REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW CIVIL CASE NO.10 OF 2015

MUSAU NDUNDA & 2 OTHERS.....PLAINTIFFS

VERSUS

THE KAKAMEGA COUNTY DIRECTOR OF EDUCATION & 13 OTHERS...DEFENDANTS

RULING

By an *ex-parte* Chamber Summons dated 18th November, 2015, and filed in court on 20th November, 2015, *Musau Ndunda, Gerald Nyaga* and *Rachael Oduor* suing as *National Officials of Kenya National Parents Association,* moved the court seeking leave to commence Judicial Review proceedings in the nature of *prohibition*, *mandumus* and *certiorari*. In particular, they sought leave to apply for an order of prohibition directed at the 14 respondents named in the application prohibiting them or any of them or their servants from vetting, appointing, inaugurating or constituting Boards of Management of public schools within Kakamega County or any of its sub-counties without relating to Schools Parents Associations, and without confirmation from the *ex-parte* applicant. They also seek leave to apply for an order of mandamus to compel the respondents to facilitate and let the *ex-parte* applicant conduct elections and nominations by School Parents Associations under the applicant's supervision as well as an order of *certiorari* to remove into court and quash nominations, vetting appointments and inauguration of representatives of School Parents Associations into Boards of Management of Schools in twelve (12) Sub-Counties of Kakamega County. The applicants have also prayed that once leave is granted, it should operate as stay of nominations and appointments done by the respondents pending the hearing of the motion to be filed.

The application is supported by the amended statement of facts, the verifying and supporting affidavits sworn by Musau Ndunda on 18th November, 2015. There are also grounds appearing on the face of the summons to the effect that the cabinet secretary has promulgated regulations which govern the Constitution of School Boards of Management that each school has to have a Parents Association; there should be elections by Parents Associations during an annual general meeting. An executive Committee of Parents and Teachers elects their own chairperson and that Schools Parents Associations are the ones to elect members for appointment to the County Education Boards as representatives on the Boards of Management of public schools; that the Constitution of Boards of Management of schools within Kakamega County has been done in violation of the applicant Association right to participate in governance and management of basic education within the county. According to the amended statement of facts, the applicant Association is the umbrella body that co-ordinates activities of Parents Associations of public schools and colleges and monitors and provides good governance in public

institutions of basic education.

The applicant further states that *Article 53(1)(b)* of the Constitution guarantees every child free compulsory education and that the /Basic Education Act, 2013 gives effect to *Article 53* of the Constitution. And in order to promote and regulate free compulsory education, basic education regulations have been promulgated which together with the Act, provide the manner in which Boards of Management of Schools, should be constituted. It is alleged in the statement that the 1st and 2nd respondents have directed the 3rd to 14th respondents to initiate nominations of representatives of School Parents Associations for purposes of constituting Boards of Management of Schools in disregard of the law namely, *section 56(1)* and *57(2)* of the Act and Regulations made there-under. The applicant also says that principals and heads of institutions within the County have declined to co-operate with the applicant in ensuring that the exercise is conducted in accordance with the law. The applicant Association has accused among others *Kenya National Union of Teachers*, (*KNUT)*, *Kenya Union of Post Primary Education Teachers*, (*KUPPET),* and *Kenya Secondary Schools Heads Association of Kakamega County* of failing to aid in the holding of elections thus no elections have been held at all. The applicant has therefore moved the court for leave to institute Judicial Review proceedings to address this short coming.

When this application was placed before court in chambers on 24th November, 2015 the court (R. N. Sitati, J.) directed that the same be served on the respondents and be heard *inter-partes* on 7th December, 2915 before me. On that day, 7th December, 2015, *Mr Wamalwa* appeared for the applicant while *Mr Tarus* appeared for the respondents. Mr Tarus indicated that he was not ready to argue the application because he had just been instructed and therefore the matter was adjourned to 8th December, 2015 for hearing. Meanwhile the respondent filed a replying affidavit sworn on 7th December, 2015 sworn by *Vincent Okwemba* who described himself as Deputy County Director of Education Kakamega County. The gist of that replying affidavit is that the prayer for leave to operate as stay has been overtaken by events since the process of appointing representatives of parents in Boards of Management of Schools has been concluded and that those members have been sitting in the Boards since September, 2015.

During the hearing of the application *Mr Wamalwa*, learned counsel for the applicant urged the court to grant leave saying that the respondents flauted the law while constituting Boards of Management of schools within the County except a few primary schools within Navakholo Sub-County where the law was followed. Counsel submitted that the Basic Education Act, 2013 together with the Rules made there-under were not followed hence the Boards of School Management in the County as they stand, are improperly constituted and this was done in violation of the law. He urged the court to exercise its discretion and grant leave and also the leave to operate as stay.

