s 31 of the Education Act.

I therefore find that the applicants have satisfactorily proved illegality as a ground for intervention.

Similarly on procedural impropriety no proper right of hearing was accorded in the circumstances and the proven facts do give a perception of bias to any onlooker. For what bias is please see Constitutional Courts judgment **R v ATTORNEY GENERAL HOMEPARK LTD Petition No. 671 of 2006**. On the ground of legitimate expectation I find that the applicants were entitled to be consulted and also heard and this was not done.

Finally as held by me in the recent case of **Peter Anyang Nyong'o & 2 others v Minister for Finance Misc Civil Application No. 1078 of 2007 (SAFARICOM IPO)** a judicial review court cannot afford to overlook issues of public interest and good public administration and these are factors that must be taken into account. The effect of the closure without proper alternative arrangements go against both principles which this court has also taken into account in granting relief in this case.

From the above reasons both singly or cumulatively, I accordingly remove into this court both the decision and the proceedings and order forthwith the issue of the judicial review orders of certiorari and prohibition and quash and prohibit in terms of prayer 1 and 2 of the application dated 6th November 2006. For the avoidance of doubt, this decision does not prevent the right decision makers making lawful decisions in future concerning the school. In the circumstances, I decline to make an order for costs

DATED and delivered at Nairobi this 9th day of November 2007.

J G Nyamu

JUDGE

ADVOCATES

M/s Nyaingiri & Co.,

Advocates for the Applicant

M/s Oboso & Co. Interested Party,