



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 3 OF 2013

THE REGISTERED TRUSTEES OF

BAPTIST CONVENTION OF KENYA

T/A KIEMBENI BAPTIST CHURCH

PRIMARY SCHOOL. APPLICANTS

VERSUS

THE MINISTRY OF EDUCATION SCIENCE AND

TECHNOLOGY 1ST RESPONDENT

THE MUNICIPAL COUNCIL OF MOMBASA..... 2ND RESPONDENT

RULING

(1). This is the final ruling on an application for committal for contempt of court by Notice of Motion dated 3rd April 2013 seeking the committal for contempt of court of two alleged contemnors as follows:

1. That Onesmus Mwatsuma Head teacher, Kiembeni Baptist Church Primary School and Tubman Otieno, Town Clerk Municipal Council of Mombasa be punished for contempt of Court Orders made on the 13th June, 2012;

2. That the cost of this application and other costs be in the cause.

A partial ruling thereon was made on the 4th December 2014 requiring the attendance in Court of the Central Government's Cabinet Secretary for Education and the County Secretary for the Mombasa County.

(2). The matter came up for further consideration on the 15th December 2014 where, upon hearing submissions by Mrs Kariuki for the Cabinet Secretary for Education and Mr. Malombo for the County Secretary and other counsel for the parties – Mr. Mogaka for the applicant and Mr. Ngari for the Attorney

General for the 1st Respondent – reserved final ruling on the contempt application for the 22nd December 2014.

(3). By its judgment delivered on the 29th December 2011 in the Mombasa High Court Petition No. 3 of 2006 between the same parties, after hearing all the parties and in the presence of the parties counsel the court made the following Declarations:

1. A declaration that the operations of the Kiembeni Baptist Church Primary School by the Respondents without consent of the Petitioners is a violation of the Petitioners' right to property in the parcel of land Plot No. 811/II/MN (Old Plot No. 169/II/MN Kiembeni-Bamburi).

2. A declaration that the Kiembeni Baptist Church Primary School belongs to the Petitioners who have the sole right of operation save where the Petitioners may in accordance with the law seek the Respondents' assistance, at the Petitioners' sole discretion.

(4). The executive parts of the Decree of 29th December 2011 were specific orders as follows:

*3. An order of mandamus is issued to compel **the 1st Respondent** to cause the registration of the Kiembeni Baptist Church Primary School, Bamburi Mombasa as a Private School in accordance with Section 15 of the Education Act.*

4. All the children/pupils enrolled with the school at various classes from nursery to standard eight for the year 2012 to proceed with their studies until completion on the basis of the public school status.

5. The Petitioners will commence enrolment of pupils for the academic year 2013 and the school will revert to full private status upon completion of studies for the pupils enrolled under the public school system as at academic year 2012."

(5). Upon considering the evidence before the court by way of the supporting affidavit and replying affidavit filed for the Respondents and the representation and submissions made by counsel in the matter, the court has established the following:

a) The 1st respondent explained that it did not register the school as a private school because the 2nd respondent refused or neglected to submit the necessary application and consent necessary under section 15 of the Education Act and its successor the Basic Education Act, 2013;

b) The Cabinet Secretary in the 1st respondent ministry explained his failure to register the school on the ground that upon informally learning of the matter and on allegation of the applicant's faulty title to the property had, in due diligence, requested his Cabinet Secretary colleague in the Ministry of Lands to investigate the matter before he could take action on the matter; However, no judicial proceedings in that regard had been initiated in any court;

c) The 2nd respondent did not explain its failure, or give its reason, if any, for failure, to sign the application in giving its consent to the registration of the school as a private school;

d) The Head-teacher of the school in relying on instructions of his employer, the Teachers Service Commission under the 1st Respondent was not able to freeze the admission of new pupils in the school in terms of Order No. 5 of the Decree. Counsel for the 1st Respondent however asserted, without any contradiction by the applicants, that the Head-teacher had not admitted any new pupils to the nursery and class 1 of the Primary school for the Year 2014;

e) There is a pending application for review of the Judgment in Petition No. 3 of 2006 which gave rise to the decree sought to be specifically enforced. This review application was filed on the 24th February 2014 over two years after the judgment of the court was delivered on the 29th December 2011 and over one year after the application for leave to commence contempt of court proceedings was filed on 12th February 2013, contrary to the provisions of Order 45 rule 1 of the Civil Procedure Rules, which requires that applications for review be filed **“without unreasonable delay”**; and

f) There has been no appeal filed against the judgment in Petition No. 3 of 2006, and the decree of the court has been flagrantly disobeyed for a period of 3 years.

