**AGA KHAN EDUCATION SERVICE KENYA V REPUBLIC AND OTHERS**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of ruling:** 19 March 2004

**Case Number:** 257/03

**Before:** Omolo, Tunoi and O’Kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Judicial review –* Certiorari *– Stay of order – Decision by the Ministry of Education to allow privatisation of a public school – Date of order not identified – Whether failure to identify date of order fatal to application for leave.*

*[2] Judicial review – Procedure –* Ex parte *leave – Parents’ association obtaining* ex parte *leave to contest school privatisation order by Minister – Circumstances under which* ex parte *leave may be set aside.*

**Editor’s Summary**

The Appellant was a body charged with running Aga Khan Primary School in Nairobi. The Appellant was running the school in collaboration with the Respondents, who were members of the Parents’ Association. The school was a public school, and its teachers were provided and paid by a government entity. The parents paid fees and development levies, while the Appellant contributed to developing the school facilities.

In November 2001 the Chairman of the Appellant informed the Parents’ Association that the Ministry of Education had mandated the Appellant to privatise the public schools it was managing, including the Aga Khan Primary School. The Association, which had not been heard prior to the privatisation order, moved the Court for leave to apply for an order of *certiorari*. The Association also sought a stay of the privatisation order.

Leave and stay were granted *ex parte*. After the substantive judicial review application was filed and served upon the Appellant, the Appellant brought an application under the inherent jurisdiction of the

Court seeking to set aside the *ex parte* orders for leave and stay. The Appellant claimed that the

Respondents had not shown a *prima facie* case that the alleged order sought to be quashed had not been properly identified and that there were no facts to support the prayer for judicial review. The Appellant’s application was heard and dismissed. The Appellant appealed.

**Held** – In order to enable a judge to grant leave under Order LIII of the Civil Procedure Rules, there must be *prima facie* evidence of an arguable case (*Njuguna v Minister for Agriculture* [2000] 1 EA 184 followed; *R v Secretary of State* ex parte *Harbage* [1978] 1 All ER 324 adopted). This leave can subsequently be set aside upon application to the judge who granted it, or any other judge if the former is not available. However, the jurisdiction to set aside leave already granted is one to be exercised very circumspectly or sparingly. Leave shall not be granted for an application for *certiorari* unless the decision sought to be challenged was made less than six months previously. The burden is on the applicant to satisfy this condition. While the date for the order in this case had not been indicated, the Judge had sufficient material to entitle him to take a *prima facie* view that the Respondents were seeking leave within the prescribed period.

The Judge was entitled to grant the Respondents leave on the basis of the facts placed before him.

Appeal dismissed with costs.

*Per curiam:* Unless the case is an obvious one where there are no prospects at all of success, practitioners should be discouraged from following the grant of leave with applications to set aside leave. The mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.

**Cases referred to in Judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Njuguna v Minister for Agriculture* [2000] 1 EA 184 – **F**

***United Kingdom***

*R v Crown Prosecution Service* ex parte *Hogg* [1994] 6 Admin LR 778

*R v Customs and Excise Commissioners* ex parte *Eurotunnel plc* [1957] CLC 392

*R v Environment Agency* ex parte *Leam* [1998] Env LR D1

*R v Secretary of State* ex parte *Harbage* [1978] 1 All ER 324 – **A**

*R v Secretary of State for the Home Department* ex parte *Begum* [1989] 1 Admin LR 110

*R v Secretary of State for the Home Department* ex parte *Chinnoy* [1992] 4 Admin LR