



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 225 OF 2008

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTIONS**

70 (A), 70 (B), 70 (C), 75, 78 (2), 80, 82 (2) AND 84 OF THE CONSTITUTION OF KENYA

BETWEEN

**THE ARYA PRATINIDHI SABHA EASTERN AFRICA
PETITIONER**

VERSUS

THE HON. ATTORNEY GENERAL

BEING SUED ON BEHALF OF THE REPUBLIC OF KENYA FOR

AND ON BEHALF OF

THE HON. MINISTER FOR

EDUCATION.....RESPONDENT

RULING

1. The petitioner is a body corporate with perpetual succession. It is the registered proprietor of all that parcel of land registered under the Registration of Titles Act Cap 281 Laws of Kenya as **I.R. No. 14848, L.R. No. 209/19**, hereinafter referred to as **“the suit property”**.
2. The petitioner alleged that its proprietary and ownership rights over the suit property have been compulsorily acquired by the respondents.
3. In its petition, the petitioner stated, *inter alia*:
 - **It established at its own expense Parklands Arya Girls High School (formerly known as Arya Girls Senior School), hereinafter referred to as “the school”, which is situated on the suit land and bears registration number G/A/336/84. Prior to 1968 the petitioner had continuously managed and controlled the running of the said school through Arya Samaj Education Board, which board was established by the petitioner under its constitution.**
 - **The respondent has invoked purported statutory powers under the Education Act Cap 211 Laws of Kenya and unlawfully encroached on the control and management of the school without the express and willful consent of the petitioner.**
 - **The petitioner’s right to protection of the law has been infringed by the respondent in that the respondent has failed to accord the said school the status befitting it as defined under the provisions of Section 2 of the Education Act in that the respondent purports to treat the school as a maintained school whereas the Ministry of Education has not accepted general financial responsibility for the maintenance of the same.**
 - **The school is not receiving grants out of public funds and it is against public interest and a gross violation of the petitioner’s rights to protection of the law for the respondent to acquire it compulsorily from the petitioner.**
4. The petitioner further stated that the respondent unlawfully and forcefully introduced boarding facilities into the school without due regard to the objectives of the petitioner at the time of establishing the school and in disregard of the special conditions set out in the Certificate of Grant.
5. It was further alleged that the acts of the respondent are a clear violation of the petitioner’s freedom to protection of the law and is unconstitutional in that:
 - (a) **There is no legislative power and/or law authorizing the respondent to compulsorily take over the petitioner’s property.**
 - (b) **The procedure used by the respondent to take over the control of the petitioner’s school is not established by law and has not been prescribed by the Education Act.**
 - (c) **The property has not been taken up for legitimate public use.**
 - (d) **No just compensation had been paid to the petitioner by the respondent.**
 - (e) **The petitioner’s property had been acquired and developed by an association of a minority group whose formation is based on a common religious belief.**
 - (f) **The respondents act is discriminatory and has targeted a minority group of Hindu religious organization.**

6. The petitioner alleged that its fundamental rights and freedoms under **Sections 70 (b), (c), 75, 80 and 82 of the Constitution of Kenya**, (now repealed), are being breached and are likely to continue being breached. The particulars of the alleged breaches are set out in the petition. The petitioner therefore sought the following orders:

“1. An order directing the respondent to forthwith stop contravening and/or violating the fundamental rights and freedoms of the petitioner in the performance of functions of his public office purportedly exercised under the provisions of the Education Act, Cap 211 Laws of Kenya.

2. Pending the final hearing and determination of this petition, the status quo be maintained at the school of the composition of its Board of Governors and the Management of the school.

3. Pending the final hearing and determination of this petition, a stay of the implementation of the respondent’s intended construction of boarding facilities at the petitioner’s Parklands Arya Girls High School, Nairobi.

4. A Declaration that the Petitioner is constitutionally entitled to own, control and manage property of any description and acquire a proprietary interest in and/or right over property of any description in Kenya, including schools and other educational institutions wholly established, built, managed, ran and controlled by it without deprivation.

5. A Declaration that the Petitioner is the legal owner of Land Reference No. 209/19 in Parklands, Nairobi on which Parklands Arya Girls High School, Nairobi is built.

6. A Declaration that Parklands Arya Girls High School, Nairobi is properly vested under the Arya Samaj Education Board and a proper subject of protection of Fundamental Rights and Freedoms enshrined under the Constitutional of Kenya and deserves protection from undue influence and unjustified deprivation by the Respondent or other agents of the state.

