



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. JR. 88 OF 2012

**IN THE MATTER OF IRREGULAR NOMINATIONS OF THE BOARD OF GOVERNORS OF
MATAARA SECONDARY SCHOOL**

AND

**IN THE MATTER OF THE RE-REGISTRATION OF MATAARA SECONDARY
SCHOOL AND CHANGE OF ITS MANAGEMENT AND SPONSORSHIP FROM THE
AFRICAN INLAND CHURCH – KENYA TO THE DISTRICT EDUCATION BOARD
GATUNDU NORTH**

AND

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO COMMENCE JUDICIAL
REVIEW PROCEEDINGS SEEKING ORDERS OF CERTIORARI, MANDAMUS AND
PROHIBITION**

AND

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO COMMENCE JUDICIAL
REVIEW PROCEEDINGS SEEKING ORDERS OF CERTIORARI, MANDAMUS AND
PROHIBITION**

AND

REPUBLIC.....APPLICANT

AND

AFRICAN INLAND CHURCH KENYA.....)

CHARLES KIUNYU GICHIA.....) EX PARTE

REV. STEPHEN KABURIA.....) APPLICANTS

JAMES KIMANI.....)

VERSUS

BOARD OF GOVERNORS

MATARA SECONDARY SCHOOL.....1ST RESPONDENT

THE HONOURABLE

MINISTER FOR EDUCATION.....2ND RESPONDENT

DISTRICT EDUCATION BOARD

GATUNDU NORTH.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 22nd March 2012 filed on 23rd March, 2012, the *ex parte* applicants herein seek the following orders:
 - a. **An Order of Certiorari to remove into this Honourable Court and quash the nominations of Board of Governors of Mataara Secondary School, quash the decision of the Minister for Education to establish a Board of governors for Mataara Secondary School from an irregularly constituted list of nominees and quash the decision of the Minister for Education to approve the re-registration of Mataara Secondary School and change of its sponsorship/Management from the African Inland Church to District Education Board, Gatundu North.**
 - b. **An order of Mandamus to remove into this Honourable Court and to compel the Minister for Education to cause cancellation of Certificate of Registration of school for Mataara Mixed Day Secondary School issued on 26th November 2010.**
 - c. **An order of prohibition to remove into this Honourable Court to restrain the District Education board Gatundu North from interfering with the Management and sponsorship of Mataara Secondary School.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 19th March, 2012 and a verifying affidavit sworn by **Rev. Stephen Kaburia**, the pastor in charge African Inland Church, Mataara (hereinafter referred to as the Church).
3. According to the deponent, in 2009 the Board of Governors made a resolution to re-register Mataara Secondary School (hereinafter referred to as the School). The school was re-registered and a Certificate issued on 26th November, 2010 changing its status from a single stream to a double stream and its management from Africa Inland Church to the District Education Board. According to him, the Church who are the founders and sponsors of the School were never consulted on the decision to re-register the school and neither did the Local Authority and District Education Board meet to authorize and approve the application for re-registration. Following the new Management, nominations were carried out in 2011 to establish a new Board of Governors. This exercise was done irregularly as the Church was neither involved nor were its representatives nominated for appointment in the Board. According to the deponent, this was an attempt to ensure that the Church is not involved in the affairs of the School which is unreasonable and unfair considering that the Church is the founder and sponsor of the School. It is deposed that it is the wish of the Church that the inauguration of the new Board of Governors be withheld until Sponsor's representatives are nominated and appointed. To him, the re-registration process was done fraudulently without following the laid down procedures and it's just and equitable that Certificate of Registration issued on 26th November be cancelled and replaced with the previous one.
4. There was another affidavit entitled supporting affidavit which was filed together with the Notice of Motion. Order 53 rule 4(1) of the Civil Procedure Rules provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

5. Therefore unless leave is granted under rule 4(2) of the said Order to file further affidavits, there is no room for filing any other affidavits other than the affidavit verifying the Statement of Facts filed in support of the application for leave. This position was restated in where **Nyamu, J** (as he then was) was of the view which view I associate myself with that:

“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant’s case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent’s case is a hangover, which is not acceptable under the Judicial Review jurisdiction.”

