



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 455 of 2008**

**ALBERT EKIRAPA ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**  
**AHMED SHEIKH TAKOY ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT**  
**ROSE MUTHONI ..... 3<sup>RD</sup> PLAINTIFF/APPLICANT**  
**ANTHONY NMORAGWA ..... 4<sup>TH</sup> PLAINTIFF/APPLICANT**  
**HENRY NJAGE ..... 5<sup>TH</sup> PLAINTIFF/APPLICANT**  
**PATRICK LUMUMBA ..... 6<sup>TH</sup> PLAINTIFF/APPLICANT**  
**JANE OMARI ..... 7<sup>TH</sup> PLAINTIFF/APPLICANT**  
**MARY APOLA ..... 8<sup>TH</sup> PLAINTIFF/APPLICANT**  
**JULIUS KIITI ..... 9<sup>TH</sup> PLAINTIFF/APPLICANT**  
**MWANGI SALIM ..... 10<sup>TH</sup> PLAINTIFF/APPLICANT**

*(Suing on behalf of themselves and Parents Association  
( School Committee) of Aga Khan Primary School Nairobi)*

VERSUS

**THE AGA KHAN FOUNDATION ..... 1<sup>ST</sup> DEFENDANT**  
**AGA KHAN EDUCATION SERVICES KENYA ..2<sup>ND</sup> DEFENDANT**

**RULING**

Before me are 3 Preliminary Objection filed as follows: -

**1. Preliminary Objection dated 27<sup>th</sup> November, 2000 raised on behalf of the 2<sup>nd</sup> Defendant the**

**Aga Khan Education Services Kenya (“AKESK”) (1<sup>st</sup> Preliminary Objection).**

**2. A second Preliminary Objection dated 5<sup>th</sup> May, 2009 filed on behalf of the 1<sup>st</sup> Defendant. The Aga Khan Foundation (“AGF”) (2<sup>nd</sup> Preliminary Objection).**

**3. A third Preliminary Objection dated 5<sup>th</sup> May, 2009 filed on behalf of the Plaintiffs *Albert Ekirapa & 9 Others* suing on their behalf and the Parents Association (School Committee of Aga Khan Primary School (“PA”) (3<sup>rd</sup> Preliminary Objection).**

In the 1<sup>st</sup> Preliminary Objection the 2<sup>nd</sup> Respondent raises points of law to the effect that the application filed by Plaintiffs dated 29<sup>th</sup> September, 2008 is incompetent, misconceived, and does not lie and should accordingly be dismissed with costs for reasons as follows; –

**(a) The applicants lack the requisite locus standi and/or legal capacity to sue on or enforce a public trust, even assuming such a trust exists in this case.**

**(b) The suit upon which the said application is founded is time barred by the limitation of Action Act, (Cap 22 Laws of Kenya).**

**(c) The suit herein and the said application are res judicata to the extent that the same raises issues which were directly and substantially in contention in a previous proceedings namely High Court Miscellaneous Civil Application No.13 of 2002 in respect of which Hon. Mr. Justice Nyamu rendered decisions in a Judgment delivered on 11<sup>th</sup> July, 2008.**

The 2<sup>nd</sup> Notice of Preliminary Objection filed on the 5<sup>th</sup> May, 2009 by the 2<sup>nd</sup> Defendant. raises the following points of law -

**1. That the suit does not disclose any cause of action against the 1<sup>st</sup> Defendant, who is the sole absolute owner of the subject property.**

**2. That the suit is res judicata in light of the decision and findings of Nyamu J. (as he then was) in High Court Civil Application No. 13 of 2002.**

**3. That the Plaintiffs lack the requisite capacity or *locus standi* to institute the suit against the Defendants.**

**4. That this suit being in the nature of a representative suit is fatally defective for failure to comply with the mandatory provisions of Order/Rule 8 of the Civil Procedure Rules.**

