THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

AT NAKURU

Judicial Review 1 of 2012

IN THE MATTER OF AN APPLICATION BY

HOPEWELL HIGH SCHOOL LIMITED……APPLICANT

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW REMEDY OF CERTIORARI TO QUASH THE DECISION OF THE MINISTRY OF EDUCATION THROUGH THE DISTRICT EDUCATION OFFICE (BOARD) TO GIVE A NOTICE OF FORECLORE THE APPLICANT'S INSTITUTION NAMELY THE HOPEWELL HIGH SCHOOL

AGAINST

MINISTRY OF EDUCATION……...1ST RESPONDENT

PROVINCIAL DIRECTOR OF EDUCTION……..2ND RESPONDENT

DISTRICT EDUCATION BOARD, NAKURU……...3RD RESPONDENT

AND

IN THE MATTER OF EDUCATION ACT CAP 211, LAWS OF KENYA

RULING

The applicant, Hopewell High School, was granted by the Ministry of Education the 1st respondent, a provisional registration certificate on 24th May, 2005, for a period of eight months.

When this action was instituted in January, 2012, some seven (7) years later the school had not

obtained full registration.

Following successive inspection of the school and other complainants, the District Education Board, the 3rd respondent, on 9th November, 2011 gave the applicant a notice of closure upto 25th November, 2011.

The applicant then moved to court with this application for orders of *certiorari* and prohibition on the grounds that the 3rd respondent had no jurisdiction to issue the closure notice; that the 3rd respondent failed to furnish the applicant with the report it relied on to issue the closure; that the reasons for the intended closure had never been brought to the attention of the applicant; that the 3rd respondent itself gave the applicant an approval for full registration but on the other hand proceeded to frustrate the applicant's efforts to attain the registration.

The applicant's have further averred that it had fully complied with the directive of the assessment team contained in the report of 2011; that the notice of closure was maliciously issued as students were preparing for examinations and further that the closure of the school would adversely affect the future of the student.

In reply, on behalf of the 3rd respondent, its secretary in an affidavit dated 18th April, 2012 has maintained the notice of closure was procedurally issued as the Minister for Education has the powers to regulate the operations of both aided and unaided schools. According to the deponent the applicant having been granted an approval for full registration failed to comply with the requirements of such registration and is therefore in violation of the Education Act for operating a school without registration.

Finally, the 3rd respondent has contended that the closure notice having been effected on 25th November, 2011 an order of prohibition is not efficacious.

I have considered the above arguments and those contained in the written submissions together with the authorities cited. Before considering the above issues, it is important to dispose of procedural and technical points raised by the respondent namely that:

i) the application has not complied with **Order 53 rule 3(2)** in that all parties affected by it have not been served, that is, the Ministry of Education and the Provincial Director of Education, the 1st and 2nd respondents, respectively;

ii) **Order 53 rules 1(2)** has also not been complied with as the notice of motion was only served with the supporting affidavit and not a verifying affidavit, containing the facts being relied on (the evidence) and;

iii) the application is incompetent for failure to be properly intituled.

Starting with the last question, it is established, on the authority of **Farmers Bus Service & others** V. **The Transport Licensing Appeal Tribunal** (1959) EA 779 that prerogative orders, like the old prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person(s) who are to comply therewith.

For this reason, the form of the application ought to have reflected the Republic as the putative applicant instead of Hopewell High School Limited. Having said that the question is whether that failure in form is fatal to the entire application. Again on the authority of **Farmers Bus** (supra), the omission is merely on form and not substance. In that case, the court ordered the notice of appeal and other

pleadings to be amended.

A similar position was taken by the Court of Appeal in **Republic** V. **Charles Lutta Kasamani t/a Kasamani & Company Advocates** in Civil Appeal (Application) No.281 of 2005 where the judges noted that despite guidelines in **Mohammed Adhmed** V. **Republic** (1957) EA 523 and **Farmers Bus** (supra) on the proper form of heading an application for judicial review, the problem of the form of title persists. They said in that regard that:

"Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners. Suffice to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment."

See also **Dipak Panachod Shah & Another** V. **The Resident magistrate, Nbi. & The Attorney General** – Civil Application No. NAI 81/2000. The failure to properly head the application in view of these authorities cannot therefore be a basis for striking out the application.

Similarly, the confusion in the filing of a supporting affidavit instead of a verifying affidavit and the failure for the verifying affidavit to state the evidence relied upon are irregularities that do not go to the root of the dispute. The applicant filed with the application for leave both verifying and supporting affidavits and only an affidavit in support with the notice of motion. The verifying affidavit does not contain evidential facts relied on in the application. Instead that evidence is in the statement of facts. No prejudice has been caused by the mix-up.

