Nyamu v County Director of Education Kirinyaga & another; Tahfid-Ul-Quran Integrated Academy (Interested Party) (Judicial Review Application 82 of 2019) [2023] KEHC 20568 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

JUDICIAL REVIEW APPLICATION 82 OF 2019

RM MWONGO, J

JULY 19, 2023

BETWEEN

ISMAEL WANJOHI NYAMU ..... APPLICANT

AND

COUNTY DIRECTOR OF EDUCATION KIRINYAGA ..... 1ST RESPONDENT

MINISTRY OF EDUCATION ..... 2ND RESPONDENT

AND

TAHFID-UL-QURAN INTEGRATED ACADEMY ..... INTERESTED PARTY

JUDGMENT

1. The 1st applicant established a premises in Sagana, Kirinyaga County, by the name and style of Tahfidh-Ul Quran Integrated Academy. From documents availed by the applicant, admissions commenced on 21st January 2018, although it was formally registered as a private limited company on 28th August, 2018.

2. The Academy wrote to the Director of Education on 9/1/2018 notifying the Director that they wished to establish the Academy. In the meantime, the Academy proceeded with enrolment and classes. Later, the Supreme Council of Muslims of Kenya (SUPKEM) issued a letter of support.

3. On 30th October 2019, the Academy's counsel wrote a formal letter to the Director demanding registration of the Academy and pointing out that they met the Alternative Provision of Basic Education and Training (APBET) criterion under the *Basic Education Act*, 2013, for such an institution.

4. On 22nd November, 2019, the applicant filed the present suit seeking the following orders from this court:

a. An order of *mandamus* by way of judicial review do issue compelling the respondents to register the 2nd applicant as a school institution.

b. An order of mandamus by way of judicial review do issue compelling the respondents to give the applicants a fair hearing in the registration and running of the second defendant as per any other institution under alternative provision of the basic education and training (APBET) within the government.

c. Alternatively, that the respondent give an alternative institution related to the students of the 2nd respondent.

d. Costs of this application be provided for.

5. In his supporting affidavit he avers, inter alia, that:

i. the 2nd applicant is an institution which assists disadvantaged students run by education guidelines of an alternative provisions for Basic Education and training (APBET).

ii. though the institution has been running and has over 80 students as exhibited on the statutory statements, attached documents the respondent has failed to issue a licence.

iii. the respondent has not offered a hearing or reason to not give a license or any sort of compliance for that matter.

iv. over 80 students and teachers have been left desperate and will be destitute for their hunger of knowledge and education.

v. the applicants' constitutional rights have been denied in the process.

vi. the applicants stand to suffer irreparable loss.

6. The respondents through the Attorney General filed Grounds of Opposition and stating as follows:

i. The Application is frivolous and lacks merit and is an abuse of the Court process and ought to be dismissed.

ii. The Application does not comply with the provisions of Order 53 of the *Civil Procedure Rules* which apply to the grant of Prerogative Orders.

iii. The Applicant has not complied with the requirement of Sections 76 to 82 of the *Basic Education Act*, 2013 as far as the requirement for registration of Alternative Provision for Basic Education and Training (APBET) Institution.

iv. The Applicants have not produced any evidence that they have made a formal Application to the County Director of Education in Kirinyaga which application was denied so as to seek and order for mandamus.

v. The Applicant has not proved that the Respondents have a statutory duty to register an illegal institution.

vi. The Applicant lacks locus in this matter in that he has disclosed to the Court in his application that he is already operating an illegal institution which has not been licensed to operate in the Country and cannot therefore evoke a discretionary remedy.

7. The respondents through the 1st Respondent filed a Replying Affidavit and deposed as follows:

i. That the Tahfid-Ul-Quran Integrated Academy (the Institution) is located at Sagana Town in Kirinyaga West Sub-County in Kirinyaga County adjacent to the Mosque opposite KPCU stores.

ii. That the Institution was not registered with County Education Board as provided under the *Basic Education Act*, 2013 as at the time of assessment by the National Intelligence Service NSIS.

iii. That institutions wanting to offer alternative basic education to that offered by the Ministry of Education are required under section 76 of the *Basic Education Act* 2013 to apply for registration as Alternative Provision of Basic Education Training (APBET) and Continuing Education Institution as per the Ministry of Education guidelines of January 2010.

iv. That the institution in this dispute has never requested for registration as an alternative Provision for Basic Education and Training (APBET) and Adult and Continuing Education before it started operating illegally before the crackdown by the authorities.

v. That contrary to the Applicant's allegation that he applied and was denied registration he has only attached a demand letter from his Advocate dated 30th November 2019 demanding registration but I have been duly informed by the state counsel on record that a demand letter does not constitute an Application for Registration and therefore the Applicant has never applied to be registered as APBET and in any case the institution does not meet the criteria for registration.

vi. That consequently there is no duty imposed by the law for the ministry of Education to register such an illegal institution and more so when there has never been an application lodged as per the law.

vii. That the Applicant has in his own admission stated that he offers religious trainings and that the school is thriving which is a clear indication that the Applicant is operating an illegal institution which has not been registered and there is serious danger of the institution offering extremist religious training on innocent children and the youth of Kirinyaga county and the country at large.

Applicant's submissions

8. The first applicant seeks an order of mandamus compelling the 2nd respondent to restore the interested party as a school institution. That order is based on a simple right enshrined in the *Constitution* that a child should not be denied a right to learn; and that the applicant is ready to comply with any conditions issued by this honourable court to facilitate or enable the said registration.

9. Secondly, an order of mandamus should issue compelling the respondents to give the applicants a fair hearing in the registration and running of the second defendant as per the basic education and training act (APBET). That the applicants seek to be granted a fair hearing, instead of blatantly shutting out the applicant for reasons which are flimsy and which are not founded on any sort of evidence.

10. APBET is an alternative provision of the basic education and training, a mechanism mooted and promoted by the government (the respondents) to promote and encourage institutions like the 2nd applicant. This would enable them to mushroom and thrive and give education in instances and circumstances where the respondents are unable to provide. The applicant asserts that it was duly recognized by SUPKEM Kirinyaga County and evidence attached as offering to seal the gap of IRE/ Arabic teachers' shortage.

11. The applicant attached two title deeds to land parcel Kiine/Sagana/3048 and Kiine/Sagana/5039 showing that he is willing and ready to put everything above board and has attached the certificate of incorporation, the admission register, school attendance register, time table, qualification for the teachers enrolled, assessment by students, scheme of work, attendance register to prove that he is willing and ready to comply.

12. He argues that failure to acknowledge an application by applicant is the first breach the respondent made as there is a deadline of 30 days to acknowledge, which the respondent ignored.

Respondents' Submissions

13. The respondents' arguments are under three prongs: That the applicant has not complied with the requirements for registration; That the applicant was essentially running and operating an illegal institution; and that the applicant has never made a formal application for registration.

14. On the first prong, the respondents submit that the Applicant has not complied with the requirements of Sections 76 to 82 of the *Basic Education Act*, 2013 as far as the requirement for registration of Alternative Provision for Basic Education and Training (APBET) Institution.

15. It is argued that the Basic guidelines and Section 76 of the *Basic Education Act* provide for Licensing, registration and accreditation of persons and institutions of education, training and research. In particular, the section provides that: no person can offer basic education in Kenya unless the person is accredited and registered as provided for under the Act and that the person must apply to the County Education Board

    2. A person or organization intending to establish an institution offering basic education shall make an application in the prescribed manner to the relevant County Education Board.

    3. Upon receipt of an application, the County Education Board shall—

        i. record the application; and

        ii) if satisfied that the establishment of the institution conforms to the prescribed requirements, notify the applicant within thirty days.

    4. where an application is approved the County Education Board shall inform the office representing the Education. Standards and Quality Assurance Council at the county in the case of a pre-primary, primary or secondary school."

16. It is further argued that the Academy has never requested for registration as an alternative Provision for Basic Education and training (APBET) and Adult and Continuing Education before it started operating illegally before the crackdown by the authorities.

17. On the second prong, it is submitted that institutions seeking to offer alternative basic education to that offered by the Ministry of Education are required under Section 76 of the *Basic Education Act* 2013 Laws of Kenya to apply for registration as Alternative Provision of Basic Education Training (APBET) and Continuing Education Institution as per the Ministry of Education guidelines of January 2010. This was not done by the applicant.

18. Instead, all that the respondents received was a demand letter from the applicant's Advocate dated 30th November 2019 demanding registration. It is argued that a demand letter does not constitute an application for registration and therefore the Applicant has never applied to be registered as APBET and in any case the institution does not meet the criteria for registration.

19. On the third prong, it is submitted that it is clear from the documents annexed by the Applicant that that he was running the institution illegally as per his statement in paragraph 7 of his affidavit. It is also dear that the institution has been operating illegally for a long time long before the purported application vide the letter from his advocate 30th October 2019. Finally, that it is clear that the institution does not fall under the APBET Policy Framework of January 2016 nor does it meet the criteria for registration of such institution as per the *Basic Education Act* and consequently it should not be allowed to continue its illegal operation.

20. Consequently, it is argued by the respondents that there is no duty imposed by the law for the ministry of Education to register such an illegal institution and more so when there has never been an application lodged as per the law. Further, that the applicant's communications with the County Government of Kirinyaga cannot supplant the need for registration under law as the County Government of Kirinyaga does not act for the Ministry of Education and therefore the Applicant cannot say that he was given a verbal authorization by the County Government of Kirinyaga to continue setting up the illegal institution.

21. Finally, it is argued that the application does not comply with the provisions of Order 53 of the Civil Procedure Rules which apply to the grant of Judicial Review Proceeding. The Applicant lacks locus in this matter in that he has disclosed to the Court in his application that he is already operating an illegal institution which has not been licensed to operate in the Country and cannot therefore evoke a discretionary remedy.

22. In light of the above, the respondents argue that the order of mandamus cannot issue where an applicant is seeking pre-emptive relief and yet has not shown that he has fully complied with the requirements for registration as set out in the *Basic Education Act* 2013 which he is alleging that the Respondents are denying him the right to be registration.

Issue for determination

23. In my view, and having considered the parties' representations and documents availed, the only issue for determination is: Whether the applicant is entitled to an order of mandamus by way of judicial review compelling the respondents to register the 2nd applicant as a school institution.

Analysis and Determination

24. The purview of judicial review was clearly set by Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service* [19851 A.C. 374, at 401D when he stated that:

> "Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

25. To qualify for judicial review, it must be shown by an applicant that the respondent has made a decision that evinces 'illegality', 'irrationality' or 'procedural impropriety'. The first thing that emerges in the present case is that there is no decision that has been made by any administrative authority or entity concerning the applicant. Indeed, the applicant has not yet shown he has made an application in terms of the *Basic Education Act* that can be subjected to the three tests aforesaid.

26. In *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001, it was held:

> "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

27. The applicants have sought an order of mandamus by way of judicial compelling the respondents to register the 2nd applicant as a school institution. Further, they pray for such an order to issue compelling the respondents to give the applicants a fair hearing in the registration and running of the second defendant as per any other institution under alternative provision of the basic education and training (APBET) within the government.

28. Nyamu, J (as he then was) enumerated some of the grounds for grant of judicial review orders in *Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another* [2008] eKLR as follows:

> "1. Where there is abuse of discretion.
>
> 2. Where the decision maker exercises discretion for an improper purpose.
>
> 3. Where the decision maker is in breach of duty to act fairly.
>
> 4. Where the decision maker has failed to exercise statutory discretion reasonably.
>
> 5. Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.
>
> 6. Where the decision maker fails to exercise discretion.
>
> 7. Where the decision maker fetters the discretion given.
>
> 8. Where the decision is irrational and unreasonable."

29. An institution seeking to offer alternative basic education to that offered by the Ministry of Education is required under section 76 of the *Basic Education Act* 2013 to apply for registration as an Alternative Provision of Basic Education Training (APBET) and Continuing Education Institution as per the Ministry of Education guidelines of January 2010. It is clear in this case, that the applicant has never

made the statutory application for registration as an alternative Provision for Basic Education and Training (APBET) and Adult and Continuing Education before it started operating illegally before the crackdown by the authorities.

30. I have carefully perused the *Basic Education Act*. Sections 76-77 provide as follows:

> "76. A person shall not offer basic education in Kenya unless the person is accredited and registered as provided for under this Act.
>
> (2) A person or organization intending to establish an institution offering basic education shall make an application in the prescribed manner to the relevant County Education Board.
>
> (3) Upon receipt of an application, the County Education Board shall-
>
> (a) record the application; and
>
> (b) if satisfied that the establishment of the institution conforms to the prescribed requirements, notify the applicant within thirty days.
>
> (4) Where an application is approved the County Education Board shall inform the office representing the Education, Standards and Quality Assurance Council at the county in the case of a pre-primary, primary or secondary school.
>
> 77.
>
> (1) Where the County Education Board is not satisfied that the institution has complied with the requirements set out under this Act the Board may reject the application and notify the applicant of the decision within thirty days.
>
> (2) Any person aggrieved by the decision of the County Education Board under subsection (1) may appeal to the Education Appeals Tribunal within a period of thirty days of the decision"

31. There is no evidence on record that the applicant made an application to the County Education Board in terms of section 76(2), and therefore the subsequent provisions could not come into play.

32. Further, even if the applicant had made such an application and it was rejected, or he was otherwise aggrieved, his first recourse would have been to the Education Appeals Tribunal pursuant to section 77(2), and not to this Court.

33. Accordingly, I am of the view that the applicant neither made an apt application as required by statute, nor did he follow the statutorily mandated dispute resolution mechanism.

34. I further find, from the materials set out herein that the applicant has admitted that he was operating the Academy and offering basic education and has over 80 students without having been registered and accredited in accordance with the *Basic Education Act*.

35. I also find that there is no document availed to the Court by the applicant disclosing any decision made by the County Education Board that is capable of being challenged. As such the Court cannot give any orders of mandamus in the absence of an application or decision. A similar view was taken

by Korir J (as he then was) in a circumstance where there was no ascertained decision by the County Education Board in *Republic v Principal Secretary, Ministry of Education Science and Technology Ex parte Presbyterian Foundation* [2015] eKLR. There the Judge stated:

> " ....From the papers filed in court, it is difficult to discern if a decision has indeed been made by the relevant authority (the County Education Board, Kiambu) on the application for full registration of Kinoo Girls High School. The Court cannot give orders on the strength of a decision that has not been established to exist. The letters from the Respondent do not amount to a decision as the Respondent has no mandate under the *Basic Education Act*, 2013 when it comes to the registration of an institution under the Act. That mandate is solely vested on the County Education Board whose decision can be appealed against to the Education Appeals Tribunal."

Disposition

36. Given all I have said, I find that the applicant's application is both premature and has no statutory basis upon which it can be allowed. It is dismissed in its entirety with costs to the respondents.

37. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF JULY, 2023

.....

R. MWONGO

JUDGE

Delivered in the presence of:

1. Kimwere for Applicant.

2. No representation for Respondents.

3. Murage, Court Assistant