



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW MISC. APPLICATION NO. 39 OF 2011

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER
ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

AND

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

AND

IN THE MATTER OF THE EDUCATION ACT CAP 211 OF THE LAWS OF KENYA

AND

IN THE MATTER OF PHASING OUT MITABONI ABC GIRLS SECONDARY SCHOOL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISTRICT EDUCATION BOARD KATHIANI DISTRICT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE:

THE REGISTERED TRUSTEES-AFRICAN

BROTHERHOOD CHURCH.....EX-PARTE APPLICANT

JUDGMENT

Introduction

The *ex parte* Applicant in this matter (hereinafter referred to as “the Applicant”) is the Registered

Trustee of Africa Brotherhood Church , a body corporate registered under the Land (Perpetual Succession) Act Cap 281 Laws of Kenya with power to sue and to be sued . The Applicant is the registered proprietor and/or owner of all that piece of land registered under the Land Adjudication Act, Cap 281 Laws of Kenya as Plot No. 352, Mitaboni Land Adjudication Section, on which Mitaboni ABC Girls Secondary School formerly known as Mitaboni Central High School is situated. Mitaboni ABC Girls Secondary School is currently under the management and/or control of the Africa Brotherhood Church through the Africa Brotherhood Church Education Board.

The 1st Respondent is the District Education Board Kathiani District, and was in charge of the direction, supervision and control of education in the District on behalf of the Ministry of Education under the repealed Education Act Cap 211, Laws of Kenya. The 2nd Respondent is the Government of Kenya sued through the Attorney General 's Chambers

The Applicant filed an application by way of a Notice of Motion dated 19th April 2011, seeking an order of certiorari quashing the decision of the District Education Board made on 7th January 2011, which decision declared Mitaboni ABC Girls Secondary School a public school, and stopping the Applicant from phasing out Mitaboni ABC Girls Secondary School to pave way for a Divinity University.

The grounds for the relief sought are that Respondents have no authority over the management and/or control of Mitaboni ABC Girls Secondary School, and their refusal to allow the Africa Brotherhood Church to phase the school and pave way for a university is a breach of the rules of natural justice and *ultra vires*. Further, that the Respondents acted *ultra vires* when they went beyond their powers and silently took over the management, control and running of the school as a public school when the school is indeed a private school under the control of the Africa Brotherhood Church, and when the building were the School stands entirely belongs to Africa Brotherhood Church .

The Applicant claims that the Respondents acts were illegal, contrary to the laid down laws and procedures governing private schools, and that the procedures used by the Respondents to take over control and or management of the Applicant 's School is not established by law and was not prescribed by the Education Act, Cap 211 Laws of Kenya

A summary of the respective cases of the Applicant and Respondents now follows.

The Applicants' Case

The Applicant's claim is set out in the supporting affidavit and statement of facts both filed in Court on 20th April 2011, and its supplementary affidavit filed in Court on 16th November 2015 . The Affidavits were sworn by Timothy Nzioki Ndambuki, a registered trustee and the current Bishop of The African Brotherhood Church. The Applicant's learned counsel N.M. Mutinda of Anne M. Kiusya & Company Advocated also filed written submissions dated 6th June 2016.

The Applicant alleges that in 1969 , a Mr. Patel started a mixed secondary school at Mitaboni Market which he named as Mitaboni Central High School. In 1973, the then Bishop of the African Brotherhood Church, Nathan Kamolo Ngala approached Mr. Patel to move his school from the market to some newly constructed Africa Brotherhood Church houses standing on Plot No. 352 Mitaboni Land Adjudication Section, owned by the Africa Brotherhood Church where Mitaboni ABC Girls School stands today.

Mr. Patel partnered with Africa Brotherhood Church , whereby he retained the role of a Manager of the School while Africa Brotherhood Church managed the hostels until 1976, when Mr . Patel pulled out of the School and left with all his assets and he was fully paid all his dues. The Africa Brotherhood Church then took over the management of the school, phased out the boys and the school became a girls school with a new name Mitaboni ABC Girls Secondary School. The registration process for Mitaboni ABC Girls Secondary School subsequently commenced, and on 15th June, 1979 the School was registered under Licence No. 3476 as a private school. Further, that over a period of nine (9) years that followed, the School was operated, managed and developed by the Africa Brotherhood Church as a private school.

It is the Applicant's case that in 1995, the Africa Brotherhood Church approached the Government for provision for the school, and wrote to the Teachers Service Commission requesting for a teacher. A Mr. Nguta was consequently posted to Mitaboni ABC Girls Secondary School, with the Church handing over to Mr. Nguta the entire leadership of the School, and that he discharged his mandate with due diligence.

Further, that at the same time, the Church decided to appoint some members of the community including a Mr. Kiilu as Board Chairman to help run the affairs of the School, but that the said Mr. Kiilu decided to take the school from the Africa Brotherhood Church, which prompted the then Bishop of Africa Brotherhood Church to write a letter dated 12th January, 1988 to the Provincial Director of Education revoking the appointment of the Board, and withdrawing the Government and the public from the School.

According to the Applicant, neither the provision of teachers by the Teachers Service Commission nor the voluntary donation by well wishers and parents turned the school into a public School. However, that on 7th January 2011 the District Education Officer declared Mitaboni ABC Girls Secondary School a public school at a District Education Board's meeting held at Kathiani Girls Secondary School, and the Respondents therefore had no power or authority to declare the school a public school.

The Applicants annexed various minutes and documents in support of their averments, including the minutes of the 1st Respondents meeting held on 7th January 2011.

The Respondents' Case

The Respondents' response is in a replying affidavit sworn on 7th June 2011 by Odul Bernard, the District Education Officer Kathiani, the 1st Respondent herein, and who was also the Secretary to the Kathiani District Education Board. The 1st Respondent stated that Kathiani District Education Board had met on several occasions to discuss matters pertaining to Mitaboni ABC Girls Secondary School, and that it is not in contention that Mitaboni ABC Girls Secondary School was initially registered as a private school.

However, that on 15th June, 1979 the school was registered by the Ministry of Education as an unaided school but classified as a Secondary (Harambee) School, by Licence No. 3476. Further, that by a circular No. G9/1/167 dated 1st February 1989, the Ministry of Education directed that all secondary schools which were developed and equipped, and also provided with staff from public funds by the Government or by the communities should be registered and designated as public schools.

According to the 1st Respondent a report by Gideon Nguta, who was the first Teachers Service Commission (TSC) Headmaster at the school, Mitaboni ABC Girls Secondary School was provided with staff by the TSC, thereby proving that the school was indeed an assisted school. Further, that Mitaboni ABC Girls Secondary School was registered as a Secondary Academic (Harambee) School vide Registration No. H/A/1057/88 which officially cancelled the earlier registration Certificate No. 3476 of 15th June, 1979. Lastly, that on 2nd October, 2000, Mitaboni ABC Girls Secondary School was re registered vide Registration No. GP/A/1475/2000 thereby canceling Certificate No. H/A/1057/88 dated 18th August, 1988, and that after the said re-registration, the subject school has never changed its status to a private school.

As regards the meeting by the Kathiani District Education Board held on 7th January, 2011, it was stated by the Respondents that the meeting was duly attended by Canon Mukwilu who was a representative of the African Brotherhood Church and a member of the Board of Governors of Mitaboni ABC Girls Secondary School; Edward Nzinga who was the African Brotherhood Church Education Director and one Peter Nzuki. Therefore, that the Applicants were afforded their natural right to a fair hearing, and that the decision made on 7th January 2011 was made with their participation, and that all the members present were in agreement that the facts clearly indicated that the school belonged to the public. Further, that the fact that Mitaboni ABC Girls Secondary School is a public school was also affirmed in a meeting previously held on 11th November, 2010

Lastly, it was averred that on diverse dates the Applicants were compensated by the Board of

Governors of the school for their investments in the school, thereby relinquishing their claim for ownership of Mitaboni ABC Secondary School. The Respondents relied on records include payment vouchers and receipts of various transactions between the Applicant and Mitaboni ABC Girls Secondary School, which were annexed. Therefore that the Applicant is guilty of failing to disclose the fact that the school had been registered as a public school, and that the assets previously held by the church were sold to the school.

