



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS APPLICATION NO.101 'A' OF 2014**

**IN THE MATTER OF: AN APPLICATION BY DARUL IRSHAAD**

**CENTER THE APPLICANT, FOR LEAVE TO APPLY FOR AN**

**ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS**

*AND*

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

*AND*

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

*AND*

**IN THE MATTER OF: THE PREVENTION OF TERRORISM ACT, NO.30 OF 2012**

*AND*

**IN THE MATTER OF: THE INDEFINATE CLOSURE OF DARUL ISHARAAD ISLAMIC  
CENTER**

*AND*

**IN THE MATTER OF: A DECISION AND ORDER CONTAINED**

**IN LETTERS DATED ON 13<sup>TH</sup> MAY, 2014 BY THE COMMISSIONER**

**OF MACHAKOS COUNTY.....RESPONDENT**

**JUDGMENT OF THE COURT**

**1. The Application:**

The Exparte Applicant herein filed a Notice of Motion dated 24<sup>th</sup> June, 2014 expressed to be brought under the provisions of Section 3A of the Civil Procedure Act, Order 40 Rules 1, 2 and 3, Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. The prayers sought are as follows:-

- (1) That this Honourable court be pleased to grant an order of Certiorari against the County Commissioner to produce the documents relied upon to have Darul Ishraad Islamic Center closed down.**
- (2) That this Honourable Court be pleased to grant an order of Mandamus quashing the decisions and orders made in the letter dated 13<sup>th</sup> May, 2014 addressed to the Applicants.**
- (3) That this Honourable court be pleased to grant an order of Prohibition against the Respondent, its agents or representatives from issuing notice to the Applicants demanding its closure of winding up.**
- (4) That this Honourable Court orders that Darul Ishraad Center to continue running as a school.**
- (5) That the costs of this application be provided for.**
- (6) That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.**

The Application is supported by the grounds set out hereunder and on the annexed affidavit of **AHMED YUSUF IBRAHIM** which is as follows:-

- (a) THAT the Applicant is a Registered trust in the Republic of Kenya**
- (b) THAT the Applicant is a charitable trust incorporated for the purpose of advancing education and social welfare in the community.**
- (c) THAT the applicants have been in operation for the last 17 years with no incidents having been reported.**
- (d) THAT the Applicants at the time of the raid and closure of the Centre had 76 students on campus at various stages of their education.**
- (e) THAT the Applicant has never had any run in with the authorities in its 17 years of operation and stay in the area.**
- (f) THAT the raid was warrant less with no Court Order of justification.**
- (g) THAT the Respondent has not done any investigations in regards to the Applicant nor into its students.**
- (h) THAT the Applicant has not been visited by any official or investigating officer from the Respondents office requesting to carry out investigations at the Applicants Centre.**
- (i) THAT the Respondents were in breach of Articles 27 and 32 of the Constitutions which provide for freedom from discrimination and freedom of conscience, Religion, belief and opinion respectively.**
- (j) THAT the Applicants Constitutional rights as envisaged under Article 47 that states “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” have been breached, and traversed upon.**
- (k) THAT the Applicant’s rights to a fair hearing as envisioned in the Constitution were not upheld when the decision to close down the school was reached.**
- (l) THAT the Applicants Centre is a crucial cog in the social fabric of the area since it offers**

**refuge for the youth to study religion as guaranteed under article 32 (2) of the constitution as well as other vocational trainings.**

**(m) THAT the Respondent has not bothered nor considered to offer an explanation to the Applicants regarding why the Centre was closed down and for how long they intended to have it closed.**

**(n) THAT this Honourable court has unfettered jurisdiction on the orders prayed for in paragraph 2, 3 and 4 of this application.**

**(o) THAT the costs of and incidental to this Application be awarded to the Petitioners.**

2. The Application was opposed by the Respondent on the following grounds:-

**1. THAT the Exparte Applicant has been operating as a religious trustee and registered as so with its objectives being to impart Islamic religious education to children of Islamic faith as per their registered trustee.**

