



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 1 OF 2017

(CORAM: J.A. MAKAU - J.)

MILLICENT OBARE.....1ST APPELLANT

(Sued in her capacity as the Head teacher and a member of the

Board of Management of Ng'iya Girls Boarding Primary School)

COUNTY DIRECTOR OF EDUCATION.....2ND APPELLANT

VS

JUSTUS ONYANGO.....1ST RESPONDENT

OCHIENG KOCHIENG.....2ND RESPONDENT

PHILEMON RAJULA.....3RD RESPONDENT

(Suing on as the Chairperson and members of the Board of Management of Ng'iya Girls Boarding Primary School)

(Being an Appeal from a Ruling dated 11.01.2017 in Civil Case No. 82 of 2016 in Siaya Law Court before Hon. Mr. T.M. Olando –SRM)

J U D G M E N T

1. The Appellants **MILLICENT OBARE** and **COUNTY DIRECTOR OF EDUCATION** were the Defendants at the Lower Court whereas the Respondents **JULIUS ONYANGO**, **OCHIENG KOCHIENG** and **PHILEMON RAJULA** were the Plaintiffs at the Lower Court. The Respondents through a plaint dated 22nd December 2016 sued the Appellants seeking the following orders: -

(a) An order of Permanent injunction restraining the Defendant/Respondents by themselves, their officers, servants, agents or otherwise howsoever from holding the elections, electing, or in any other manner constituting an interim board of management of Ng'iya Girls Boarding Primary School.

(b) Cost of the suit.

2. The Plaintiff simultaneously with the filing of the Plaintiff's Notice of Motion under **Section 1A, 1B, 3A, and 63(e) of the Civil Procedure Act and Order 40 Rules 1(a), 2,3 and 9 of the Civil Procedure Rules** seeking the following orders: -

(i) This Application be certified Urgent and be heard ex-parte in the first instance.

(ii) Pending the interpartes hearing and determination of this Application, the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from holding the elections, electing, or in any other manner constituting an interim board of management of Ng'iya Girls Boarding Primary School on 22nd December 2016 or any other date and or from removing the names of the Plaintiff's as signatories to the Ng'iya Girls Boarding Primary School Respective Bank account numbers: -

a) Co-operative Bank, Siaya Branch – 01100255609100

b) Kenya Commercial Bank, Siaya Branch – 1106836022

(iii) Further to or in the alternative to prayer 2 above an Order of Interim Injunction do issue against the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever restraining them from removing the Plaintiff's/Applicants from their respective offices in the Board of management of Ng'iya Girls Boarding Primary School.

(iv) Pending the hearing and determination of this suit, the Defendants/Respondents by themselves, their officers, servants, agents and otherwise howsoever be restrained from holding the elections, electing, or in any other manner constituting an interim board of management of Ng'iya Girls Boarding Primary School or from removing the Plaintiff's/Applicants from their respective offices in the Board of Management of Ng'iya Girls Boarding Primary School.

(v) The Cost of this Application be awarded to the Plaintiffs/Applicants.

3. That on 22nd December 2016, the Respondents'/Applicants' application proceeded ex-parte and the trial court granted prayers no(s) 1 and 2 as follows: -

(i) That the Application dated 22nd December 2016 is certified urgent and admitted for hearing ex-parte in the 1st instance.

(ii) That pending the interpartes hearing, the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever are restrained from holding the elections, electing, or in any other manner constituting an interim board of management of Ng'iya Girls Boarding Primary School on 22nd December 2016 or any other date and or from removing the names of the Plaintiff's as signatories to the Ng'iya Girls Boarding Primary School respective bank account numbers: -

(a) Co-operative Bank, Siaya Branch – 01100255609100

(b) Kenya Commercial Bank, Siaya Branch – 1106836022

(iii) That the inter-parties hearing of the application is on 4th January, 2017.

4. The Appellants upon being served with the pleadings on 22nd December 2016, filed Memorandum of Appearance and grounds of opposition on 4th January 2017 raising several points of law as follows: -

(a) The Plaintiffs have no locus to file the suit as the chairperson and members of the board of

management of Ng'iya Girls Boarding Primary School since said the board was dissolved on the 8th of December 2016.

(b) The Honourable Court lacks jurisdiction as the 2nd Defendant is a government official under the Ministry of Education, Sports and Technology and thus a Judicial Review ought to have been filled in the High Court.

(c) The orders sought for in both the application and the suit have been overtaken by events, since by the time service of the order was done on the 1st Defendant, the events sought to be injuncted against by the 2nd Order, had already occurred.