7. A Declaration that the compulsory take over by the Respondent through the Honourable Minister for Education of educational of any and/or all institutions built, owned, managed, ran and/or wholly established at the Petitioner’s own expense, has, is and is likely to continue infringing the Petitioner’s Constitutional rights.

8. A Declaration that the compulsory acquisition and taking possession of the Petitioner’s [property by the Honourable Minister for Education and which property the Respondent has no interest or right,. Amounts to unlawfully depriving the Petitioner of its property and as such, is unconstitutional, null and void.

9. A Declaration that the Respondent’s actions lack any lawful and/or reasonable justification, is discriminatory, attributable wholly or mainly to the Petitioner’s descriptions by religion or other local connexion and a gross violation of the Petitioner’s constitutionally guaranteed fundamental rights and freedom of protection from discrimination enshrined under section 82 of the Constitution.

10. A Declaration that the Honourable Minister’s action prejudices the rights and freedoms of the Petitioner and offends the due process of law, is against public policy, is unlawful and a contravention of the constitution of the Republic of Kenya.

11. A Declaration that the Applicant’s right to its freedom to manifest and propagate its religion

or belief in worship, teaching, practice and observance, as well as the right to protection of its freedom to establish, maintain and manage places of education at its own expense under sections 78 (1) and (2) of the Constitution respectively, have been, are being and are likely to continue being violated.

12. **A Declaration that the Applicant is entitled to its constitutional rights and freedom of protection from deprivation of its property as set out under the provisions of section 75 of the Constitution and the compulsory acquisition and take-over of its schools by the Ministry of Education is unlawful, unconstitutional, null and void.**

13. **A Declaration that the compulsory acquisition and take over of Parklands Arya Girls High School, Nairobi by the Ministry of Education is a violation of the Petitioner's freedom of assembly and association and a threat to its interests safeguarded under the provisions of section 80 of the Constitution of Kenya.**

14. **A Declaration that the Petitioner is rightfully entitled to a constitutional redress in pursuance of section 84(1) of the Constitution of Kenya.**

15. **An order barring the Respondent from compulsorily acquiring, de-registering and taking over the ownership and control of the land on which the Petitioner's Parklands Arya Girls High School and other education institutions in Kenya are established.**

16. **An order prohibiting the Respondent and/or its agents from further interfering with the ownership, possession, maintenance, administration, finance, management and day to day running of any or all education institutions and/or schools established at the Petitioner's own expense and/or managed, maintained and controlled by the Petitioner.**

17. **An order prohibiting the Respondent and/or its agents from setting up boarding school facilities at the Petitioner's Parklands Arya Girls High School, Nairobi or any other school wholly established at the Petitioner's own expense.**

18. **Any other Orders which this Honourable Court shall deem fit and just to grant for the purpose of enforcing and securing the enforcement of the constitutional provisions herein above disclosed."**

7. The petition was supported by an affidavit sworn by **Joginder Pal Gajree**, a registered trustee of the petitioner.

8. The respondent filed a replying affidavit sworn by **Judith Okungu**, the Chief Legal Council in the Ministry of Education.

9. She stated that the school is a Kenyan government assisted school with a Board of Governors appointed by the Minister for Education and is currently registered vide certificate of registration number A/336/84 dated 2nd August, 1984.

10. She further stated that the land on which the school is built is registered in the name of the petitioner who doubles up as the sponsor of the school. The school is enlisted in the second schedule at page 37 of the Education Act which comprises missionary and/or privately owned schools that are run by the government.

11. Mrs. Okungu further stated that the school has since its inception been constantly in receipt of grants from the government for a variety of items that range from furniture, repairs, salaries for non-teaching

staff, tuition, operations and infrastructure. She added that the parents too have over the years contributed to several projects like the school dining hall, home science laboratories, repair of leaking roofs, school bus and a multipurpose hall that now serves to hold the boarding facility as a dormitory.

12. She further stated that since its inception the school had teachers, teaching and non-teaching staff, Board of Governors, school bus registration and even school curriculum were all employed, overseen and/or implemented by/or on behalf of the government.

13. After the 2007 General Elections when the country experienced post election violence, there was a shift in education policy by the government. The shift was particularly geared towards improvement of education of the girl child and the Provincial Education Board authorized the schools Board to consider starting a boarding wing in March 2008, Mrs. Okungu stated.

14. Pursuant to the foregoing, the Board of Governors and Parents Teachers Association met and resolved to turn the school into a boarding one and it has been so since March 2008.