**5. That the Plaintiff lack capacity to seek a declaration of public trust.**

**6. That the suit is statute barred by the provisions of Limitation of Actions Act.**

The Plaintiff’s notice of Preliminary Objection dated 5<sup>th</sup> May, 2009 was raised as against the 2<sup>nd</sup> Defendant’s application dated 21<sup>st</sup> April, 2009 seeking for injunctive orders against the Plaintiffs. The same is based on the grounds that:-

**1. The 2<sup>nd</sup> Defendant has no *locus standi* to seek the relief in the said application in that it has no proprietary right/interest in the suit under the Registration of Titles Act, Cap 281.**

**2. The 2<sup>nd</sup> Defendant’s application is founded on a claim purporting to run or manage a school on the suit property contrary to the grant in respect of the suit property.**

**(3) Under Order XXXIX of the Civil Procedure Rules, the 2<sup>nd</sup> Defendant, *locus standi* to seek the reliefs in the application.**

The genesis of the matter is the filing of this suit on 23<sup>rd</sup> September, 2008 by the Plaintiff on their behalf and the Parents Association and/or School Committee (“**PA**”) of Aga Khan Primary School Nairobi. They have sued the 1<sup>st</sup> defendant, “**AGF**” a registered foundation with operations in Kenya and elsewhere as the registered proprietor of Land Parcel L. R. No.209/3576 situate in Parklands area of Nairobi, the premises wherein the Aga Khan Primary School Nairobi lies. The 2<sup>nd</sup> Defendant Aga Khan Education Services Kenya

“**AKESF**” is a registered body involved in the management of Aga Khan Primary School Nairobi amongst others in Kenya and has been sued as such. The Plaintiffs contend *inter alia* that the 1<sup>st</sup> Defendant holds the property in trust for the Plaintiffs and the public generally as the school has benefited from time to time from public funds. Further that the Plaintiffs want to participate in the management of the school and/or for the City Council to take over management of the school currently in the hands of the 2<sup>nd</sup> Defendant.

The Plaintiffs sort for interlocutory orders by filing under certificate of urgency a Chamber Summons simultaneously with the plaint dated 26<sup>th</sup> September, 2008. The application was brought under the provisions of order XXXIX Rules 1 to 3 of Civil Procedure Rules, and Section 3A of the Civil Procedure Act.

The application is seeking for substantive orders that –

- (3) That an order of temporary injunction be issued to restrain the Defendants/Respondents by themselves, agents or servants from interfering with the rights, privileges and functions of the applicants as the school committee in the management and operations of the Aga Khan primary School pending hearing and determination of this application.**
- (4) That an order of temporary injunction be issued to restrain the Defendants/Respondents by themselves, servant and agents from carrying out any act or omission that deny, curtail or limit the right and entitlement of the Plaintiffs, their children and local community of Aga Khan Primary School to enjoy or access the Free Primary Education (EPE) Funds and/or such aid, benefit or assistance offered by the Government and the City Council of Nairobi including and not limited to Free primary Education (EPE) Funds, provisions of teachers by the Teachers Service Commission, allowance of tax and rent rebates, advertisement of infrastructural development, management and operational assistance pending hearing and determination of this application.**
- (5) That an order of injunction be issued restraining the Defendants/Respondents by themselves, agents or servants from de-aiding, changing, converting, or otherwise transforming Aga Khan primary School from a public school within the meaning of Section 2 of the Education Act to a private school pending hearing and determination of this suit.**
- (6) That an order of mandatory injunction be issued to compel the Defendants/Respondents to transfer the management of the school to the City Council of Nairobi pending hearing and determination of this suit.**
- (7) That as an alternative to prayer (6) above, an order of mandatory injunction be issued to compel the second Defendants/Respondents to manage the school jointly and in collaboration with the existing school Committee consisting of members of the Parents Association and City Council of Nairobi pending hearing and determination of this suit.**
- (8) That an order of injunction be issued to restrain the Defendants/Respondents by themselves, servants and agents from carrying out any act or omission that deny, curtail or limit the right and entitlement of the Plaintiffs, their children and local community of Aga Khan Primary School to**

enjoy or access the Free Primary Education Funds and/or such aid, benefit or assistance offered by the Government and the City Council of Nairobi including and not limited to Free Education (FPE) Funds, provision of teachers by the Teachers Services Commission, allowance of tax and rent rebates, advancement of infrastructural development, management and operational assistance pending hearing and determination of this suit.