Mr Tarus, learned counsel for the respondents, opposed the application submitting that the application had been overtaken by events. He further submitted that suspension of operations of the Boards will cause more harm to the schools than the harm the applicants will suffer if they remain in office. Counsel submitted that granting a stay is a higher risk than allowing the Boards to continue functioning. At the very end, counsel conceded that he did not seriously oppose the grant of leave saying that his strong opposition was to the leave operating as stay. He asked that the application be dismissed with costs.

I have considered the application, statement of facts, supporting and verify affidavit, the affidavit in reply and submissions by learned counsel for the parties herein. This being an application for leave to commence Judicial Review proceedings, it calls for exercise of discretion. In exercising that judicial discretion the court is to be exercised in favour of the applicants.

The criteria for granting leave to commence judicial review proceedings was well stated in the case of *Mirugi Kariuki vs Attorney General* [1992] KLR 8 as follows:-

"The law relating to judicial review has now reached a stage where it can be said with confidence that if the subject-matter in respect of which prerogative power is exercised is justiciable that is to say, if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. The controlling factor in determining whether the exercise of Prerogative Power is subject to Judicial review power is not its source but its subject-matter ... It is neither the absoluteness of the discretion nor the authority of the person exercising it that matter but whether in its exercise some of the person's legal rights or interests have been affected ... It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show when he applies for leave, a prima facie case on reasonable grounds for believing there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need to show when he seeks leave to apply that he has a case, is essential to prevent abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief makers ..." (emphasis provided).

The court in the above discussion was clear that an applicant who seeks leave to apply must show at the stage of leave, that he has a prima facie case, that there has been failure of public duty and that there are reasonable grounds upon which the court can act in granting leave, including the fact that the applicants rights or interests have been affected by the act complained of.

The same position was echoed in the case of *Re Birac International SA (Bureau Ventas)* 2005 EA 4 where the Court of Appeal stated as follows:-

"Application for leave to apply for orders of Judicial Review are normally ***ex-parte*** *and such an application does not restrict the court to threshold issues namely whether the applicant has an arguable case and whether if leave is granted the same should apply as stay. Whereas Judicial Review remedies are at the end of the day discretionary that discretion is a judicial discretion and for that reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the courts discretion. There should be an arguable case which without delving into the details could succeed. Ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings the scope of the Judicial Review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontier of Judicial review and perhaps give an applicant his day in court instead of denying him ... Judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and has become the most powerful enforcer of the greatest promoters of constitutionalism, one of the rule of law and perhaps one of the most powerful tools against arbitrariness ... Although leave to apply for Judicial review should not be granted as a matter of routine, where one is in doubt, one has to consider the wise words of Meggary J. In the case of John vs Rees (1970) Ch 343 at 402, in the exercise of discretion on whether or not to grant stay, the court takes into account the need of good administration ..." (emphasis)*

Similarly in the case of *Republic vs County Council of Kwale & Another ex-parte Kondo & 57 others*, *Mombasa HCM Civil C. No. 384 of 1996*, *Waki, J* (as he then was) said:-

"*The purpose of application for leave to apply for Judicial review is firstly to eliminate at an early stage any applications for Judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that*

there is a case fit for further consideration. The requirement that leave must be obtained before making an application to Judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived ... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter-parte hearing of the substantive application for Judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially." (emphasis)

The position in law is that when considering whether or not to grant leave to apply, the court must be satisfied that the applicant has demonstrated that he has a *prima facie* case and that leave to apply should not be granted as a matter of course except on sound grounds. In the same vein the court should not deny an applicant his day in court. The court should act on the material before it and not delve into the substance of the case and allow further proceedings only where a case has been made for further investigation..

In the present application, the Association applicant says that its principal objective is to foster nurture, advance and advocate objectives that are in the best interest of children in public schools. In furtherance of its objectives, the applicant says that it receives regular reports from Parents Associations on the management and governance of basic education thus the reason why it has to be involved in the process of constituting Boards of Management.

According to the applicant, the Basic Education Act, 2013, (the Act) provides for the procedure and process of constituting Boards of Management which has to be through elective representation in the Boards of Management in those institutions but the applicant says that process was not followed and further that no elections were conducted in Kakamega County and blames the respondents for this failure to comply with the law. It has been argued on behalf of the applicant that, *sections 53*, *56, 57,* of the Act, the Third schedule to the Act and Regulation 6 of the Basic Education Regulations 2015, provide for the procedure of elections and minimum qualifications for those to be elected to the Boards of Management but that those provisions of law were ignored thus denying Parents Associations the right to participate in the management of their schools.