The Respondents did not file any written submissions

The Issues and Determination

I have considered the pleadings and submissions made by the Applicant and Respondents. The issues that require to be determined are firstly, whether the 1st Respondent acted beyond its powers in declaring Mitaboni ABC Girls Secondary School a public school and stopping the applicant from phasing out Mitaboni ABC Girls Secondary School, and secondly if not, whether the Applicant is entitled to the relief sought.

On the first issue, the Applicant submitted that Mitaboni ABC Secondary School is a private school contrary to what is being alleged by the Respondents, and relied on a policy circular that was issued by the Ministry of Education on 1st February 1989 regarding public and private schools, and which defined public schools as "secondary schools which are developed, equipped and provided with staff from the Government, parents and communities". Private schools were defined as "secondary schools which are developed, equipped and provided with staff by private funds from individuals, religious organizations etc."

Further, that from these definitions, Mitaboni ABC Secondary School is a private school and not a public school as all along the school has been under the management of the church and not anyone else. It was also submitted that under section 31 of the repealed Education Act, a Board of Education is not mandated to declare a private school as public, and that the 1st Respondent acted beyond their mandate hence their decision was *ultra vires*, unreasonable and bad in law.

In determining the first issue, this Court shall be guided by the applicable law at the time of the impugned decision, as regards the mandate and operations of the 1st Respondent. District Education Boards were established by section 28 the then Education Act (Cap 211 of the Laws of Kenya) (since repealed) which was in force in June 2011, and a notice under the said section was to specify the classification or types of schools, or groups of schools, in respect of which the Board concerned shall have jurisdiction within the area for which it is established. The District Education Boards Order 1972 accordingly provided that District Education Boards were to be established for each district, and that their jurisdiction was in respect of all maintained and assisted primary schools situated within the area of the district for which it is established.

A maintained school was defined in the Act as a school in respect of which the Ministry or a local authority accepts general financial responsibility for maintenance, while an assisted school was a school, other than a maintained school, which receives financial assistance from the Ministry or assistance from the Teachers Service Commission established by the Teachers Service Commission Act. In addition, Section 31 of the repealed Education Act provided for the functions of District Education Boards in respect of the schools under its jurisdiction as follows:

- (a) to prepare and to submit to the Minister for approval estimates of revenue and expenditure; to receive grants or grants-in-aid from public or local authority funds;**
- (c) to administer such grants or grants-in-aid in respect of such schools in accordance with the approved estimates of expenditure;**
- (d) to submit to the Minister for approval plans for the development or promotion of education in the area and to carry out such plans if approved;**

- (e) to tender advice to the Minister on the establishment of new schools;**
- (f) to submit such statistical, financial and other reports as the Minister may require;**
- (g) to superintend the management of public schools;**
- (h) to fulfil such other functions as the Minister may prescribe.**

According to the certification of registration provided by the 1st Respondent, as at 2nd October 2000 Mitaboni ABC Girls Secondary School was registered as a public secondary school by registration certificate number GP/A/1475/2000, which as annexed as Annexure "OB7" to the 1st Respondent's replying affidavit. The Applicant did not provide any certificate of registration after 2nd October 2000 showing that the status of the school change to a private school, and on the contrary averred that the school was last registered on 15th June 1979 under certificate No. 3476, as an unaided school. The 1st Respondent did in this respect however produce as its annexure "OB6" a certificate number H/A/1057/88 dated 18th August 1988 which cancelled the previous registration certificate No. 3476 of 15th June 1979, and registered Mitaboni ABC Girls Secondary School as a harambee secondary school.

