



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Misc Appli 164 of 2006

**IN THE MATTER OF INTENDED APPLICATION FOR JUDICIAL REVIEW TO SEEK
LEAVE TO FILE AN APPLICATION SEEKING ORDERS OF CERTIORARI AND
PROHIBITION**

AND

IN THE MATTER OF NOTICE TO THE DEPUTY REGISTRAR AS PER ORDER LIII

RULE 1 SUBRULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF EDUCATION ACT CAP 211 LAWS OF KENYA

REPUBLIC.....

APPLICANT

V E R S U S

MINISTER FOR EDUCATION SCIENCE AND TECHNOLOGY.....

RESPONDENT

EX PARTE

JUSTUS MARETE KABWIMA

SIMON NTOITHA

ANDREW MURIUKI M'UTHAKA

R U L I N G

1. This is an application under Order 53 of the Civil Procedure Rules to apply for leave in order to file an intended motion an order of certiorari to remove into this court and quash the decision of the

Respondent Minister to revoke the appointment of the ex-parte Applicants as members of the Board of Ntunene Girls Secondary and for leave to apply for orders of prohibition to prohibit the Respondent **“from exercising his powers without lawful justification as per s.12 of the Education Act.”** It is further prayed that if the leave is granted then the same should operate as a stay of the said revocation until the matter is fully heard and determined.

2. In the statement of facts and in the verifying affidavit it emerges that the ex-parte Applicants were appointed as members of the Board of Ntunene Girls Secondary by the Respondent’s predecessor, Hon. George Saitoti by powers conferred on him by the Education Act. It is clear that the appointments were made on 12.8.2004 and they continued serving as such members until the 27th July 2006 and 28th July 2006 respectively when the holder of the office of the Respondent at the present time, Hon. Dr. Noah Wekesa by letters addressed to the ex-parte Applicants and invoking powers conferred by s.12(1) (b) of the Education Act, Cap.211 revoked the said appointments.

3. The ex-parte applicants now claim that the said revocation was irregular and is breach of the law and that the Minister acted ultra vires his powers.

4. S. 12 of Cap 211 which was invoked by the Respondent provides as follows:-

1. Where in the opinion of the Minister a board of governors has behaved irresponsibly or has failed to exercise properly its functions under this Act, he may in writing-

(a) suspend the board from the exercise of and performance of all its powers and duties, and appoint an administrator to exercise and perform all the powers and duties of the board for such period not exceeding one year as the Minister specifies;

(b) require the resignation of all or any of the members of the board, and appoint or require the appointment of new members of the board.

2. The Minister shall make regulations providing for the manner in which an administrator appointed under subsection (1) shall exercise all the powers and perform the duties of a board of governors”.

5. It is clear from that section that where members of a Board have **“behaved irresponsibly”** the options open to the Minister are;

a) to suspend the Board from exercise of its powers and duties and then appoint an administrator who would be guided by regulations known as the Education (Board of Governors) (Administration) Regulations which were promulgated through L.N. 18/1969

or

b) to require the resignation of the affected member(s) of the Board and only after such resignations, can the minister appoint other members of the Board.

6. In the letters addressed to the exparte Applicants the Minister wrote as follows:

“REF: REVOCATION OF BOARD OF GOVERNORS MEMBERSHIP

In accordance with Section 12(1)b of the Education Act. (Cap.211). I hereby cancel my letter Ref. S/HAR/2642/TYP/6 dated 12th August, 2004 appointing you member of Board of Governors of Ntunene Girls’ Secondary School. This revocation takes effect immediately.

I take this opportunity to thank you for the services you have rendered to Ntunene Girls Secondary School.

signed

HON. DR. NOAH WEKESA M.P.

MINISTER FOR EDUCATION, SCIENCE AND TECHNOLOGY.

c.c.

The Provincial Director of Education,

Eastern Province,

P.O. Box 123,

EMBU.”

7. Reading the above letter together with s. 12 aforesaid, then clearly by those writing those notices the Minister was way out of his statutory power. He has no power to “**revoke**” membership of a member of the Board. He has power to “**require resignation**” and he has power to “**suspend**”. The three words in their ordinary meanings mean completely different things and none means the same thing as the other. Least of all, the Minister has no power to “**cancel**” his letter of appointment as he purported to do.

8. What is even more surprising is that s.12 can only be invoked if the Board of Governors has “**behaved irresponsibly**”. If the ex-parte Applicants had so behaved, why would the Minister “**Thank**” them for “**the Services....rendered to Ntunene Girls Secondary School.**” One who behaves irresponsibly does not get kudos for the services so irresponsibly rendered if it was really true that there was irresponsibility on their part.

9. In Elizabeth Wainaina and other vs The Board of Governors of Pangani Girls High School, Misc Civil Application 818/92 where there was breach of procedure (as seems to be the case here) which procedure is set out in the Education Act, then the High Court can intervene to ensure that the right procedure as set out in the statute is followed. In the instant case, I have said that the Minister has stepped outside the purview of his statutory powers under s. 12 of the Education Act, has unlawfully conferred on himself powers that are not his and prima facie this is a good case for leave to be granted as prayed to enable the ex-parte Applicants challenge that decision.

10. While I am prepared to grant leave to seek orders of certiorari I am not going to do so in respect of orders of prohibition because where the Respondent exercises powers under s.12, which section is available to him this court cannot allocate to itself the power to interfere with such exercise. I also do not see what purpose the orders of prohibition would serve as worded in the Application because certiorari would avail itself to the ex-parte Applicants if they manage to convince the court that they are entitled at the hearing to those orders.

11. As to the stay order sought, I note that the ex-parte Applicants and the Principal of Ntunene Girls Secondary School are at logger-heads over the management of the school. The effect of the stay order would be that the bad blood between them would not only affect the running of the school but the welfare of the students I say so because a stay of the decision of the minister would be translated to mean that the ex-parte Applicants would continue to serve on the Board and I do not see how they can be effective and serve the school community well when clearly others within the Board including its secretary who is the day to day manager of the school (as Principal) does not want to work with them. It is not the desire of this court to perpetuate animosity at the expense of innocent students whose future is in the hands of those now jostling for control of the affairs of the school. I see no prejudice whatsoever in any event if the stay is not granted to the chagrin of the ex-parte Applicants Order 53 Rule 1 (4) of the Civil Procedure Rules procedure Rule provides as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari

shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

12. The grant of stay is discretionary and tailored to address each unique situation that confronts a judge. It is not an automatic order but should be weighed against all other relevant circumstances and in my view it is not a desirable order in the special nature of the case before me. I shall decline to grant the order of stay for these reasons.

13. In the event therefore I shall grant leave for the ex-part applicants to seek orders of certiorari only.

14. The notice of motion under order 53 Rule 3 should be filed within 10 days of this Ruling and thereafter the ex-parte Applicants should appear before any judge in this station to be given hearing dates on a priority basis.

15. Costs shall be in the cause.

16. Orders accordingly.

Dated, signed and delivered in open court at Meru this 17th day of October 2006

ISAAC LENAOLA

JUDGE

In Presence of

Mr. Mugambi holding brief for Mr. G. Anampiu Advocate for Applicant

N/A Advocate for Respondent.

ISAAC LENAOLA

JUDGE