15. The respondent further stated that the government take over of management of the school was not an acquisition of ownership, it was done in connivance, in consonance, in implied consent and acquiescence of the petitioner who has been party to all the happenings and developments at the school.

16. The school offers 8-4-4 curriculum that encompasses Hindu Religious Education and ensures observance of all religious days and festivities on the Hindu calendar which accords with the sponsor's religion, the respondent stated. As a result of sound management through the Board and in partnership with the sponsor the school is well endowed and capable of offering quality education for the girl child and requires continued support from all other stakeholders including the Ministry of Education as well as the petitioner, the respondent added.

17. No documentary evidence in support of all the aforesaid averments was provided by the respondent. The affidavit sworn by Mrs. Okungu does not have even a single annexure. No other evidence was adduced by the respondent since the petition was to be determined on the basis of affidavits on record.

18. In response to the affidavit sworn by Mrs. Judith Okungu, **Kul Bhushan Vidyarthi**, a trustee of the petitioner, swore an affidavit and stated that the history of the school goes back to 1956 when the petitioner was granted a 99 year lease of the land on which the school is standing.

19. The school was constructed from funds fully provided by members of the petitioner and allied bodies. At no time did the colonial government or the Government of the Republic of Kenya fund the construction of the school, he stated.

20. He further stated that the school had never received any grant of furniture, repairs, salaries for non-teaching staff tuition and development of the infrastructure therein. The Ministry has only provided some recurrent expenditure to benefit some pupils. Some teaching staff is provided by the Teachers Service Commission but all that does not mean that the school belongs to the Government of Kenya. Even the parents' help or assistance in some school projects does not make it a government school, the petitioner added.

21. Regarding the boarding wing that was started in March 2008, the deponent stated that the project was vehemently opposed by the petitioner as the whole purpose of running the school as a private one was obviated.

22. He added that the school was always a day school for students residing within its vicinity. There is no provision in the title to the land authorizing putting up of any boarding facilities.

23. The Board of Governors and the Parents Teachers Association had no mandate to build on the petitioner's property and any such building is illegal as the owner of the land is still the petitioner, the

deponent asserted.

24. The petitioner further stated that the current Board of Governors is irregularly constituted and hence the decisions taken by it are irregular and void. A copy of a letter dated 27th November, 1998 addressed to the Attorney General's chambers by the then Chairman of the allied body, Arya Samaj Nairobi, was annexed to the affidavit. The letter queried the manner in which the Board had been constituted. A reply thereto from the Attorney General's chambers dated 21st February, 1999 was also annexed to the affidavit. The Attorney General's chambers confirmed that the appointment of the Board had not been done in conformity with the provisions of **Section 4** of the Education (Board of Governors) Order.

25. Mr. Vidyarthi denied that the petitioner consented or connived to the government's take over of the school management or starting of the boarding wing. He reiterated that the petitioner is well capable of offering quality education to the girl child without any assistance from the government.

26. The parties filed their respective submissions and chose to rely on the same entirely. I have carefully perused all the affidavits on record as well as the submissions.

27. There is no denial that the suit property is registered in the name of the petitioner. A copy of the title was annexed to the petitioner's affidavit. There are special conditions spelt out in the title. The relevant ones are as follows:

“2. No further buildings shall be erected until plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewerage surface and sullage water on the land) drawings and elevations and specifications thereof shall have been approved in writing by the Local Authority and the Commissioner of Lands. Such plans, drawings, elevations and specifications shall be submitted in triplicate to the Local Authority within three months of commencement of the term.

3. The land and buildings shall only be used for the erection of a school and for one house for the accommodation of teachers employed in connection therewith.”

28. The respondent merely stated that a boarding wing in the school was put up in March 2008. The respondent did not state whether the aforesaid special conditions were complied with.

29. There is no indication as to whether any change and/or extension of user of the suit property was ever obtained from the relevant authorities. It is not also clear whether the building plans, if any, were duly approved. Any developments on the suit property that do not meet the requirements of the law are illegal. A letter dated 21st August, 2007 from the Provincial Director of Education, Nairobi, addressed to the school Principal directed her to discuss the issue of making the school a boarding one with the relevant stakeholders. On 4th March, 2008 the Permanent Secretary wrote to the Principal and informed her that the Provincial Education Board had approved introduction of a boarding wing and authorized her to admit boarding students with effect from 2008 once the facilities were available. There is no evidence whether the petitioner was consulted.

30. The respondent stated both in the replying affidavit and in the submissions that the government had not acquired the petitioner's property, the government had merely taken over management of the school. That was done in connivance, consonance and/or implied consent of the petitioner, it was alleged.

31. No sufficient evidence was adduced by the respondent in support of the said averment. The respondent ought to have produced, for example, minutes of the meeting in which it was discussed and resolved by both parties that the management of the school be taken over by the government.

32. To the contrary, there is evidence that the petitioner by itself and/or members of its community and/or allied bodies strongly objected to the purported take over of the school by the government to no avail. The following illustrations of such objection are appropriate:

- (a) By a letter dated 30th June, 2003, addressed to the Hon. Professor George Saitoti, then Minister for Education Science and Technology, the petitioners and other persons complained about general take over of Asian religious community schools by the Ministry of Education.
- (b) On 24th April, 2003 Dr. Manu Chandaria wrote to the same Minister and raised the same issue.
- (c) On 17th July, 2003 Dr. Manu Chandaria wrote to the Minister again and stated that the Director of Education had given unilateral instructions that religious community schools be categorized as public schools. Dr. Chandaria stated that the decision was unfair since the land, the buildings, the equipment were owned by the religious community which was also managing the institutions.
- (d) On 18th February, 2004 a letter was written to Hon. Moody Awori, then Vice President of the Republic of Kenya, complaining about take over of Asian schools. The Vice President responded to the said letter and stated, *inter alia*, that he did not know the circumstances under which the schools had been taken over and directed the complaint to the Minister of Education.
- (e) There are several other letters of complaint dating back to the year 2001 or thereabout.

33. All the above is a clear pointer to the fact that there was no agreement between the petitioner and/or other religious communities of Asian origin which own community schools and the Ministry of Education before the government took over the running of the school.

34. The definition of “**land**” includes the surface of the earth and all the developments thereon. Since the petitioner owns the suit land and financed the construction of most of the developments standing thereon, the respondent cannot purport to take any action that may interfere with the petitioner’s rights and enjoyment of the suit property without consent of the petitioner.

35. **Article 40** of the **Constitution of Kenya, 2010** states that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. The sanctity of property ownership is emphasized by the provisions of **Article 40(2) & (3)** which state, *inter alia*:

“**40(2) Parliament shall not enact a law that permits the State or any person –**

- (a) **to arbitrarily deprive a person of property of any description; or of any interest in, or right over, any property of any description; or**
- (b) **to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in Article 27(4).**
- (3) **The State shall not deprive a person of any property of any description, or of any interest in, or right over, property of any description, unless the deprivation -**

(a) **results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter five, or**”

36. The repealed Constitution had similar provisions which safeguarded private property rights.

37. It is unconstitutional for the respondent to purport to apply any provision of the Education Act to interfere with the petitioner's proprietary rights over the suit property as well as their right of worship. It matters not whether the parents of the students in the school have contributed to the acquisition of some of the facilities and/or equipment in the school. The parents' contribution is good and commendable but that *per se* cannot alter the proprietary interest of the petitioner.

38. The **Education Act** came into operation on 4th April, 1968. As at that date the petitioner had continuously managed and controlled the running of the school through Arya Samaj Education Board. The running of the school could not therefore be taken over by the Ministry of Education without express consent of the petitioner. Any purported take over and acquisition of an interest in or right over the petitioner's property by the respondent is a gross violation of the petitioner's fundamental rights and freedoms as guaranteed by the Constitution. No provision in the Education Act can be invoked to override the petitioner's Constitutional right to ownership of property.

39. The **Education Act** defines an "assisted school" to mean, "**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.**" The school falls within the second schedule to the Act and the manner in which members of the Board of Governors of the school is supposed to be appointed is well set out under **Section 10** of the **Education Act** as read together with **Section 4 (2) of the Education (Board of Governors) Order**. The petitioner sought an opinion from the Attorney General's Chambers regarding the composition of the school's Board of Governors and the Attorney General's Chambers advised that the appointment of Board members ought to be done strictly as per the provisions of **Section 4** of the **Education (Board of Governors) Order**.

40. In view of the foregoing, this court finds that the petitioner has largely established the grounds of the petition and consequently grant prayer 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 & 17 of the said petition.

41. These findings notwithstanding, the petitioner, the respondent, the Parents/Teachers Association and all other concerned parties should consult and agree about the running of the school, bearing in mind the best interests of the students who are in the school so that their education is not disrupted in any way.

42. The respondent shall bear the petitioner's costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Mr. Shah for the petitioner holding brief for Mr. Mubea

No appearance for the respondent