I am, however, only concerned with practitioners who do not seem to take such mandane matters seriously. For instance, again in this application, the chambers summon for leave seeks the *"writ"* of *certiorari* and prohibition against the clear wording of **Section 8(1)** of the **Law reform Act** that:

"8(1) the High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of such prerogative writs of mandamus, prohibition or *certiorari*,

(2) In any case in which the High Court in England is, by virtue of provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom empowered to make an order of mandamus, prohibition or *certiorari,* the High Court shall have power to make a like Orders."

(Emphasis added)

No writs, except perhaps the writ of *habeas corpus*, can be issued by the High Court. Turning to the crux of this application, an order of *Certiorari* is intended to quash a decision made by a body without or in excess of jurisdiction or without compliance with the rules of natural justice.

It is the contention of the applicant that the 3rd respondent had no powers to issue the closure notice and that the 3rd respondent failed to bring to the notice of the applicant the complaints giving rise to the notice of closure. I reiterate that although the applicant was granted a provisional registration in 2005, todate, seven years later it has operated without registration, the provisional certificate having been issued for only 18 months.

This is so even after it was given the go ahead to apply for full registration in April, 2008. Although the applicant has deposed that the 3rd respondent has frustrated its efforts towards attaining full

registration, no evidence of those efforts has been presented in this application. All they have said in one of the letters to the 3rd respondent is that the school has been operating above board; being recognized as KCSE examination centre since 2005. In terms of **Section 15(1)** of **Education Act,** the Minister may cause an unaided school at once or to be provisionally registered for a period of eighteen months, depending on the circumstances of each case.

Even with the provisional registration, the Minister may give full registration within one (1) year if he is satisfied that the efficient and suitable instruction is being provided at the school. There is no evidence that after receiving the letter from the District Education Officer, Nakuru dated 9th April, 2008 informing the applicant of approval for full registration that an application as set out in the Second Schedule of the Education Act was submitted and the requisite fees paid. Apart from the issue of registration, previous investigations have found the school wanting in a number of areas.

For instance, a quality assessment report compiled by the Ministry of Education on 19th March, 2008 listed the following short-comings:

i) shortage of teaching staff;

ii) some structures (classrooms) are semi permanent and not sufficient.

While this report did not identify many shortcomings, the subsequent reports noted the following challenges:

i) the schemes of work were incomplete;

ii) teachers had no lesson notes but instead used text books when teaching;

iii) the school did not comply with the Ministry's policy guidelines on the minimum number of subjects to be offered;

iv) the school had hired untrained teachers;

v) there was a decrease in the student enrolment;

vi) the school had registered dismal performance in KCSE examinations;

vii) the student-text book ratio was imbalanced.

From the above, it appears to me that the applicant was in gross violation of Section 19 of Education Act which prescribed the minimum education standards to be complied with by all schools.

Similarly, it is apparent from the exchange of letters and various visits followed by reports that the applicants were all along aware of their challenges some of which they endevoured to address while others they did not yet new ones also emerged.

The only question to be determined is whether the 3rd respondent had the authority to issue the notice of closure. The District Education Boards are established under **Section 28** of the **Act**, appointed by the Minister for each District. The functions of the boards as far as the matter before me is concerned, according to **Section 31**, is limited to submit to the Minister such reports as the Minister may require:

- to superintend the management of public schools and
- to fulfill such other functions as the Minister may prescribe

Regulation 14 donates to the boards, powers to do anything that helps in the promotion of education and maintenance of standards. There is no express provision donating to the 3rd respondent the powers to close school. That power is retained and exercised only by the Minister in terms of **Section 16** to the effect that:

"16(1) Where the Minister is satisfied that an unaided school which has been registered under this Part is objectionable because the school:

a) fails to comply with paragraphs (a), (b) and (c) of section 15 (1); or;

b) is a place in which efficient and suitable education or instruction is not being provided; or;

c) is being conducted or managed in a manner which is, in the opinion of the Minister, prejudicial to the physical, mental or moral welfare of the pupils of the school, or to peace, good order or good government in Kenya; or

d) is a place in which a person is teaching who is not registered in the register of teachers kept under section 7 of the Teachers Service Commission Act and is not exempted under Section 22 of that Act from registration; or

e) fails to conform with regulations made under section 19: or

f) has not complied with a condition imposed under section 15(3).

the Minister may serve on the manager of the school a notice in writing specifying the respects in which the school is objectionable and requiring him to remedy those matters within a specified period not exceeding six months……...

(2) If the manager of an unaided school fails to remedy the matters specified in a notice served on him under sub-section (1) within the period specified therein, the Minister shall order the manager to close the school."

It is clear that although there were glaring breaches of the Education Act for which a closure notice was due, the notice that was issued was of no legal effects as it was not issued by the Minister. For that reason, even if the action had been taken as claimed by the 3rd respondent, such action was anulity *ab initio.*

The closure notice is for those reasons quashed by an order of *certiorari*. An order of prohibition in the circumstances is not available. The application is to that extent allowed with costs.

Dated, Signed and Delivered at Nakuru this 12th day of October, 2012.

W. OUKO

JUDGE