

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. CAUSE NO. 266 OF 2017

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS BY
WAY OF JUDICIAL REVIEW**

5 **BETWEEN**

1. **ENG. DANISH DULLO**
2. **FLORENCE OBUA.....APPLICANTS**

AND

1. **BOARD OF GOVERNORS, AGA KHAN EDUCATION SERVICES
10 (UGANDA)**
2. **COMMISSIONER PRIVATE SCHOOLS AND INSTITUTIONS ,
MINISTRY OF EDUCATION AND SPORTS.....RESPONDENTS.**

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

15 **Introduction**

The applicants sought sixteen orders under section 3 of the Judicature Act No. 3 of 2002, rules 3, 4,6,7 and 8 of the Judicial review Rules 2009. The orders are so many that I need not repeat them here. Suffice it to summarise them as follows:

- 20 1. A declaration that the 1st respondent is improperly constituted and so exercising its mandate illegally.
2. A declaration that all decisions made by the 1st respondent without approval of the Minister of Education and Sports and approval of a duly constituted board of governors to increase its school fees are illegal, null and void and of no effect.
- 25 3. A writ of certiorari removing the record and quashing the decision of the 1st respondent made on the 23rd day of June 2017 to increase the termly school fees paid by the applicants.

4. A writ of mandamus directing the 2nd respondent to exercise its statutory role to investigate and cause the inspection and audit the 1st respondents books of account.
5. A writ of prohibition prohibiting the 2nd respondent from approving the school fees increase .
6. An injunction restraining 1st respondent or their agents from expelling the applicants' children for their refusal to pay the increased fees .
7. General , aggravated, exemplary and punitive damages and interest on the said damages.

10 The grounds of the application are contained in the affidavits in support and rejoinder of Eng. Danish Dullo, Florence Obua respectively.

The respondent filed an affidavits in reply of Mahmood Manji and Fred Tukahirwa opposing the application .

Representation

15 Ms Simon Tendo Kabenge & co. advocates and Kavuma Kabenge & co. advocates appeared for the applicants while Shonubi, Musoke & Co. advocates appeared for the respondents.

Applicants' case.

20 It was the applicants' case that the two are parents of children who attend the international section of the Aga Khan Education Services. According to eng. Dullo, the 1st respondent named as 'Board of Governors of Aga Khan Education services' (the board in brief) has failed to cause the formation of management committee and a parents teachers association in compliance with the law .

25 He further states that the 1st respondent (the board) is illegally constituted and does not have all the required members.

It was further the evidence of eng. Dullo that on 23rd June 2017, the Board in its illegal form increased termly school fees exorbitantly . document H1 shows that key stage 1 class, the fees is now 3,739,000/; key stage 2 the fees is now 4,740,000/.

5 As a result, eng. Dullo and other parents held a meeting on 13th and 19th July 2017 during which meeting it was agreed that the parents' concerns be brought to the attention of the board which eng. Dullo by a memorandum dated 9.8.2017 marked 'O'.

On the same day, 9.8.2017, the school management (Tukahirwa , interim country manager and Apolo Gabazira regional CEO) wrote a letter to parents explaining the fees increment.

10 According to Dullo, this was an attempt by the Board to pre-empt the parents' petition.

Dullo complains that the school management has completely ignored his complaint and that of other parents.

15 According to Dullo, after realizing the Board would not respond to the parents' memorandum, he wrote a complaint to the Commissioner, Private Education, Ministry of Education and Sports (2nd respondent) on 9.8.2017, the same day as other letters discussed above.

It was the evidence of Dullo that on 11.8.2017, the Board responded to his complaint and offered the same discounts as earlier communicated by the interim country manager but which Dullo called ridiculous, unjust and unfair.

20 According to Dullo, the board maintained its decision and promised future increases over the next two years.

The affidavit in rejoinder of Florence Obua supports Dullo in as far as it reiterates the complaints of hiking fees by 100% and a promise of another 200% in the next two years , and inadequate discounts offered by the board .

25 The following facts emerge from an evaluation of the applicants case.

Parents under the leadership of eng. Dullo held meetings on 13th and 17th July 2017 where they expressed dissatisfaction with the high charges the school had imposed. I

have examined the minutes of these meetings marked M and N . Noteworthy is that the resolutions of the meetings are silent on the decision to litigate over the increases.

The dissatisfaction of parents was prompted by increase in fees by the school management by a letter to parents dated 23.6.2017.

- 5 Central to the applicants' case is that the Board is not properly constituted in accordance with the law and that therefore, the increase in fees is illegal.

The 1st respondent's case

10 It was the 1st respondents' case is that the Aga Khan Education services has a legal existence with a certificate of incorporation ; the circular dated 9.8.2017 explains the background to the fees increment; the respondent runs a private school whose fees are affordable; the applicants eng. Dullo and Florence Obua were not targeted for discrimination as the circular was addressed to all parents; the two freely opted for the international section of the school which is more expensive than the section that runs the national curriculum ; the two applicants freely entered into a contract with the 1st respondent ; the issues raised in the application would better be addressed in a suit; the current dispute is being handled by the Ministry of Education and Sports; the two applicants have paid the disputed fees; the two applicants have no locus to bring a representative suit.

15 Several facts emerge from the above analysis. The Aga Khan Education Services is a limited liability company incorporated on 22nd April 1992 with seven directors and admits the fees increment .

Preliminary issues raised by counsel for the 1st respondent.

