REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 472 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE PUBLIC PRIVATE PARTNERSHIP ACT NO 15 OF 2013, LAWS OF KENYA

BETWEEN

NAZIR JINNAH.....APPLICANT

VERSUS

HIS HIGHNESS PRINCE AGA KHAN SHIA IMAMI

ISMAILI NATIONAL CONCILIATION AND ARBITRATION

BOARD OF KENYA.....1ST RESPONDENT

AGA KHAN EDUCATION SERVICES KENYA.....2ND RESPONDENT

AGA KHAN EDUCATION SERVICES NAIROBI.....3RD RESPONDENT

CHIEF MAGISTRATES COURT NAIROBI.....4TH RESPONDENT

RULING

Introduction

1. Nazir Jinnah, the ex parte Applicant herein (hereinafter referred to as "the Applicant"), is a member of the Shia Imami Ismaili Muslims. The 1st Respondent is a Board established under the Constitution of the Shia Imami Ismaili Muslims to hear and adjudicate disputes between members of the Shia Imami Ismalia Muslims in Kenya. The 2nd and 3rd Respondents are Limited Company incorporated in Kenya under the Companies Act. By a Chamber Summons dated 4th December 2018 and filed in court on 5th December 2018, the Applicant sought leave to institute judicial review proceedings against the Respondents as follows:

> **a) THAT this Court be pleased to grant leave to the Applicant to apply for an order of Certiorari directed to the Nairobi Chief Magistrates Court to bring to the High Court the Record/Proceedings in Civil Case Number 1002 of 2017 Aga Khan Education Services (Kenya) vs. Nazir Jinnah for purposes of being quashed.**
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> **b) THAT this Court be pleased to grant leave to the Applicant to apply for an order of Mandamus to compel the 1st Respondent to admit and thereafter hear and adjudicate the Applicant's complaints against members of the 2nd Respondent as contained in the Applicant's submission forms of 13th March 2018.**
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> **c) THAT the grant of such leave do operate as a stay of the proceedings in Civil Case Number 1002 of 2017 Aga Khan**

Education Services (Kenya) vs. Nazir Jinnah.

d) THAT the costs of this application be provided for.

2. This Court directed that the said application be canvassed interpartes by way of written submissions, which were adopted by the parties for purposes of this ruling. The respective cases of the parties are set out in considerable detail in the following sections, as they raise novel issues as regards the extent of this Court's judicial review remit.

The Applicant's Case.

3. The Applicant's application was supported by a Statutory Statement dated 4th December 2018 a verifying affidavit sworn by the Applicant on even date, and a further affidavit he swore on 7th February 2019. It is the Applicant's case that he enrolled his three children at the 2nd and 3rd Respondent's learning facilities from the year 2008. According to the Applicant, in 2010 he suffered some difficult economic circumstances directly affecting his children's education at the 2nd and 3rd Respondent's school. The Applicant avers that following the aforesaid circumstances, there were formal meetings, correspondences and engagements between the Applicant and the 2nd Respondent's Chairman and Director at the time, Mr. Moez Jamal. That as a result, the said Mr. Moez Jamal gave instructions to the 2nd Respondent's management to allow the Applicant's children to continue to receive their education undisturbed. Further, that the Applicant's case was considered and he was granted an unconditional contract of a waiver on payment of fees for his children within the doctrines of the Ismailia Community.

4. It is the Applicant's averment that he was thereafter able to perform his part of the agreement and continued to make minimum payments of fees for his children, with the said waiver being reflected in the applicable invoices, receipts and statements since 2011 to date. However, that a dispute has now arisen between himself and the 2nd Respondent with respect to the succession of the subject agreement, and payment of fees as per the said waiver. It is the Applicant's case that following the dispute, some members of the 2nd Respondent have mistreated the Applicant and his children and acted in a manner that amounts to gross misconduct, warranting disciplinary action under Article 14 of the Constitution of the Shia Imami Ismaili Muslims. The said Article provides for disciplinary action against a member of the Shia Imami Ismailia Community.