In addition, as the Applicant admits that Mitaboni ABC Girls Secondary School was receiving assistance from the Teachers Service Commission, the school was clearly an assisted school and within the jurisdiction of the Kathiani District Education Board. Lastly, on this issue, the Applicant did not dispute the averments that the School did buy the assets of the school from the African Brotherhood Church, and the copies of payment receipts attached in this regard by the 1st Respondent as evidence. This issue was only addressed and denied in the Applicant's submissions with no corresponding evidence to this effect.

The finding by this Court therefore is that the Mitaboni i ABC Girls Secondary School as at the time of the decision by the 1st Respondent on 7th January 2011 was a public school, and therefore the 1st Respondent acted within its powers in and functions by declaring it as such.

As regards the second issue as to whether the decision of the 1st Respondent should be quashed, the Applicant submitted that the minutes of the meeting of the 1st Respondent held on 7th January 2011 indicate that all members were in agreement that the school belonged to the public, which is a false conclusion as they do not indicate anywhere that there was voting done so as to come up with their decision. Further, that it was clear from the minutes that the issue as to who owns Mitaboni ABC Secondary School was in contention, and that the District Education officer produced documents in the meeting which showed that land belonging to the school had been sold to the school by the church.

However, that upon seeing the documents the Education Director of African Brotherhood Church, Mr. Edward Nzinga, indicated that he had not come across such documents and that if indeed such transactions had taken place, they were illegal and criminal. He also asked for more time so that the church would study the said documents and give a response, and that it would have been in line with the rules of natural justice for the church to be given an opportunity to present its side of the story before the board made its decision. Hence, the decision that the board came up with was ill-motivated and was not consented to by any of the church representatives at the meeting. Further, that the action taken by the Board cannot in the circumstances be said to have procedurally fair, and was done irregularly.

Reliance was placed by the Applicant on Article 47 (1) of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and it was contended that denying the church a fair hearing is a clear violation of their constitutional right and it also goes against the rules of natural justice. The Applicant cited various decisions on the scope of the remedy of certiorari including **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** in this regard.

This Court notes that the key requirements of the rules of natural justice are the right to be heard and the rule against bias. In addition the nature and scope of the remedy of certiorari as stated in **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** is as follows:

"Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law. Thus an order of certiorari is not a restraining order"

The decision sought to be quashed is in the minutes of a meeting of the 1st Respondent held on 7th January 2011, which minutes were availed by both the Applicant and 1st Respondent. After perusal of the said minutes I note that there is no decision that was made stopping the Applicant from phasing out Mitaboni ABC Secondary School, and the decision made was that the school belonged to the public .

As regards the right to be heard during the making of the decision, this Court notes that there were two representatives of the Applicant in attendance, namely Edward Nzinga, its Education Director, and Canon Mukwilu its member who is also a member of the Board of Governors, and who from the minutes contributed to the discussions as to whether the Mitaboni ABC Secondary school was a public school. Therefore the Applicant was clearly given an opportunity to be heard.

In addition the minutes showed that the representatives of the Applicant indeed asked for time to respond to the findings that the school land and buildings that once belonged to the Applicant had been paid for by public funds arising from school fees, and there is no record of such an opportunity being denied. As at the time of filing of this application on 19th April 2011 and during the hearing, the Applicant did not provide any evidence in rebuttal and/clarification of these findings, for this Court to make a finding that the decision to declare Mitaboni ABC Girls Secondary School a public school was made in error and contrary to the rules of natural justice.

In the premises, the Applicant's Notice of Motion dated 19th April 2011 is found not to have merit, and is dismissed, and each party shall meet their costs of the application. The stay granted by this Court on 31st March 2011 is accordingly discharged.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 10th DAY OF OCTOBER 2016

P. NYAMWEYA

JUDGE