



**Little Prinz eV Germany v Lumumba & 4 others (Sued on behalf of and/or trustees of Little Prinz Children’s Home Trust); Ministry of Labour & Social Protection Children Department Kakamega East Sub-County (Interested Party) (Constitutional Petition E001 of 2022) [2023] KEHC 3483 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3483 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E001 OF 2022**

**WM MUSYOKA, J**

**APRIL 28, 2023**

**BETWEEN**

**LITTLE PRINZ EV GERMANY ..... PETITIONER**

**AND**

**COLLINS MUYELA LUMUMBA & 4 OTHERS (SUED ON BEHALF OF AND/OR TRUSTEES OF LITTLE PRINZ CHILDREN’S HOME TRUST) ..... RESPONDENT**

**AND**

**MINISTRY OF LABOUR & SOCIAL PROTECTION CHILDREN DEPARTMENT KAKAMEGA EAST SUB-COUNTY ..... INTERESTED PARTY**

**JUDGMENT**

1. The cause herein commenced on 24<sup>th</sup> January 2022, by way of a petition, dated 25<sup>th</sup> December 2021, at the instance of the petitioner, a non-governmental organisation based in Germany, against the respondents, who are the officials of a children’s home funded by the petitioner, and the interested party, the department of the Government of the Republic of Kenya responsible for children’s welfare.
2. The petition is premised on Articles 2, 3, 19, 22, 23, 27, 28, 31, 32, 53, 165 and 258 of *the Constitution* of Kenya, which provide the legal foundation to the case. Article 2 is cited as providing that *the Constitution* is the supreme law in Kenya, which binds all levels of the Government of Kenya, while Article 3(1) binds every person within Kenya to respect uphold and defend *the Constitution*. Article 19(1)(2) of *the Constitution* makes the Bill of Rights the framework for protection of human rights and fundamental freedoms. Articles 22 and 258 entitle every person a right to institute legal proceedings for protection human rights and fundamental freedoms. Articles 23 and 165 empower the High Court to



entertain the causes brought under Articles 22 and 258, and may grant the decrees and orders specified in those Articles. Article 27 guarantees equal treatment of all persons before the law, while Article 28 guarantees every person inherent dignity and its protection. Articles 31 and 32 guarantee rights to privacy, freedom of conscience, religion, belief and opinion. Article 53 is on the rights of children.

3. In addition to *the Constitution* of Kenya, the petitioner also cites Articles 5 and 9 of the African Charter on the Rights and Welfare of the Child. Article 5 urges States to ensure, to the extent possible, the survival, protection and development of the Child; while Article 9 provides for the entitlement of every child to freedom of thought, conscience and religion, and states the best interest principle, with regard to the duty on the parents and guardians in providing guidance and direction in the exercise of the rights stated in that Article.
4. The factual background is that the children's home in Kakamega was started under the initiative and funding of the petitioner and other organisations, in 2009, to provide a haven for neglected and orphaned children. Funds were raised, land purchased and structures constructed, and the new institution named after the parent institution, the petitioner. A trust deed was registered by Collins Muyela Lumumba, which was later amended in 2015, without the knowledge of the petitioner. It is averred that the petitioner sent money monthly to the home, to meet its daily needs. It is averred that in recent times, members of the board began to resign, without giving reasons, but intelligence began to merge that the children were being mistreated. It is averred that Collins Muyela, his wife Lucy and his mother Jessica began to run the home as private property, with highhandedness and lack of accountability, which pushed board members out. In March 2021, Collins Muyeka purported to delink the home from the parent organisation, the petitioner herein, and to source donations from other organisations. It is averred that the close connection between the current management of the home and the Jehovah Witnesses was not healthy for the children, for it was radicalising them, and denying the children the freedom of choice of religion. It is averred that the older children were being forced to convert to Jehovah Witnesses, and upon resistance they were being mistreated. It is averred that several children have attempted to flee from the home. A report of these events was made to the interested party, who carried out investigations, found them to be true, and moved some of the children to another children's home, after which a senior officer directed that the said children be returned to the respondents. It is averred that the petitioner has no personal interest in the institution, besides ensuring that the children are treated humanely and fairly. The petitioner avers that it is entitled to demand for the best interests of the children, having participated in and funded the founding of the in institution.
5. The petitioner claims that the rights of the children have been violated and contravened, and in particular their right to basic education as guaranteed under Article 53(1)(b) of *the Constitution*, through the failure by the respondents to enrol the children who have attained school going age in accredited schools, failure to enrol the children who have attained school going age in schools where the current curricula, CBC, is being implemented, hiring teachers to teach the children within the home without considering the CBC programme, subjecting the children to strange doctrinal teachings and practices, abdicating the role and duty to expose the children to the free and compulsory education offered by the Government of Kenya, and purporting to offer a programme of education which does not conform with the CBC programme being offered and run by the Government.
6. It is further averred that the respondents are infringing on the rights of the children to enjoy their freedom of conscience, belief and opinion, contrary to Article 32 of *the Constitution*, by subjecting them to the beliefs and teachings of the Jehovah Witnesses without offering them an option, by expelling children from the home who have refused to subscribe to the Jehovah Witnesses and forcing the rest of the children to subscribe to the doctrines of Jehovah Witnesses, causing 5 children to be expelled from school after they indoctrinated them into Jehovah Witnesses, making it difficult for them



- to fit into programmes of the schools into which they have been enrolled. It is also averred that the suspension of the 5 children for not subscribing to the Jehovah Witnesses doctrines violated Article 27(5) of *the Constitution*, and section 5 of the *children Act*, No. 8 of 2001.
7. It is further averred that Article 31, on privacy is being violated, through publication in social media of their images and information relating to them, their history and health status, and thereby infringing on their right to privacy, contrary to Articles 28 and 53 of *the Constitution*.
  8. The orders sought are declarations that the continued stay of the said children in that institution was likely to endanger their wellbeing; the respondents are unfit to provide care and protection to the children at the said home; the respondents were not serving the interests of the said children; the sharing of images, pictures, identities and details of the children in social media breached their rights to privacy; the rights of the children under Articles 27(5), 28, 31 and 32 of *the Constitution* were violated; the provisions of *the Constitution*; the African Charter on the Rights and Welfare of the Child and the best interests of the child principle; the conduct of Collins Muyela Lumumba of purporting to terminate the contract or agreement with the donor was null and void; and the home in question is not a conducive environment for children currently accommodated there. The other orders sought are to direct the home to transfer the children to Malaika Children's Home or any other home which would guarantee their welfare, the interested party to be ordered to close the home for violating *the Constitution* and failing to serve the interests of the children in that home, and any other orders.
  9. The petition is not supported by an affidavit, deposing the facts that provide a background to the matter. It was, however, filed simultaneously with a Motion, dated 25<sup>th</sup> December 2021, which was withdrawn by consent on 22<sup>nd</sup> February 2022, to pave way for the hearing of the petition. That Motion was supported by an affidavit, sworn on 25<sup>th</sup> December 2021, by Josef Utters, as second Chairperson and official of the petitioner. The same could be adopted for the purpose of the petition, of course bearing in mind that it was sworn in support of the withdrawn Motion, whose effect could be that the affidavit was withdrawn with the Motion. The said affidavit largely regurgitates the averments made in the petition, and what is of utility in it are the annexures attached to it.
  10. The first document is *the Constitution* for the Little Prinz Children's Help Project or organisation. *The Constitution* covers the name of the project, its mission, governance, officers, aims and objectives, membership, property ownership and dissolution. The second document is a part copy of a sale agreement in respect of Isukha/Shinyalu/1255, between Robin Dunn and Christine Dunn, on one part, as sellers, and Collins Lumumba, Sabine Kapell, Lewis Oyembe, Sabine Kerstan and Taylor Bergmann as buyers, executed on 8<sup>th</sup> September 2010. The third document is a declaration of trust, dated 29<sup>th</sup> April 2015, of Little Prinz Children's Home Trust, by Collins Muyela, Jessica Iramwenya, Carlos Odera, Johnson Dhadho and Bramwell Shahenza, stating the administration and objectives of the trust, and covering such other matters as appointment of trustees, eligibility of trusteeship, its determination, governance, amendment of the trust deed and cessation. The fourth document is a statement of funds, in euros, to the Little Prinz Children Help Kenya, for the period between 2011 and 2020, both dates inclusive. The fifth set of documents show flight tickets for March 2021, when officials from the petitioner visited the home, and were chased away. The sixth set of documents are emails between the petitioner and individuals, who were reporting mistreatment of children at the home. The seventh document is an email from Collins Muyela Lumumba, whose date is unclear, terminating the relationship between the petitioner and the respondents. The eighth set of documents depict images of the children shared in social media as a tool to raise funds. The ninth document is a piece of paper showing the OB number with respect to a report made on 1<sup>st</sup> November 2021. The tenth set of documents are: a letter from the Advocates for the petitioner, dated 1<sup>st</sup> December 2021, asking for a report, concerning ill-treatment of children at the home, and a report on the home, which is



- unsigned and undated, and does not disclose the name and designation of the maker of the report. The eleventh document is a letter from the interested party, addressed to Malaika Children's Home, dated 5<sup>th</sup> October 2021, indicating that the Little Prinz Children's Home had been closed, and the children accommodated at that home were to be relocated to Malaika Children's Home. The twelfth document is a letter, dated 15<sup>th</sup> October 2021, from the superiors of the interested party, the Kakamega County Coordinator of Children Services, countermanning the letter of 5<sup>th</sup> October 2021, and ordering the reopening of the Little Prinz Children's Home, on grounds that it had been closed unprocedurally.
11. The respondents reacted to the petition, by way of grounds of opposition, dated 21<sup>st</sup> February 2022. They deny mistreatment of the children, and argue that the petition carries generalised allegations which are not supported by relevant documentation. They aver that the local Children's Officer and the Area Advisory Council had never ordered closure of the home. They further aver that the home is run in a manner that respects the privacy and dignity of the children, and respects their gender, religious belief, racial and tribal background, and any other special needs. It is denied that the respondents had forced their religious beliefs on the children. It is asserted that the respondents had always worked to promote the educational needs of the children. It is averred that the respondents have never discriminated against the children, and that their photographs had never been obtained in an intrusive manner. It is averred that the photographs had not been used in a manner that was not sensitive to the welfare of the minors, and the respondents did not use them for commercial or profit considerations. It is asserted that the petitioner halted funding for the home, which was a breach of *the Constitution* for the home. It is asserted that the petition herein does not meet the threshold for a constitutional petition, as the petitioner has not sought redress for any of the constitutional rights alleged to have been violated. It is averred that the petition was initiated out of malice rather than for the best interests of the children. It is further averred that the petition does not disclose the nature of the injury caused to the children or likely to be caused to them. It is averred that the High Court does not have jurisdiction to close down a children's home, for that lies with the Director of Children Services. It is argued that the petition is incurably defective, frivolous and vexatious, and ought to be struck out.
  12. Collins Muyela, who is named as one of the respondents, swore an affidavit, on 21<sup>st</sup> February 2022, in response to the Motion. As indicated elsewhere, the Motion was withdrawn, and that should have taken with it the affidavits sworn in support of it and in reply to it. I shall, however, consider the affidavit of the said Collins Muyela, in the same light as I have that of Josef Utters. Collins Muyela avers to be founder and one of the trustees of the home, which he had initially established as Good Heart Foundation, before the petitioner came on board, whereupon it adopted the name of the petitioner. He says that the role of the petitioner was to fund the home, while the trust was to run the home. He denies that the children were mistreated or harassed or left hungry, asserting that in 2020 the home had been named as the best within the Kakamega Sub-County. He asserts that the allegations against the home were unproven, for they are not supported by any documentary evidence. He avers that the process that led up to the closure of the home in October 2021 was not compliant with the relevant law, hence the County Coordinator of Children Services countermanned the move. He asserts that the area Children's Officer and the Area Advisory Council did not, at any time, recommend closure of the home. He avers that the home is not a danger to the children. Regarding the 5 children who had been expelled from school, he states that the home found another school for them. On some children escaping, he explains that some of them come to the home from a life in the streets, where they had been fully independent, and changing over to live under control and authority can be a challenge. He asserts that the shutting down of the home would not be in the best interests of the children.
  13. He has attached a bundle of documents to support his case. Some of them are blurry and illegible. The first bundle is of correspondence between the petitioner and the respondents on the registration of the trust and related matters. The second bundle of documents are minutes of the Area Advisory



Committee of a meeting held sometime in 2020, an inspection report of the Area Advisory Committee signed by the interested party on an unknown date, and a public health inspection report of 2<sup>nd</sup> July 2020. The documents are quite unclear, and can only be read with some difficulty, but the little that I am able to read appears to give the home a clean bill of health. The third document is dated 5<sup>th</sup> October 2021, from the interested party, closing the home, on grounds that complaints had been received on mistreatment of the children and radicalisation. The fourth document is a letter addressed to the Director of Children Services, dated 4<sup>th</sup> November 2021, complaining about the conduct of the interested party, with regard to the said closure of the home. The fifth document is addressed to the Secretary of the Directorate of Children Services, Nairobi, by the County Coordinator of Children Services Kakamega, recommending the reopening of the home, after he established that due process was not followed to close it. The sixth bundle of documents relate to education of the children. The seventh document is registration of the home, by the government, as a basic education institution. The last document is about the 5 children who had been expelled from school over religious beliefs.

14. Following the directions of 22<sup>nd</sup> February 2022, that the petition be disposed of by way of written submissions, the petitioner and the respondents have complied, by filing written submissions. I have read through them, and noted the arguments made.
15. The petition herein rides on 2 principal allegations. One, that the children at the home are being mistreated, and two, that the children are being subjected to radicalisation. The allegations that their fundamental human rights and freedoms are being violated are founded on these 2 principal claims. Before I can determine whether or not there are violations or infringements of the rights and freedoms, I need to assess whether there is evidence or adequate evidence that the said children are being mistreated and radicalised.
16. On mistreatment, the petition merely talks of the children being mistreated, harassed and kept hungry. It is also said that the children are being subjected to punishment, and the respondents are quoting the Bible to justify their actions. The affidavit, sworn by Josef Utters, does not go beyond what is averred in the petition, indeed it merely regurgitates what is said in the petition word for word. What is the basis for these allegations? What is the source of what is alleged in the petition and the affidavit? What evidence is there that the children are being mistreated, harassed and going hungry? The information being relied on is not first hand, for the deponent of the affidavit is based in Germany, and not at the home. He is not an eyewitness to what is contained in the petition. He relies on sources. The information in the petition is said to have been given in confidence by a whistle-blower. An undisclosed former Director of the home is also said to have had given some information. Some unnamed German volunteers and visitors to the home are also said to have given some information. There is also reference to an unnamed German dentist based at Masinde Muliro University. The only person named is Luke Shitekha, a chairman of the Association of Children Homes.
17. So, what do I make of all this? The petition is not founded on any concrete evidence of mistreatment or harassment of the children. The petitioner has relied largely on hearsay evidence, from persons whose names have not been disclosed. Even for the one person whose name has been mentioned, Luke Shitekha, no document authored by him, addressed to the petitioner, has been placed on record, to authenticate the claim that he was an informant for the purposes of this petition. Crucially, if the petitioner wished to have the court believe it, it should have secured the affidavits of the persons who are the source of its information, and placed them on record. I am being invited to act on rumours and conjecture, to make orders that would lead to closure of an institution taking care of destitute children. Surely, for such drastic orders to be made, there must be concrete evidence, that what is being alleged has been happening.



18. The law provides for agencies of the State that watch over institutions set up to take care of destitute children. There are elaborate provisions in the *Children Act* about oversight of such institutions. I see, from the record, that the petitioner did engage the interested party to look into the matter of the mistreatment of children. I see that the Advocates for the petitioner wrote to the interested party, asking for a report, and I have seen on record what is purported to be a report. I am not persuaded that that document, purported to be a report of the interested party, is authentic. It is not on official Government letterhead or notepaper, neither is it purported to have been signed by a Government or State agent, for it does not bear the name, designation and signature of the person who made it. Its utility is nil. It is of no value to this case. The only letter that the petitioner has lodged on record on the closure of the home, is that addressed to Malaika Children's Home, by the interested party. It merely says that there had been complaints about child abuse by Little Prinz, but no details or particulars are given. The letter that closed the institution has been placed on record by the respondents, written by the interested party. Like that addressed to Malaika Children's Home, it merely tells the respondents that there had been complaints of child abuse, but no details were given.
19. Mistreatment and neglect of children are serious charges, and the acts are criminalised under the *Children Act*. I would have expected that the petitioner would exhibit documents to show that after these issues were reported to the police, investigations were done, and the affected children were taken to hospital for check-up and treatment, and medical documents were procured to evidence the mistreatment. Other than disclosing the OB number, the petitioner has not presented any document from the police, to show the action the police took after the report was made to them. A letter detailing what the police did, and established, would have gone some way in giving some credence to the claims made in the petition and the affidavit.
20. As it is, there is no material upon which I can determine whether or not the children were mistreated or illtreated or harassed or neglected. Consequently, on that account, I have no basis upon which I can hold that the fundamental human rights of the minors were violated in that regard.
21. The second component is radicalisation. It is alleged that the children were being acculturated in the doctrines of the Jehovah Witnesses movement, to which the respondents allegedly subscribe. First of all, the petitioner has not sought to demonstrate that the Jehovah Witnesses movement is proscribed, on account of any radical positions. Secondly, the radical doctrines that the petitioner is alleging are being pumped into the minds and souls of the minors have not been identified. What are these offending doctrines or teachings? How have the respondents been inculcating them into the minors? What evidence is there that the doctrines and teachings were being forced on the minors? What does radicalisation entail, for the purpose of these proceedings? Nothing was placed on record to demonstrate that the children were being subjected to bizarre religious teachings and practices that were out of this world to require intervention by the court.
22. Of course, there was the issue of the 5 children who were allegedly expelled from a school, ostensibly in connection with a dispute over religious beliefs or teachings. Although both sides have talked of the expulsion, and exhibited material about it, being a social media post about it and a letter by one of the respondents to the Principal about it, however, the letter or letters expelling the 5 were not exhibited, and I cannot begin to speculate as to why they were expelled, and assess whether it had anything to do with the doctrines taught by the respondents, and if it had anything to do with doctrine, what those doctrines were. The burden was on the petitioner to demonstrate what the expulsion was about, and that could only come from the school that expelled them.
23. There are allegations that children are not being taken to school whenever they attain school going age, and some are being trained at the home instead of being taken to public schools, and that the



system of education being offered is not in conformity with the system being run by the Government, among others. On matters relating to education, little evidence has been placed on record. No names are given of the children who are alleged to be of school going age who have not been enrolled in school. No evidence that the home was not authorised to run a school within its premises, and that the programmes it is running are not approved by Government. The respondents have exhibited a certificate, which authorises them to do that which the petitioner says they are doing. On these matters of education, the petitioner has not demonstrated that they have made reports to the relevant authorities responsible for education, and that the said officials have established that what the petitioner alleges is true, but have failed to act, to warrant court intervention.

24. I believe I have said enough to demonstrate that I do not have material before me, upon which I can assess whether or not the violations complained of occurred or not. The case presented by the petitioner is very weak on evidential material. It, perhaps, would have helped, to seal the gaps, if the parties had opted to have the case canvassed viva voce, but they opted to take the easier option, which is often fraught with challenges, where the evidential basis of the pleadings is weak. I get the impression that the fight herein is not so much about the children, but the fallout that has happened between the petitioner and the respondents.
25. No case has been presented that moves me to grant the orders sought, and I shall, accordingly, dismiss the petition herein. Constitutional petition proceedings are not the silver bullet, which enables parties to approach the court with flimsy evidence, and get orders freely, while avoiding the dedicated and established structures and processes for handling disputes around the issues being raised. Each party shall bear their own costs. It is so ordered.

**RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Ong'anya, instructed by Ong'anya Ombo, Advocates for the petitioners.**

**Mr. Orenge, instructed by Kiyondi Nyachae, Advocates for the respondents.**

**Mr. Nyauma, instructed by the Attorney General, for the interested party.**