(d) The orders sought seek to indefinitely stop the operations of a body of the Ministry of Education, Sports and Technology.

(e) The orders sought threaten to deprive the Pupils of Ng'iya Girls Boarding Primary School of their fundamental right to basic education guaranteed in the Kenyan Constitution and the Basic Education Act.

(f) The orders sought are furthermore an affront to the overriding objectives of the Court.

(g) The Application is bad in law, incurably defective and an abuse of the court process.

5. The Appellants also filed a Notice of Motion dated 3rd January 2017 under **Order 40 Rule 1, 2, 4 and 10 of the Civil Procedure Rules 2010** and under **Section 1A, 1B, 3A and 63(a) of Civil Procedure Act** seeking the following orders: -

a) The Application herein be certified urgent and the same be heard Ex-parte in the first instance.

b) Pending the hearing and determination of the instant Application, the Honourable Court be pleased to set aside the orders of injunction obtained by the Plaintiff/Respondents on the 22nd of December 2016.

c) Pending the hearing and determination of the instant Application inter partes, the Honourable Court be pleased to grant an Interim Order of Injunction restraining the Plaintiff, their agents, employees and anyone acting under their authority, from barring the 1st Applicant, from accessing her residential premises and office at Ng'iya Girls Boarding Primary School or in any way interfering with the 1st Applicant at her said residential and office.

d) That in the alternative to prayer 2 above, the Plaintiff/Respondent do deposit into court the sum of Kshs. 2.5 million for payment of staff salaries for the months of November and December 2016 as well as January 2017.

e) That in further alternative to prayer 2 above, the court do order for the release of Kshs. 2.5 million from the two school accounts for the payment of salaries and payment of essential school requirements.

f) Pending the hearing and determination of the suit, the Honourable Court be pleased to set aside the orders of injunction obtained by the Plaintiff/Respondents on the 22nd December 2016.

g) The Honourable Court be pleased to grant a temporary Order of Injunction restraining the Plaintiff, their agents, employees and anyone acting under their authority, from barring the 1st Applicant, from accessing her residential premises and offices at Ng'iya Girls Boarding Primary School or in any way interfering with the 1st Applicant at her said residential and office; pending the hearing and determination of the suit.

h) That the 1st Defendant/Applicant be removed as a Defendant to the suit filed by the Plaintiffs/Respondents.

i) Cost of this Application be borne by Plaintiff/Respondents.

j) Such further and/or other orders be made as the court may deem fit.

6. The Respondents filed a replying affidavit dated 5th January 2017, deponed upon by the 1st Respondent and further affidavit dated the same day. The 1st Appellants filed a replying affidavit dated 3rd January 2017. The Appellants' defence was subsequently filed on 17th January 2017. On 4th January 2017, the trial court directed that both the Notice of Motions dated 22nd December 2016 and 3rd January 2017 respectively be held on 5th January 2017 at 2.30pm and interim orders extended till then. That after hearing both parties ruling was delivered on 11th January 2017.

7. The Appellants aggrieved by the trial court's ruling, provoking them to prefer this appeal setting out seven(7) grounds of appeal which can be summarized as follows: -

i. The trial court lacked jurisdiction to issue the orders that it did.

ii. The entire ruling delivered by the trial court is bad in law.

iii. That the trial court ruling is not practicable.

8. M/S Opondo, Learned Advocate appeared for the Appellants and urged the appeal based on the three grounds as summarized herein above, whereas Mr. Sasaka Ochieng, Learned Advocate, for the Respondents opposed the appeal mainly on the grounds thus; the appeal is incompetent and lacks merits, the appeal was filed without Court's leave offending **Section 75 of the Civil Procedure Act and Order 43 of Civil Procedure Rules**, that the trial court in its ruling only affirmed the decision of the County Director of Education of 8th December 2016 and as such, it did not check on the powers of the County Director of Education, in that the court gave direction on the reconstitution of the Board of Management as guided by the **Basic Education Act 2013**.

9. Whether the trial court lacked jurisdiction to issue the orders that it did? In the trial Magistrate's ruling dated 11th January 2017, the court ordered that County Director of Education and the County Education Board urgently reconstitute the Board of Management for the school, in any event not less than 14 days from the date of the ruling. A quick perusal of the Plaint filed by the Respondents dated 22nd December 2016, the prayer sought is very clear, is that of permanent injunction restraining the Defendant/Respondent by themselves, their agents, servants or otherwise from holding the elections, electing or in any of the matter constituting an Interim Board of management of Ng'iya Girls Boarding Primary School or from removing the Plaintiffs/Applicants from their respective offices in the Board of Management of Ng'iya Girls Boarding Primary School. The court issued an order that was not sought and in excess of the court's jurisdiction in that it purported to check on the powers of a public body, from carrying out its official function, by questioning the manner in which the function in issue was being carried out. The function of a public body, as is the case can only herein, be questioned by way of Judicial Review proceedings commenced in the manner provided for by law before the appropriate court but not before a Magistrate's Court, as is the case in this matter. I therefore, find the trial court in making the order it did, it exceeded its jurisdiction and that it lacked jurisdiction to issue such orders as it did. The orders issued in excess of the trial court's jurisdiction, was null and void.

10. Whether the trial courts entire ruling is bad in law? Before the trial court there were two combined application set down for hearing on the same time, this application for the Respondents dated 22nd December 2016 and that of the Appellants dated 3rd January 2017. The applications were basically supported by respective affidavits and both counsel who appeared before the trial court, made their respective rival submissions in support of their opposing positions. The Appellants urged the

Respondents further affidavit was filed without court's leave and that point was according to the Appellants not considered. The further affidavit in question, filed by Justus Onyango is dated 5th January 2017. The court proceedings do not show how the further affidavit was filed and the trial court having been moved to strike out the said affidavit ought to have considered that point but the court, in its ruling did not make any finding on the validity of the further affidavit. The trial court did not further make a finding as to whether at the time of presenting of the application at the *ex parte* stage whether the Board of Management had been dissolved by the relevant Ministry as per the letter dated 8th December 2016 and that the 1st Respondent was not a member of the Board. The trial court also failed to consider the issue of whether the Respondents had *locus standi* to file this suit. The trial court further failed to consider whether by the time the suit was filed, whether the school had already set an Interim Board, in place and further the court failed to consider whether the order it issued had been overtaken by events. I have carefully considered the pleadings before the trial court, and various issues raised for consideration by the trial court and I note the several issues raised before the trial court were totally overlooked and ignored. The trial court failed to give weight to matters raised before it, before coming up with the directions which none of the party had sought. The court's ruling is not based on the pleadings before it. The trial court did not consider prayers sought by the parties but gave orders which were not pleaded for. I therefore find and hold the entire ruling, delivered by the trial court is bad in law and has no probative value to any of the parties in this matter.

11. Whether the ruling delivered by the trial court is practicable? The order issued was to the effect that the County Education Board was to move and reconstitute the Board of Management for the school in question within 14 days, from the date of the ruling. That at the time the order was made, the trial court had been made aware that the County Education Board had been dissolved in September 2016 by Cabinet Secretary of Ministry of Education. The order issued, in my view serves no useful purpose, as it cannot be executed and secondly, it is an order hanging in the air as no party had sought such an order. I find and hold that the order issued is an order in vain as it cannot be executed. I find the order to be null and void and an order that is not practicable.

12. Whether the appeal is incompetent and whether court's leave was necessary for filing the appeal? The Appellants and the Respondents applications were both brought to court pursuant to **Order 40 Rule 1(a), 2 and 3 of Civil Procedure Rules**. Under **Section 75 (1) and (2) of Civil Procedure Act**, it is provided as follows: -

“75. Orders from which appeal lies: -

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted: -

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under Section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

13. Under 43, Rule (1), (u) of the Civil Procedure Rules, it is provided: -

“Order 43 - Appeals from Orders.....

1. Appeals from Orders [Order 43, rule 1.]

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act: -

(u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions)”

14. In view of the provisions of Section 75 of the Civil Procedure Act and Order 43(1)(u) of Civil Procedure Rules, the ruling on application before the trial court being based on Order 40 Rule 1, (2) and (3) of Civil Procedure Rules, the Appellants did not need to seek court’s leave before filling an appeal because the appeal arising out of granting or rejecting to grant an injunction order, appeal lie as/of a right and any aggrieved party is at liberty to exercise his or her right of appeal whether the court record, states there is right of appeal or not. I therefore, find no merit in the contention by the Respondents, that the Appellants’ appeal is incompetent for lack of leave to appeal, as none was needed.

15. The upshot is that the appeal is meritorious. I therefore make the following orders: -

(a) The appeal is allowed.

(b) The trial court’s ruling dated 11th January 2017 is set aside.

(c) The parties to appear before the trial cost for full hearing and determination of the case on merits.

(d) Costs of the appeal to the Appellants.

DATED AND SIGNED AT SIAYA THIS 5TH DAY OF APRIL 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

M/s Opondo: for Appellants

Sasaka Ochieng: for Respondents

J.A. MAKAU

JUDGE