



REPUBLIC OF KENYA



KENYA LAW
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Goodhart & another v Cabinet Secretary, Ministry of Education & 4 others (Constitutional Petition E007 of 2021) [2023] KEHC 948 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CONSTITUTIONAL PETITION E007 OF 2021**

RPV WENDOH, J

JANUARY 31, 2023

**IN THE MATTER OF: ARTICLES 3(1), 22(1), AND 2, 48, 50(1),
159(1) 21(C) OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: ARTICLES 1(1), 2 (1-4), 3(1),
10 OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: ARTICLES 23 (1) AND (3), 30, 31, 43,
53 (1), AND (2) OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: S. 9, 10 (1) AND (3), (5), 13
(1), 15, 19, 22 OF THE CHILDREN'S ACT 2001.**

**IN THE MATTER OF: S. 50 (1), 2 (B), (C), (3), 4 (A)
AND (B), S. 52(1), 2 OF BASIC EDUCATION ACT.**

**IN THE MATTER OF: THE ALLEGED ABUSE OF CHILDREN'S RIGHT AT
NOAH BOAT GOODHEART SCHOOL SITUATED AT NYAMAHARAGA
(ISEBANIA) VILLAGE, KURIA WEST SUB-COUNTY MIGORI COUNTY.**

**IN THE MATTER OF: THE MINISTRY OF EDUCATION'S FAILURE TO DETER
THE VIOLATION OF THE CHILDREN'S RIGHT BY ESTHER WAMBUI KANYUTU.**

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

AVIS GOODHART 1ST PETITIONER

ZIPPORAH MUTHONI MBURU 2ND PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT



**COUNTY DIRECTOR OF EDUCATION MIGORI COUNTY 3RD
RESPONDENT**

ESTHER WAMBUI KANYUTU 4TH RESPONDENT

NOAH'S BOAT GOOD HEART ORGANIZATION (C.B.O) 5TH RESPONDENT

JUDGMENT

1. This matter was commenced by way of a Petition dated November 17, 2021 and filed in court on November 18, 2021. The petitioners seek the following reliefs and declarations: -
 - i. A declaration that the 1st, 2nd and 3rd respondents have violated the rights of the children at Noah's Good Heart School by failing to ensure that it adhered to the provisions of sections 49, 50, 51, 52, 76 and 77 of the Basic Education Act.
 - ii. A declaration that the 1st, 2nd and 3rd respondent's act of allowing Noah's Boat Good Heart School to operate is irregular and unlawful and an infringement on the rights of the children in the said school.
 - iii. A declaration that the 4th respondent's acts of opening accounts in social media platform soliciting for funds allegedly on behalf of the minors by sending pictures of the minors on the said platform is a violation of the minor's privacy.
 - iv. A declaration that the 4th respondent solicitation of funds using social media platform is exploitation of the children at Noah's Boat Good Heart School.
 - v. An order compelling the 1st, 2nd and 3rd respondent to close down and/or regulate Noah's Boat Good Heart School in strict compliance with the Constitution and national legislation.
 - vi. An order compelling the 4th and 5th respondents to comply with section 52 of the Basic Education Act.
 - vii. An order compelling the 4th respondent to render accounts for all monies and materials she received from 2017 to date and refund the same to the donors.
 - viii. An order compelling the 1st to 5th respondent to pay the petitioners costs of this suit.
 - ix. Any other relief this court may deem just to grant.
2. In support of their petition, the petitioners Avis Goodhart and Zipporah Muthoni Mburu each swore an affidavit, both dated November 17, 2021. The petitioners' case is that the children's constitutional rights at Noah's Boat Good Heart School (hereinafter the school) are being violated in an unregistered school with the connivance of the 1st, 2nd and 3rd respondents; that the 4th respondent continues to display pictures of minors of tender age on her Facebook page for solicitation purposes, thus violating the rights of the minors by exposing them to social media, to their detriment; that the 4th respondent continues to violate the rights of the minors by subjecting them to hard labour of collecting water from nearby streams, fetching firewood and building materials to their detriment; that the 4th Respondent has been exploiting the children at the school by collecting huge sums of money and materials for personal gain to the detriment of the children.
3. The petitioners further contend that the 1st, 2nd and 3rd respondents continue to allow the 4th respondent to operate a school without the necessary regulatory procedures; that the 1st, 2nd and