(9) That an order of injunction be issued to restrain the Defendants/Respondents by themselves, agents or servants from interfering or otherwise prevent the Applicants as members of the Parent Association from discharging their role as the School Management Committee provided for under section 9 of the Education Act Cap 211 pending hearing and determination.

(10) That an order of mandatory injunction be issued compelling the Defendants/Respondents to use the rental income from building erected on L. R. No. 209/3576 for the benefit of Aga Khan Primary School.

The 1<sup>st</sup> and 2<sup>nd</sup> Preliminary Objections touch on both the suit and the plaintiffs' application.

Whereas the 3<sup>rd</sup> preliminary objection, is against the 2<sup>nd</sup> defendant's application.

Having considered the pleadings before the court, submissions by counsels & case law cited I summaries the grounds of objection as follows -

1. **Whether or not the suit herein is Resjudicata in view of Judgment in High Court Misc. Application No.13 of 2002 – Ali Self & 2 Others vs. The Minister for Education & Aga Khan Education Service Kenya.**
2. **Whether the Plaintiffs have the *Locus standi* and/or legal capacity to institute this suit.**
3. **Whether the suit is time barred**
4. **Whether or not the 2<sup>nd</sup> Defendant has the *locus standi* to file an application seeking injunctive orders against the Plaintiffs.**

I will consider each of the grounds separately.

#### **1. Whether or not the suit is res judicata**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the issues raised in this suit are similar to those raised in High Court Miscellaneous Civil Application NO.13 of 2002 Ali Seif & 2 Others vs. The Minister of Education & Aga Khan Education Service Kenya. (“Judicial Review”) Which issues were considered and findings made by Nyamu J.

They contend that the main issues between the parties are: - ownership & management of the Aga Khan Primary School Nairobi and whether or not the school can be classified as a public school. They submit that although the 1<sup>st</sup> Defendant was not a party to the Judicial Review, this is not a bar to the application of the doctrine of Res judicata . That the introduction of the 1<sup>st</sup> Defendant in this suit is purely to circumvent the application of the doctrine.

On their part the Plaintiffs maintain that the doctrine of Res Judicata is not applicable in this instance. They contend that in the Judicial Review the issues were between the Plaintiffs and the Minister of Education, and the issue in consideration was the directive by the Minister of Education. That the same was Judicial Review proceedings as opposed to a suit where the 2<sup>nd</sup> Defendants participated only as an interested party. They contend further that there were no issues between the parties now in court, for determination by the court nor were there declarations made by the court, and any findings thereof were obiter.

Both sides vehemently argued this point and cited several authorities.

The defence submitted that the similar issues as the ones before the court were raised and findings made in the Judicial Review. In support of the 1<sup>st</sup> Defendant the court was referred to the case of **POP – IN (KENYA) LTD & 3 OTHERS vs. HABIB BANK AG. ZURICH (1990) KLR.** The suit dealt with matters that had been raised in 2 separate suits.

In support of the 2<sup>nd</sup> Respondent the court was referred to **OMONDI & ANOTHER vs. NATIONAL BANK OF KENYA LTD & ANOTHER** (2001) KLR at 579 in this case the issue before the court was said to have been determined in a previous suit the only difference was the additional parties. Similarly in the case of **GICHUKI vs. GICHUKI (1982) KLR 285.** The dispute involved same parties & same issues both brought by way of civil action one suit in the Magistrates court and another in the High Court.

The Plaintiffs on the other hand contended that the issue for consideration in the Judicial Review was the Minister of Education's directive and that any findings therein were obiter and as such this suit is not res judicata. The Plaintiffs argue that a Judicial Review is not a suit within the meaning of either the Civil Procedure Act nor the Interpretation & General Provisions Act. The Plaintiffs relied on the case of **COMMISSIONER OF LAND vs. KUNSTE HOTEL LIMITED.**(1995-1998)1 E.A. Where the Court of Appeal held inter alia -

**“1. The term “action” is defined under section 3 of the interpretation and general Provisions Act, as any Civil Proceedings and includes any suit as defined in section 2 of the Civil Procedure Act. The above definition when looked at together with the Provisions of Section 8 of the Law Reform (Cap 26), it is describe that an application for an order of certiorari or any of the prerogative orders is not an action.**

**2. Section 8(1) of the Law Reform (Cap 21), denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal Jurisdiction”**

The doctrine of res judicata is founded on 2 objectives namely-

- (i) That there has to be an end to litigation &
- (ii) That a party should not be tried twice on the same issue.

Section 7 of the Civil Procedure Act provides :-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and subsequently in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such a court.”**

The above section is clear that no court shall try a suit or a matter that has been an issue or substantially in issue in a former suit. The question herein is whether a Judicial Review is a suit and whether issues that were considered in a Judicial Review if raised in a civil action for determination render a suit res judicata.

S. 2 of the Civil Procedure Act defines a suit as follows:-

**“Suit”** means all Civil Proceedings commenced in any manner prescribed

In **WELAMONDI vs. THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA** (2002) I KLR 480 at 487 Ringera J (as he then was) held inter alia –

**“2. Judicial Review Proceedings under order 53 of the Civil Procedure Rules are special procedures; which are invoked, whenever orders of certiorari, mandamus or prohibition are sought**

on either Criminal or Civil proceedings.

3. **In exercising powers under Order 53, the court is exercising neither Civil nor a Criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *suis genesis*. It is incompetent to invoke the provisions of section 3A and Order 1 Rule 8 of the Civil Procedure Act and Section 42, 79 & 80 of the Constitution of Kenya.”**

Guided by the 2 authorities quoted above I agree with the Plaintiffs’ counsel that the doctrine of res judicata cannot apply herein. Judicial Review is not a suit within the meaning prescribed by S. 2 of Civil Procedure Act nor as contemplated by S.7 of the said Act. Neither is it a civil action within the meaning of Section 3 of the Interpretation and General Provisions Act. That being the case, it is obvious to me that the matters/issues in this suit cannot be said to have been conclusively decided in the Judicial Review.

Having determined that the matter before the court is not res judicata I now turn to consider the other grounds of objections raised.

2. **Do the Plaintiff have the *locus standi* and/or Legal**

**capacity to institute this suit?**

The 1<sup>st</sup> Defendant contends that he Plaintiffs lack *locus standi* to bring this suit and have put forth 3 arguments. One that, it is only the Attorney General who can seek for a declaration of a public trust on behalf of the general Public. Secondly that if indeed the Plaintiffs have come to court in a representative capacity they have failed since they did not obtain leave and directions of the court in line with the requirements of order 1 Rule 8 of the Civil Procedure Rules.

That although the “P.A.” describes itself as “**School Committee**” that a School Committee within the meaning of Section 9 of the Education Act Cap 211 can only be inexistence where a School is maintained by a local authority which is not the case with the school here.

Thirdly, the “P.A.” is unregistered, has no recognition in law and that The Education Act does not provide for such a body.

The 1<sup>st</sup> defendants relied on several cases including, **GOURIET vs. UNION OF POST OFFICE WORKERS & OTHERS** (1977) **ALL E R 70 & EL BUSAIDY vs. COMMISSIONER OF LANDS & 2 OTHERS** HCCC NO.613 of 2001 amongst others.

