



**Kahiga & another v Director Children Services Mathioya & 2 others (Constitutional
Petition E001 of 2021) [2022] KEHC 12660 (KLR) (29 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CONSTITUTIONAL PETITION E001 OF 2021**

**K KIMONDO, J
AUGUST 29, 2022**

BETWEEN

HANNAH WANJIKU KAHIGA 1ST PETITIONER

HAWA IMANI CHILDREN'S HOME 2ND PETITIONER

AND

DIRECTOR CHILDREN SERVICES MATHIOYA 1ST RESPONDENT

KANGEMA SENIOR PRINCIPAL MAGISTRATES COURT . 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The 1st petitioner is the founder and proprietor of Hawa Children's Home (the 2nd petitioner), a charitable institution operating in Murang'a County.
2. She has brought a petition to quash the orders issued by the Senior Principal Magistrates Court at Kangema (the 2nd respondent) shutting down the home; and, to restrain the Director of Children's Services Mathioya (the 1st respondent) from interfering with its operations.
3. Pending the hearing of the petition, the petitioners presented a notice of motion dated July 29, 2021 seeking nine reliefs. A number are now spent leaving only three live prayers: Firstly, that the 1st respondent be restrained from interfering in any manner with the operations of the home.
4. Secondly, that the Directorate of Criminal Investigations (hereafter the *DCI*) Mathioya Sub-County do conduct investigations on the whereabouts of five children who escaped from the home and to repatriate them into "the safe custody and care" of the petitioners.



5. Thirdly, that the proceedings in the Kangema Senior Magistrates Court Case No. MCP & CCO/E007/2021 *Republic v Hawa Imani Children's Home* (hereafter the proceedings in the subordinate court) be stayed.
6. The motion is predicated upon a deposition of the petitioner sworn on July 29, 2021 and a further affidavit sworn on October 22, 2022.
7. The brief background is as follows: Some complaints were allegedly made by the public and former children at the home to the 1st respondent "relating to the management of the home and conduct of its proprietor". The 1st respondent shuttered the home in exercise of powers conferred by regulation 3(4) (b)(ii) of the *Children's (Charitable Children's Institution) Regulations, 2005*.
8. The director's actions were preceded by a meeting held on July 7, 2021 by the Sub-County Area Advisory Council Kangema which resolved that the home be closed; that all the children at the facility be sent home; and, that the petitioner, among other things, be arrested and charged with child neglect.
9. Subsequently, the 1st respondent brought proceedings at the subordinate court at Kangema which granted ex parte orders closing the home. The petitioner was also summoned by the DCI and interrogated about the complaints. Sixteen minors residing at the home also recorded statements.
10. On July 19, 2021, the police conducted an operation to remove the children from the home and allegedly "re-united them with their families". Five children escaped during the operation.
11. In a synopsis, the petitioners contend that the actions by the respondents were driven by ill-motives and are unlawful or unconstitutional for violating the rights to a fair trial, access to information, and fair administrative action.
12. The motion is contested by the respondents through a replying affidavit sworn on September 17, 2021 by Susan Kimani, the Sub-County Children's Officer. She has annexed a number of reports (exhibits SK1 to SK6) justifying the decision to close the premises.
13. The objections can be summed up as follows: Firstly, that the certificate of registration (annexture SK7) had long expired; and, secondly, that the environment at the home was not conducive to proper development or best interests of the minors. For instance, the children were not properly supervised and were getting only one meal a day.
14. In a synopsis, the respondents' case is that their actions complied fully with the *Children Act* and the regulations thereunder.
15. Like I mentioned earlier, the 1st petitioner swore a further affidavit on October 22, 2022 challenging that position. One issue in particular is the role of the DCIO's report (annexture HWK3). According to the petitioners, it supports their case to re-open the facility but the respondents' view is that the report is a mere inspection report which cannot override the conclusions by the Public Health Officer or Children's Officer.
16. Learned counsel for the petitioners filed detailed submissions and a list of authorities on November 2, 2021. The 1st and 3rd respondents replied on January 31, 2022.
17. I take the following view of the matter. The main petition is pending for hearing. It would thus be prejudicial to delve too deeply into the merits of the dispute.
18. But I can safely say the following: article 53 of the *Constitution* and section 4 of the *Children Act* enjoin the court to act in the best interest of the child. See generally *GN v Chumani Secondary School Board of Management Mombasa High Court, Civil Suit 95 of 2014* [2014] eKLR.



19. Article 47 of the [Constitution](#) and section 4 of the [Fair Administrative Action Act](#) on the other hand decree that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
20. The applicants contend that they were condemned unheard. The reply and materials by the respondents are completely silent on that allegation.
21. I agree with the respondents that upon recommendation by the Area Advisory Council, the Director had power to close the institution under regulation 3(4)(b)(ii) of the [Children's \(Charitable Children's Institution\) Regulations, 2005](#). I am also alive that any aggrieved party has recourse to an appeal to the Minister. From the materials before the court, it is evident that the petitioners have not pursued that right.
22. I have reached the conclusion at this stage that the petitioners were not reasonably heard before the decision to shut the home was made by the 1st and 3rd respondents and the impugned order issued by the subordinate court (2nd respondent). It will however be the true province of the trial court to establish these matters.
23. But I cannot also dismiss off-hand the allegations that Hawa Children's Home did not make proper provision for the holistic care, education, supervision and treatment of the children hosted there as decreed, for instance, by regulations 7, 8, 9, 18 and 25 of the above regulations. I state that very guardedly and without a final finding as the main petition is pending.
24. I am thus minded to grant an interim order to re-open the institution. But in order to ring fence the best interests of the children, it can only be done upon fulfillment of conditions precedent including, but not limited to, the following: Renewal of the operating licence and paying any back fees; re-inspection of the facility by the Children Officer or Area Advisory Council; and full compliance with applicable Public Health Regulations.
25. My final orders shall be as follows-
 - (a) That pending the hearing of the petition, an interim and conditional order is hereby granted to re-open the *Hawa Imani Children's Home* upon the institution renewing its operating licence and paying back fees if any; the carrying out of a fresh inspection of the facility by the Director Children Services or the Mathioya Sub-County Area Advisory Council Committee; and, upon compliance with Public Health Regulations.
 - (b) For the avoidance of doubt, the children who were resident at the facility on or before the July 19, 2021 shall *not* resume stay at the home nor shall new ones be admitted until compliance with order (a) above.
 - (c) That to avoid the ends of justice from being defeated, the proceedings in the Kangema Senior Magistrates Court Case No MCP & CCO/E007/2021 *Republic v Hawa Imani Children's Home* are hereby stayed until the hearing and determination of the petition.
 - (d) That the 1st and 3rd respondents through the DCIO Mathioya Sub- County shall trace the five children whose names are particularized at paragraph 9 of the petitioners' supporting affidavit and present them at the earliest to the Children's Court at Kangema for appropriate orders under section 138 of the [Children Act](#).
 - (e) That the main petition shall be heard on priority and is fixed for directions before the court on a date that I shall now grant.



(f) Costs shall abide with the petition.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Baragu for the petitioner instructed by K. M. Mburu & Associates.

Ms. Susan Waiganjo, Court Assistant.