(6). The order for the registration of the school as a private school was primarily against the 1st respondent as shown in Order 3 of the Decree of 29th December 2011. The 2nd respondent's role in the matter was the formal certification that the school was possessed of the necessary facilities for the operation of a school. The Court had in its Judgment advert to this matter and ruled that as the school had been found fit to operate as a public school there could not be justification in holding that it lacked facilities to operate as a private school. In compliance with the decree of the Court, therefore, the respondents were obliged to register the school as a private school after following the due process required under the Education Act and the successor Basic Education. It has not been shown that the new Act prohibited registration of private schools. Accordingly, I find that the 1st respondent and the 2nd respondent are both in contempt of the orders of the Court of 29th December 2011, which has to date not been discharged, altered or perfected by any appeal or review thereof.

(7). In giving effect to the contempt of court order against the executive heads of the 1st and 2nd Respondent, the orders must be enforced against the *Cabinet Secretary* of the Ministry of Education, Science and Technology and the Mombasa County Secretary as successors, respectively, of the *Minister* for Education and *Town Clerk* of Mombasa County Council. There is no doubt as their liability in view of section 33 of the Transitional and Consequential Provisions of the Constitution of Kenya, 2010, which provides as follows:

“33. An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

(8). The application for contempt before the court, however, seeks the committal to jail for contempt of two alleged contemnors, namely: **“Onesmus Mwatsuma Head teacher, Kiembeni Baptist Church Primary School and Tubman Otieno, Town Clerk Municipal Council of Mombasa...”**

(9). In continuing to admit pupils beyond the year 2013, the Head-teacher was enforcing the policy and instructions of his employer, the Teachers Service Commission under 1st Respondent Ministry of Education. He did not act in his own behalf and it cannot, in my view, be right to hold him to account personally. It is the Cabinet Secretary who holds the overall executive power of the Ministry who should be held in contempt as a representative of the Ministry for which he is the human embodiment. In the circumstances, the order for committal sought against the Head-teacher cannot be granted. The applicant did not seek to commit the Minister for Education as the head of the Ministry, and the court will not make committal orders that have not been sought by the parties.

(10). The County Secretary as the successor of the Town Clerk of the Municipal Council of Mombasa is the direct inheritor of the executive role of the contemnor Town Clerk. He is liable to be punished for failure to sign the applications and to give the formal consent for registration of the private school.

However, the County Secretary was said to be out of the country when the matter came up before the court requiring his personal attendance and the court did not receive submissions for any reason for his default. Accordingly, in the interests of fair hearing to the County Secretary, the court does not propose to make orders of committal against the County Secretary, at this stage.

(11). However, when considering an application under the special contempt of court jurisdiction for punishment, the court has in discretion powers to make an order for the punishment of the contempt and suitable alternative or further or complementary orders, as noted in the ruling of 4th December 2014 herein, as follows:

a) Committal of the contemnor or sequestration of his property or imposition of a fine;

b) The court may, in its own discretion, grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt.

c) The court may in lieu of any other penalty require the contemnor to pay the costs of the motion on a common fund basis.

d) In a doubtful case, the court may, instead of proceeding for contempt, grant an order requiring the defendant to state whether he has complied with an undertaking.

e) If an order of mandamus, a mandatory order, injunction or judgment or order for the specific performance of a contract is not complied with, the court may

a. proceed with contempt application, or

b. besides or instead of proceeding for contempt, direct the act to be done by some person appointed for that purpose.

See Halsburys Laws of England, 4th Ed Vol. 9 pp. 62-63, para. 104.

12. Taking into consideration the whole circumstances of this case, I consider that the justice of the case will be served by making, consistently with the rule of law principle that orders of the court must be obeyed as long they are not discharged, varied or perfected on review or appeal, and instead of an order of committal for contempt, the following orders:

1. An Injunction against the 1st respondent from registration of any new pupils for the Year 2015 in the classes of Nursery and Standard 1 of the Primary School the subject of these proceedings.

2. The 1st respondent and the 2nd respondent by its successor, the County Government of Mombasa to take all necessary steps for the registration, and to effect the registration of the school, as a private school within 30 days.

3. Upon such registration, the applicant to commence registration of new pupils as a private school in terms of the Decree of the Court of 29th December 2011.

4. Without prejudice to the foregoing orders, the 1st respondent is at liberty to move the court for the hearing of its review application; If it is successful in its application, the school may revert to its public status.

13. Each party will bear its own costs of the proceedings.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS DAY OF 22ND DECEMBER 2014.

MARY KASANGO

JUDGE

In the presence of: -

Mr. Mogaka for the Petitioners

Miss Kitty for the Respondents

Mr. Mbiu - Court Assistant.



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