6. Consequently, I will ignore the affidavit sworn by Peter **Gicheha Mbugua** on 23rd March 2013.

RESPONDENT’S CASE

7. In opposition to the application, the respondent filed a replying affidavit sworn by **Francis Kihui Maina**, a parent at the school on his on behalf and on behalf of the parents and stakeholders and community members of the School on 7th September 2012.
8. According to him, the School was started as a Community School which community donated the land and the School was constructed on a Harambee basis with the Church not sponsoring or contributing in the construction or maintenance of the school. According to him, they protested to the PS Ministry of Education and the School has been registered under DEB as the Manager and it is surprising that AIC wants to lay a claim against it. He deposes that the origin of Mataara Secondary School was AIM Mataara Primary School and H.G.M. Mataara Primary School because the idea of building the school was discussed and agreed upon by **Mr. Elizaphan Mukuha** for AIM Mataara and **Mr. Stanlaus Kimani** for H.G.M. Mataara and their school committees which delegation comprised members of the school committees and not members of A.I.C. To him, Mataara Primary School is not a synonym of A.I.C.
9. It is further deposed that Mataara primary School Committee was entrusted by the community of the larger Mataara sub-location to oversee the construction and off take of the school and that the committee had members of other churches and not only A.I.C. The finances, according to her, were from members of community of Mataara sub-location. The deponent contends that despite the church knowing the land on which is built was inadequate, they never donated an land although their primary school (Mataara Primary School) and a very big chunk of land lay idle and still lying idle up to date. This, it is deposed, necessitated the BOG to expand the school’s compound by a ¼ acre plot with a house at a cost of Kshs. 1,050,000.00 which the parents footed. He further deposes that the underwritten were not members of the first BOG but members of

- Mataara Primary School Committee and by then **Ben Chege** was a member of Mataara Independent Church. The community entrusted the primary schools committee to manage the school waiting election of Mataara Secondary School committee and later BOG. In his view, nobody could be forced to join the school and Maria-ini School leavers joined the school without being forced.
10. The deponent avers that the school was provisionally registered in 1983 through a notification letter Ref. No. 5115/23/25/148 dated 6th May 1983. If there is another certificate other than pu/5/2/1234/10 they should produce it. To him the teachers were employed by the Board and these included other teachers from other religious faiths. In the deponent's view, there has never been any Harambee fund raising driven by AIC since all Harambees, fund raisings were driven by school committees, the two primary schools and secondary committee and later B.O.G and that the school had not been fully registered for 31 years until the 26/11/2010. He states that **Mr. Kinyanjui** was a member of their church and they had the power to promote him to the rank of principal anybody wise could have used the opportunity and that the minutes attached has false and faked information and that the registration by **J. N. Kinyanjui** was proper because he went through all stages needed.
 11. To the deponent, there was no re-registration of the school since this was the first time that the school was fully registered and that the DEB of 31/10/2011 lasted about 8 hours discussing one agenda of Mataara school sponsorship which meeting was held while the DC and secretary of DEB knew very well the school was registered under DEB as the manager and the secretary of DEB recommended that the school be registered under DEB hence the principal could not return the certificate because the school belongs to community (land constructions) and the registration was proper. To him, the nomination of the BOG was procedural because the school was under DEB and the church could not be consulted and this is a matter to be left upon the court to give a ruling. The deponent avers that the church is not the auditors of the school to unearth financial mismanagement and has no right to seize community land and properties. The church cannot stay idle waiting for the community to contribute land, construct the school, and buy additional land just to grab the school in the pretext that it is its sponsor.
 12. To him, the Minister for Education indeed has the power to revoke the said certificate if he has good reason to do it and if the school belongs to the ministry, he should first consult the owner of the school. It is his position that the principal after perusing school records and consulting the community of Mataara discovered that the community has been denied their rights and properties and that is why he was bold enough to pursue the registration of the school under D.E.B since there was enough consultation before the nomination of the BOG members Denominations was not one of the criteria used. It is his position that the community will suffer a lot because their parcels of land and the school, they have built will go to the other party yet the applicants will have nothing to lose for they contributed nothing to the development of the school. If the certificate is revoked this will bring conflict within Mataara community and anything can happen. The above mentioned could be avoided by making wise judgement or refer the issue back to the community to decide who they want to manage their school. It is contended that the Applicants have introduced new executive members in July 2012 without consultation with the Ministry of Education.
 13. As can readily be appreciated most of the averments in this replying affidavit were in response to the affidavit sworn by **Peter Gicheha Mbugua** which affidavit I have already found irrelevant.

