



IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, TUNOI & O’KUBASU, J.J.A.
CIVIL APPEAL NO. 257 OF 2003

BETWEEN

AGA KHAN EDUCATION SERVICE KENYA APPELLANT

AND

REPUBLIC THROUGH ...
ALI SEIF..

BENSON WAIRAGU
JOSEPH NGETHE GITAU

ATTORNEY GENERAL RESPONDENTS

(An appeal from the ruling & order of the High Court of Kenya at Nairobi (Waki J) dated 4th July, 2003)

in

H.C.MISC.APPLN. NO. 13 OF 2002)

JUDGMENT OF THE COURT

The appellant before us is a body called **The Aga Khan Education Service Kenya** shortened to “**the AKESK**”. We shall hereinafter refer to it by that acronym. The body is apparently in charge of running educational institutions in Kenya on behalf of His Highness the Aga Khan. Among the institutions that fall under the jurisdiction of AKESK is the Aga Khan Primary School, Nairobi. The effective respondents to the appeal before us are **Ali Seif, 1st respondent, Benson Wairagu, 2nd respondent and Joseph Ngethe Gitau, 3rd respondent. The Hon the Attorney General** was also named as a 4th respondent and during the hearing of the appeal before us, Mr Muiruri Ngugi who appeared on behalf of the Attorney General simply associated himself with the submissions of Mr Bill Inamdar on behalf of **AKESK**. Mr Muturi Kigano opposed the appeal on behalf of the 1st, 2nd and 3rd respondents. These three respondents are parents with pupils learning at the Aga Khan Primary School, Nairobi. The 1st respondent is the Chairman of the School’s Parents Association, the 2nd respondent is the Association’s Vice-Chairman while the 3rd respondent is the Treasurer of the Association. It appears clear to us from the record that prior to this dispute coming to the courts, **AKESK** was running the school in association or collaboration with the Parents Association. The school was, and we believe still is, a public school under the **Education Act, Cap 211 of the Laws of Kenya**. As is usual in such cases, the parents would pay fees and other levies for development and improvement of the schools’ facilities; **AKESK** would also be doing the same. There does not appear to be much controversy on the material placed before the superior court, Waki, J. (as he then was), that the Association had bought several school buses and a mini bus for the school and had also built or improved the school’s swimming pool. The teachers in the school were provided and paid for by the Teachers’ Service Commission. It would further

appear from the record that there was once a tussle between **AKESK** and the Parents Association over the school transport account but that issue was settled and the school was run peacefully by AKESK and the Parents Association until the 29th November, 2001 when the Parents Association held a joint meeting with the Chairman of AKESK, one Farid Hamir. At that meeting Farid Hamir informed the Association that the Ministry of Education, Science & Technology:

“... has already given the Board the mandate to go ahead and privatise the public schools managed by AKESK (K) Board including Aga Khan Primary School, Nairobi.” – we quote from the minutes of the meeting of 29th November, 2001.

As is obvious from the minutes of the meeting, the Parents Association was obviously not amused by that announcement. It asked why it had not been consulted and what would happen to the investments it had made in the school. Mr Farid Hamir tried to assuage the Association’s fears and concerns but apparently to no avail. However, the minutes of the meeting of 29th November, 2001 were not before Mr Justice Waki on 9th January, 2002 when he granted leave, so they are not really relevant to the issues before us. But the dispute was already on and on 9th January, 2002, Mr Muturi Kigano moved to the superior court, obviously on behalf of the Parents Association represented by the 1st, 2nd and 3rd respondents and among the provisions of law cited in their chamber summons of the same date was **Order 53 Rule 1 of the Civil Procedure Rules**. The prayers asked for under that Order and which are the only ones concerning us in this appeal were that:

“3. Leave be granted to the applicants to apply for an order of CERTIORARI to remove into the High Court and quash the Order/directive by the Minister for Education (“the Minister’s Order”) that the School be managed by the Aga Khan Education Service Kenya (“the AKESK”).