On their part the 2<sup>nd</sup> Defendant are in consonance with the 1<sup>st</sup> Defendant on this issue. The 2<sup>nd</sup> Defendant contends that the Plaintiffs have absolutely no colour of right either as proprietors or managers which the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are respectively. That the “P.A.” is an amorphous body whose members change at different times. The 2<sup>ND</sup> Defendant has in expounding this proposition relied on several authorities some of which include **Law Society of Kenya Vs. Commissioner of Lands & 2 Others** KLR (E&L)1 456, **Aga Khan Education Service Kenya Vs. Ouma John Mark Onyango & 2 Others** **High Court at Kisumu Civil Suit NO. 282 of 2001** & **Simu Vendors Association V. The Town Clerk City Council of Nairobi & Another** (2005) e KLR.

On their part the Plaintiffs argue that they have sued in 3 different capacities namely:-

- On their own behalf
- As Parent Association &
- As a School Committee

The Plaintiffs contend that the court can only determine whether they are a School Committee or not by

way evidence, therefore, this cannot be an issue for Preliminary Objection. That their interest as parents in the school are legitimate and recognizable in Law.

Locus standi means the right of a party to be heard. To have *locus standi* one must have a sufficient interest in a matter to sustain his standing in a Court of Law. On this subject, the question to ask is whether the Plaintiffs herein have the right to be heard and likewise do the 2<sup>nd</sup> Defendant have any *locus standi* to file the application as against the Plaintiffs.

The Plaintiffs argue that the 2<sup>nd</sup> Defendants does not *locus standi* to seek the relief in their application in that it has no proprietary rights/interest in the suit and that order XXXIX of the Civil Procedure Rules therefore cannot stand.

On whether the 2<sup>nd</sup> Defendant has *locus standi* in this matter in my view the answer lies in the Plaintiffs' pleadings. The plaintiffs have sued the 2<sup>nd</sup> Defendant as a **“registered body, involved in the management of various schools in Kenya in which the 1<sup>st</sup> Defendant is the owner or manger.”** It follows therefore that there is an issue touching on management and ownership, the 2<sup>nd</sup> Defendant as the manager of the school and deriving its right from the 1<sup>st</sup> defendant has sufficient right to seek for restraining orders and to file a counterclaim as they have done, in order to safeguard their interest. The Plaintiffs preliminary objection must therefore for this regard fail.

I will consider the 3 capacities as described by the plaintiffs to ascertain whether or not they have locus standi –

- (a) **On their on behalf**
- (b) **As Parents Association and**
- (c) **As School Committee.**

To have locas standi as shown earlier one must have sufficient interest in a matter. The plaintiffs have described themselves as parents. Do they have sufficient interest in the management and ownership of the school ? In my view parents of a school have interest in the management and ownership of a school, and where aggrieved they must turn to court for justice. If parents do not challenge the management and owners who else? **In Njau vs. City Council of Nairobi** (1983) KLR the court of Appeal Held inter alia,

**“Capacity to sue is a matter of mixed law and facts, which is to be decided on legal principles ( with common sense coming into it ) and not a matter of discretion. The learned judge erred when he decided that the appellants had no locus standi”**

In the said case Hancox J A had this to say:-

**“ I agree had this been an application for an order of *certiorari*, prohibition or *mandamus*, and had the appellants no other legitimate right or interest which they could reasonably say required protection, then the judge would have been fully justified in saying that the mere fact of their being so entitled, along with others... this was an action by summons and plaint by people who had interest in the subject matter in respect of which they were seeking declarations and a mandatory injunction.....it did not involve any question as to the infringement of any right appertaining to the public at large but only to persons who were within a particular class”**

In the same case Chesoni J on his part stated as follows:-

**“The present case was not one where a public authority (the council) had transgressed the law. ....Though appearing to have been instituted as such it was not in effect, relator proceedings. But a case of plaintiffs who considered themselves aggrieved... in the circumstances it would in my view be unjust to shut them away from coming to court for a hearing of their grievances. They have**

**capacity to be heard and that is what is meant by *locus standi*.”**

I therefore find that the plaintiffs have a right to institute this suit in their individual capacity and hold that as such the 10 plaintiffs have *locus standi* as such

If the plaintiffs have brought this suit as the Parents Association, then the suit must fail. Under the Education Act there The Parents Association as a body is unknown. It is not a registered association and therefore can neither sue or be sued. Members can only sue or be sued in their individual capacity.

In **Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank H.C.C.C No.5116 of 1992** (O.S.) Bosire J (as he then was) stated as follows:-

**“The position at Common Law is that a suit ..... as against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue and be sued as a legal personality. That being so it lacked the capacity to institute legal proceedings on its own name.”**

**Would this suit be considered as a representative suit** The Plaintiffs have every right to bring a suit on behalf of other claimants with interest similar to theirs, however to do so they must follow the laid down procedure. Order 1 Rule 8 provides –

**“Where there are numerous persons having same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested. There is no such..... or authority of court was obtained to institute a representative suit.”**

It is clear from the pleadings and the court record that the plaintiffs have not complied with Order 1 rule 8 and on this score the lack *locus standi*.

**Is the School Committee a legal entity capable of suing?**

The School Committee by itself is not a legal entity capable of suing or being sued. Its members will have to sue or be sued in their individual capacity. It therefore follows that this unregistered body will suffer the same fate as the Parents Association.

**Whether the suit is statutory time barred &** whether the Plaintiffs are a School Committee within the meaning in Section 9 of the Education Act. These are matters of fact which can only be established by way of evidence. And therefore do not fall within the ambit of a Preliminary objection. On this score the Preliminary Objection fails. I am guided by the case of **Mukisa Biscuit Manufacturing Co Ltd Vs. West End Distributors LTD** (1969) E. A. 696. LAW J. A. stated in part.

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of a pleading, and which if argued as a Preliminary point may dispose of the suit.”**

In the same case Sir Charles Newbold P had this to say on Preliminary Objection.

**“A Preliminary Objection is in the nature of what used to be a *de murrer*. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial Discretion.”**

In **El Busaldy Vs. Commissioner of Lands & Others** (2002) KLR 1 it was held inter alia -

**“The issue as to whether or not the suit was time barred was a matter of fact which could only be established by evidence. It therefore could not be decided at the Preliminary stage.”**

From the foregoing, I have come to the following conclusion that:-

- (1) The preliminary objection raised on the ground that the matter is res judicata fails on reasons that the issues before the court have not been in issue or in contention in a previous suit as a judicial review is not a suit within the meaning of S,2 & 7 of the civil procedure act , or a civil action within the meaning of section 3 of Interpretation and General Provisions Act.**
- (2) The preliminary objection by the defendants on the ground that the plaintiffs have no *locus standi* succeeds only to the extend that the plaintiffs have failed to demonstrate that they have filed this suit in a representative capacity on behalf of others, and as a Parents Association or School committee.**
- (3) The objection on the ground that the plaintiffs have no *locus Standi* fails to the extend that the plaintiffs can sustain this suit as individuals in their capacity as parents.**
- (4) The plaintiffs’ objection on the ground that the 2<sup>nd</sup> defendant has no *locus standi* to bring an application seeking for injunctive orders fails. The 2nd defendant was indeed sued by the same plaintiffs and have a right to defend their interest.**
- (5) The objection on the ground that the suit is time barred similarly fails as this is not a pure point of law for consideration as a preliminary point and can only be determined by way of evidence.**

I accordingly direct that the two applications currently on record dated 29<sup>th</sup> September 2008 & 21st April 2009 be heard on merit.

Dated and delivered this 2<sup>nd</sup> July, 2009.

**ALI- ARONI**

**JUDGE**