**2. THAT sometimes in the month of May, 2014 the Sub-County office based at Matungulu Sub-County where the ex-parte applicant is based received complaints from residents of unhealthy conditions prevailing at the premises of the ex-parte applicant and that the same was a health danger for the children who are boarding at the premises.....**

**3. THAT the officers visited the premises on the aforesaid date and made a report dated 5<sup>th</sup> May, 2014 together with recommendations which report was addressed to the Administrator of the school and also copied to Respondent.**

**4. THAT the finding of the health officers was that though the building was in good conditions the toilets, drainage system and garbage management and sewerage system was found wanting, with tanks discharging water in the compound and lack of water treatment at the source.**

**5. THAT the report made recommendations that the aforesaid be rectified as it was posing health risks to not only the children in the school but also the neighbourhood especially the spilling of liquid waste and the piling up of solid wastes which had become the home for flies and rodents.**

**6. THAT subsequently, several reports followed claiming that the institution was admitting strangers who are above the age of the religious training and the members of public expressed fear on the security of the area.**

**7. THAT the reports further claimed that the school had started offering technical and vocational training without being registered as so and contrary to the objectives of the Trust as contained in the Trust Deed.**

**8. THAT due to the many complaints and the health situation of the school on 13<sup>th</sup> May, 2014, Respondent ordered the school closed having not complied with the health report requirements and also to enable officers conduct investigations on the other allegations and to have a meeting with the administration to find the way forward.**

**9. THAT indeed on the 27<sup>th</sup> May, 2014 a meeting was held which was attended by the school administrator and agreement reached to the effect that the administrators were to ensure compliance with the recommendations of the health officers and on registration with the Education Ministry for the Vocational Training.**

**10. THAT the meeting ended on a good note with a promise and a resolution that upon**

**compliance with the health and educational requirements the institutions shall be immediately opened.**

**11. THAT instead of the Ex-Parte Applicant complying with the mutual agreements Respondent was shocked when served with court pleadings in this suit seeking the orders as herein claiming that no explanation has been given to the Exparte Applicant or a chance to rectify the health conditions which allegation is untrue.**

**12. THAT all that is required is compliance of the lawful registration requirement for the school and health in order to resume their activities.**

3. The Exparte Applicant had earlier on moved the court vide a chamber summons dated 5/6/2014 which application was only considered at Exparte stage and the Applicant granted leave to apply for orders of certiorari, mandamus and prohibition against the Respondent. However the Exparte Applicants prayer to be allowed to continue running its operations pending the filing of the present substantive application was declined by this court vide a ruling dated 7<sup>th</sup> June, 2016.

4. Parties in this matter agreed to dispose of the Application by way of written Submissions. However, it is only the counsel for the Ex-parte Applicant who filed submissions dated 10/09/2016. Counsel for the Applicant submitted that the Applicant be issued with orders of certiorari against the Respondent who is the County Commissioner of Machakos County from closing down the applicants Institution which is an Islamic Centre. Applicant also seeks for orders to quash the decision made by the County Commissioner on the 13<sup>th</sup> May, 2014 instructing the DSIC team to ensure the institution is closed down. The Applicant also seeks an order of mandamus to compel the Respondent to reopen the Applicant's institution. An order of prohibition is also sought in order to prohibit the County Commissioner's office, its agents or representatives from demanding the Applicant's closure or winding up. According to the Applicants counsel, the Respondent ordered the Institution closed and as a result 76 of its students had to leave. As far as the Applicant was concerned, the actions of the Respondent were illegal, unlawful and capricious since the Respondent's office had no jurisdiction over matters regarding education in the County and further it has no jurisdiction over matters regarding healthcare in the County. It was further submitted that there was no security threat posed by the Applicants to warrant the closure. It was further submitted that the institution was quite helpful to the community at Matungulu as the jobless youth were absorbed and given vocational training skills and therefore this petition was meant to secure their constitutional rights as well as those of the residents.

