REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISC. CIV. APPLI. 13 OF 2002

IN THE MATTER OF AN APPLICATION BY ALI SELE, BENSON WAIRAGU,

JOSEPH NG'ETHE GITU

AND

IN THE MTTER OF AGAPHAN PRIMARY SCHOOL NAIROBI

AND

IN THE MATTER OF AGA KHAN EDUCATION SERVICE KENYA

AND

IN THE MATTER OF THE MINISTER FOR EDUCATION

AND

IN THE MATTER OF THE EDUCATION ACT (CHAPTER 211 OF THE LAWS OF KENYA)

JUDGMENT

By an application dated 23rd January 2002 the Applicants who described themselves as Chairman, and Treasurer respectively of the School Parents Association of the Aga Khan Primary School in Nairobi, seek a quashing order of the directive by Minister for Education to the effect that the Aga Khan Primary School be managed by the Aga Khan Education Service Kenya (AKESK).

The grounds upon which the relief is sought are that the Minister's directive/order is:-

(a) ultra vires and/or offensive of the Education Act.

(b) oppressive draconian and high handed

(c) unreasonable

(d) offensive of the rules of natural justice

(e) devoid of justification in a democratic society

(f) offensive of the rule of the right to legitimate expectation to consultation.

The application is opposed and parties have filed written submissions which I have taken into account in my judgment. I have also taken into account all the affidavits filed by the parties.

At the outset, the court is of the view that the application is incompetent in that in the statement no substantive judicial review orders have been sought contrary to O 53 rule 4 and therefore, the relief sought in the statement - namely leave, does not tally with the relief sought in the Notice of Motion. According to Order 53 rule 4, relief not sought in the statement cannot be relied on at the hearing.

O 53 rule 4(1) reads:-

"Copies of the statement accompanying the application for leave, shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supported on demand and no grounds shall, subject as hereinafter in this rule provided be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

In addition there is now available a wealth of case law on the point for example *R v MINISTRY OF PLANNING AND NATURAL DEVELOPMENT ex-parte NON GOVERNMENTAL ORGANISATION Misc Civil Application No. 1769 of 2004* where this Court held that failure to seek substantive judicial review orders in the statement is fatal.

However, in view of the time, this matter has taken to reach finality I would wish to adjudicate on the other points raised.

The Interested Party (I.P.) Aga Khan Education Service Kenya (*AKESM*) K has been described as a company limited by guarantee and duly incorporated under the provisions of the Companies Act Cap 486 of *LOK* and it is a non profit making organization whose principal objective is the provision of quality education in various schools that it manages since 1953. The land upon which the school which is the subject matter of these proceedings, is owned by Aga Khan Foundation "AKF" and leased to *AKESK*. AKF is said I have put up the vast majority of the buildings and facilities on the land. However, it is common ground that the parents have over the years chipped in. According to the applicants they have contributed Kshs 40 million for the school to put up various facilities but the IP has contended that this was exaggerated and the contribution is not more than 9 million.

It is against this factual background that the applicants centend that the Minister should have consulted them and given them a hearing before making the directive. They further contend that the absence of an identifiable decision/directive is not fatal to their application and that the Parent Association has locus to bring the matter to Court. The other principal ground is that the applicants claim that the school is a public school under the provisions of the Education Act.

As expected, the IP has denied all this. The Respondent was represented by the Attorney General who did not turn up but had opposed the application and had filed written submissions.

LOCUS

On the issue of locus my finding is that for purposes of judicial review, provided an applicant can demonstrate sufficient interest in the subject matter he should have the recognition of the court. Granted as argued by the IP that two of the Applicants have no kids in the school and only one has kids at the school at the time of the hearing of this application, I find that this is no ground to hold that the remaining parent has no locus. Since on the ground the school itself did recognize the existence, role and contribution of the Parent Association. I find that the Applicants do have standing to bring the proceedings. In judicial review unlike in Constitutional matters this court has been liberal on matters of standing so as to allow the fullest articulation of public law rights without unnecessary inhibition. In this case no right thinking person in Kenya would regard the Parent Association as a busybody.

IDENTIFIABLE DECISION

I agree with the applicants that the absence of an identifiable decision is not fatal to their application for the following reasons:-

(1) The Respondents and Interested Parties or affected parties have an obligation to fully respond to the challenge concerning the decision. They owe this duty to the court when the matter is filed. The court agrees with the reasoning of *Sir John Donaldson Mr* in *R v LANCANSHIRE COUNTY COUNCIL ex-parte HUDDLESTON [1986] 2 ALLER 941 at 945* observed:-

"Judicial review is a process which falls to be conducted with all the cards face upwards on the table and where the vast majority of the cards will start in the public authority's hands ... the defendants should set out fully what they did and why so far as necessary, fully fairly to meet the challenge."

Again in the case of *R v LONDON BOROUGH OF LAMBETH exparte CAMBELL 26 HLR618 at pg 622 Law J,* observed:-

"the council had given the court very little assistance towards the performance of its task of deciding whether there are here good grounds for judicial review. This is lamentable, since it is the duty of a local authority to place before the court the reasons for its decision under challenge so as to enable the court to ascertain whether there is a Wednesbury error."

A sufficient act is capable of sustaining an application for judicial review. Thus in the case of *R v SECRETARY OF STATE FOR TRANSPORT ex-parte LONDON BOROUGH OF RICHMOND UPON THAME S (No 3) [1995] Enx LR at pg 413 No 3 SEDLE J* held - "*the want of an identifiable decision is not fatal to an application for judicial review."* As held above I find and hold that this represents good law taking into account that many aggrieved applicants would have no means sometimes of identifying the decision in the absence of any discovery provisions upfront. Order 53 rule 7 only applies to the formal orders set out therein.

LEGITIMATE EXPECTATION

On the point that the applicants expected the Minister to consult the *Parents Association* although I agree with the learned Commissioner of *Assize Hon Birech* in the case of *Aga Khan Education Service Kenya v Ouma John Mark Onyango & 3 others HCCC No 283 of 2001* at Kisumu that the Parents Association has no recognition in the Education Act, on the ground the Ministry of Education and all those involved in the management of education are aware of the existence of the Association in many schools. Since legitimate expectation is a principle of fairness and it is pegged on practices and promises it was expected that the parents of the school would be alerted concerning the intended move. I do not agree with the IP argument that because the Education Act does not provide for the right to consult such a right cannot arise in law. I hold that it can arise from past dealings between the parties. Whether or not the PAs are part of the Education Act, their existence has been recognised in the Education system in Kenya. I do depart from the Commissioner of Assize on this point. In the case of *CCSU v MINISTER OF CIVIL SERVICE (HL)(E)[1985] IAC at page 401 Lord Fraser* observed:-

"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law."

It is not therefore unreasonable for the PA to have been consulted as regards the affairs for which they exist. However they do not in my view exist to mange schools. On the facts it is common ground that the body charged with the management of the school is AK E S (K), and it appears to have been aware of the decision by the Minister and they have in turn agreed to fill the gap left after the withdrawal of the additional teachers from the school. It is for this reason the court fails to see what benefit or advantage the applicants (PA) are losing or better still what bargain is being thwarted? If there is any bargain it was to the disadvantage of *AKES* (K) and not the PA and the *AKES* (K) does not take the withdrawal as a

diadvantage. There is no benefit or disadvantage to the applicant since the applicant cannot show any promise to consult them directly, or past practice by the Ministry to consult them instead of consulting the management of the school. The PA does not deny having been informed of the decision by the school management. They have not established a claim based on legitimate expectation. I set out the requirements for the establishment of legitimate expectation, in the case of *R v KENYA REVENUE AUTHORITY ex-parte ABERDARE FREIGHT SERVICES LTD Misc Civil Application No. 946 of 2004* and I wish to reiterate those holdings here. The PA has clearly not satisfied the requirements set in that case.

Under s 4 of the Teachers Service Commission (TSC) the *TSC* may assign any teacher employed by *TSC* for service in any public school or any unaided school. The assignment of teachers to an unaided school does not make the school a public school. In other words the involvement of the Government in the school was the provision of teachers by *TSC*. The challenged directive which was issued in late 2001 was to the effect that the Government would not continue giving assistance, by way of additional teachers through *TSC* to this particular school and to the other schools founded by *AKF* and run and managed by *AKES* (K). Upon receipt of the directive the *AKES* (K) did on a point of information send out a notice to the parents and teachers of the school informing them of the directive. This was sufficient notice.

ILLEGALITY & ULTRA VIRES ALLEGATIONS

The contention that the Minister acted ultra vires the Education Act cannot be sustained in that under s 6(b) of the Education Act, the Ministers powers are stipulated as under:-

"Every maintained or assisted school shall be managed by a board of governors or as the Minister may otherwise direct, in accordance with this Act and any regulations made under the Act."

Moreover, section 4(3) of the Teachers Service Commission Act, provides that the *TSC* may, with the consent of the Minister and subject to such conditions as he may impose, assign any teacher employed by the *TSC* for service in an unaided school. It is therefore quite evident, that the Minister's power to deny teachers to the school is within his general powers. If he has power to consent to the assignment it is incidental to those powers to decline to assign or withdraw the assignment.

In this regard I accept as good law the citation by the IP's Counsel of the *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 3rd Edn by SA de SMITH PP 10-11* where the learned author states:-

"The House of Lords has laid down the principle that "whatever may fairly be regarded as incidental to, or contigent upon those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires."

Is the Directive oppressive, draconian and high handed

I find no basis for this. It is within the discretion of the Minister through *TSC* to withdraw provision of teachers and it has not been suggested that the managers of the school are not able to fill the gap. Judicial review does not review the merit of a decision but the decision making process. In this case, the attack is directed on the merit of the decision and this is not the court's role.

Unreasonableness of directive

I find the suggestion that the Minister's directive could be unreasonable, as a misdirection in law on the part of the applicants. The decision not to provide teachers to the school in a situation where the Manager, namely, the *AKES* (K) has declared that it has the ability to provide the withdrawn teachers and is also fully managing four other schools on the same basis, can never even be regarded as unreasonable, using all the tests set out in the unrivalled case on the point, namely *ASSOCIATED PROVINCIAL PICTURE HOUSE LTD v WEDNESBURY COPORATION (1947) 2 ALL ER 680* where Lord Greene set out the principle and the tests as follows:-

"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law ... you may have something *so absurd that no sensible person could ever dream that it lay within the powers of the authority* (emphasis provided) ... That is unreasonable in one sense. Theoretically it is true to say - and in practice it may operate in some cases - that if a decision on a competent matter is *so unreasonable that no authority could ever have come to it* (emphasis provides) then the courts can interfere. That I think is right, *but that would require overwhelming proof* (emphasis provides), and in this case the facts do not come anywhere near such a thing."

I find that the Minister's directive cannot by any stretch of imagination be said to be Wednesbury unreasonable. I decline to intervene on the facts as outlined.

Were the Rules of Natural justice violated

The principle underlying the Rule are two-fold:-

(1) The rule against bias (non judex in causa sua)

(2) Hear the other side (audi alteram partem)

The applicants have not shown any bias by the Minister. Indeed the Minister had acted the same way in respect of the Aga Khan Schools before. It has not been shown that the Minister had direct or any interest in the directive. It has also not been demonstrated that there is reasonable suspicion appearance or likelihood of bias. In this respect and for the meaning of bias, the Court wishes to refer to the recent decision of a constitutional court of two judges in the case of *R v ATTORNEY GENERAL ex-parte HOME PARK CATERERS Petition No. 671 of 2006.*

As regards the second meaning namely "*hear the other side",* I have already held that the duty to consult the PA, if any, could only have arisen in respect of the matters ordinarily handled by PA's and since the PA was not involved in the management of the school, that duty cannot reasonably arise in their favour, if anything, it is the management who should be complaining for non consultation (but they are not) because the burden to provide the additional teachers now falls on them.

The court holds the view that as regards the assignment of teachers the Minister has unfettered discretion through the *TSC* and the audi alteram partem (hear the other side) is excluded - see *HALSBURY LAWS OF ENGLAND 4th Edition Vol 1 para 74 pages 20-21* where the learned authors state:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice ... In a given context, the presumption in favour of importing the rule may be partly or wholly displaced ... where Parliament has evinced an intention to exclude the operation of the rule ... by conferring on the competent authority unfettered discretionary power."

On the facts, I find no such breach of the audi alteram partem rule.

On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations where the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.

I respectfully agree with what was expressed by Turker LJ concerning the requirements of natural justice in the case of *RUSSELL v DUKE OF NORFORK [1949] I ALL ER* at 118:-

"There are in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being deal with and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted one essential is that the person concerned should have a reasonable opportunity presenting his case.

As the PA is not even mentioned in the Act, its legitimate expectations to be heard, could only have arisen on matters which it deals with and one of the matters is not management of the school or the assignment or withdrawal of teachers. The Act gives the *TSC* and the Minister unfettered discretion to act as appropriate which is what they have done without the school managers being prejudiced otherwise they should have been the aggrieved party. I find no need of prior hearing in the circumstances. And I further find that the applicants have miserably failed to establish or prove the requirements necessary in all legitimate expectation claims.

Is the School Public and who owns it

Section 2 of the Education Act provides that only schools managed and maintained by a local authority are defined as public schools. This is not one of them and cannot be since the land on which the school is built and the buildings are owned by the AKF (not made party to these proceedings) since 1951 and the school has always been managed by the *AKES*, K since its inception. Surely the applicants and each generation of parents cannot be allowed to claim ownership by virtue of voluntary (harambee) contributions. Ownership is a matter of land law and on the facts, the *AKF* owns both the land, buildings and fixtures. I find that the PA contribution is exaggerated, in that the evidence exhibited shows that school fees constitutes the main source of revenue for the school.

Whether directive is devoid of justification in a democratic society

The applicants contention based on this ground is a stranger to the judicial review jurisdiction. There is no such ground for intervention in judicial review.

CONCLUSION

As is apparent from the above analysis, the applicants have in addition to the first ground of fatal incompetency in not seeking any judicial review orders in the statement, failed to establish any of the grounds upon which the application is based.

For this reason the application is dismissed with the costs to the Interested Party (IP) only since the Respondent through the Attorney General did not attend the hearing.

DATED and delivered at Nairobi this 11th day of July 2008.

J.G. NYAMU

JUDGE

Advocates

Miss Githui - Advocate for the Applicant

Mr Njoroge Regeru - Advocate for the IP