



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

Misc Appli 76 of 2006

MOHAMED ZAFAR NIAZ SAEED CHAUDRY & WAHEED.....
.....APPLICANTS

versus

THE PERMANENT SECRETARY MINISTRY OF EDUCATION.....RESPONDENT

JUDGMENT

The ex parte applicants, Mohamed Zafer Niaz, Saeed Chaudry and Waheed Chaudry who are Chairman, Secretary and Treasurer of the Islamia Madrassa Society, respectively, filed the Notice of Motion dated 17th February 2006 and filed in court the same date, against the Permanent Secretary, Ministry of education seeking the following orders:

1. An order of certiorari to issue removing to this Honourable Court for the purpose of the same being quashed the decision of the Permanent Secretary, Ministry of Education dated 23rd January 2006 issuing Registration Certificate No. P/A/1418/06 and cancelling Registration No. P/A/1369/05 in relation to Muslim Academy.
2. An order of prohibition to prohibit the Permanent Secretary Ministry of Education or any other official of the Ministry from acting upon or enforcing the said decision or taking any step in relation to the said decision or at all.
3. That costs of the application be provided for.

The grounds upon which the application is predicated are found in the statutory statement dated 10th February 2006 and a verifying affidavit dated 10th February 2006 and sworn by Mohamed Zafar Niaz, the Chairman of Islamia Madrassa Society.

Though duly served with the Notice of Motion, the Office of the Attorney General representing the Respondent did not file any papers in reply to the Notice of Motion. All that was done was the filing of a notice of appointment of an advocate dated 20th March 2006 by H.A. Kajwang Principal Litigation Counsel. On 18th May 2006 when the court gave the hearing date of 19th July 2006, Mr. Ombwayo held brief for Ms Kajwang. On the hearing date however, the respondent's counsel did not attend and the Notice of Motion proceeded to hearing undefended.

Briefly, the background to this case is that by a certificate No. 1628 issued by the Ministry of Education, Islamia Madrassa Committee was authorized to sponsor Muslim Girls School situate on LR 209/2435

along Park Road. The certificate was exhibited as MZN 31. Upon application by the applicants to increase the streams to two on 13th August 1985, the earlier certificate was cancelled and replaced by certificate No. GIA/435/85. Several certificates were issued thereafter an application. On 21st October 2004 an application was made by the society to register the school as Muslim Academy which was approved on 16th March 2005 (MZM 6) and by another letter dated 18th July 2005, the then Minister for Education Prof. Saitoti approved the said application under Section 15 of the Education Act and the previous certificate was cancelled. On 26th January 2006 Mr. Ondego, on behalf of the Permanent Secretary wrote a letter to Provincial Director of Education copied to the applicants, and issued the applicants with a certificate No. P/A/14118/06 dated 23rd January 2006 which cancelled the certificate P/A/1369/2005 (MZM 10 & 11). The applicant contends that the certificate P/A/1418/2006 was issued without any application having been made by the applicant. By notice of certificate No. P/A/1369/05 the school was now a private school, had been modernized at a large expense and students pay higher fees than in Government Schools and teachers are paid by the Society.

The school had been allowed to admit a total of 880 students but the new certificate now reduced the students to 160 and changed it to be a boys school only instead of mixed as before. The applicant contends that, fees have been paid and the decision to reduce the number of students will cause them financial difficulty, they will be open to litigation and it would disrupt learning. The applicants therefore seek the quashing of the Permanent Secretary's decision of 23rd January 2006.

The applicant filed skeleton arguments and from the submissions of counsel and the skeleton arguments the following issues arise;

1. Did the Permanent Secretary violate the provisions of the Education Act, Sections 14, 15 and 16 as read with Section 3 and 38 (1) of the Interpretation and General Provisions Act?
2. Did the Permanent Secretary act ultra vires the provisions of Section 14 and 15 of the Education Act?
3. Was the Permanent Secretary's decision to cancel the old certificate unreasonable? Does the Wednesbury principle apply?
4. Was the Permanent Secretary in breach of the Rules of Natural justice?

I have considered the evidence on record, the submissions by counsel and the authorities cited. The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. The remedy is supposed to ensure that the individual is treated fairly by the authority or body to which he is subjected and it is in no way an appeal nor will the court interfere with the discretion conferred on the decision making body unless the decision is unreasonable, will the court then can intervene.

It is the applicant's contention that the Permanent Secretary's decision is ultra vires because the Minister of Education never authorized the Permanent Secretary to take such a decision and hence violated Sections 14, 15 and 16 of the Education Act as read with Section 3 and 38(1) of the interpretation and General Provisions Act and urged that delegation can only be valid if one is expressly authorized by statute. Counsel said that whereas Section 14, 15 and 16 of the Education Act authorizes one to deal with the issue before court, the power should be properly delegated and properly published in the Kenya Gazette in accordance with Section 38 (1) of Interpretation and General Provisions Act and that failure to do so meant the Permanent Secretary had no power to delegate to another as he purported to.

Section 38 (1) of the Interpretation and General Provisions Act (Cap 2 LOK) provides as follows:

"Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney General or a Minister, the President, the Attorney General or the Minister, may unless by law expressly prohibited from so doing, delegate by notices in the Gazette, to a person by

name, or to the person for the time being handling an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the president, the Attorney General or the Minister may specify in the notice.”

The above provision does allow the Minister for Education to delegate his powers but it must be done by a gazette notice. He could have named a specific person or in this instance, the office of the Permanent Secretary as the office he had delegated the powers to.

Under Section 14 of the Education Act, one can apply to the Minister to register an unaided school like the Muslim Academy, the subject of these proceedings.

Section 15 of the Education Act goes on to state what the Minister has to consider before provisionally registering the school, for example, if the application is consistent with the needs of Kenyans, if there is a suitable manager and if the premises and accommodation are suitable.

Section 16 of the Act goes on to state under what circumstances an unaided school can be closed. Before closure, the Minister is supposed to issue a notice in writing specifying in what respects the school is objectionable and require the manager to remedy the matters. If the manager does not comply, that is when the Minister can move to close the school. The circumstances of this case are different. The letter dated 23rd January 2006 does not order the closure of the school but orders a reduction of the number of students that can be admitted to the school.

Section 14, 15 and 16 are clear. The deregistration or cancellation of the registration is supposed to be done by the Minister. The letter dated 23rd January 2006 is written by one Orwa M. Ondego for the Permanent Secretary, Ministry of Education. There is no evidence that the Minister of Education had specifically delegated his powers under Section 15 of the Education Act to the Permanent Secretary of the Ministry, who could then have delegated it to Orwa Ondego. In the case of *WOOLLETT V MINISTER OF AGRICULTURE AND FISHERIES* (1955) 1 Q B Lord Denning had this to say of delegation by a Minister of his powers:

“I am quite aware that the Act does not require any formalities, and that the Minister can act by any servant in his department, at any rate so long as the servant uses the magic words “I am directed by the Minister” to do it, but here not even these words were used, and in the absence of them the procedure was irregular, to say the least. There is some virtue in expecting a civil servant, when duly authorized, to use the words “I am directed by the Minister” and so forth, for that should bring home to him the significance of what he is doing and should make him realize that if he does anything wrong he will be implicating the Minister. The words may have some legal importance too.

.....But ratification is not admissible in law unless the agent professed to act on behalf of the principal”

The letter by Ondego does indicate that he writes it on behalf of the Permanent Secretary but the respondents have not produced any Gazette notice as proof that Ondego had powers to issue the said notice and I find that notice was issued in total breach of the doctrine of delegation. Any act done in breach of a statutory power is void and comes under the purview of certiorari.

Was the notice to reduce the number of students at Muslim Academy ultra vires the powers of the Permanent Secretary? Sir William Wade and Christopher Forsyth in their Book *Administrative Law* 7th Ed, state as follows at page 39;

“Action unauthorized by law and inaction contrary to law are equally subject to the court’s control. In the case of unauthorized action, the court’s principal weapon is the doctrine of ultra vires, which will be seen in the foundation of a large part of administrative law. If administrative action is in excess of power (ultra vires), the court has only to quash it or declare it unlawful and then no one need pay any attention to it.”

The letter of 23rd January 2006 having been made without authority of the Minister is therefore ultra vires and has to be quashed by an order of certiorari.

Under Section 16 of the Education Act, if the registration of an unaided school is objectionable for some reason, the Minister has to serve the manager of the school with a notice in writing specifying the reasons for the objection and how it should be remedied.

There is no evidence that the Permanent Secretary served the applicants with any notice. Though the letter of 23rd January 2006 did not order the closure of the school, there was reduction in the number of the students to be enrolled in the school. It would be reasonably expected that the Minister would give the management of the school the necessary notice and state the reasons why the decision to reduce the number of the students was taken. By making the decision, the Permanent Secretary was performing a quasi judicial function and even if it had not been specifically provided for, the rules of natural justice required that the applicant be given a hearing before such a drastic step could be taken. This was not a new school. It had been in existence since 1985 and there has to be good reason for the decision made.