5. According to the Applicant, the members of the 2nd and 3rd Respondents are members of the Shia Imami Ismaili Muslims and are bound by the Constitution of the Shia Imami Ismaili Muslims. Further, that Article 13.1(b)(i) of the said Constitution of empowers the 1st Respondent to act as an arbitration and judicial body, to hear and adjudicate upon such disputes of commercial, business and other civil liability matters between the members of the Shia Imami Ismaili Muslims. According to the Applicant the dispute with respect to payment of fees qualifies as a commercial, business and/or other civil liability that ought to be referred to arbitration by the 1st Respondent. The Applicant contends that in line with the said Constitution he appropriately submitted complaints with the 1st Respondent for the commencement of disciplinary actions against the said members. That, the 1st Respondent however declined to admit the complaints citing lack of jurisdiction, and the Applicant annexed copies of the correspondence requesting for the disciplinary proceedings.

6. Further, that contrary to the provisions of the Constitution of the Shia Imami Ismail Muslims, the 2nd Respondent has lodged a civil suit before the **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah** that is pending determination. He annexed copies of the pleadings in the said suit. It is the Applicant's case that the said subordinate court lacks jurisdiction to entertain the subject dispute, whereas the 1st Respondent on the other hand has express jurisdiction over the same. The Applicant in reply to the Respondents responses also made further allegations as to the credibility of the deponents and veracity of the averments made therein, whose examination is not necessary to address at this leave stage.

7. The Applicant reiterated the foregoing averments in submissions dated 11th February 2019, which were filed by Khaminwa and Khaminwa Advocates, its Advocates of record. It was submitted therein that the 1st Respondent is obliged by law to observe the rules of natural justice to act lawfully, fairly and reasonably in exercise of their mandate under the Constitution of the Shia Imami Ismaili Muslims. The Applicant submits that the intended judicial review proceedings are for purposes of compelling the 1st Respondent to oblige with its mandate and determine the stated dispute in line with the constitutional right to fair hearing and fair administrative action as provided under Articles 50 and 47 respectively. According to the Applicant, the 1st Respondent is a body established to arbitrate and determine disputes within the Ismaili Community, and is mandated to exercise administrative authority within the scope of an "Administrator" as defined under Section 2 of the Fair Administrative Actions Act.

8. The Applicant therefore submitted that any act, omission or decision by the 1st Respondent qualifies as an "administrative action" that is subject to the provisions of the Fair Administrative Actions Act and is "reviewable". The Applicant submits that the 1st Respondent is a party as envisaged under Article 13.1 of the Ismaili Muslims Constitution, hence obliged to act without bias within the provisions thereof, which necessitates that the 1st Respondent's omission be reviewed by this Court. It is the Applicant's submissions that his grievances are valid and not based on frivolous trappings. The Applicant further submitted that he desires to have his grievances addressed in the right forum within the doctrines of Shia Imami Ismaili Muslims Community.

9. On the requirement of leave to bring judicial review proceeding, the Applicant submitted that the leave requirement is designed to prevent abuse of court process by litigants with inappropriate or frivolous applications. That, the court holds the discretion on whether to grant leave to commence judicial review proceedings, which discretion ought to be exercised judiciously, depending on the circumstances of each case. Reliance was placed in this regard on the decision by Odunga J. to this effect in the case of **Hon. Lady Justice Joyce Khaminwa vs. Judicial Service Commission & Another, (2014) e KLR.**

10. According to the Applicant, the 1st Respondent falls within the definition of a quasi-judicial tribunal under Article 13.1 (b) of the Shia Imami Ismaili Constitution, and is thus permitted to conduct arbitration in any dispute referred to them amongst members of the Ismaili

Community. That therefore, by declining to take up the Applicant's complaint with respect to the dispute with the 2nd Respondent, the 1st Respondent has failed to comply with its obligations under the Constitution of the Shia Imami Ismaili Muslims. The Applicant submits that the intended judicial review proceedings are for purposes of compelling the 1st Respondent to oblige with its mandate, and determine the stated dispute in line with the constitutional right to fair hearing and fair administrative action as provided under Articles 50 and 47 respectively. The Applicant in highlighting the importance of granting leave as matter of natural justice relied on the case of **Onyango Oloo vs Attorney General (1986-1989) EA 456**

11. Further, that the instant proceedings are therefore not merely inspired by personal affectation but motivated by greater public interest in safeguarding the natural and established universal right to a fair hearing in public interest and community matters. Submitting that leave to review the matter bears the dual aspect of personal and public interest, the Applicant cited an excerpt from **Christopher Forsyth** and **Emma Dring** in **"The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review"** in the following terms:

> **"Administrative decision makers are often required by law to make findings of fact and, inevitably those findings will from time to time be erroneous. This can be caused by serious injustice to the individuals affected. They may be denied a benefit to which they are, in truth, entitled or the error may lead them to suffer some deprivation. Equally, an error of fact may cause a public authority (and the tax payer behind it) to bear some burden, it is not, in law, required to bear. Thus, the government, as well as the individuals disputing a particular administrative decision, share an interest in avoiding errors of fact. May the injustice caused by leaving errors of fact uncorrected be addressed by way of judicial review?"**

12. It is the Applicant's submission that this Court has jurisdiction over the instant application because the subject herein falls within the definition of judicially reviewable administrative action by a tribunal. The Applicant cited Article 23(3) of the Constitution of Kenya which confers jurisdiction on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of Rights, to grant by way of relief an order for judicial review. He also cited section 2(2) of the Fair Administrative Actions Act on the definition of an administrative action and submitted that denial of the leave sought herein would compound the infringement of the Applicant's right to a fair hearing. It is the Applicant's prayer that this Court be the final arbiter on whether the Respondents have acted procedurally and properly, or misdirected themselves in declining to hear the Applicant's request for disciplinary action pertaining to arbitration for commercial, family and financial matter.

The 1st Respondent's Case

13. In response to the instant application, the 1st Respondent filed a Replying Affidavit sworn on 21st January 2019, by its Chairman, Kassamali Abdul Sultan, and written submissions dated 4th March 2019 filed by Oraro and Company Advocates, its advocates on record. The 1st Respondent's states that it's aims and objects include:

(a) To assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters; and

(b) To act as an arbitration and judicial body and accordingly to hear and adjudicate upon:

i. Commercial, business and other civil liability matters; and

ii.Disciplinary action to be taken under the Constitution and any rules and Regulations.

14. It is contended that the said Constitution binds and is only applicable to Shia Imami Ismaili Muslims as individuals, and that it is the responsibility of the individual who desires to have a dispute conciliated or arbitrated to apply to the Board as provided under Article 3.1 and 13.5 of the Constitution. That, the instant Application is therefore misconceived and a non-starter as it seeks to compel the 1st Respondent to admit and adjudicate the Applicant's complaint against the 2nd Respondent, yet the 1st Respondent does not have that jurisdiction because the 2nd Respondent is not an individual. The deponent also contended that the 2nd Respondent is an independent legal entity responsible for managing education services in Kenya on behalf of the Aga Khan Development Network (AKDN), and a body corporate governed by its own rules and regulations.

15. It is the 1st Respondent's case that the Applicant has been notified and is aware that the 1st Respondent does not have jurisdiction to hear the matters complained of. That, the Applicant, through eleven letters dated 15th March 2017, requested the Board to take disciplinary action against Board members of the 2nd Respondent for alleged actions taken against the Applicant's son. It is contended that the Board responded vide letters dated 22nd March and 3rd April 2017 stating that it lacked jurisdiction to accept the complaints for reasons that:

(a) The alleged acts, which are the basis of the Applicant's complaints, do not fall within the ambit of Article 14.1 of the Constitution;

(b) The Board does not have power to award the remedies sought and;

(c) Volunteers, paid staff and office bearers of AKDN institutions are under the guidance and supervision of their appointing authorities for their workings and activities and as such, jurisdiction with matters pertaining to these personnel rests with the appointing authority and not the Board.