Applicants have no locus to bring a representative suit

25 Counsel for the 1st respondent submitted that the applicant did not obtain a representative order prior to filing the application for judicial review and therefore have no locus standi. Counsel cited **Tumuhamye & anor v Nakamya HCCS No. 42 of 2015** where the court found that persons referred to in the plaint were a group of persons with a common interest and therefore a representative order ought to have been obtained prior to filing the suit.

I have carefully examined the affidavits in support and rejoinder. Although eng. Dullo and Florence Obua make reference to minutes of meetings with other parents, they present their complaint in the singular and do not purport to represent them.

Therefore a representative order was unnecessary.

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The application is supported by an incompetent affidavit.

Counsel for the respondents submitted that the affidavit of eng. Dullo contains a falsehood that he is a Ugandan national yet he is a Kenyan national.

10 In rejoinder, counsel for the applicant submitted that in para. 1 of his affidavit, eng. Dullo states

‘ I am an adult Ugandan of sound mind...’.

According to counsel , the deponent meant he is a resident of Uganda.

I agree with counsel for the respondent that this is a falsehood because he is a Kenyan national as deponed by Turyakira in his supplementary affidavit.

15 This finding notwithstanding, the **Supreme Court Election Pet. 1 of 2001** set the principle that an affidavit can be severed so that the court acts on the relevant parts. I will therefore disregard the false averment that eng. Dullo is a Ugandan but consider the rest of the contents of the affidavit.

20 ***Applicants sued non –existent party.***

Counsel for 1st respondent submitted that section 28 Education Act 13 of 2008 makes it mandatory for the Ministry of Education or the District Education Officer to constitute a board of governors for any education institution by a notice published in the Gazette. Counsel submitted that the board cannot be in legal existence because of the decision of **the Const. 25 Petition No. 21 of 2016 Rubaramira Ruranga v EC and another** that declared local councils unconstitutional. Regulation 3 of the third schedule to the Education Act provides for membership of a board of governors to include one nominee of the local council. It was

counsel's submission that this means a board of governors cannot be legally in place and therefore the applicant sued a non-existent party.

In response, counsel for the applicants submitted that their argument is that the board is improperly constituted and it is therefore exercising its mandate illegally.

5 Having addressed myself to regulation 3 of the third schedule to the Education Act, I find that a board of governors is required to have six categories of members as follows.

Five members including a chairperson nominated by the foundation body; one local government representative nominated by the district council's standing committee responsible for education; two representatives of parents of the school; two representatives
10 of staff elected; one representative of old students.

This adds up to a membership of thirteen. Of these, one is a member of the local council which local council is not specified.

The absence of one member by default because elections of local councils I and II have not been held in accordance with Const. Pet. No. 21 of 2006 does not render a board of
15 governors non-existent in law.

An examination of the affidavits in support and in reply show that at all times, communication by the school was by Fred Tukahirwa, interim country manager and Apollo B. Gabazira Regional CEO. The affidavits in reply do not refute the charge that they have no board of governors. Therefore it is a fact that the school under the Aga Khan Education
20 services does not have a board of governors.

I considered retaining the Aga Khan education services as a party but this is limited liability company which owns the school but may not be directly involved in its management.

As submitted by counsel for the 1st respondent, where a non-existent party is sued, there is no suit and the case must be dismissed.

25 In the absence of a board of governors, the decisions of the officials of the 1st respondent cannot be subject to judicial review because those decisions are made by private individuals and not a statutory body.

The applicants' expectation that this court should make a finding that the 1st respondent is in breach of the Education Act is not valid because it is not for this court to turn itself into the enforcement agency of the Education Act .

5 The role of this court in an application for judicial review is to review decisions of statutory bodies and not to enforce compliance with the statute by responsible persons where the body has not been established in the first place.

As the board of governors is not in place, I accordingly dismiss the suit as against the 1st respondent.

Actions and omissions of the 2nd respondent.

10 The application is therefore with respect to actions or omissions of the second respondent who did not file an affidavit in reply.

The other two preliminary points raised by counsel for the 1st respondent are

- The procedure adopted is improper
- the applicants ought to have exhausted available remedies

15 These points will be discussed as I look into whether the applicants are entitled to a writ of mandamus against the 2nd respondent to cause an inspection of the 1st respondent's accounts within thirty days .

20 The applicants prayed for a writ of mandamus directing the 2nd respondent to exercise its statutory role to investigate and cause the inspection and audit of the 1st respondent's accounts within thirty days.

In para 18 of the affidavit of eng. Dullo, he affirms that on 11.8.2011, he petitioned the 2nd respondent about the increase in fees and on 14.8.2017, the Permanent Secretary Ministry of Education and Sports wrote to the Board of Directors, Aga Khan Education Services to respond to allegations of exorbitant hike in fees among other concerns.

25 Before the Permanent Secretary could complete his work, the applicants filed this application for judicial review on 18.8.2017 just four days after the commencing an inquiry.

Obviously , there is nothing to suggest the 2nd respondent has failed to exercise its statutory duties under the Act. Instead, the Permanent Secretary promptly responded to the concerns raised by eng. Dullo in his letter to the Ministry dated 9.8.2017.

5 The Education Act has in built mechanisms for addressing non-compliance with the Act including an Appeals Tribunal established under section 53 of the Act.

This application for judicial review was therefore brought prematurely before exhausting the available procedures under the Education Act.

It is accordingly dismissed with costs to the 1st respondent only as the 2nd respondent did not participate in the proceedings.

10 **DATED AT KAMPALA THIS 31st DAY JANUARY 2018.**

HON. LADY JUSTICE H. WOLAYO