- 3rd respondents continue to allow the running of the school despite it not having Teachers Service Commission registered teachers to the detriment of the learners; that the damage that is being caused is irreversible and should be checked by orders of this court.
4. It is against this background that the petitioners contend that the 1st respondent permitted the establishment of the school contrary to the provisions of Sections 50(1), (b), (c), and (3) and 52 of the Basic Education Act; that the exposure of the children's faces and images is an infringement of the children's rights under Article 31 of the Constitution which guarantees the right to privacy; that the minors are forced to undertake hard labour which is a violation to Article 53 (1) of the Constitution. It was further stated that Article 73 (1) of the Constitution vests authority in the 1st respondent as a State Officer which authority should be exercised in a manner that is consistent with the Constitution, demonstrates respect for people and brings honour to the nation and dignity to the office.
5. Further to the foregoing, the petitioners adduced through their respective affidavits the following bundle of documents in support of their case:-
- a. A certificate of Noah's Boat Good Heart Community Based Organization.
 - b. Pictures of social media pages used to infringe on the children's basic rights.
 - c. Agreements for purchase of land allegedly for the orphanage.
 - d. Statements of remittances from Go Ye Ministries Incorporated to the 4th respondent in 2017.
 - e. Statements of remittances from Go Ye Ministries Incorporates to the 4th respondent in 2018.
 - f. Statements of remittances from Go Ye Ministries Incorporates to the 4th respondent in 2019.
 - g. Statements of remittances from Go Ye Ministries Incorporates to the 4th respondent in 2020.
 - h. Statements of remittances from Go Ye Ministries to the 4th respondent in 2021.
 - i. Alleged budget for Noah's Boat Good Heart Children's Home.
 - j. Invoice for drilling borehole paid by the 1st petitioner.
 - k. Request by the 4th respondent for water borehole pump.
 - l. Request by the 4th respondent for drugs.
 - m. Letter from Association of Charitable Children's Institution of Kenya.
 - n. Quotation for water pump.
 - o. Noah's Boat Good Heart Children's Home Budget.
6. The petition is opposed. On behalf of the 4th and 5th respondents, the 4th respondent Esther Wambui Kanyutu filed a replying affidavit dated 28/1/2022 and annexed documents "EWK I - EKW IX (a) and (b)" in support of her case. She deposed that she is the founder of the 5th respondent Community Based Organization (CBO) having founded them in Kisii County in 2018; that she was then running a children's home under a CBO from a residential home; that she met the 1st petitioner in the year 2017 through a pastor at New Life Covenant Church in Kisii; that the 1st petitioner volunteered to be one of her sponsors; that the 1st petitioner then organized to move her 46 children to a new premises and paid rent for six months; that in the year 2019, the 1st petitioner took her to Singapore to meet other philanthropist she considered friends; that the 1st petitioner even called her to Uganda for another convention.



7. The 4th respondent further deponed that the 1st petitioner opened for her an account in her home country where all the donations were being channelled; that through the GO YE Ministry, she was recognised as the founder of the 5th respondent; that from the proceeds of the donations, she used Kshs. 500,000/= to purchase 2 acres of land where she moved with the 46 children; that she bought a further 100 by 100 property out of her own effort; that she then built a children's home, a Sunday school and church for the children.
8. The 4th respondent denied violating any of the children's rights under her care but instead the CBO (5th Respondent) has worked hand in hand with the Children's Office Kuria West to ensure that the children are safe; that the 2nd petitioner has no locus standi to petition this court as she is not a donor nor an interested party to the petition; that the photos produced by the 2nd petitioner are not from her phone number and she has never posted photos of a minor or disabled persons in social media as alleged; that the 1st petitioner's exhibit 54 - 152 which shows withdrawals from the 1st petitioner's account, were done by her after the 1st petitioner issued her with a visa card and password pin of 1615 which card has been cancelled; that the visa card is in the name of Avis Goodhart Go Ye Ministries; that any withdrawals done on the account, were done by 1st respondent and she could only authorize her to withdraw what she approved. The 4th respondent asked this court to dismiss the petition with costs.
9. Despite being served severally, the 1st, 2nd and 3rd respondents did not enter appearance nor file any response.
10. The petition was canvassed by way of written submissions. The petitioners filed their submissions dated 8/7/2022 and submitted on two issues. On whether the petition raised a constitutional dispute, it was submitted that the petitioners have disclosed in their petition, constitutional provisions violated, principles enunciated and protected by Articles 30, 31, 43 and 53 of the *Constitution*. It was submitted that the 4th respondent infringed and invaded the privacy of the minors under her care at the 5th respondent's premises contrary to Article 31 of the *Constitution* by unlawfully posting and/or publishing illicit pictures of the said minors begging for food and money from donors. It was submitted that the 4th respondent infringed the provisions of Article 30 of the *Constitution* unlawfully subjecting children of tender years under her care to exploitive labour and inhuman treatment; that the respondents jointly and severally infringed the provisions of Articles 43 and 53 of the *Constitution* by denying the minors under the care of the 4th and 5th respondents the right to quality and standard education and by failing to sanction the 4th respondent for offering unqualified education in an uncredited facility.
11. The petitioners further contended that the 1st, 2nd and 3rd respondents have a Constitutional and statutory mandate to ensure that all learning institutions adhere to the provisions of Sections 50 (1), 2 (b & c), 3, 4 (a & b) and Section 52 (1&2) of the *Basic Education Act*; that the violations by the 4th respondent has been under the watch of the 1st, 2nd and 3rd respondents since the inception of 5th respondent on 13th March 2018; that the infringement of Articles 43 and 53 of the *Constitution* has subjected the minors to a deprivation of benefits of quality education and their best interests. The petitioners further submitted that they have established the background with specificity and in accordance with the case of *Anarita Karimi Njeru vs Republic* (1976 - 1980) KLR 1272.
12. On whether the petitioners are entitled to the prayers sought, the petitioner submitted that they are alive to provisions of Section 107 of the *Evidence Act* and the Constitutional avoidance principle which was upheld by the Supreme Court in the Case of *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 others* (2014) eKLR; that they are also alive to the essence and importance of education as a right on its own and also as an economic and social right as was held in



the case of *Kenya National Association of Parents vs Cabinet Secretary Ministry of Education Science and Technology, Jacob Kaimenyi & 4 others* (2015) eKLR.

13. The petitioners submitted that this matter is suitable for resolution through a constitutional petition since at the centre of this dispute is the denial of the right to quality education to minors under the care of the 4th and 5th respondents; that the other issue which is at the centre of this matter is a violation of the provisions of Articles 30 and 31 of the *Constitution*. It was submitted that the petitioners have attached evidence to prove their claim and they are entitled to their claim since it remains uncontroverted by the 1st, 2nd and 3rd respondents; that the 4th and 5th respondents have also failed to attach proof of compliance with Sections 50, 51, 52 and 76 of the *Basic Education Act*.
14. The petitioners further submitted that the act of the 4th respondent of publishing pictures of the minors was a violation of their right to privacy; that it is imperative the 5th respondent comply with the aforestated provisions to safeguard the best interest of the child under Article 53 and the right to free and basic education under Article 43 of the *Constitution*; that as a donor to the 5th respondent, the 4th respondent had an obligation to render accounts for all the monies donated by the 1st petitioner and substantiate that the same was used in the best interest of the child.
15. In conclusion, the petitioners submitted that Article 165 (3) (b) of the *Constitution* vests this court with jurisdiction to determine whether a fundamental right or freedom has been infringed, threatened or violated; that the 1st petitioner invested a lot of money in the 4th and 5th respondents for the welfare and upkeep of the minors and she has a right to legitimate expectation to be heard by this court; that the best interest of a child is paramount and should be upheld to curb a further violation of the rights and fundamental freedoms of the minors under the care and control of the 4th and 5th respondents. The petitioners also prayed for the costs of this petition.
16. The 4th and 5th respondents filed their submissions dated October 31, 2022 and relied on the findings in the case of *Anarita Karimi Njeru (supra)* to demonstrate the threshold to be met in constitutional petitions. They also relied on the findings in *Timothy Njoya & 6 others vs Attorney General & 3 others No 2* (2004) eKLR. It was submitted that the petitioners do not have *locus standi* to bring this petition and have failed to link the 4th respondent with the running of the said school; that they have also failed to provide a list of any of the school going children; that the remedies being sought in the petition are based on the *Basic Education Act* and Article 53 of the *Constitution* and they have not tabled evidence on the existence of any infringed constitutional rights of the petitioners; that the petitioners have not proved any wrong doing on the 4th and 5th Respondents' part to warrant punitive orders from this court.
17. It was also submitted that prayer (vii) is not a constitutional issue and is a sign of mischief of the petitioners given that they seek to compel the 4th respondent to render accounts from donors and it should be frowned upon by the court. It was also submitted that the petitioners have not tabled evidence to show which guaranteed rights are grossly violated or infringed by the 4th and 5th respondents specifically to entitle the petitioners to the award of the reliefs sought.
18. On whether the petitioners are entitled to the remedies sought, it was submitted that the petitioners lack locus standi to seek these remedies; that the petitioners have failed to table evidence of any form of violation, past and/or continued of any constitutional provisions; that the petitioners have not proved the social media accounts as detailed in this prayer belong to either the 4th and 5th respondents; that the petitioners have not tabled evidence that the 4th and 5th respondents have been subject to criminal proceedings or any complaint raised. It was submitted that the petitioners have not indicated



to the court how the 4th and 5th respondents are violating or have continually violated the alleged constitutional rights.

19. In conclusion, the 4th and 5th respondents submitted that a petitioner with *locus standi* has to establish that there is a precise complaint, the provisions of the Constitution infringed or violated, the manner in which the section is infringed and that no evidence has been tabled to warrant grant of the reliefs sought. The 4th and 5th respondents urged the court to dismiss the petition with costs.
20. I have carefully considered the Petition, its Supporting Affidavits, the respective annexures, the response and the annexures by the 4th and 5th respondents and the rival submissions by both parties. On that account, it is this court's considered opinion that the issues for determination which arise therefrom are:-
 - a. Whether the petition meets the threshold of a constitutional petition.
 - b. Whether the petitioners have locus standi to bring this petition.
 - c. Whether the Petition dated November 17, 2021 is merited.
 - d. Whether the orders sought should be granted.
21. The principles set out in the case of Anarita Karimi Njeru (supra) in relation to constitutional petitions is that a party who alleges violation of his or her rights must plead with reasonable precision the alleged violation. In the case of David Gathu Thuo v Attorney General & another (2021) eKLR the court held:-

“The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.”
22. Looking at the petitioners' pleadings, they have outlined their standing in this petition, the facts they rely upon and the particulars, the various constitutional provisions and other laws allegedly breached and/or violated and the reliefs sought. This court is of the view that the petitioners have met the required standard of bringing this petition with a reasonable degree of precision required.
23. On the *locus standi* of the petitioners, Article 258 (1) and (2) of the Constitution provides as follows:-
 1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
 - (a) person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
24. Article 22 of the Constitution and rule 4(2) of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 “Mutunga Rules” re-echo the position in Article 258



(*supra*). In the case of *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR the Court of Appeal stated as follows:-

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the *Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this; we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the *Constitution*.”

25. It is therefore established that any member of the public may institute a constitutional petition where there is a violation or contravention of any constitutional rights. The Court of Appeal in *Mumo Matemu* (*supra*) cautioned that persons who move the court should act with *bona fides* with a view to vindicating the cause of justice. The court should not allow itself to be seized of the instance where a person is seeking personal gain, for private profit or out of political motivation.
26. The instant petition relates to children who are under the care of the 4th and 5th respondents. The 1st petitioner’s interest is that she is a philanthropist and a financier of organizations especially orphan institutions. The 2nd petitioner describes herself as a human and childrens’ rights defender. The petitioners allege that the rights of the children under the care of the 4th and 5th respondents are being violated. Article 258 (*supra*) of the *Constitution* provides that a person can file a constitutional petition even on behalf of other persons whose rights are being infringed, threatened and/or violated. The 1st Petitioner has demonstrated and it has been admitted by the 4th Respondent that she has supported and assisted heavily on the 5th Respondent. No doubt the petitioners have a big stake in the 5th Respondent and have a right to be heard. I therefore find that the petitioners have locus standi to institute this petition for the alleged violation of the rights of the children under the care of the 4th and 5th respondents.
27. The 4th respondent admitted that she founded the Noah’s Boat Good Heart (CBO) in the year 2018 in Kisii as a children’s home. She further stated that she has been running the children’s home from her residential house but later on with the help of the 1st petitioner, moved to a new premises. The petitioners stated in their petition that the CBO is based and registered at Keragai Sub - Location, Tendere Location, Gucha Sub County. It was also stated that it was registered on 13/3/2018. Hence, it is not disputed that the 4th respondent registered the 5th respondent in the year 2018 and the place of registration was in Kisii County.
28. The petitioners sought declarations against the 1st, 2nd and 3rd Respondents for failing to comply with Sections 49 – 52, 76 and 77 of the *Basic Education Act*. Sections 49 – 52 of the Act, deals with establishment, rights and duties of private schools. Section 52 inter alia, provides for duties of private schools to establish necessary education and governance structures, and recruit registered teachers. Section 76 and 77 deals with licensing of Private Schools and the rejection of applications for registration. The petitioners did not annex any evidence to show that the 4th and 5th Respondent run a private school and that they have acted contrary to the above provisions. It is not enough to allege.



There must be proof through evidence. To the contrary the 4th and 5th Respondent have exhibited a certificate of registration of Community Board Organization (CBO). The question is whether there is also a school in the same organization. Without evidence, the declarations sought against the 1st – 3rd Respondents cannot issue.

29. According to the 4th respondent, she met the 1st petitioner in the year 2017 through a pastor at New Life Covenant Church in Kisii. The 1st petitioner thereafter took her to Singapore in the year 2019 with a view to meet other philanthropists. The 4th respondent also averred that the 1st petitioner opened a donor account in her own country for the benefit of the CBO and the 1st petitioner issued her a visa card and password. On the access to the money, the 4th respondent stated that the withdrawals were made by the 1st petitioner and any withdrawals she did, had to be approved by the 1st petitioner.
30. The petitioners pleaded that the 4th respondent has been running the Noah's School contrary to Sections 50 (1), (b), (c), and (3) and 52 of the Basic Education Act. Further, the petitioners pleaded that the 4th respondent violated the rights of the pupils and minors in the aforementioned school by among others, publishing grotesque photos of the minors in social media, subjecting the minors to hard labour contrary to Articles 31 and 53 (1) (d) of the Constitution. In support of these allegations, the petitioners annexed "exhibit 001 (b)" the alleged pictures on the 4th respondent's social media.
31. Exhibit 001(b) seems to be screenshots of conversations in a social media account known as "WhatsApp" and "Facebook" of one Esther Wambui. The screenshots are digital print outs which the petitioners have sought to heavily rely on to prove the allegations of the alleged violations of the children's rights under the care of the 4th and 5th respondents. Section 78A (1) of the Evidence Act provides for admissibility of electronic and digital evidence while Section 78A (2) provides that the evidence is admissible even if the evidence is not in its original form. The condition for admitting digital evidence is outlined in Section 106 of the Evidence Act. Section 106B on the admissibility of electronic records provides: -

"Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible....."

Section 106 4 (a) - (d) provides: -

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following...identifying the electronic record, giving such particulars of any device involved in production of the electronic record...purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device...shall be provided."

32. The law requires that Sections 78A and 106B of the Evidence Act must be read conjunctively. A person who desires to have any form of electronic evidence produced and considered in court as part of their evidence must accompany the evidence with a certificate.



33. In *Samwel Kazungu Kambi vs Nelly Ilongo & 2 others* (2017) eKLR the court said:

“Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter.” (Emphasis mine)

34. Similarly in this petition, the source of the electronic conversations and the photos from the Facebook social media pages are unknown. Even by looking at the face of the documents, there is no particular phone number which reflects the sender or receiver of the WhatsApp conversations. The petitioner cannot therefore seek to rely on the said conversations and pictures as part of her evidence since they have not been properly produced in court.
35. If at all this court were to speculate that the said Esther Wambui whose name appears on the WhatsApp conversations is one and the same as the 4th respondent, a look at the conversations reveals that one party used to refer to the other as “mummy” “mum” or “sweet mummy” whom the court assumes is the 1st petitioner. The said Esther Wambui would request some money from “mum” towards running some of the expenses of the 5th respondent. The said “mum” would then send money willingly.
36. That being the case, this court finds it difficult to see how the 4th respondent used minors for her own benefit unless the petitioners would have tabled further evidence to show that the 4th respondent used the money advanced to her for her own personal gain instead of channeling it to the its intended use. If that would be the case, then it goes without saying that the 4th and 5th respondents should have been best charged before a criminal court for obtaining money through false pretense and fraud. It will not be a case suited for a constitutional petition.
37. In relation to the various bank statements, they are in the name of Go Ye Ministries. The 1st petitioner described herself as the president and founding member of the said ministry. The bank statements show various withdrawals from the account in the name of the ministry. The 1st petitioner did not state how the operations of the account affected the children under the care of the 4th and 5th respondents. No evidence that the money was not used for the purposes it was sent. The 4th respondent however shed light and stated that she was issued with a visa card by the 1st petitioner and only made withdrawals with the approval of the 1st petitioner, but the card has since been cancelled. This averment has not



- been controverted by the 1st petitioner. Once again, there is no remote relationship between the bank account activities and the alleged rights of the children being infringed.
38. The 4th respondent annexed a letter marked as “EWKV” from the Go Ye Ministries dated November 19, 2018. The letter confirms that the ministry is the donor of the 5th respondent. It seems that the donations come from the ministry but not from the 1st petitioner personally. The 1st petitioner has not averred that she made the donations with her own money. Go Ye Ministries is not a party to this petition for it to make claims against the 4th and 5th respondents.
 39. The petitioners also annexed alleged budgets for the 5th respondent, various letters written by the 4th respondent requesting for help, a tax invoice dated 3/5/2018, a quotation for the supply and installation of solar powered borehole pump dated 12/2/2020. The petitioners have not adduced evidence or directed this court to any proof that they sent the 4th respondent money for the drilling and installation of the borehole or they sent the 4th respondent money towards the alleged budget. The petitioners have also produced a letter dated 8/11/2018 from the Association of Charitable Institutions of Kenya but its relevance to this petition has not been explained. The letter is simply an invitation to the 5th respondent through its director to attend an Annual General Meeting which was held on November 29, 2018.
 40. The 2nd Petitioners stated that she is a human rights defender and a children’s right crusader. Being a Kenyan citizen and a resident of Nyamaharaga. She is in a better position to know the proper legal channels to report any incidence of violation of children’s rights. Making mere allegations is not in the best interest of the children. A report to the police station, relevant education offices and children offices, for those offices take up and to do their own independent investigations and make a comprehensive report on their findings on the state of the children under the care of the 4th and 5th respondents and the school generally, would have helped this court.
 41. As pointed out earlier in this judgment, the 1st, 2nd and 3rd Respondents did not bother to file any response to this petition despite the fact that they were allowed sufficient time to do so. This is a very important matter that touches on the lives and rights of the children of this Country. Even if the 1st to 3rd Respondents believed there was no case against them, the allegations made against the 4 and 5th Respondents are grave and required some response from the office of the Attorney General, being the protector of the rights of the ordinary Kenyan. It is so irresponsible of that office that the said office too thus matter so lightly by not taking any stand or responding. This court would have expected the Attorney General’s office to file a reply to inform the court whether indeed there exists a private school run by the 5th Respondents organization, whether it has complied with the Basic Education Act. There is no doubt that Children are in the said CBC 5th Respondent under Article 43 (1) every child has a right to basic education and so do these children go to school and costly, were the children in these pictures taken in that CBO? Those are grave concerns that the Attorney General’s office could not just wash away and sit on the fence.
 42. For the above reasons, though the petitioners did not prove breach of fundamental rights because the threshold of proof was not attained, there is smoke and where there is smoke, there is always a fire. This court cannot fold its hands and say its helpless. The bodies concerned with protection of Children’s rights must take steps and investigate. I direct that the 1st and 2nd Respondents through the Director of Education Migori do investigate all the allegations made herein and file a report with the court within thirty (30) days and suggest any steps to be taken if necessary.
 43. The Petition stands dismissed with each party bearing its own costs. *Status quo* on the properties to remain in force till March 1, 2023. Mention on March 1, 2023.



DATED, SIGNED AND DELIVERED AT MIGORI THIS 31ST DAY OF JANUARY, 2023

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Mr. Singei for the 1st and 2nd Petitioners.

No appearance for the 1st, 2nd and 3rd Respondents.

No appearance for the 4th and 5th Respondents.