16. According to the 1st Respondent, the basis of the Applicant's complaints are acts of the learning institution where the Applicant's children attend school. Further, that the Applicant is in arrears of school fees totaling to Kshs. 3,915,266.30, hence the civil suit lodged

against him by the said institution for recovery of the same. It is also contended that the said action has nothing to do with the institution's officers, and that the Ismaili Constitution is applicable to Ismaili Muslims as individuals and not institutions. Therefore, that this is merely a commercial matter pending before the court, hence there is no decision or action capable of being challenged under judicial review. That the Applicant ought to instead make any applications or raise any defence it has against the 2nd Respondent under the said suit.

17. It is also the 1st Respondent's case that the instant Application is baseless, misconceived, an abuse of the court process and amounts to forum shopping. It is contended in this regard that the Applicant has filed five (5) suits against the 2nd Respondent, including the instant Application, with the aim of preventing the 2nd Respondent from recovering school fees; and educating his children at the Aga Khan Academy free of charge. That, the suits for which the Applicant is guilty of non-disclosure thereof before this Court, include:

(a) Constitutional Petition 48 of 2017, which was dismissed on 30th July 2018, wherein the Applicant sought orders to compel the 2nd Respondent to readmit his son and to keep him in school until he completes his studies. That, following the dismissal, the Applicant has, with the intent to appeal, applied for a stay pending appeal;

(b) Children's Court Miscellaneous Application No. 52 of 2017 wherein the Applicant seeks orders to compel the 2nd Respondent not to disclose the names of his children in the documents filed in court. That, the said Application was dismissed for want of prosecution and later reinstated and is yet to be prosecuted;

(c) Petition No. 152 of 2018 where the Applicant seeks orders to compel the 2nd Respondent to release his daughter's academic certificates, which was pending hearing on 6th March 2019;

(d) High Court Miscellaneous Application No. 129 of 2018 where the Applicant seeks committal orders against various officials of the 2nd Respondent for allegedly failing to comply with orders issued in Miscellaneous Application No. 52 of 2017, which Application was coming up for hearing on 7th February 2019.

18. The 1st Respondent averred the High Court determined in Constitutional Petition 48 of 2017 that the issue and dispute between the parties herein is simply commercial and for recovery of money owed hence not one raising constitutional questions. It is therefore contended that there is no decision capable of being challenged through judicial review. That in light of the foregoing, the Applicant ought not to be entertained and instead be declared a vexatious litigant and cautioned against wasting judicial time and be penalized for lost time.

19. The 1st Respondent further sought to have the instant Application dismissed based on the following points of law:

(a) The Application is time barred since Order 53 Rule 2 of the Civil Procedure Rules 2010 provides that an application for leave is to be made not later than 6 months after the date of the proceedings. That in any event, the subject suit, CMCC No. 1002 of 2017 against the Applicant was filed in February 2017, and the instant Application was filed on 5th December 2018. Hence, that the Applicant is guilty of inordinate delay and cannot file suit to challenge the 2nd Respondent's decision to file suit to recover a debt the Applicant owes; and

(b) Whereas the Chief Magistrate's Court has been joined as the 4th Respondent in the instant Application, the Chief Magistrate's Court cannot be sued and the Applicant ought to have, if necessary sued through the Attorney General.

20. The 1st Respondent addressed the principles upon which leave to file judicial review proceedings is granted in its written submissions. It is submitted that the test is that the Court must be satisfied that on the material available and without going into the merits of the case, there is a *prima facie* evidence of an arguable case. The 1st Respondent relied on the case of **Aga Khan Education Services Kenya v Republic ex parte Ali Seif & 3 Others (2004) e KLR** for this position, and *for the submission that the instant application is time barred.* It is the 1st Respondent's submission that the Applicant has not demonstrated a nexus between the disciplinary process that he seeks and the legal proceedings in **CMCC No. 1002 of 2017**, and there is thus no basis upon which to grant the orders sought. Further, that in the absence of a nexus as stated, the implication may be that these proceedings are in bad faith and have the ulterior motive of preventing the 2nd Respondent from recovering outstanding school fees owed by the Applicant which is the subject matter in **CMCC No. 1002 of 2017**.

21. Additionally, that there is no specific decision, ruling or order of the Chief Magistrate's Court that the Applicant has presented before this Court as being illegal, irrational, unreasonable, *ultra vires* or made without jurisdiction. Hence, this Court's supervisory jurisdiction over the Chief Magistrate's Court is being improperly and unnecessarily invoked. Reference was made to the case of **Eunice Khalwali Miima v Director of Prosecutions & 2 Others [2017] e KLR,** in this regard. In addition, that the eleven persons against whom the Applicant wishes to compel the 1st Respondent to conduct disciplinary proceedings, and who would ultimately be adversely affected by the Order sought have not been personally enjoined to these proceedings, nor accorded the right to be heard. Hence, the instant Application is rendered fatally defective as the same would be in breach of natural justice. The 1st Respondent cited the case of **Onyango Oloo vs Attorney General [1986-1989] EA 456** wherein the Court of Appeal pronounced itself on the issue of natural justice.

22. Lastly, the 1st Respondent submitted that the Constitution of the Shia Imami Ismaili Muslims states at its preamble that it is binding on individual Shia Imami Ismaili Muslims. That, being a religious text, the Constitution is binding on individuals not institutions. Therefore, that it is erroneous for the Applicant to state that the Constitution is binding on the 1st and 2nd Respondents who are institutions and not individuals.

The 2nd Respondent's Case

23. The 2nd Respondent relied on and adopted the contents of the Replying Affidavit of Kassamali Abdul Sultan filed by the 1st Respondent, and its advocates on record, Waweru Gatonye & Company Advocates, in addition filed written submissions dated 12th March 2019. It is their submission that leave to commence judicial review proceedings is a judicial procedure developed in order to ensure only cases that are meritorious are granted such leave. In this regard, reference was made to the purpose of an application for leave as held by Waki J. (as he then was) in the case of **Republic vs. County Council of Kwale & Another Exparte Kondo & 57 Others, Mombasa HC. Misc. App. No. 2284 of 1996.** *The 2nd Respondent also relied on the case of* ***Republic vs Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex Parte Centrica Investments [2019] e KLR*** .

24. Accordingly, it was submitted that the Applicant has neither met nor established any of the above. In like manner as the 1st Respondent, the 2nd Respondent also submitted that the instant application is time barred, and cited Section 9 (3) of the Law Reform Act and the case of **Republic vs County Government of Nairobi & Another ex-parte Isfandiar Sohali [2017] eKLR** in support of this position. Further, that the Applicant's attempt to stay or quash the proceedings in **CMCC No. 1002 of 2017** is misinformed as the proceedings are purely of a commercial nature, where the 2nd Respondent seeks to recover fees arrears in the sum of Kshs. 3,915,266.30 owed to them by the Applicant. That, the 2nd Respondent is simply an institution taking action for recovery of school fees, which action has nothing to do with its individual officers that the Applicant calls for disciplinary action against.

25. On whether the Applicant has *locus standi* and an arguable case, the 2nd Respondent submitted that the instant application is misconceived since it is an institution and not an individual, noting that the Constitution of the Shia Imami Ismaili Muslims binds and applies to individuals. That therefore, the 1st Respondent lacks jurisdiction to adjudicate the Applicant's complaint against the 2nd Respondent, as indeed communicated in the 1st Respondent's letter to the Applicant dated 22nd March 2017 and 3rd April 2017. Further, that the 2nd Respondent, like any other institution, has its own internal rules and regulations as well as disciplinary mechanisms for their employees. It is also submitted that the 1st and 2nd Respondents, although established under the said Constitution are not individuals, therefore cannot be bound by it by virtue of Article 14 thereof.

26. In similar manner as the 1st Respondent, the 2nd Respondent submitted that the Applicant is guilty of non-disclosure of material facts, and that the instant Application is an abuse of the court process**.** It was their submission that the Applicant has filed five (5) suits against the 2nd Respondents, the present application included, and has failed to disclose the existence of the said suits to this Court. That, the Applicant has therefore approached this Court with unclean hands seeking equity, and in any case, that there is no decision that is capable of being quashed, hence the Applicant has not demonstrated any arguable case from the above laid basis.

27. The 2nd Respondent also submitted on whether the application is established under the rules of public law and natural justice**.** It is their submission that in the instant case, there is no procedural injustice that has been occasioned to the Applicant. It is submitted that the 1st Respondent merely states that it has no jurisdiction to commence disciplinary proceedings against the mentioned eleven individuals, and lack of jurisdiction cannot be bent to suit a case against natural justice. In this respect, it is their submission that the rules of natural justice include fair hearing and impartiality.

28. The 2nd Respondent accordingly cited the case of **Republic vs Nairobi City County and Another [2019] e KLR** where the Court held that the erroneousness or injustice of the judgment or decision does not make the judgment contrary to natural justice. It was the 2nd Respondent's submission that the Applicant has not demonstrated procedural impropriety, breach of the rules of natural justice or an injustice in the manner in which the 1st Respondent's Board refused to assume jurisdiction on the matter.

The Determination

29. *Order 53 Rule 1* of the Civil Procedure Rules provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

30. Various criteria come to play in the granting of leave to commence judicial review proceedings, including the capacity and interests of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim and the propriety of judicial review proceedings to resolve the claim. Mativo J. described the requirements *that an applicant must demonstrate at the leave stage* as follows in ***Republic vs Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex Parte Centrica Investments [supra]****:*

> **" (i) 'sufficient interest' in the matter otherwise known as *locus standi*; (ii) that he/she is affected in some way by the decision being challenged; (iii) that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (v)the**

decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated."

31. In the present application, the Respondents have raised an argument as regards the sufficiency of the Applicant's interest. The Respondents have argued that the 1st Respondent has no jurisdiction of this matter, which is purely a commercial matter between the Applicant and 2nd Respondent, and as the 2nd Respondent is not an individual over whom the 1st Respondent can have jurisdiction. In other words, the Respondents argue that the Applicant's claim is not amenable to judicial review.

32. This Court as a judicial review Court in this respect exercises supervisory jurisdiction, pursuant to the provisions of Articles 47, and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged or unfair action by an administrator is alleged, and intervenes to protect and redress the rights of the affected party. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

33. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the proceedings in the Nairobi Chief Magistrates Court in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah,** and of the 1st Respondent's decision declining to hear the Applicant's complaint. For such proceedings and/or decision to be amenable to judicial review, it must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions.

34. In the present case, the Nairobi Chief Magistrates Court is a subordinate Court created under the Constitution, while the 1st Respondent has stated that it is a quasi-judicial body, and their decisions clearly affect the Applicant's rights and interests. They are therefore amenable to this Court's supervisory jurisdiction to ensure that the exercise of their powers is legal, rational and compliant with the principles of natural justice.

35. Article 47 of the Constitution also grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Fair Administrative Action Act in this regard defines an administrative action to include—

a) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or

b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

36. In addition, under section 3, the said Act applies to all state and non-state agencies. Therefore, the provisions of the Act as regards fair action also bind the Nairobi Chief Magistrates Court and 1st Respondent not only as a quasi-judicial tribunals, but also as authorities and bodies whose decision is likely to affect the rights and interests of the Applicant, and bring them under the supervisory jurisdiction of this Court.

37. Having established the amenability of the Applicant's application to judicial review, I will now address the arguments put forward by the Respondents as regards the merits of the Applicant's case. Firstly, it is alleged the Applicant's claim is time barred under Order 53 Rule 2 of the Civil Procedure Rules 2010 as he seeks to quash proceedings in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah** which was filed in February 2017, and the instant Application was filed on 5th December 2018. Order 53 Rule 2 provides as follows:

" Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

38. Similar provisions are also provided in section 9(3) of the Law Reform Act. The Applicant is in this regard seeking leave for orders to quash the entire proceedings in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah,** which are on-going and of a continuous nature, and not specific proceedings of a particular date. Therefore the six months limitation rule in Order 53 Rule 2 of the Civil Procedure Rules and section 9(3) of the Law Reform Act is not applicable in the present application.