4. The grant of leave herein do operate as a stay of the Minister’s Order.”

As is mandatory with applications under **Order 53**, the chamber summons was accompanied by a statement of facts to support it and an affidavit by the 1st respondent to verify the facts. The summons came before Waki, J. on the same day and he granted leave as prayed for in paragraph 3 above and further ordered that the leave so granted was to operate as a stay of the Minister’s order. For the purposes of the appeal, we need to point out that in the chamber summons asking for leave, an order of **certiorari** was asked for to quash the order/directive of the Minister that the School “*be managed*” by AKESK; in the statement of facts, the prayer was the same while in the verifying affidavit of the 1st respondent it was contended that Minister’s order had:

“Wholly alienated the School, to AKESK who has privatised the same ...”

Pursuant to the leave granted by Waki, J. the substantive motion was lodged in court on 23rd January, 2002 and the only order sought in the said motion was that:

“An order of CERTIORARI do issue to remove into the High Court and quash the Order/directive by the Minister for Education that Aga Khan Primary School, Nairobi be managed by the Aga Khan Education Service Kenya.”

To date that motion has never been heard and the reason for that is that by a notice on motion brought under **Section 3A of the Civil Procedure Act and Order 50 rule 17 of the Civil Procedure Rules**, **AKESK** itself went to the superior court on 12th February, 2002 and sought two orders from that court, to wit:

“1. THAT the ex parte leave, granted to the Applicants on 9th January, 2002 to apply for an order of certiorari in this case be set aside and the order for stay issued on the same day be discharged.

2. THAT the Chamber Summons dated 9th January, 2002 filed by the Applicants be dismissed with costs. ...”

The grounds on which the motion was brought were set out on the body of the motion itself and they were that:

“(a) There is no, or no sufficient, material placed by the Applicants before this Honourable Court to show that the Applicants have a prima facie case to apply for an Order of Certiorari;

(b) The alleged Order/Directive of the Minister of Education sought to be quashed has not been properly identified by reference to its date or at all;

(c) There is no material placed before this Honourable Court to support the “grounds” on which the aforesaid Chamber Summons and the Statement dated 9th January, 2002 are based;

(d) The Statement dated 9th January, 2002, is incurably defective in that it contains no facts which could be verified by the affidavit of Ali Seif sworn on 8th January, 2002 in support of the said Chamber Summons;

(e) The said affidavit of Ali Seif contains conclusions of alleged facts without any particulars to support the same;

(f) The “facts” alleged in the said affidavit of Ali Seif do not justify or support the ex parte orders sought from and made by this Honourable court.”

It was this motion which was heard by Mr Justice Waki on 31st October, 2002 and in a reserved ruling dated 4th July, 2003, the learned Judge dismissed the motion with costs. That is the genesis of the appeal now before us.

We think both Mr Inamdar and Mr Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under **Order 53**, there must be **prima facie** evidence of an arguable case and for that proposition both counsel rely on this Court’s decision in: **IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS** and **IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal NO 144 OF 2000** in which the Court approved and applied the principles to be found in the English case of **R V SECRETRAY OF STATE, ex p. HARBAGE [1978] 1 ALL ER 324** where it was stated thus:

*“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see **Halsbury’s Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276.**”*

So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior court - See for example, **SECRETARY OF STATE FOR THE HOME DEPARTMENT ex p. Begum (1989) 1 Admin L.R. 110.**

Again, both Mr Inamdar and Mr Kigano are agreed that the jurisdiction to set aside leave already granted is one to be exercised very circumspectly or very sparingly. In this connection Mr Kigano drew our attention to certain remarks to be found in the text **Judicial Review Handbook, 3rd Edition by Michael Fordham where at page 360 paragraph 21.7** this statement is to be found:

“At the request of a defendant or an interested party, the Court can set aside permission previously granted. However, this is a very restricted power. It was never popular with judges, who required there

to be a very clearcut case before discharging the permission. ...”

Again at page 361, it is stated:

“... The jurisdiction to set aside is one which is sparingly exercised and the reason for invoking that jurisdiction in a particular case must be specified. ...”

The learned author of the book continues as follows on page 361:

“(E) POWER TO BE USED SPARINGLY:

R V SECRETARY OF STATE FOR THE HOME DEPARTMENT, ex p. BEGUM (1989) 1 Admin LR 110, 112F (McGowan J): “this is a jurisdiction that should be very sparingly exercised”; R V Crown Prosecution Service ex p. Hogg (1994) 6 Admin LR 778, T81E-782A; R V Secretary of State for the Home Department ex p. Chinnoy (1992) 4 Admin LR 457, 462 D-F; R V Customs & Excise Commissioners, ex p. Eurotunnel Plc [1957] CLC 392, 399 F (“it is obvious that the whole purpose of the [permission] stage would be vitiated if the grant of [permission] were to be regularly followed by an application to set it aside”); R V Environment Agency, ex p. Leam [1998] Env LR D1, transcript (Law J.: “It may very well be that [the claimants] will face great, perhaps insuperable, difficulties when the case is finally heard, but in my judgment this was never a case for an application to set aside [permission]”. “It cannot be emphasised too strongly that such an application is not to be brought merely on the footing that a [defendant] has a very powerful, even overwhelming case”). ...”

We are grateful to Mr Kigano for making these authorities available to us. We did not understand Mr Inamdar to contest any of these propositions. Of course in England the position is now different and leave or permission is granted inter partes but in Kenya, the leave stage is still **ex parte**. We would, however, caution practitioners that even though leave granted **ex parte** can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of **certiorari** is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.

The appellant filed a total of nine grounds of appeal against the refusal by Waki, J. to set aside his earlier grant of leave to the respondents. Mr Inamdar, however, condensed those grounds into two broad propositions. The first proposition was argued under grounds 1, 2 and 3 contained in the memorandum of appeal and the substance of the proposition was that the respondents had failed to prove to the trial court, **prima facie**, that they had any case to warrant the grant for leave. For this proposition the appellant relied on the provisions of **Section 9 (3) of the Law Reform Act, chapter 26 of the Laws of Kenya and also on Order 53 rule 2 of the Civil Procedure Rules. Section 9 (3) of the Law Reform Act** provides:

“In the case of an application for an order of **certiorari** to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; ...”

Order 53 Rule 2 is in similar terms. Expounding on this point, Mr Inamdar contended before us, as he did contend before Mr Justice Waki, that the respondents had not identified the Minister’s order or directive with reference to the date on which it was made. The question of the date on which the order or directive of the Minister was made, according to Mr Inamdar, was a thresh-hold issue and had to be decided by the superior court before deciding the issue of whether or not to grant leave. If the application was made more than six months after the Minister’s decision then leave could not have been granted because **Section 9**

(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules are couched in mandatory terms:

“... leave shall not be granted unless the application for leave is made not later than six months after the date. ...” of the decision.

It was accordingly incumbent upon the respondents, argued Mr Inamdar, to show to Mr Justice Waki that their application for leave was made not later than six months from the date of the Minister’s decision. The respondents had failed to show to the learned Judge the date of the Minister’s decision and that being so, the learned Judge did not have material or sufficient material upon which he could exercise his discretion in granting leave.

We agree with Mr Inamdar that the burden is on an applicant for leave to satisfy the judge that leave ought to be granted. As we stated elsewhere in this judgment, if it is apparent from the material placed before a judge that the application for leave is made more than six months from the date of the decision sought to be challenged, then in the words of Section 9 (3), *“leave shall not be granted”*. What was the position in this case? It is true that the date of the Minister’s decision was not known by the time Waki, J. heard the motion for leave. But in paragraph 5 of the 1st respondent’s verifying affidavit which was before the learned Judge on the day leave was granted, the 1st respondent had sworn as follows:

