



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 11 OF 2015

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER
ORDER 53 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 167 LAWS OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE TRUSTEES ACT CAP 167 LAWS OF KENYA

AND

**IN THE MATTER OF: THE PRINCIPAL MAGISTRATE'S COURT CIVIL SUIT NUMBER 17
OF 2015**

**IN THE MATTER OF: AN APPLICATION BY MUHSIN SAYYED ALI BADAWY FOR THE
GRANT OF LEAVE TO APPLY FOR JUDICIAL REVIEW AGAINST THE DECISION BY THE
PRINCIPAL MAGISTRATE LAMU RESTRAINING THE APPLICANTS AND ALL STUDENTS
AND STAFF AT MUSLIM ACADEMY LAMU FROM ENTERING OR REMAINING OR
TEACHING OR LEARNING IN THE MUSLIM ACADEMY RIYADHA MOSQUE LAMU**

AND

REPUBLIC.....APPLICANT

VERSUS

1. THE PRINCIPAL MAGISTRATE

2. LAMU MAGISTRATE'S COURT.....RESPONDENTS

EX PARTE: MUHSIN SAYYED ALI BADAWY

RULING

1. This Ruling relates to a Notice of Motion dated 30th April, 2015 and filed on 5th May, 2015 pursuant to leave granted to the ex parte Applicant made on 17th April, 2015, for –

1.(i) an order of certiorari to remove into this court for purposes of quashing the order of the Principal Magistrate in Lamu Civil Suit No. 17 of 2015 granted on 10th April, 2015;

(ii) restraining the defendant/Applicant herein by himself, his servants, employees, teachers and students whether foreign or local, children, agents or any other person or persons authorized by him from entering into, or remaining in, or leaving or teaching in the MUSLIM ACADEMY RIYADHA MOSQUE aka ISLAMIC CENTRE LAMU situate on a piece or parcel of land known as TITLE NUMBER LAMU/BLOCK 617, 620/I, 621, 621/I, 734 & 735 and that all dormitories or hostels standing or erected on PLOT NO. I/731 be temporarily closed;

(iii) the Defendant (MUHSIN SAYYED ALI BADAWY) by himself, his servants, employees, teachers, students or agents or any other person authorized by him be temporarily restrained from conducting any prayers in the Riyadh Mosque standing or erected on PLOT NO. BLOCK I/731;

(iv) requiring the security agencies through the OCPD LAMU to screen all the foreign students currently admitted and studying at the MUSLIM ACADEMY RIYADHA MOSQUE aka ISLAMIC CENTRE LAMU and confirm if the aforesaid students have in their possession the necessary documents to allow them to study in the country;

(v) that the MUSLIM ACADEMY RIYADHA MOSQUE aka ISLAMIC CENTRE LAMU be handed over to the TRUSTEES (Plaintiffs) by the headmaster (Defendant) within seven (7) days under the supervision of the OCPD/OCS LAMU POLICE STATION in order for the TRUSTEES to comply with the PUBLIC HEALTH NOTICE dated 8/1/2015.

2. an order of prohibition to prohibit the Principal Magistrate Lamu from continuing with the proceedings in the Principal Magistrate's Court Civil Suit No. 17 of 2015.

3. any other further orders/directions as may be deemed just to be granted.

4. that the costs of the application be provided for.

2. The application was based upon the grounds set out in the Statutory Statement dated 17th April, 2015 and the Affidavit Verifying the Facts of MUHSIN SAYYED ALI BADAWY sworn on 17th April, 2015 and filed in support of the Application (Chamber Summons) for leave, all annexed to the Application and was said to be based upon further other grounds to be adduced by counsel for the Applicant at the hearing of the Application.

3. The other grounds relied upon by the ex parte Applicant at the hearing of the substantive Notice of Motion (the subject of this Ruling) were set out in the submissions of counsel dated 14th December, 2015 and filed on 15th December, 2015.

4. The Applicant's case is **firstly** based upon the three "Is", "**illegality**", "**irrationality**" (unreasonableness in the Wednesbury sense), and procedural "**impropriety**". **Secondly**, the ex parte Applicant also pleaded that –

(a) the Interested Party lacked *locus standi* to institute proceedings before the lower court;

- (b) the lower court lacked jurisdiction to determine the suit before it;
- (c) the lower court failed to adhere to the principle of legitimate expectation.

5. On all the above grounds the ex parte Applicant's counsel urged the court to grant the orders sought, and with costs to the ex parte Applicant. The Application was however opposed.

THE RESPONDENTS CASE

6. The Respondent, through the Attorney-General opposed the Application, **firstly** through Grounds of Opposition dated 3rd March, 2016, and filed on 7th March, 2016, and countered all the contentions by the ex parte Applicant that –

- (a) the application is misconceived, frivolous, vexatious and an abuse of the process of the court, making the judicial review application defective;
- (b) the Principal magistrate court at Lamu had jurisdiction to grant the orders complained of;
- (c) the orders granted were of an ex parte temporary nature pending the hearing and determination of the application dated 8th April, 2015;
- (d) no principles of natural justice were breached;
- (e) no appeal from and/or application to set aside the orders complained of has been made;
- (f) in the absence of such appeal or application to set aside the impugned orders, judicial review orders are not available to the Applicant, and that consequently such orders would not issue. Reliance on this ground was placed upon the case of NICHOLAS MUCHORA & 5 OTHERS VS. SRM COMMERCIAL COURT [2011]eKLR

7. The said Grounds of Opposition were reiterated in the Respondent's counsel's written submissions dated 3rd March, 2016 and filed on 24th March, 2016, and counsel urged the court to dismiss with costs the application against the ex parte applicant.

DETERMINATION

8. The common issue between the parties is whether there are any sustainable grounds for granting the judicial review orders sought. The principal issue is whether the subordinate court had jurisdiction to grant the ex parte orders as it did. To determine that question, it is necessary to look at the nature of the suit, and the orders sought therein.

9. Through the Plaint dated 8th April, 2015 and filed on 9th April, 2015, the Interested Parties sought orders of permanent injunction against the Defendant, from conducting prayers in the RIYADHA MOSQUE LAMU, and acting as Headmaster of the MUSLIM ACADEMY RIYADHA ACADEMY aka ISLAMIC CENTRE LAMU, and an order of closure of the said ISLAMIC CENTRE LAMU, and all of its dormitories and hostels, erected and standing on Plots Nos. 617, 620/1, 621, 621/1, 734 and 735, the Interested Party was careful not to seek such orders at the interlocutory stage.

10. In the **NOTICE OF MOTION** of even date with the Plaint, and purportedly brought under Order 40, rule 1(a) 4(1), (2), (3) and (4) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya), the Interested Parties herein sought temporary orders of injunction restraining the ex parte Applicant by himself, his servants, employees, teachers and students whether foreign or local, children, agents or any other person authorized by him from entering into, remaining in, or learning or teaching in the said MUSLIM ACADEMY RIYADHA MOSQUE aka ISLAMIC CENTRES, LAMU, and that the dormitories and hostels erected and standing thereat be **temporarily**

closed, and the ex parte Applicant be excluded therefrom and from conducting any teaching or prayers thereat and the local OCPD/OCS to provide security to ensure that the orders are carried out.

11. The grounds for seeking both the permanent and temporary orders are however the same. The most germane grounds for the purposes of the Ruling are stated both in the Complaint and the grounds for seeking the temporary orders –

(i) Interested Parties as Trustees wish to carry out all the recommendations contained in the NOTICE dated 8/05/2015 from the Ministry of Health (Lamu County Public Health Department) from an inspection of the ACADEMY by the Ministry officials, and

(ii) that the ex parte Applicant has allowed the hostels and dormitories of the ACADEMY and other amenities to deteriorate and fall into waste rendering the whole ACADEMY a health hazard to the students and to the neighbouring buildings, houses and their occupants.

12. The notice aforesaid from the Public Health Department in its pertinent and concluding part said –

“The conditions of the hostels may facilitate outbreak of a disease at any time and contravenes various sections of the Public Health Act, (Cap 242, Laws of Kenya). As a matter of emergency this requires you to do all the recommendations in due time.

NB: You are hereby given thirty days to comply from the date of the service of the notice.”

13. Without going into the merits of the Interested Parties suit, it is quite evident that the situation of the Academy’s hostels and dormitories was such that it needed **emergency** not just urgent action to prevent outbreak of disease. The notice was issued by the Public Health Department of the County of Lamu. The Notice is expressed to be issued under the provisions of the Public Health Act.

14. The Public Health Act grants a magistrate’s court power to issue orders prohibiting the use of a dwelling place until in its judgment, the dwelling is again fit for habitation. Section 120(9) provides –

“(1) – (8)

(9) Where the nuisance proved to exist is such as to render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment the dwelling is fit for that purpose; and may further order that no rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate the closing order and by a further order declare the dwelling habitable, and from the date thereof such dwelling maybe let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of the same dwelling in the event of any nuisance occurring or of the dwelling being found to be unfit for human habitation.”

15. It is thus clear the suit before and orders made by the lower court were for temporary closing to facilitate compliance with a Public Health Notice. Clearly the Respondent had the jurisdiction to entertain the suit before it and indeed to grant the orders it did.

16. Having come to that conclusion, arguments about illegality, irrationality and procedural impropriety must fall by the way side, and have no validity in this application. Likewise the question of legitimate

expectation or breach of the rules of natural justice, do not arise. Once served with the temporary orders, the ex parte Applicant's first port of call would have been the learned magistrate court and seek a review or stay of, or appeal against those orders. I do not think the judicial review court was the appropriate forum, at least not for the grounds given, for none of them is valid.

17. The question of *locus* is a matter to be determined by the trial court and not the judicial review court.

DISPOSITION

18. For all those reasons, I find and hold that the ex parte Applicant's Notice of Motion dated 17th April, 2015 has no merit, and the same is dismissed with costs to the Interested Parties.

19. I direct that the Lamu Principal Magistrate's Court Case No. 17 of 2015 be prosecuted with utmost priority.

20. It is so ordered.

Dated, Signed and Delivered in Mombasa this 4th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Applicant

Mr. Makuto for Respondents

Miss Mukongo holding brief Adhoc for Interested Parties

Mr. S. Kaunda Court Assistant