In the case of HYPOLITO CASSIANO DE SOUZA V CHAIRMAN & MEMBERS OF TANGA TOWN COUNCIL (1961) EA 377, the court held that the hearing before a Finance Committee was a quasi judicial or judicial proceeding and though the committee and complainant could have met in private to discuss the procedure to be followed for 15 minutes prior to the meeting, it was objectionable even if their presence did not influence the decision. It would be difficult for the defendant to conceive that the tribunal had acted fairly under the circumstances. The court went ahead to quash the decision of the committee on the basis of it being unfair.

In addition to the hearing, the tribunal had a duty to act fairly and in this case the Permanent Secretary had a duty to act fairly.

In the case of RIDGE V BALDWIN & OTHERS (1963) 2 ALL ER 66 at page 74 Lord Reid relied on the COOPER V WANDSWORTH BOARD OF WORKS CASE (1863) 14 CB N s 180 where the judge held,

“although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the Common Law will supply the Omission of the Legislature”.

It means that even if the Education Act had not specifically provided for the applicant to be given a hearing, that right will still be implied in Common Law. In the same case (Ridge v Baldwin) it was observed that the requirements of natural justice are not just limited to giving of an adequate hearing but there must be adequate notice of the charges to be met. The applicants were not notified as to why there was to be a reduction in the number of students to be enrolled in their school. Even if the applicants had good reasons, they were not given a chance to be heard. That amounts to denial of natural justice and the order of certiorari would be invoked to quash any decision reached under the circumstances.

The applicant also contends that the decision by the Permanent Secretary was unreasonable, capricious and malicious. What is deemed to be unreasonable was clearly set out in the case of ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. V WEDNESBURY CORPORATION (1947) 2 ALL ER 680. At page 683 Lord Green M.R. had this to say;

“.....If a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it, then the courts can interfere”

In the case of REP V COMMISSIONER OF CO-OPERATIVES Ex parte KIRINYAGA TEA GROWERS (1999) 1 EA 245 the Court of Appeal held that the decision by the Commissioner of Co-operatives in ordering an enquiry into the affairs of the Society after the court had barred an inspection to have been done unreasonably. The court held at page 249

“.....It is axiomatic that statutory powers can only be exercised validly if they are exercised

reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.”

In the present case the school in question had been registered and certificates issued over the years. It has been deponed and not controverted that so far, 880 students have been enrolled in the school.

Since the letter of 23rd January 2006 was written without any prior notice of the reduction of the numbers of students, one wonders where these students would suddenly move to or what would happen to these students who had enrolled in the school in earlier years and about to complete their studies. Their education would certainly be effected. What of the commitments made by the school? This would throw the school into confusion. Bearing in mind the fact that the Permanent Secretary had not been moved to make such decision nor did he justify the decision, one can only conclude that the decision was made in bad faith and therefore falls under the Wednesbury Principle of unreasonableness and hence comes under the purview of Judicial Review.

The Supreme Court Practice 1997 Vol 53/1 – 14/6 states

“The court will not however, on a judicial review application act as a ‘Court of Appeal’ from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred in that body, unless it has been exercised in a way which is not within that body’s jurisdiction or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty of usurping power.”

The above quotation summarizes what this court has found to have transpired in this case. The Permanent Secretary acted ultra vires his powers, in fact he had no powers to act as he purported to do. If he had authority, he should have given the applicant a notice or hearing before the decision of 23rd January 2006 was made. This court remains with no option but call for the said decision of 23rd January 2006 for purposes of its being quashed by certiorari and it is hereby quashed by order of certiorari.

The 2nd prayer is one of prohibition, seeking to bar the Permanent Secretary or any other official from the Ministry from acting or enforcing the said decision. The order of prohibition is an order from the High Court directed at an inferior body or tribunal forbidding the tribunal from proceeding to act in excess of its jurisdiction or contravening the laws of the land. It does not lie to correct the course or practice or procedure of an inferior tribunal or a wrong decision on the merits. The order looks to the future. Where a decision has been made whether in excess of jurisdiction or not, an order of prohibition will not serve any purpose if issued.

In this case, once an order of certiorari is made there is nothing that the Permanent Secretary would implement and if granted an order of prohibition would be made in vain. I hold that it would not serve any purpose to make an order of prohibition.

In sum I allow prayer (1) of the Notice of Motion dated 17th February 2006 with costs to the applicant.

Dated and delivered this 13th day of October 2006.

R.P.V. WENDOH

JUDGE

Delivered in the presence of

Mr. Munga for applicant

Ojjo Court Clerk