SUPPLEMENTARY AFFIDAVIT

14. There was a supplementary affidavit sworn by the said **Rev. Stephen Kaburia**, on 11th May 2012.
15. According to him, the original was/is Mataara Full Primary School whose Manager was Africa Inland Mission as per Certificate of Registration of Schools and the idea and initiative to start Mataara secondary school was hatched in the year 1977 by the then Pastor and elders of AIC Mataara Church by virtue of them being the sponsors of the Primary School. Indeed Church leaders were led by **Rev. Eleazar Gitaka Kamau** and included **Lisaphan Mukuha gathiru** and **Charles Kiunyu** who constituted a delegation to the then area Councillor the late **Philip Ngugi Mbuibu** and this culminated to the School being allocated plot known as Chania/mataara/T.145

by the then Kiambu County Council. The initial and actual construction of the school began in the year 1978 under the supervision of **Rev. Eleazer Gitaka** who was the then chairman Mataara Primary School management Committee and **Elisaphan Mukuha** the then head Teacher Mataara Primary School assisted by Charles Kiunyu Gichia a teacher then at Mataara Primary School as well as an elder Africa inland Church Mataara. The then Education Officer formally opened the school in the year 1979 and though having made findings that it had insufficient land for future expansion especially to accommodate a playing ground, teachers, houses and enough classrooms concurred with the Church leaders that the Primary school playing ground could be shared by the secondary School which position obtains to date. The very first Board of Governors comprised the same leaders as were at Mataara Primary School which was and still is sponsored by Africa Inland Church led by its officials and effectively, the leadership of Mataara Primary School was transferred to the secondary school since the initiative to put up the secondary school was born by them. In the said year of 1979 there was a resolution reached by all A.I.C Church members with pupils at Mataara Primary School that those completing Primary school that year and not securing places in other secondary Schools led by the leadership would all join Mataara Secondary School. This was meant to boost the school make it grow and have ownership of the School. Most complied with this resolution. In the year 1982 the school officially received its registration with A.I.C Church as the Sponsor and the reasons were obvious as the Church had spearheaded the establishment of the school in all fronts while the Ministry of Education had over the years continued to give regard to this status and communicates with A.I.C. Church as the sponsor. The Church too has had official Communications with the Ministry on matters related to the school. Armed with fervour to see the Secondary school flourish the Church itself took up the teething challenges like any other new and young school an act which saw the early leadership almost “donating” their A-Level graduates from the area to teach at very low salaries and convened very many funds drives meetings. From the foregoing it is deposed that it is evidently clear that the sponsorship was not and has never been that of the District Education Board. By a letter dated 20/2/2003 the then Principal and Secretary to the Board of governors invited the church as the School Sponsor to a meeting scheduled on 28/2/2003 to nominate Board of Governors members for 2003/2005 and by yet another letter dated 29/3/2007 the **Principal J. N. Kinyanjui** invited A.I.C. Mattara addressing it The Sponsor to a meeting scheduled for 11/4/2007 for the nomination of BOG members. The said then **Principal N. Kinyanjui** had by a letter dated 4/12/2001 recognized A.I.C. as a sponsor of the school when after being given a chance to serve as an acting principal expressed his desire to be confirmed as a Principal. According to him, the contents of paragraph 14 are given even more credence by the recommendation of A.I.C. National Education Secretary’s letter dated 5/6/2001 recommending the said **J. N. Kinyanjui** to be elevated to the position of a Principal of Mattara Secondary School for the action of the secretary Teachers Service Commission. On the 30/11/2009 there was convened Gatundu North District Education Board meeting at the DC’s office whose agenda among others was (No. 6) approval for Registration of Schools in which meeting it was resolved that Mataara Secondary School be fully registered as a double stream mixed day school. Nowhere did this meeting resolve that the Sponsorship of Mataara Secondary School change to that of District Education Board. Curiously and surprisingly when the above registration was effected through the presentation of the then Principal **J. N. Kinyanjui** vide Registration Number PU/S/2/1234/10 it was indicated that the manager/Sponsor is/was D.E.B. The above re-registration and change of sponsorship prompted protest by AIC through the national Education Secretary by a letter dated 13/9/2011 to the Permanent Secretary Ministry of Education and on 31/10/2011 followed vide Min 6/31/10/2011 titled (sponsorship of Mataara Secondary School) the DEB resolved that the school should be under AIC sponsorship. A new board was to be reconstituted and the school be re-registered to reflect the current status of sponsorships. Indeed the DEO was mandated to initiate the process of nominating a new BOG under the sponsorship of AIC and the Principal/Head Teacher was required to return the existing Certificate for cancelling to the Ministry of Education offices at Jogoo House. However, to date that Certificate has never been surrendered to the Ministry as required.

16. It is therefore contended that the nomination of board of Governors without the involvement, participation, consent and or knowledge of the sponsor (as it ought to have been) was outright wrong, unprocedural and lacked credibility and hence the re-registration of the school on

- 26/11/2010 to be managed by the DEB should be revoked by the Minister of Education.
17. According to him, it would be anybody's right guess as to why the then principal would register Mataara Secondary School under the sponsorship of DEB. This would inevitably slow down the pursuit of the AIC to unearth the financial mismanagement and other malpractices taking place in the school leading to its dismal performance in National examinations. The current board of Governors if confirmed by the minister would only take part in perpetuating the downward trend the school has taken - a great concern to the sponsor hence the need for the minister to be called upon through this court process to revoke the nominations and not to confirm the names so forwarded. The failure to nominate representatives from the church is not only offensive to the rules of natural justice, *ultravires* the **Education Act** but devoid of any justification in a democratic society.
 18. Based on legal advice, it is contended that pursuant to section 17(e) of the Education Act the Minister may make regulations with respect to registration of unaided school and in particular such regulations may provide for the issue, variation and revocation of certificates, provisional registration and certificates of registration hence this application. It is reiterated that the Minister for Education has powers to revoke the said certificate of re-registration which was issued under false misrepresentation by the then Principal of Mataara Secondary School **J. N. Kinyanjui** since the decision of the school principal aforesaid is/was *ultravires* the Education Act, unfair to the Sponsor AIC, irrational, offensive to the rule of the right to legitimate expectation of consultation and contrary to Section 47 f the Constitution of Kenya.
 19. Based on the said legal advice it is deposed that pursuant to Section 11 (c) of the **Education Act** Constitution of the Board of Governors shall include among the members communities served by the school, persons representing any voluntary body which was the founder of the school or its successors or any other persons or representatives of bodies or organizations that, in the opinion of the Minister should be included and it is the wish of African Inland Church that the inauguration of board of governors for Mataara Secondary School be withheld until sponsors representatives are nominated and appointed to the Board and that the Certificate of registration issued on 26th November 2010 be cancelled.
 20. To him, there are no prejudices or loss that can be suffered by the interested parties or any other party for that matter if the application is granted as prayed. If anything it would suffer justice to all parties involved in the administration of the Mataara Secondary School.

SUBMISSIONS

21. The applicants filed submissions which were a regurgitation of the affidavits in support of their case while the interested parties' submissions also did the same.
22. On the part of the 2nd and 3rd respondents they supported the *ex parte* applicants Motion.

DETERMINATION

23. Having considered the foregoing, this is the view I form of the matter.
24. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
25. Section 11(c) of the **Education Act** provides that an order establishing a Board of Governors shall provide for including among the members of the board representatives of the communities served by the school, of persons representing any voluntary body which was the founder of the school or its successor, and of any other persons or representatives of bodies or organisations that, in the opinion of the Minister, should be included.
26. From the documents exhibited by the applicants herein, it is clear that the Church was playing an active role in the management of the school. Whereas the Court cannot state with certainty the actual role played by the church as that is not a matter within the realm of judicial review application, it is not lost on the Court that the Church ought to have been given an opportunity to present its side of the story before the Ministry made the decision it took. In my view the action taken by the Minister cannot in the circumstances be said to have been procedurally fair.
27. I agree with the 2nd and 3rd respondents that the applicant was never consulted at all and neither did the Local Authority and the District Education Board meet to authorise and approve the

application for re-registration hence the whole exercise was done irregularly and thus due process was not followed. Not only was the process tainted with illegality but it was similarly tainted with procedural impropriety.

28. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters”

29. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.

ORDER

30. Accordingly the orders which commend themselves to me and which I hereby grant are as follows:

1. **An Order of Certiorari is hereby issued removing into this Honourable Court for purposes of being quashed the nominations of Board of Governors of Mataara Secondary School, the decision of the Minister for Education to establish a Board of governors for Mataara Secondary School from an irregularly constituted list of nominees and the decision of the Minister for Education to approve the re-registration of Mataara Secondary School and change of its sponsorship/Management from the African Inland Church to District Education Board, Gatundu North and the said decisions are hereby quashed.**
2. **An order of Mandamus is hereby issued compelling the Minister for Education to cause cancellation of Certificate of Registration of school for Mataara Mixed Day Secondary School issued on 26th November 2010.**
3. **An order of prohibition is hereby issued restraining the District Education Board Gatundu North from interfering with the Management and sponsorship of Mataara Secondary School.**
4. **There will be no order as to costs.**

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties