



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO.19 OF 2018

IN THE MATTER OF THE DECISION OF THE EXECUTIVE BOARD OF MANAGEMENT OF M.H.S (NAME WITHHELD)

AND

IN THE MATTER OF THE EDUCATION ACT NO. 14 OF 2013

AND IN THE MATTER OF EDUCATION, SCHOOL DISCIPLINE REGULATIONS NOTICE 40 OF 1972 AND LEGAL NOTICE NO. 56 OF 2001

AND IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 10,22,27,28,29,32,33,43,53 AND 232 OF THE CONSTITUTION

AND

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

AND IN THE MATTER OF THE TSC CONSULTING WITH NON-STATE ACTORS

1. A.J.O (MINOR),E.L.K.(SUING AS NEXT FRIEND).....1ST PETITIONER

2. E.O.(MINOR) T.O.O(SUING AS NEXT FRIEND).....2ND PETITIONER

VERSUS

1. E.N.....1ST RESPONDENT

2. BOARD OF MANAGEMENT M.H.S.....2ND RESPONDENT

3. MINISTRY OF EDUCATION.....3RD RESPONDENT

RULING

1. By Notice of Motion filed contemporaneously with the Petition dated 27th September, 2018 the two Petitioners identified as A.J.O and E.O. being minors suing through their respective next friends E.L.K. and T.O.O. seek from this court the following orders:-

- a. THAT this court be pleased to certify this petition as urgent and deserving to be heard on a priority basis;**
- b. That this court be pleased to grant a mention date on priority basis for directions on the hearing of the petition herein;**
- c. That pending the hearing and determination of this application inter partes this court be pleased to issue temporary conservatory orders staying the contents of letters of suspension dated 27th /7/2018 issued by the Principal M.H.S suspending the two [petitioners A.J.O and E.O.;**
- d. That Costs of this application be in the cause.”**

2. On 3rd October, 2018 this matter was brought before this court under certificate of urgency and this court did certify it as urgent and

directed the petitioners/applicants to serve the Respondents for inter partes consideration today.

3. All parties have appeared this morning represented by their advocates. Mr Ouma advocate for the 2nd respondent and holding brief for the advocate for the 1st and 3rd respondents intimated to court that they had received instructions on Friday and were still seeking full instructions from their respective clients, the respondents hence they needed more time to file their responses to the application.

4. On the part of Mr Achura counsel for the Petitioners /applicants, he had no issue with time being given to the respondents to file their responses to the application but urged the court to, in the interim, to grant conservatory orders to allow the petitioners to sit for end term examinations which are starting on 10th October, 2018.

5. Of great concern in the application which was due for inter partes consideration today is that albeit it seeks for a conservatory order staying the decision to suspend the petitioners from school, the application has no substantive prayer for a conservatory order pending hearing and determination of the petition. What that means is that once the prayer sought is granted, then there will be nothing else to be considered inter partes until the petition is heard and determined. Assuming there was a clerical error committed by the advocate drafting the pleadings, then the application seeks for conservatory orders pending the hearing and determination of the petition on its merits.

6. Therefore the understanding of this court is that what the Petitioner is now seeking is a conservatory order in terms of Article 23(1) c) of the Constitution.

7. The principles governing the grant of such an order are well settled. In **Centre for Human Rights Education and Awareness (CREAW) & 7 Others -Vs- Attorney General Petition No. 16 of 2011; [2011] eKLR, Musinga J** stated that:-

“It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order.....

“At this stage, a party seeking orders only requires to demonstrate that he has a prima facie case with a likelihood of success, and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation.”

8. The Supreme Court emphasized in **Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others SCK [2013] eKLR** that the court considering the grant of conservatory orders must bear in mind the element of public interest. The Court stated:-

“ [86] “Conservatory orders” bear a more decided public-law connotation: Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

[63] Thus where a conservatory order is sought against a public agency like a legislative Assembly that is mandated to carry out certain fictitious [sic] in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered function in public interest.”

9. Thus the question in this case is whether the Petitioners have on the face of their application and petition demonstrated a *prima facie* case with a likelihood of success, and that there is a real danger that they will suffer prejudice from the violation or threatened violation, if the orders sought are denied. Finally, the court will consider the question of public interest.

10. Prayer 1 and 2 are spent as this court did accord the parties the earliest available date for *inter partes* consideration of the application and the parties have appeared and expressed their sentiments to court.

11. Despite the erroneous wording of the application due to poor or hurried drafting by the advocate, this court is prepared to believe the 3rd prayer was intended to refer to the “final determination” of the Petition, rather than the determination of the instant application. Otherwise, in light of the framing of the prayers, the entire application would stand spent.

12. The grounds in support of the Notice of Motion are *inter alia* that the Petitioners, are form three students at the Respondent School which is a public National School and that this matter is in the public interest and that the Board of Management was not properly constituted. In addition, it is alleged that the School Principal has adopted a dictatorial and unilateral approach to the school management of affairs of students without factoring in stakeholders and good governance principles. Further, that the petitioners have a legitimate expectation that the school will be managed taking into account best interests of the children, among other grounds.

13. The petitioners’ application is supported by a supporting affidavit sworn by E.L.K on behalf of herself and on behalf of the second petitioner’s next friend.

14. At this stage, this court is not expected to delve into the actual merits of the application or petition save to consider whether an interim conservatory order is merited, taking into account all circumstances of this case.

15. The circumstances as submitted by both advocates on record are such that the petitioners/ students plead with the court to allow them back to school so as to sit for their end term examinations. On the part of the respondents they contest the conservatory orders on the grounds among others, that the applicants’ will suffer no irreparable loss since there is a newly constituted Board of Management of the School which

is ready to convene to consider the petitioners' cases on merit.

16. On the part of the petitioners it was argued that the Board of Management was not in place during the suspension of the students hence the decision to suspend them was unlawful. To counter his averment the respondents contend that the disciplinary process begun when the Board was in place but its term ended before the process was completed as shown by the affidavit by the Petitioners on record.

17. However, at paragraph 19 of the supporting affidavit, the deponent makes clear that:

“That I am aware that our children have not attended class the whole of this term notwithstanding the fact that the end term exams are commencing on 10/10/2018 which would be a condition precedent to movement to the next class.”

18. With the above deposition in mind, and in the absence of a deposition that the petitioners have while on suspension been preparing for end term exams which are to begin in a few days' time from today, it makes no academic sense for a student who has not attended any class or instruction from any teacher to demand to sit for an exams.

19. This court is alive to the rights of the child as stipulated in the Children's Act and the right to Education as stipulated in Article 53 of the Constitution. However, it is my view that the petitioners/ applicants have not demonstrated that unless stay of impugned decision is granted then they will suffer irreparable loss or that their application and petition shall be rendered nugatory or that they will be rendered mere pious explorers in the judicial process. In my view, and as correctly submitted by Mr Ouma Njoga Advocate for the respondents, the petitioners can still be given time to sit for special end term examinations if the court finds that due process was not followed or that their rights were violated.

20. There is unequivocal and clear admission by the 1st petitioner that her son was against the school administration administering examinations at short notice and what this court discerns is that the whole issue concerns the impending examinations.

21. In my humble view, therefore, an interim conservatory order will not serve any purpose at this stage and neither have the applicants/ petitioners demonstrated that they stand to suffer irreparable loss if the orders sought are declined, or that they shall be mere pious explorers in the judicial process if the orders sought are denied at this stage.

22. In **Centre for Human Rights Education and Awareness (CREAW) & 7 Others -Vs- Attorney General Petition No. 16 of 2011; [2011] eKLR, Musinga J** stated that:-

“It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order.....

“At this stage, a party seeking orders only requires to demonstrate that he has a prima facie case with a likelihood of success, and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation.”

23. It is also apparently clear in this case that the prayer for constitution of the Board of Management of the Respondent School has been done hence the 1st prayer in the petition is spent and therefore mere stay of the impugned decision pending nothing will not assist the petitioners who nonetheless are at liberty to amend their petition to make legal sense out of it.

24. In **Martin Nyaga Wambora -Vs- Speaker of the Country Assembly of Embu & 3 Others – Petition No. 7 of 2014** the court emphasized that a successful Applicant to conservatory orders must demonstrate “real danger” of prejudice stating:

“[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious so much so that it deserves immediate remedial attention or redress by the court. Thus, an alleged threatened violation that is remote and unlikely will not attract the court's attention.

[62] The second principle which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory.”

25. The students were suspended from school and not expelled. And even if they had been expelled, under the 2015 Regulations, expulsion from a given school of a student referred to as the **“exclusion of a learner”** does not necessarily mean that his education is over. Moreover, under Regulation 40, a duty is placed upon the County Director of Education, upon receiving the Board of Management's recommendation for exclusion of the learner, to adopt the following course of action:

“Where the County Director of Education receives the recommendation of the Board of Management then he or she shall seek the advice of the County Education Board as to whether to-

(a) Order for conditional or unconditional re-admission of the learner;

(b) Transfer the learner to an alternative institution; or

(c) Transfer the learner to a corrective center in the context of education.”

26. Muriithi J had this to say in the **G.N. -Vs- Chumani Secondary School Board of Management [2014] eKLR and E.K. & 5 Others - Vs- The Registered Trustees of S.H.S. [2015] eKLR** case:-

“There cannot be any contest that a school is entitled to ensure the discipline of school students and for that purpose to take punishment decisions that may include the expulsion of students from the school. However, consistently with the constitutional right to basic education, the decision of the school to expel must be exercised in accordance with the due process established by the law and the school’s regulations. Section 35 of the Act has made provision for the discipline of students in a manner that accords to the right to basic education of the students. Suspension or expulsion of a student minor may not breach his right to education and to paramount regard of best interest of the child if it is done in accordance with due process established by the provisions of the Basic Education Act or other law, unless such law can be shown to be unconstitutional.”

27. The Motion, appears on the face of it, to be the procedural and lawful enforcement of school discipline and therefore fails the public interest test.

28. In the end, I decline to grant any interim orders and direct that the petitioners do consider amending their petition within the next 10 days of today and serve upon the respondents before responses can be filed within 14 days of service. I make no orders as to costs.

Dated, Signed and Delivered at Siaya this 8th day of October, 2018

R.EABURILI

JUDGE