“5 I am informed by the second applicant herein and verily believe the same to be true that on Thursday 20th December, 2001 he (the 2nd applicant) at Jogoo House, Nairobi, met one Mr Karaba, Deputy Director of Education in charge of Primary Division, Ministry of Education (“the Ministry”) and with regard to the school the latter confirmed as follows:

(a) The Ministry had by Order/directive wholly alienated the School to AKESK who has privatised the same effective January 2002 and that the Ministry’s Permanent Secretary has executed all the necessary documents/ authorisations to that effect and was going to dispatch general circular to that effect to the School’s teachers and parents;

(b) Prior to the privatisation no technical advice was sought;

(c) The Ministry did not consult the said Association nor any school parent.”

So that with regard to the date of the Minister’s decision, the first date mentioned by the respondents was 20th December, 2001 and the decision was to take effect in January, 2002. The respondents went to court on 9th January, 2002. In those circumstances, Waki, J. was entitled to assume at the stage of leave that the respondents had gone for leave within the prescribed period. If it should turn out at the hearing of the motion itself that six months had elapsed before leave was granted, the motion would then fail. It is to be noted that while the Minister who made the order was represented by the Attorney General at the hearing of the motion to set aside, the Minister did not himself contend that six months had elapsed since he made the order. Having considered the cases cited before him, Waki, J. disposed of this contention in the following manner:

“I think the guidelines cited do not require me to make any conclusive findings at that stage. There was reference in the affidavit in support of the application to a fact that the existence of the order became known on 20.12.2001, and the order/directive was to take effect in January 2002. Whether the actual order would surface at the hearing of the Notice of Motion to put the matter beyond doubt is a matter envisaged under Order 53 r. 7 Civil Procedure Rules and is lawful procedure. If it turned out at the hearing of the motion that indeed the provisions of section 9 of the Law Reform Act apply then the respondent or the interested parties would be vindicated. I have not even at the hearing of this application been persuaded that the point of limitation will be a valid one. I remain with the prima facie view that it is an arguable point on the material presented to me at the ex parte stage.”

With respect, we agree with the learned Judge and that being our position grounds 1, 2 and 3 contained in

the memorandum of appeal must fail.

The second broad ground of appeal argued by Mr Inamdar related to the issue of whether the school was to be “*managed*” by AKESK, or whether it was to be “*alienated*” or “*privatized*”, words used variously in the chamber summons, and in the verifying affidavit. With the greatest respect to Mr Inamdar, we do not think that the use of those words in various documents could alter the basic position which was being challenged by the respondents, namely that the school was to be removed from among public schools and categorised as a private school to be run only by AKESK. The existence of the Minister’s decision was not denied by anyone and the purport of that decision was obviously to change the status of the school from a public institution to a private one. The respondents were parents with children in that school and they alleged they were entitled or had a legitimate expectation to be heard before the change of status took place. **Prima facie**, the Judge thought the respondents had an arguable case, even on the issue of their being heard. We also think so and confirm his conclusion that:

“... The splitting of hairs in terminology is again not suitable at the stage of leave and I am not inclined to reverse my view of the matter on that ground either.”

Lastly, it was contended that the statement of facts in support of the chamber summons did not contain facts which could be verified by the 1st respondents’ affidavit. All we wish to state on this point is that the statement of facts could have been better drafted, but that is not the same thing as saying that it had no substance which the learned Judge could consider and come to a decision on the issue of whether or not to grant leave. He considered what was contained in the statement and in the verifying affidavit and came to the conclusion that he must grant leave. We are far from convinced that the Judge’s decision to grant leave was supported by no facts at all. Whether those facts are or are not sufficient to sustain the respondents’ case during the hearing of the motion itself is not a matter for us in this appeal. The consequence of what we have said must be that grounds 4, 5, 6, 7, 8 and 9 of the grounds in the memorandum of appeal must also fail.

That being our view of the matter, the appellant’s appeal must accordingly fail.

We order that the appeal be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of March, 2004.

R. S. C. OMOLO

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. O. O’KUBASU

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR