



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 95 OF 2014

G N (MINOR) *SUING THROUGH G N*

(*FATHER AND NEXT FRIEND OF THE MINOR*)..... PLAINTIFF

VERSUS

CHUMANI SECONDARY SCHOOL BOARD OF MANAGEMENT DEFENDANT

RULING

Issues

1. The issues before the court are whether suspension or expulsion from school of a student minor under a disciplinary process following his fighting in school with another student is a breach of his right to education and best interest of the child; and whether, therefore, an order for reinstatement of the student to school may be granted.

Cardinal principle

1. It is a cardinal constitutional principle under Article 53 (2) that in considering matters relating to a child, the best interests and welfare of the child are of paramount consideration. The Article specifically provides:-

“(2) A child’s best interests *are of paramount importance in every matter concerning the child.*”

Under Article 53 (1) (b) a child has a right to free and compulsory basic education, which right is given effect by the Basic Education Act No. 14 of 2013.

1. Section 35 of the Basic Education Act provides as follows:

“35. (1) Pupils shall be given appropriate incentives to learn and complete basic education.

(2) No pupil admitted in a school, subject of subsection (3) shall be held back in any class or expelled from school.

(3) Subject to subsection (1) the Cabinet Secretary may make regulations to prescribe expulsion or the discipline of a delinquent pupil for whom all other corrective measures have been exhausted and only after such child and parent or guardian have been afforded an opportunity of being heard:

Provided that such a pupil shall be admitted to an institution that focuses on correction in the context of education.”

The Application

1. By a Complaint dated 30th July 2014, through his father and next friend, the plaintiff minor, a Form Four student at the Defendant’s school, and who is scheduled to sit his final Kenya Certificate of Secondary Education examinations in October this year, sought a reinstatement order for student together with damages and cost of the suit following the suspension from school of the student on 4th June 2014. By a Notice of Motion of the same date, the plaintiff sought an interlocutory order for reinstatement to school of the student pending the full hearing of matter.

2. The plaintiff’s case is presented simply as an enforcement of the constitutional provisions of the interests and welfare of the child under Article 53 (2) of the Constitution of Kenya 2010. It is conceded that the applicant student ‘did engage in a fight with his classmate J K and during the commotion J K was slight injured.’ Following the fight which involved the student the subject of this application, the victim J K and four other students and report thereof to Kilifi Police station, the parents of the involved students settled the matter at the police station. The student wrote a letter of apology seeking forgiveness. When the said parents sought to have the school close the matter on the basis of the compromise among the parents, the school declined and instead suspended the students. The plaintiff/applicant contended that the school’s action was a violation of the student’s right to education and contrary to interests of the child under Article 53 (2) of the Constitution.

3. The defendant’s case is set out in the affidavit of the School’s deputy Principal Mr. Nicolas Githua Wanjiku sworn on the 24 the September 2014. The plaintiff/applicant together with the four boys who had assaulted a fellow student were, in accordance with section 12 of the School’s Regulations, suspended for two weeks to allow investigations into the matter. Without involving the School, the matter was subsequently settled by the parties at the Police Station where it had been reported. Upon investigation of the matter, the

school's Discipline Management Committee considered the matter one of grave misconduct of criminal nature having been reported to Kilifi Police station and consequently referred the matter to the school's final decision making organ, the Board of management. The Board resolved to suspend the plaintiff/applicant from school and only allow him to report back to school on the rehearsal day before the taking of the final KCSE exams. In opposing the plaintiff/applicant's application, the school points out that the plaintiff/applicant has not exhausted the school's appeal mechanism which provides for appeal to the Full Board of Management and thereafter to the District Education Board and finally to the County Education Board. The school explains its decision to keep the plaintiff/applicant out of school by reason of security concerns for himself and the other students for the plaintiff/applicant 'is not in good communication with other students' who 'feel intimidated when he is around'. The school reckons that for this reason, it had to provide an extra guard to supplement the regular school guards when on 11th September 2014, the plaintiff/applicant had been invited to school to present his agriculture project paper. The school therefore urged that the plaintiff/applicant's application be dismissed.

Hearing of the Application

1. On account of the August Court vacation, the application, though filed on the 31st July 2014, was set for hearing when this court resumed on 17th September 2014. The file was placed before me on the 18th September 2014 and noting the urgency of the matter, I directed that the application be served for hearing on the 23rd September 2014, when upon request by the State for time to take instructions to enable them file a replying affidavit, the application was adjourned. The matter eventually came up for hearing on the 26th September 2014 when upon hearing the plaintiff/applicant and State Counsel, Ms. Namahya, for Defendant/respondent, again on the basis of its urgency, I reserved ruling for the 29th September 2014.

Determination

1. Existence of appeal procedure is no bar to judicial review of administrative action. Lengthy and dilatory appeal procedures would have been inappropriate in the circumstances of this case where the application for a remedy is time-bound to the shortly forthcoming KCSE examinations and the necessary pre-exam revision. Although the proceedings are commenced as a normal action, the nature of the claim is one of constitutional application under Article 22 or judicial review under the court's supervisory jurisdiction under Article 165 (6) of the Constitution. Indeed, the applicant cites Articles 22, 23 and 53 in his suit for enforcement in respect of the student, the Bill of Rights provision on the rights of the child under the latter Article, as quoted above.

2. The plaintiff/applicant's application for reinstatement of the student into the school in the Notice of Motion dated 30th July 2014 is in the nature of a prayer for an interlocutory mandatory injunction. It is trite law that interlocutory mandatory injunction may be given in clear cases where the plaintiff/applicant demonstrates his right to the relief sought. See *Kamau Mucuha v. The Ripples Limited*, Court of Appeal Civil Application No. NAI. 186 of 1992 (NAI.77/92 UR).

3. There cannot be any contest that a school is entitled to ensure the discipline of school students and for that purpose to take punishment decisions that may include the expulsion of students from the school. However, consistently with the constitutional right to basic education, the decision of the school to expel must be exercised in accordance with the due process established by the law and the school's regulations. Section 35 of the Act has made provision for the discipline of students in a manner that accords to the right to basic education of the students. Suspension or expulsion of a student minor may not breach his right to education and to paramount regard of best interest of the child if it is done in accordance with due process established by the provisions of the Basic Education Act or other law unless such law can be shown to be unconstitutional.

4. With regard to adequacy of damages, I am prepared to accept that the breach of the student's constitutional right to basic education is not adequately remediable by an award of damages as the loss - occasioned by his expulsion from school and therefore lack of opportunity to adequately prepare for the forthcoming KCSE examinations - of the student's education qualification by passing his examinations may affect adversely his ability to progress to further studies and, consequently, the quality of his future life.

5. The best interest of the child, the student herein, requires that the student be allowed to continue with his studies in the crucial period of his revision for his final examinations in his secondary school education. The defendant/respondent's concern on the security of the other students, or of the student, upon return of the student to the school cannot override the paramountcy of the student's right to education and his best interest in pursuing education qualification by taking the final secondary school examinations. The defendant/respondent's safety defence is ambiguous and contradictory: while it is offered as a reason to keep the student from the school for his own security from other students with whom, it was alleged, "he is not in good communication", it was also claimed that the school had to pay for "an extra guard as other students feel intimidated when he is around".

6. The defendant/respondent's decision that the student would not be allowed back to school except on the rehearsal day prior to the commencement of the Kenya Certificate of Education Examinations clearly amounts to an expulsion from the school as the student is only allowed back to school for purposes of taking the national examinations for which the student is registered to sit at the school. For all other purposes, the student is required to stay out of the school effectively on expulsion for his indiscipline. The peremptory expulsion of the student is contrary to student's right to basic education and procedure for the discipline of students under section 35 of the Basic Education Act, quoted above. The school did not show that expulsion was the last resort penalty after exhausting all other corrective measures and that the student and his parent were given an opportunity to be heard, in accordance with regulations prescribed by the Cabinet Secretary for that purpose under section 35.

7. Even assuming that the defendant/respondent's concerns for the security of the student and other students are legitimate – although at this stage the evidence is by affidavit only without cross-examination of deponents - the said concerns must be considered as against the student's right to education and to the paramountcy of his best interests. I note that the school was, on the day when it invited the student to go to the school to present his Agriculture Project paper, able to hire an extra guard for the security of other students whom the student herein intimidated and for his own security. There is no reason why such arrangement cannot be continued for the short period of slightly over a fortnight [the student informed court that the examinations begin on 13th October 2014] and cost of such extra guard would be an expenditure which the defendant may recover from the plaintiff/applicant, if eventually successful. I would, however, agree with counsel for the defendant/respondent that providing security for the student as well as other students may be a challenge in the night should the student be readmitted to the boarding section of the school. The student's father confirmed on query by the court that the student is able to commute to school as a day scholar.

8. I find that the student has a clear right to education and to his interests being held in paramount regard as against the defendant/respondent's authority to discipline the student in the circumstances of this case where the applicable law – section 35 of the Basic Education Act, No. 14 of 2013 has not been shown to have been complied with. The balance of convenience lies with promoting the student's rights as against the defendant/respondent.

Orders

1. Accordingly, for the reasons set out above, I make the following orders on the plaintiff's application dated 30th July 2014:

1. An order for the immediate reinstatement to the school by the defendant/respondent of the student the subject of this suit, G N, to enable him pursue and attend classes with the school's teachers for purposes of revision together with other Form Four candidates in preparation for the 2014 Kenya Certificate of secondary education examinations.

2. The student will attend the school on the basis of day scholarship while commuting to school every day.

3. The defendant/respondent may, as necessary, engage hired guard to maintain security for the student and the other students in the school, which cost will become part of the costs in the cause in favour of the successful party upon hearing and determination of the main suit.

4. The costs of the application will be costs in the cause.

1. The plaintiff's suit may be set for full trial of the remainder of the cause of action on dates to be fixed in consultation with the parties.

Dated, Signed and Delivered on the 29th day of September 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Plaintiff in person

No appearance for the Defendant/Respondent

Ms Linda - Court Assistant



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