5. I have considered the Applicant's Application as well as the affidavit and grounds in support. I have also considered the averments of the Respondent in their Replying Affidavit, I have considered the submissions by Learned Counsel for the Applicant. The issue for determination by this court is whether the Applicant has sufficiently persuaded the court for the grant of the prayers sought in the Notice of Motion. The Applicant has claimed that its institution was arbitrarily ordered closed down by the Respondent yet the Applicant had been conducting legitimate activities. The Applicant further avers that it was not given an opportunity to give its side of the case and thus denied right to fair administrative action as guaranteed by Article 47 of the Constitution. The Respondent has countered the allegations by the Applicant and maintains that the order of closure of the institution was quite legitimate in that a resolution reached between the Applicant and some Health officials to have some health and sanitation issues rectified was reneged by the Applicant leading to the said closure. The Respondent further contended that several complaints had been received from the community regarding the activities of the Applicant in the area to the effect that security matters for the residents were likely to be at risk.

Further the Respondent averred that it had come to the fore and admitted by the Applicant that the Applicant's Institution was offering technical and vocational training without being registered contrary to the objectives of the Trust Deed and that the Applicants through a meeting of 27/5/2014 undertook to regularize the status of the institution.

6. The Respondent herein being the County Commissioner for Machakos County is responsible for co-ordination of activities on behalf of the National Government. The Respondent in fact oversees activities

at the County level and also to be the link person between the National and County Government. Even though the National Government and County Government are separate and distinct, they are interdependent and that is why in some functions or activities at the County Level one finds officers from both levels of Government working together in co-operation. The Applicant has admitted that indeed its institution had not handled matters to do with health and sanitation to an acceptable standard and hence in the subsequent meeting of 27/05/2014 it undertook to rectify the issues of poor sanitation and health. Again the Applicant admits to have embarked on offering vocational training despite not obtaining the relevant authority to do the same. Indeed matters to do with education were not devolved to the County and therefore they are with the National Government. The Respondent being responsible for co-ordination of Government functions at the County Level was therefore mandated to delve into matter regarding education. The office of the Respondent is provided for pursuant to the provisions of Section 17 of the sixth Schedule of the Constitution. Again Section 17 of the National Government Cohesion Act seems to provide functions of the County Commissioner as follows:-

***“Subject to the Constitution, this Act or any other written law, a National Government administrative officer appointed under Section 15 shall be responsible for the co-ordination of National Government functions as set out in the Constitution, this Act now and any other written law at the County level and other decentralized units as far as may be necessary”.***

It would follow that any matters relating to education at the County level would be brought to the attention of the Respondent since the same are national Government functions. The Respondent herein received the complaint that the Applicants institution was not handling proper sanitation and health issues and further that it later transpired that it was offering some courses of training yet it had not been registered. This coupled with some concerns from the area residents that the institution could pose a security threat in the area compelled the Respondent to issue the letter of closure. Indeed from the report of the health Inspector and also from the minutes held on the 27/05/2014 it became quite clear that the Applicant had a lot on its hands to rectify before the institution could be opened. In fact the Respondent in her replying Affidavit at paragraph 14 indicated clearly that the ball was in the Applicants court and was now required to comply with the issues raised by the health Inspectors and further to secure its registration before resuming its activities. Under those circumstances and in view of the Applicants own admission that the Applicants institution had not sorted out sanitation and registration issues, I am therefore unable to find fault at the action taken by the Respondent. I find the Applicant has not convinced this court sufficiently to warrant the orders being sought. Even though the youth of the area have been inconvenienced as a result of the closure of the institution, I find the issues of proper healthcare at the institution and the need for registration rank in priority. It will be to the youths benefit if these crucial issues are attended to by the Applicants.

In the upshot, I find the Applicant’s application dated 24<sup>th</sup> June, 2016 lacks merit. The same is ordered dismissed with costs to the Respondent. The Applicants institution shall only be opened upon compliance with the health and education requirements as agreed between the Applicant’s and Respondent’s representatives on the 27/05/2014.

Dated and Delivered and Machakos this 9<sup>th</sup> day of MARCH .2017.

**D. K. KEMEI**

**JUDGE**

In the presence of:

Chexoti for applicant.....

C/A: Muoti.....