39. Secondly, it is alleged that the Applicant has been guilty of material non-disclosure, as he has failed to disclose previous litigation that he has undertaken on the subject matter of this application. While I do admit that this may point to an element of abuse of the process of court, the import and effect of the previous litigation undertaken by the Applicant cannot be determined at this stage but only after a full hearing, when this Court can give a considered decision in this regard and any consequential orders that may be necessary.

40. Thirdly, the Respondents argued that the persons who are the subject of the complaints made by the Applicant before the 1st Respondent have not been joined to this suit, and that the 4th Respondent which is the Nairobi Chief Magistrates Court is also wrongly joined. Again, on this point it is my view that any issue of non-joinder or misjoinder of parties are issues that go to amendment of pleadings and not striking out of an application at leave stage, and the effect of such joinder and/or non-joinder is one to be decided upon after a full hearing.

41. Lastly, on the merits of the Applicant's case, the Respondents argued that there is no specific decision, ruling or order of the Nairobi Chief Magistrate's Court that the Applicant has presented before this Court as being illegal, irrational, unreasonable, *or ultra vires.* The Applicant on the other hand seeks to quash the proceedings in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah** on the basis that the Nairobi Chief Magistrates Court is not the proper forum to hear the dispute

therein, which should be heard by the 1st Respondent.

42. It is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but just give a cursory glance at the evidence before court and make the decision. The key facts presented in this regard by the Applicant are that he made a complaint to the 1st Respondent which declined jurisdiction, and that the subject matter of the complaint, is the same subject matter of the civil suit brought against him by the 2nd Respondent in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah.**

43. I find in this regard that an arguable case has been put forward by the Applicant as regards *inter alia* the nature of the jurisdiction of the 1st Respondent and the applicable law in determining the 1st Respondent's jurisdiction, and secondly whether proceedings before the 1st Respondent can qualify to oust the jurisdiction of the Nairobi Chief Magistrates Court in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah.** These are issues which can only be canvassed at a full hearing of the application, and therefore the Applicant to this extent merits leave to argue his case.

44. On the outstanding issue as to whether the leave so granted should operate as a stay, the applicable law is Order 53 Rule 1(4) of the Civil Procedure Rules , which 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."**

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

45. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127,** it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision and in various decisions by Kenyan Courts.

46. The main factor that is relevant is whether or not the decision or action sought to be stayed has been fully implemented, on which there are differing opinions. In **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega (2005) e KLR,** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. A similar decision was also made in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR.** According to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

47. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

48. In the present case, the Respondents have brought evidence of other suits filed by the Applicant over the same subject matter, and of orders that have been granted in some of the said suits . I therefore find that in light of other litigation brought by the Applicant on the same subject matter, a stay in the circumstances may conflict with orders given in the other suits, and I therefore decline to exercise my discretion in favour of the Applicant for this reason.

49. In the premises, I find that the Applicant's Chamber Summons dated 4th December 2018 is partially merited, only to the extent of the following orders:

> I. **Leave is granted to the Applicant to apply for an order of Certiorari directed to the Nairobi Chief Magistrates Court, to bring to the High Court the Record/Proceedings in Civil Case Number 1002 of 2017 Aga Khan Education Services (Kenya) vs. Nazir Jinnah for purposes of being quashed.**
>
> II. **Leave is granted to the Applicant to apply for an order of Mandamus to compel the 1st Respondent to admit and thereafter hear and adjudicate the Applicant's complaints against members of the 2nd Respondent as contained in the Applicant's submission forms of 13th March 2018.**

III. **The prayer that the said leave operates as stay of the proceedings in Civil Case Number 1002 of 2017 Aga Khan Education Services (Kenya) vs. Nazir Jinnah is denied.**

IV. **The costs of the said Chamber Summons shall be in the Cause.**

50. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2019

P. NYAMWEYA

JUDGE