JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 180 OF 2016

BETWEEN

SHEIKH ISMAIL DAUDI (suing as next friend for AISHA DAUDI) ..... 1ST PLAINTIFF

ALI SAIZI (suing as next friend for AISHA SAIZI and SAHARA SAIZI) ..... 2ND PLAINTIFF

47 OTHERS (on their own behalf and on behalf of the students dismissed together with the within students and their respective next friends) (SEE THE ATTACHED LIST) ..... 3rd PLAINTIFF

AND

THE REGISTERED TRUSTEES OF AL-BARAKAH CHARITY TRUST ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs Chidothe and Master, of Counsel, for the Plaintiffs
Messrs Malijani and Sudi, of Counsel, for the Defendant
Ms. A. Mpasu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

On 26th April 2016, the Plaintiffs commenced an action by a specially endorsed writ of summons seeking the following:

"a) *A declaration that the within decisions of the Defendant and/or school authorities violates the students' right to Administrative Justice.*

b) A declaration that the within decisions of the Defendants and/or school authorities violates the students' right to education

c) A declaration that the within decisions of the Defendants and/or school authorities violates the students' right to development

d) A declaration that the within decisions of the Defendants and/or school authorities are unlawful

e) Damages on violation of the right to Administrative Justice

f) An order setting aside the dismissal of the students herein

g) An order of permanent injunction restraining the Defendants either by themselves, their servants or agents or however from implementing or continuing to implement their decision to dismiss the students herein or preventing the students herein from pursuing their studies and sitting for or writing National Examinations at Mama Khadija Girls Academy or aiding or abetting or facilitating the same or doing anything with the like effect

h) Costs of this action"

On the same day, the Plaintiffs were granted an ex-parte interlocutory injunction to restrain the Defendant from implementing or continuing to implement its decision to dismiss 49 students or preventing them from pursuing their studies and sitting for or writing National Examinations at Mama Khadija Girls Academy or aiding or abetting or facilitating the same or doing anything with the like effect until the hearing and determination of the originating summons or a further order of the Court [hereinafter referred to as the "injunction"].

The facts, as can be gathered, lie within a narrow compass. On or about 8th March 2016, the Defendant noted that over 100bags of maize, beans and other foodstuffs were missing from its warehouse. The Defendant reported the same to police at Namwera. The Police, on 14th March 2016, arrested one teacher and a stores clerk [hereinafter referred to as the "detained persons"] for further questioning. Two days later, students started boycotting food. Upon being asked about the boycott, the students demanded the immediate and unconditional release of the detained persons. The students left the campus and camped at Namwera police station where they demanded the immediate and unconditional release of the detained persons. The police refused to release the detained persons and this did not go down well with the students. The students then went back to the campus and started rioting, pelting stones at offices, classrooms and other school property. As a

result of the riots, the school was closed indefinitely and students were ordered to immediately leave the campus. Following enquiries, 51 students were expelled.

The Defendant has moved the Court to strike out the Plaintiff's action on the ground that the action was wrongly commenced, for being irregular, against public policy and an abuse of court process. The Defendant also seeks an order vacating the injunction on three main grounds, namely, that (a) the injunction was obtained wrongly and irregularly by suppression of material facts, (b) the injunction is supporting an illegality, and (c) there is no triable issue.

For reasons that will become apparent in a due course, I have not found it necessary to recite in any detail the various aspects of the evidence and the legal arguments advanced by Counsel. Instead, I have opted as a matter of prudence to address what in my view constitutes the threshold question, namely, whether or not the action herein was correctly commenced.

The Defendant contends that the action herein ought to have been commenced by way of judicial review and not by writ of summons. In trying to get a full appreciation of the Defendant's argument, it might be useful to set out in full the relevant parts of the Defendants' written submissions:

> *"4.1.6 It is undisputed that the Defendant is a private institution. However, when it comes to execution of its duties or functions, namely, the running of a school and the decision to admit or expel a student, they fall within the ambit of a public law duty. Such functions affect the right which the public as well as the Constitution protect (section 25 of the Constitution). Again the same Constitution under section 43 provides for lawful and fair procedural administrative action.*
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> *4.1.7 Despite the Defendant being a private institution, it performs public law duties as functions namely the admission and expulsion of students. Thus any such decisions are susceptible to judicial review. See* ***Chioza v Board of Governors of Marymount Secondary School****;* ***Ridge v Baldwin****;* ***Mangani v Trustees of Malamulo School of Medical Science****; Order 53/14/25 supra.*
>
> *4.1.8 Having shown that the Plaintiff's action is susceptible to judicial review, it follows therefore that the Plaintiff's action was wrongly commenced by writ of summons. It ought to have began by judicial review where the court would have reviewed the decision making process of the Defendant.*
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> *4.1.9 Per the Plaintiff's writ of summons and affidavit in support of the injunction, it is clear that the Plaintiff seeks to establish that a decision of the defendant infringed the rights which are entitled to protection under public law. In such a situation the law is clear that such actions must proceed by way of judicial review.* ***See Koreai v Designated Board Schools, Supra****.*

*4.1.10 Where the Plaintiff wrongly and irregularly commenced the proceedings by way of ordinary action which proceedings ought to have began by judicial review, the law is perfectly clear that such action must be summarily dismissed. See **Koreai v Designated Board Schools**, supra.*

4.1.11It follows therefore that the interim injunction was irregularly obtained. The court should therefore discharge the order of interim injunction herein."

The Plaintiffs are of the opposite view. They maintain that the case was properly commenced by way of writ in that the action herein deals with a private body and not a public body. Counsel Chidothe further argued that some of the remedies sought by the Plaintiffs are only available when an action is commenced by way of writ and not otherwise.

The Plaintiffs also advanced an alternative view. Counsel Chidothe submitted that in the event that this Court finds that the action was wrongly commenced, the remedy does not lie in striking out the action but in converting it to a proper mode of commencement. Reliance was placed on Order 2 of the Rules of Supreme Court (RSC).

I have considered the submissions by both Counsel and I cannot agree more with the submissions by Counsel Malijani that the cases of **Chioza v. Board of Governors of Marymount Secondary School [1996] MLR 109** [Hereinafter referred to as the **"Chioza Case"]** and **Koreai v. Designated Board Schools [1995] 2 MLR 649** [Hereinafter referred to as the **"Koreai Case"]** are direct decisions on point.

In **Chioza Case**, the High Court held that:

"...the remedy for judicial review will not lie against those carrying out private duties. However, whilst the respondents may be performing certain private functions in the running of the school, they fall within the public domain when they perform such functions as the admission or expulsion of students from the school, thus rendering their decisions in the respect susceptible to judicial review."

Further, a perusal of Order 53/14/25 of the RSC shows that it answers the question "against whom does judicial review lie". In **Ridge v. Baldwin [1964] A.C 40**, the court stated that judicial review now lies against an inferior court or tribunal, and against any persons or bodies which perform public duties or functions. The court went further to say that the remedy of judicial review may lie against any persons or bodies which perform public duties or functions. What this means, therefore, is that the remedy will not only lie against public officers or institutions but even private institutions that carry out public duties or functions.

In **Koreai Case,** the Plaintiff commenced an action for a declaratory order and an injunction to restrain the defendants from acting on certain invoices and expelling pupils who had refused to pay the new tariff of tuition fees. On the same day, the Plaintiff was granted an interim injunction order, on an ex-parte summons, restraining the defendants from excluding the Plaintiff's children from school on the grounds of refusal to pay school fees.

In the course of its judgment, the Court dealt with the issue of whether or not the plaintiff had rightly commenced the proceedings by way of ordinary action and it remarked as follows, at page 651:

> *"The Defendant has submitted that under Order 53/1-14/15 of the Rules of the Supreme Court there is a provision that where a person seeks to establish that a decision of a private body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (O'Reilly v Mackeman) [1982] All ER 1124). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process. It would, as a general rule, be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public or authority infringed rights to which he was entitled to protection under public law, to proceed by way of an ordinary action and, by this means, to evade the provisions of Order 53 for the protection of such authorities.*
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> *The above exposition of the law in the submission of the defendant is correct."* - [Emphasis by underlining supplied]

I now turn to the submissions by Counsel Chidothe that some of the remedies sought by the Plaintiffs are only available when an action is commenced by way of writ and not otherwise. The arguments by Counsel Chidothe have to be rejected in that the views that he espouses have long being overtaken by developments in the judicial review regime. In **O'Reilly v. Mackman [1982] 3 ALL ER 1124,** Lord Diplock stated at page 1132 that:

> *"Another handicap under which an applicant for a prerogative order under Ord 53 formerly labored ... was that a claim for damages for breach of a right in private law by the applicant resulting from an invalid decision of a public authority could not be made in an application under Ord 53. Damages could only be in a separate action begun by writ; whereas in an action so begun they could be claimed as additional relief as well as*

a declaration of nullity of the decision from which the damage claimed had flowed. Rule 7 of the new Ord 53 permits the applicant for judicial review to include in the statement in support of his application for leave a claim for damages and empowers the court to award damages on the hearing of the application if satisfied that such damages could have been awarded to him in an action begun by him by writ at the time of the making of the application.

Finally r 1 of the new Ord 53 enables an application for a declaration or an injunction to be included in an application for judicial review. This was not previously the case; only prerogative orders could be obtained in proceedings under Ord 53. Declarations or injunctions were obtainable only in actions begun by writ or originating summons. So a person seeking to challenge a decision had to make a choice of the remedy that he sought at the outset of the proceedings, although when the matter was examined more closely in the course of the proceedings it might appear that he was not entitled to that remedy but would have been entitled to some other remedy available only in the other kind of proceeding."

Finally, the Court has to consider the contention by Counsel Chidothe that Order 2 of RSC gives the Court power whereby, instead of striking out the action, the Court could convert the writ of summons to a proper mode of commencement and give directions as to how the case can be proceeded with. This contention also lacks merit and must be summarily dismissed. I read and re-read the Rules of the Supreme Court and searched in vain for a provision therein allowing an action begun by writ to continue as if it were an application for judicial review. I am confirmed in this view by the apt observations by Lord Diplock in **O'Reilly v. Mackman,** supra, at page 1133:

"So Ord 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that the complaint is not an infringement of any of his rights that are entitled to protection in pubic law, but may be an infringement of his rights in private law and thus not a proper subject of judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. <u>There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review</u>." – [Emphasis by underlining supplied]

In light of the foregoing, the Plaintiff's action is strike-out. As an interlocutory injunction is dependent upon there being a pre-existing cause of action (see the **Siskina (1979) A.C 21** and **Channel Tunnel Group Limited v Balfour Batty Construction Limited [1993] AC 334)**, the injunction granted to the Plaintiffs cannot stand. It is, accordingly, vacated.

Regarding costs, these normally follow the event and since the Defendant has succeeded, I order that the costs of these proceedings be borne by the Plaintiffs. I so order.

Pronounced in Chambers this 16th day of August 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE