



TJO (Suing as father and next friend of NM (Minor) v Riara Springs Girls’ High School (Petition 468 of 2019) [2022] KEHC 15456 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 468 OF 2019

HI ONG’UDI, J

NOVEMBER 18, 2022

IN THE MATTER OF ARTICLE 3(1), 19, 20, 22, 23, 24, 25, 26, 27, 35, 43, 47(1), 50, 53 AND 54 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 24, 26, 27(1), (2), (4) AND (5), 28, 29(D), 35(1)(B), 43(1)(F), 47(1), 53(1)(B) AND (2), 54(1)(A) OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF SECTION 4, 5, 7(2), 12, 13(1), 16, 22, 119(G), (M), (Q) AND (S) AND 127 OF THE CHILDREN’S ACT, NO. 8 OF 2001, LAWS OF KENYA AND IN THE MATTER OF SECTION 18(1) & (2) OF THE PERSONS WITH DISABILITIES ACT, NO. 14 OF 2003 AS REVISED IN 2012 AND IN THE MATTER OF SECTION 28(1) OF THE MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA AND IN THE MATTER OF SECTION 4, 30, 35, 36, 39 AND 51 OF THE BASIC EDUCATION ACT, NO. 14 OF 2013, LAWS OF KENYA

BETWEEN

**TJO PETITIONER
SUING AS FATHER AND NEXT FRIEND OF NM (MINOR**

AND

RIARA SPRINGS GIRLS’ HIGH SCHOOL RESPONDENT

JUDGMENT

1. The petition dated November 15, 2019 was filed under rule 3, 4(1), 8 and 10 the [*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013*](#) for the alleged contravention of articles 19, 20, 24, 26, 27(1) (2) (4) & (5), 28, 29(d), 35(1)(b), 43(1)(f), 47(1), 53(1) (b) & (2) and 54(1)(a) of the [*Constitution*](#).



2. Accordingly, the petition seeks the following orders: -

- i. A declaration that the minor's fundamental rights and freedoms as enshrined under article 26(1) and 43(1) of the Constitution, have been contravened and infringed upon by the respondent.
- ii. A declaration that the minor's fundamental rights and freedoms as enshrined under article 27(1)(2)(4) and (5) of the Constitution as read together with section 4, 30, 36 and 51 of the Basic Education Act, 2013 and section 4, 5, 7(2), 12, 13(1), 16, 22 of the Children's Act, 2001 have been contravened and infringed upon by the respondent.
- iii. A declaration that the minor's fundamental rights and freedoms as enshrined under article 10, 47(1) and 50(1) of the Constitution and the provisions of the Fair Administrative Actions Act, 2015 have been contravened and infringed upon by the respondent.
- iv. A declaration that the minor's fundamental rights and freedoms as enshrined under article 53(1)(b) & (c) and 53(2) of the Constitution as read together with the provisions of section 4, 30, 36, and 51 of the Basic Education Act, 2013, section 4, 5, 7(2), 12, 13(1), 16 and 22 of the Children's Act, 2001 have been contravened and infringed upon by the respondent.
- v. A declaration that the minor's fundamental rights and freedoms as enshrined under article 54(1)(a) & (b) of the Constitution as read together with the provisions of section 18(1) and (2) of the Persons with Disabilities Act, No 14 of 2003 have been contravened and infringed upon by the respondent.
- vi. A declaration that the minor's fundamental rights and freedoms as enshrined under article 26(1) and 43(1) of the Constitution have been contravened and infringed upon by the respondent.
- vii. The honourable court be pleased to award the minor general damages against the respondent for the inconveniences suffered by the minor.
- viii. The honourable court be pleased to award the petitioner general damages against the respondent for the losses and inconveniences suffered by the petitioner.
- ix. The honourable court be pleased to award the minor exemplary damages against the respondent for breach, violation and/or contravention of her fundamental rights by the respondent herein guaranteed under article 26(1), 27(1)(2)(4)&(5), 28, 29(a) & (b), 43(1)(f), 47(1), 50(1), 53(1) & (2) and 54(1)(a) of the Constitution.
- x. The costs consequent upon this petition be borne by the respondent in any event on indemnity basis.
- xi. The honourable court do make such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the minor's and petitioner's fundamental rights.

The Petitioner's Case

3. The petition is supported by the petitioner's affidavit dated November 15, 2019 and the further affidavit of April 22, 2022. The minor is the petitioner's daughter. She joined the respondent school in January 2018 having transferred from St George's Girls High School.



4. He averred that he had informed the respondent that the minor had been diagnosed with bipolar formerly known as manic depression, which is a mental health condition that causes extreme mood swings that consist of highs known as mania or hypomania and lows referred to as depression. Due to this condition and to assist manage the minor, AO was also registered as a guardian of the minor and one who would go to school to attend to her needs. In view of this, he averred that he had made several futile attempts to visit the respondent to discuss the minor's condition and care.
5. He deposed that sometime in July 2019, two weeks before schools closed, the minor while in school was left uncared for and unsupervised. As a result, she accessed the unmanned school infirmary and took tablets to self-medicate. The respondent's principal called him at around 9:00pm and informed him about the incident. It was noted that the minor had not been taken to the hospital following this occurrence. He immediately procured the services of an ambulance to take her to Nairobi Women's Hospital where she was treated and later referred to Bustani Rehabilitation Centre. The school was informed of the same through a letter sent from the doctor.
6. He deposed that following the treatment, the minor went to the respondent to collect her homework for the holidays which she was denied. The petitioner was then informed *vide* a letter dated July 31, 2019 that due to the minor's condition the institution could no longer manage her as a boarding student as her condition requires keen professional and daily supervision. He was further advised to consider other options so that the minor can get assistance in the right environment.
7. He deposed that AO went to the respondent's school on 27th and July 28, 2019 to enquire whether the minor had been expelled but was not issued with any information. It was at this juncture that the petitioner involved his advocates, Echessa & Bwire Advocates LLP to communicate with the respondent to get an answer. This was done *vide* a letter delivered to the school physically on August 23, 2019. Following this communication, the guardians were then invited to the respondent's school for a meeting to be held on August 30, 2019. It is said that the meeting proved to be fruitless.
8. Soon thereafter the respondent's advocates, Chiuri Kirui & Hugo Advocates responded to the petitioner's advocates letter which he averred was an advisory without any clear answer as to the minor's position in the school. In reply through a letter dated September 6, 2019 the petitioner reminded the respondent through its advocates that the minor had been in the school since form 2 and that the condition had been clinically managed effectively. Moreover, he noted that the minor was set to resume for the third term in the Form 3 class and so their decision had an implication on her right to education.
9. He deposed that the respondent issued its response *vide* a letter dated September 10, 2019 which confirmed that the minor had not been expelled but would be accommodated by the school on the following grounds that:
 - i. The minor attends school as a day scholar reporting at 8:00am to 4:00pm, Monday to Friday.
 - ii. The petitioner was to provide at his own cost, a medically certified care giver who will accompany the minor to school daily.
 - iii. The respondent would not be responsible for the self –inflicted injuries and or damage, including suicidal attempts.
 - iv. The petitioner will be held responsible for injuries to other students occasioned by the minor's deeds.
 - v. A medical report from a psychiatrist confirming that the minor is in a state to withstand the workload that comes with learning in a competitive communal education environment.



10. Moreover, the respondent informed the petitioner that registration of the KCSE examination was ongoing and advised the petitioner to consider registering the minor as a private candidate. To this end the petitioner averred that the respondent's conduct made it apparent that it was not willing to accommodate the minor in the school. This is due to the unattainable conditions that would make it costly for the petitioner to sustain the minor's education. He noted that the conditions would also affect the minor's psychological and social growth. In view of this it is the petitioner's contention that the respondent blatantly disregarded the due process which violated the minor's fundamental rights and freedoms.
11. In the further affidavit while reiterating the contents of his affidavit, the petitioner informed contrary to the respondent's averments that the petition, supporting affidavit and annexures were all dated November 15, 2019 unless the respondent had referred to a different petition. He deposed that at the time of enrolment of the minor at the respondent's institution, the minor had not been diagnosed with the bipolar disorder to warrant any form of disclosure as alleged. He deposed that immediately the said condition was diagnosed, he personally informed the Director of the School, Ms Juju Gachukia of the minor's special needs. She vowed that the respondent would accommodate the minor and offer the necessary assistance. In view of this he denied the respondent's claim that the petitioner sought audience with the school on the minor's mental condition after the July 2019 incident.

The Respondent's Case

12. The respondent in response filed its replying affidavit dated July 22, 2020 sworn by the school's principal, JM who commenced by deposing that the respondent has no legal capacity to sue or be sued, and was thus a wrong party in this suit. Moreover, it was stated that the supporting affidavit was defective because it was dated pre-petition. She deposed that the petitioner had not at the time of enrolment disclosed that the minor was diagnosed with the bipolar disorder. Furthermore, she noted that the petitioner and the other guardian had abdicated their responsibility over the minor to the school and only sought audience on her mental condition after the July 2019 incident.
13. She deposed that the incident occurred on July 18, 2019 at around 8.30pm when the students were attending their night preps. That contrary to the petitioner's allegation the school nurse was at the infirmary at the time of the incident and the minor already had the medication on her person. The students summoned the teacher on duty informing him that the minor was sick. The minor thereafter received first aid at the school infirmary. The petitioner was informed of the incident at around 9.00p.m. The minor was then taken to Nairobi Women's Hospital at around 9:45pm, in an ambulance, hence acting without undue delay.
14. She deposed that their letter to the petitioner dated July 31, 2019 had been drafted because of several incidents that had arisen between 2018 and July 2019. The events were outlined as follows:
 - i. During first term in 2018, the minor wanted to go home to celebrate her birthday. She feigned sickness, by claiming she had lost her voice and could not talk. Upon reporting back, she bragged to her classmates that she just wanted to go celebrate her birthday and was determined to get permission by all means necessary.
 - ii. During the same term, she cut her wrists and thighs with a blade.
 - iii. On May 13, 2018 the minor had an altercation with a classmate where she grabbed her by the neck and pinned her against the wall sending panic to her class.



- iv. In the evening of the same day, the minor was restrained by her cubemates from drinking a fabric softener. When she was summoned by the principal to the office, she fainted and placed her head on the table for about 15 minutes. The petitioner was called and took her home.
 - v. After three weeks, she reported back and in the presence of the father, committed herself in writing that she was going to live harmoniously with other students.
 - vi. The principal was informed by one of the teachers that in December 2018, the minor had threatened on Instagram to commit suicide for falling out with the boyfriend.
 - vii. On reporting back to school in January 2019, she was put on a keen counselling schedule. Both the class teacher and the deputy principal closely monitored her progress.
 - viii. On May 4, 2019 during the day, the minor used a pencil sharpener blade to slice her wrists and chest. At night, she attempted drinking a fabric softener. The students alerted the matron and the school nurse.
 - ix. On May 5, 2019, the minor was still hysterical shouting that she wished to die since no one loved her.
15. She deposed from that the foregoing it became apparent that the minor required special care. In the interest of the minor and other students the conclusion made was that the minor was better-off as a day scholar or taken to an institution where she would get the requisite attention. It was stressed that the decisions were made in good faith contrary to the petitioner's allegations. The respondent denied having violated the minor's right to education. This is because the minor continued with her studies at the school as a day scholar and did receive education. Besides, had the minor opted to attend another institution the respondent did not do anything to render her ineligible to join the other institution. It was noted that the minor was eventually enrolled at Loreto Convent Msongari, and the petition had been filed to tarnish the name of the respondent.

Submissions

16. On behalf of the petitioner, the firm of Echessa & Bwire Advocates LLP filed written submissions dated April 22, 2022. The following issues were identified for determination:
- i. Whether the respondent by its impugned action and or decision violated the minor's fundamental right and freedoms under articles 26(1), 27(1), (2), (4) & (5), 47(1), 53(1)(b) and (c) & (2) and 54(1)(a) of the *Constitution* according to legislative intent.
 - ii. Whether the orders and reliefs under the petition should issue.
17. On violation of article 53(1) (b) and (c) and article 53(2) of the *Constitution*, counsel submitted that these articles guarantee every child the right to free and compulsory basic education, while seeking to protect children from neglect and inhuman treatment. Additionally, the child's best interests are of paramount importance in every matter concerning him/her. On this premise it was argued that the respondent's actions and decisions fell short of this and were in blatant disregard of these provisions.
18. Counsel argued that the minor had been in the school since January 2018 and had completed 5 terms there. In this period, it was noted that the minor's condition had been managed. He noted that this only changed after the July 2019 incident as detailed in both parties' affidavits. That despite the petitioner's confirmation that the minor had been treated and was under medication to manage the condition, the respondent effectively denied a minor with disability the opportunity and right to preferred education, occasioning psychological torture and prejudice upon her.



19. In view of this counsel submitted that the respondent's decision was arrived at in blatant disregard and innate ignorance of article 27(1), (2),(3) and (5) of the Constitution that guarantees every person equality and freedom from any form of discrimination, in this case the health status of the minor; article 54 of the Constitution, that guarantees every person with any disability the right to be treated with dignity and respect and to access educational institutions; article 10 of the Constitution as guaranteed by article 47 and 50 of the Constitution together with the Fair Administration Actions Act, 2015 and impact on general life of the minor and education under article 26 and 43(1) of the Constitution.
20. On violation of the right to equality and freedom from discrimination under article 27(1), (2), (4) and (5) of the Constitution, counsel submitted that equality means equal concern and respect across differences. As such it does not presuppose the elimination or suppression of differences as held in the case of National Coalition for Gay and Lesbian Equality v Minister for Justice [19981 ZAAC 15. He argued that instead of upholding the said provisions, the respondent by its conduct with gross impunity and complete disregard violated the inviolable fundamental right of freedom from inhuman or degrading treatment as underpinned under article 25(a) of the Constitution.
21. Counsel noted that this was done by subjecting the minor to curtailment of her right to education, curtailing her access to her educational institution of choice, discriminating and failing to tolerate her based on her mental condition subjecting her to psychological, inhuman and degrading treatment. Relying on the International Covenant on Economic, Social and Cultural Rights, Committee General Comment 13 (21st Session, 1999) "The right to education" article 13, counsel noted that it was stated that education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.
22. On the right of persons with disabilities under article 54 of the Constitution, counsel submitted that the respondent's actions amount to a violation of the said right. It was noted that this provision was set to ensure that persons with disabilities are not discriminated against on the basis of their disabilities. In support reliance was placed on section 18(1) and (2) of the Persons with Disabilities Act, 2003, as revised in 2012, section 34(2) of the Basic Education Act, 2013, section 5, 7(2) and 12 of the Children Act, 2001, article 7(1) & (2) of the United Nations convention on rights of persons with disability - Children with disabilities, article 24(1) & (2) of the United Nations Convention on Rights of persons with disability - Education.
23. It was additionally submitted that the respondent by setting out the impugned conditions had the indirect implication of forcing the minor out of the institution. This was due to the over burdening expenses and costs involved and the psychological effect that the minor would endure owing to the presence of a care giver following her around. This action on the part of the respondent was discriminatory against the minor as it was based on her disability. The respondent in denying her reasonable accommodation further violated the provisions of section 12 of the Children Act, 2001, section 18(2) of the Persons with Disabilities Act, 2003 and article 7(1) & (2) and article 24(1) & (2) of the United Nations convention on rights of persons with disability.
24. In support reliance was placed on the Supreme Court of India case of Prince v President, Cape Law Society and others [2002J 2ACC 1; Mine (Pty) Ltd Secunda Collieries 2003 (6) SA 254(W) and South African case of Public Servants Association of South Africa and others v Minister of Justice and others 1997 (3) SA 925(T) where it was held that at its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights



equally. It ensures that people are not relegated to the margins of society because they do not or cannot conform to certain social norms.

25. On article 10 as guaranteed by articles 47 and 50 of the Constitution, counsel submitted that the respondent was obligated to afford the minor due process in line with the dictates of article 47 of the Constitution. Further as per article 50(1) of the Constitution the minor had a right to have the dispute determined by a tribunal that was impartial and fair. He submitted that these rights were not available to the minor on account of the respondent's actions of knowingly curtailing the petitioner and the minor's legal guardian access to the management of the institution on several occasions leading up to the impugned administrative action.
26. Likewise, the respondent while aware that the 3rd term of schooling had already started failed to adjudicate on the issue of the minor's continued admission in the institution expeditiously, which in effect made the minor miss out on important schoolwork preceding her enrollment in another institution. Further, that the decision of the respondent was not lawful as it was based on the minor's mental disability.
27. In view of this it was submitted that the respondent had violated the rules of natural justice and the decision made is void. This was settled in the cases of General Medical Council v Sparkman [1943] 2 All ER 337, Attorney-General v Ryan, (1980)A.C. 718 and later adopted by the Court of Appeal in the case of Mirugi Kariuki v The Attorney General Nairobi civil application No 70 of 1991.
28. On the impact on the general life of the minor under article 26 and 43(1) of the Constitution, counsel submitted that the respondent's actions placed the economic and social rights of the minor in jeopardy, as the disturbance caused drastic adjustments on her, a person with a medical condition right before her final examinations. He stated that this could have affected her ability to sit and pass the said examinations, therefore rendering her economic and social rights set out under article 43(1) of the Constitution unattainable.
29. On the final issue, counsel submitted that the Court of Appeal in the case of Attorney General v Kituo Cha Sberia & 7 others (2017)eKLR held that there is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the bill of rights with a view to the preserve the dignity of individuals and communities. It was on this basis that the petitioner seeks justice on behalf of the minor.

The respondent's submissions

30. The firm of Njoroge Regeru & Company Advocates on behalf of the respondent filed written submissions dated June 21, 2022. Counsel identified the following as the issues for determination:
 - i. Whether the petitioner has a right to institute the suit against the respondent.
 - ii. Whether the minor's right to access to education was violated.
 - iii. Whether the minor's best interests under the Constitution, the Children's Act, and the Basic Education Act were violated.
 - iv. Whether the minor was discriminated against due to her disability/ mood disorder.
 - v. Whether the minor's right to fair administrative action as violated.
31. On the first issue counsel citing the case of Maurice Ooko Otieno v Mater Misericordiae Hospital (2004) eKLR submitted that the law requires that a suit be brought against a legal entity which he



- argued that the respondent was not. In effect it was argued that the respondent did not have the ability to action any judgment that would be made against it.
32. Turning to the second point, counsel submitted that the respondent operates according to the standards set out in the *Basic Education Act* which recognizes it as a private school. He thus submitted that under article 43 (1) (f) of the *Constitution* the right to a free and compulsory basic education is a duty that falls on the government and not the respondent and so the allegation of violation is unfounded. Nevertheless, counsel submitted that the respondent had on several occasions made considerable effort to ensure that the minor was able to attend her classes including the suggestion for a medically qualified person to attend to her. It was noted that the respondent had also suggested that the minor continues pursuing her studies at the school albeit as a day scholar.
 33. It was emphasized that the petitioner while filing the medical records report as the minor joined the school had failed to disclose that the minor had been diagnosed with bipolar during her stay at the school. In view of this it was argued that the minor always had full access to education and her right to education had not been prejudiced.
 34. On the third issue, counsel submitted that the respondent, in all its activities, had the overarching duty to ensure that all its actions were in the best interest of the minor. To support this point counsel cited the case of *RCK (a child suing through her mother and next friend KRC) v KSI* (2014) eKLR where it was held that a child's best interests are of paramount importance in every matter concerning the child. This provision is also given effect by section 4(2) of the *Children's Act* which provides that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. It was further noted that even a private school is bound by law to protect the best interests of the child while carrying out its functions.
 35. Counsel thus submitted that when it became clear to the respondent that the minor needed further assistance in order to cope with the environment, efforts were made to contact the petitioner in order to reach an agreement on what was the best way forward. Citing the case of *AA (a minor suing through the father and next friend AEM) v Board of Governors. M Academy* [2016] eKLR he noted that the court held that a parent is under an obligation to nurture a child by providing an enabling environment where the child's potential can be realized for growth to adulthood and to a responsible citizen. He argued thus that the petitioner also had an equal stake and needed to consider the minor's change of health to ensure that her best interests were being recognized.
 36. Turning to the fourth issue, counsel submitted that discrimination can only be said to happen amongst people of similar status as held in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR)(22 October 2021) (Judgment). Similar reliance was placed on the cases of *James Nyasora Nyarangi and 3 others v the Attorney General* (2008) eKLR and *RM (suing through next friend JK) v Attorney General* (2008)1 KLR (G&F) 574.
 37. He submitted that the minor's health placed her in a category of persons under the ambit of the *Mental Health Act* and these persons are, lawfully, distinguished from other persons. He further noted that the respondent did not at the time have any other students with the same health conditions. As a result, it was asserted that the minor was in a class of her own and therefore the allegations of discrimination were unfounded. In addition, it was noted that with no information on her condition, there was no way to prepare the staff to take care of her. Relying on the cited authorities counsel emphasized that the minor had not been unfairly discriminated against, and what the respondent did simply distinguished her by attempting to accommodate her special needs.



38. On the final point, counsel submitted that there was no need for any form of administrative action because there were no administrative issues and decisions involved. This is since the measures taken to engage the petitioner in discussions were not disciplinary in nature. It was noted that the respondent and the petitioner had been in constant communication as to the best way to ensure that the needs of the minor were met.
39. Relying on the case of *Cberono Gladys v University of Nairobi* [2020] eKLR counsel submitted that the petitioner had not pleaded nor demonstrated the existence of bias, procedural impropriety, ulterior motive, failure to consider relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power in the respondent's actions. To this end counsel submitted that the petition lacked merit.

Analysis and Determination

40. Having carefully considered the pleadings, submissions, cited authorities and the law I find the following issues to fall for determination:
- i. Whether the respondent has legal capacity to sue or be sued;
 - ii. Whether the petitioner's rights under articles 26(1), 27(1), (2),(4)&(5), 43(1), 47(1), 53(1)(b) and (c) & (2) and 54(1)(a) of the *Constitution* were violated; and
 - iii. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i). Whether the respondent has legal capacity to sue or be sued.

41. The respondent contested its eligibility as a proper party in this suit. It was argued that the school does not have the requisite legal capacity to sue or be sued. The petitioner in response deposed that article 260 of the *Constitution* defines a person to include a company, association, or other body of persons whether incorporated or unincorporated. As such it is the *Basic Education Act*, No 14 of 2013 under which the respondent is registered and licensed as an organization to undertake matters relating to basic education and training making it a proper party for purposes of the present petition. In essence the issue this court must interrogate is how a private school is to sue or be sued determining whether the respondent is a proper party in this suit.
42. The *Basic Education Act*, 2013 that governs basic education in Kenya makes known in its preamble that it is an Act of Parliament to give effect to article 53 of the *Constitution* and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes. The respondent made known that it is a private school, as defined under section 2 of the Act which means a school established, owned or operated by private individuals, entrepreneurs and institutions and so required to be registered in the proper form under the required law before being registered with the Ministry of Education as required under part vi of the Act which deals with Private Educational Institutions.
43. This section can be contrasted with part viii of the Act which deals with the governance and management of basic education and training regarding public schools. The part informs under sections 55, 56, 57, 58 and 59 of the *Basic Education Act* No 14 of 2013 that School Management Committees and the Board of Management are established as custodians of primary and secondary schools respectively. As such it follows that the Boards of Management and School Management



Committees manage, supervise, and run affairs of secondary and primary schools respectively and so only such bodies have the capacity to sue or be sued on behalf of the school.

44. In essence the legal status of private and public schools is distinct. The legal status of a private school owing to the definition reveals that it can be legally registered in various forms. For instance, as a company under the *Companies Act* or if it is managed by a church as an organization under the *Societies Act*. This means therefore that there was need for the legal status of the respondent to be established by the petitioner to ascertain its legal capacity before filing this suit.
45. The court in the case of *Mavoko Land Development Company Limited v Mlolongo Catholic Church & 2 others* [2022] eKLR in a similar matter opined as follows:

“ 47. The 2nd defendant having denied legal capacity to be sued, it behooved the plaintiff to lead evidence on the legal capacity of the 2nd defendant to be sued in its name. The plaintiff did not do so. In *Janto Construction Company Ltd v Enock Sikolia & 2 others* [2020] eKLR it was stated thus;

“the claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which are either natural or legal persons which can successfully sue or be sued. Instituting legal proceedings against a non-legal entity renders the suit a non-starter.”

48. This court agrees with the sentiments in *Maurice Ooko Otieno v Mater Misericordiae Hospital* (supra) relied on by the defendant which in the court’s opinion rightly captured the inescapable legal position by stating thus:

“ The law requires that a suit be brought against a legal entity. This is an individual, a limited liability company, the Attorney General – on behalf of government department, certain parastatals and or co-operations. Mater Misericordiae Hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued. The plaintiff required to find out what the status of the said hospital is. If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into.”

46. From the pleadings, annexures etc. placed before this court, I note that there is no evidence or material to demonstrate that the respondent possesses the requisite legal capacity with an ability of suing or being sued to rebut the respondent’s assertion. I say so because as it stands this court cannot ascertain the legal status of the respondent to determine whether it is the right party to this suit. The registration documentation would have assisted the court to make such a determination but the same was not supplied.
47. The issue of the respondent’s legal standing has not just arisen. The respondent in the replying affidavit raised it and the petitioner ought to have acted on it. No assumptions ought to be made on such matters. It is important for the court to be sure that incase of a successful judgment a party will not have challenges in executing it. The position is that the petitioner has failed to show that the respondent is legal entity capable of suing and being sued. For this lapse in the petitioner’s case I have no option but to strike out the petition without going into the merits. The petition is struck out with no order as to costs.

Orders accordingly.



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN
OPEN COURT AT MILIMANI, NAIROBI.**

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