For purposes of ascertaining the soundness of the applicant's assertions, I have perused *section 55* of the Basic Education Act (No.14 of 2013) and it proves as follows:-

"55(1) - There shall be a Board of Management for every –

a) Pre-primary institution

b) Primary school

c) Secondary school

d) Adult and continuing education centre

e) Multipurpose development training institution or

f) Middle level institutions of basic learning

(2) Notwithstanding subsection (1) every school shall have a Parents Association which shall be constituted in the manner set out in the Third Schedule."

Section 56 of the Act gives the composition of the Board of Management established under *section 55* and gives the criteria for their appointment. Parent are required to elect six representatives and teachers are to elect one of their own among other people. However the section is clear that parents as well as teachers *shall elect their representatives*.

Under *section 57* of the Act, in constituting Boards of Management, issues such as ethnic and regional diversity of the people of Kenya, impartiality and gender equity, and *Article 10* of the Constitution must be taken into account. The Third schedule to the Act provides for the establishment of Parents Associations in public and private schools and composition of the membership of the Association as well as an executive committee. These are provided for under the law and how they come into existence is also clearly a process provided for by the Act and the Schedule. The applicant has argued that the constitution of the Boards was not done in accordance with the law and that it was done arbitrarily. The respondents on their part say that there are Boards already in existence and argue that representatives of parents in all schools have already been nominated, vetted and appointed, thus taking up their positions.

Having carefully considered this matter, I am satisfied that the applicant's assertions are neither frivolous, trivial, vexatious nor hopeless. They raise questions of law, impropriety of procedure as well as arbitrariness in constituting those Boards of Management. The respondents are public officers who exercise powers on behalf of the Parent Ministry and who are required to act within the law. It is therefore proper and appropriate that the process leading to the constitution of those Boards of Management as well as the legality of that process be opened for scrutiny, investigation and examination, to ascertain whether they were fair and complied with the law as required. For that reason I am persuaded that leave ought to be granted.

The applicant has also pleaded with the court that upon granting leave, the same should operate as stay of actions taken in constituting the Boards of Management. The respondent on their part have stated that Boards Management were constituted a while back and have been in office since September, 2015. The stage at which the process of constituting the Boards of Management has reached and considering that these are public institutions and those Boards are supposed to manage affairs of public schools including taking care of properties in those schools, I am of the view that it will be inappropriate to allow leave to operate as stay at this stage, and in the words of *Meggary J* in the case of *John vs Rees* (supra), in the exercise of my discretion whether or not to grant stay, I have to take into account the need for continued administration of those schools and allow them to continue functioning while the court conducts an inquiry as to how those Boards were constituted. Should the court after hearing the yet to be filed motion determine that they were not properly brought into office, they could of course be made to account should anything be found to have gone wrong in their institutions during their watch. I think that is the best course to take in this matter at this stage.

For the foregoing reasons, I allow the application dated 18th November, 2015 and make the following orders:-

1.) Leave is hereby granted to the Applicant to apply for orders of Prohibition directed to the respondents prohibiting the respondents or any of them or their servants or agents from howsoever vetting, appointing, inaugurating or constituting Boards of Management of Public Schools within Kakamega County and/or within Sub-Counties thereof without reference or unrelated to any Schools Parents Association elections and prohibiting the respondent or any of them from receiving lists of

nominees for vetting or appointment or inauguration as representatives of School Parents Associations on to Board of Management of Schools other than from lists under the hand of and certified by the applicant Association.

2.) Leave is hereby granted to the applicant to apply for orders of mandamus compelling the respondents to facilitate and let the applicant conduct elections and nominations by School Parents Associations under supervision of the applicant and compelling the vetting and appointment by the respondent of nominees by representatives of Schools Parents Associations from lists of nominees by Schools Parents Association under the hand of the Applicant Association accompanied by a certificate by the applicant's certificate of election confirming and authenticating conduct of election.

3.) Leave is hereby granted to the applicant to apply for an order of certiorari directed to the respondents to remove to the court and to quash nominations vetting and appointments and inauguration of representatives of Schools Parents Association onto Boards of Management of Schools in the 12 Sub-Counties of Kakamega County hitherto fore done by the respondents before determination of this application for Judicial Review.

4.) The applicant do file and serve the substantive motion on all interested parties within twenty one (21) days from the date hereof.

5.) The matter be mention on ... for directions.

6. Costs of the application to abide by the result of the motion.

Dated and delivered at Kakamega this 15th day of December, 2015.

E.C. MWITA

JUDGE