



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

KISUMU CONSTITUTIONAL PETITION NO 11 OF 2020

IN THE MATTER OF:- A Petition/application by KESTPA' suing on their own behalf and on behalf of and representing parents and/ or guardians of students who are minors currently schooling at the Mahavir Nursery School, Kisumu Junior Academy and the Kisumu Senior Academy- a group of schools registered as community and nonprofit institutions under the Kisumu Education Society Trust

IN THE MATTER OF: - The Right of Education under Article 53 of the Constitution under Articles 43 (f) and 53 (2) of the Constitution

IN THE MATTER OF: - The Right provided under Article 46 of the Constitution and Consumer Protection Act No 46 of 2012

IN THE MATTER OF: - The Board of Trustees of Kisumu Education Society Trust for contravening express provisions of Consumer Protection Act No 46 of 2020

IN THE MATTER OF: - The Constitution of Kenya Section 23 (3) (f) and 27, 28, 32, 33, 44 and 165 (6)

BETWEEN

KESTPA' (Suing as parents and / or guardians of students who are minors currently schooling at the Mahavir Nursery School, Kisumu Junior Academy and the Kisumu Senior Academy- a group of schools registered as community and non-profit institutions by the Kisumu Education Society Trust.....**PETITIONERS**

VERSUS

THE KISUMU EDUCATION SOCIETY TRUST.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. In their Petition dated 22nd June 2020, the Petitioners sought the following orders:-

- a. **THAT permission be granted to the Petitioners/Applicants by the Honourable Court to use the initials "KESTPA" as the Petitioners/ Applicants are parents and or guardians of minor children and it was in the best interest of the children in terms of Article 53(2) of the Constitution that the names of the parents and their children be sealed from the public and as also provided for under Section 76(5) of the Children's Act.**
- b. **THAT a CONSERVATORY ORDER be issued staying the implementation of payment of full fees payable to the 1st Respondent and in lieu they be allowed to offset up to 30% of school fees pro forma for term 3 of the year 2019-2020.**
- c. **THAT a declaration be and is hereby issued that the 1st Respondent was obliged by the law and under the Constitution**

vide Article 53(2) to consider the best interest of the children in their schools, whenever they made any policy decisions and/or changes that would affect the children's schooling, including virtual learning and must consequently consult and obtain consent of their parents before implementing the same.

d. THAT an ORDER of mandamus be hereby issued directing the 1st Respondent to immediately and without any further delay establish a parents' teachers' Association in terms of Article 36 of the Constitution and Section 55 (3) of the Basic Education Act No 13 of 2012.

e. THAT a declaration be and is hereby issued that the Petitioners are entitled by virtue of Article 36 of the Constitution and Section 55 and the 3rd Schedule of the Basic Education Act No 13 of 2012 to establish a parent Association that is recognized and is able to engage the school.

f. THAT the 1st Respondent be ORDERED by the Honourable Court to only charge for the equivalent to the only service offered, which is the virtual class or digital class.

g. THAT the Honourable court to direct that the 3rd Respondent, being the cabinet Secretary for Education to immediately inquire in terms of section 52(1) (g) of the Basic Education Act No 13 of 2012 about the actions of the 1st Respondent in offering virtual or online learning and whether the same met the basic education requirements under the Constitution and Basic Education Act No 13 of 2012.

h. THAT the Honourable Court do direct that the 3rd Respondent, being the Cabinet Secretary for Education to immediately come up with rules, regulations and policy in terms of Section 39 of the Basic Education Act No 13 to guide the 1st Respondent and all other schools with respect to offering virtual or online learning to meet the basic education standards for under the Constitution, International Conventions and the Basic Education Act No 13 of 2012.

i. THAT the Honourable court do direct that the 3rd Respondent by a structural interdict, being the Cabinet Secretary for Education to immediately and without any delay and in consultation with the 2nd Respondent to develop a Bill for consideration by the National Assembly to regulate and control the capping of school fees in private schools and schools offering international curriculum in Kenya and report back to our court about his progress in 12 months.

j. Or such other orders as this Honourable Court shall deem just.

k. That there be no order as to costs.

2. The Petitioners' Written submissions and their Bundle of authorities dated 12th October 2020 were filed on 13th October 2020 while those of the 1st Respondent were dated 30th November 2020. On their part, the 2nd and 3rd Respondents' Written Submissions were dated 30th November 2020 and filed on 1st December 2020.

3. Parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PETITIONERS' CASE

4. The Petitioners' Petition was supported by the Affidavits of Eric Ondiek that were sworn on 22nd June 2020 and 13th October 2020 on his own behalf and that of the other parents of the group of schools registered as community and nonprofit institutions under the Kisumu Education Society Trust.

5. They challenged the virtual learning program also known as "online classes" that had been introduced by the 1st Respondent herein following the suspension of physical learning in education institutions by the 3rd Respondent following the outbreak of the COVID-19 pandemic. They raised several issues surrounding the said online learning.

6. The first issue was premised on the fact that the ten (10%) per cent discount of the school fees that the 1st Respondent had offered them was unfair, unconscionable and unlawful as the virtual classes were being offered at a fee rate that was almost similar to the fees that the 1st Respondent charged when the schools were in normal session. They termed this as a violation of their consumer rights under Article 46 of the Constitution of Kenya, 2010. They contended that schools of the same parity in systems, curriculum and fees structure had considered requests by distressed parents and granted considerable fee discounts of up to fifty (50%) per cent, which the 1st Respondent declined to accede to despite their pleas.

7. The second issue related to the 1st Respondent's failure to consult and engage them meaningfully. They were emphatic that the unilateral decision to proceed with online learning amounted to a breach of contract by the 1st Respondent. They averred that the contract they had with it was binding and any changes made thereto would necessarily need their express consent. They contended that if failed to provide them information so as to make informed choices and that where the said information was provided, it was provided late and in an unclear manner.

8. The third issue was that the 1st Respondent irredeemably failed to offer educational services with reasonable care and skill and to comply with promises made prior to the signing of the contracts as regards the services on offer.

9. They were also concerned about the quality of education their children were being given through online learning vis a vis the fees they were being asked to pay. They therefore pleaded with the court to intervene and to further direct the 3rd Respondent to immediately inquire in the terms of Section 52(1)(g) of the Basic Education Act, 2013 regarding the 1st Respondent's actions to offer virtual learning and establish whether the same met the basic education requirements under the Constitution and the Basic Education Act, to immediately come up with rules, regulations and policy in terms of Section 39 of the Basic Education Act to guide the 1st Respondent and all other schools with respect to offering virtual or online learning to meet the basic education standards under the Constitution, international conventions and the Basic Education Act, to issue a structural interdict to the 3rd Respondent to immediately and without any delay and in consultation with the 2nd Respondent develop a Bill for consideration by the National Assembly to regulate and cap school fees in private schools and schools offering international curriculum in Kenya.

10. The Petitioners relied on the Constitution and the Statutes to buttress their case but did not cite any case law for consideration by the court. If there were any, then the same were neither in the body of their Written Submissions and/or attached thereto.

THE 1ST RESPONDENT'S CASE

11. In opposition to the said Petition, on 8th July 2020, Prester Ogunde, the Manager of all the Schools under the ownership of Kisumu Education Society swore the Replying Affidavit on behalf of the 1st Respondent herein.

12. The 1st Respondent averred that it was common knowledge at the time that schools were offering online classes to its students to mitigate the closure of schools that had been prompted by Covid-19 pandemic with the full blessings of the Government.

13. It was categorical that none of the Petitioners' constitutional rights and fundamental freedoms were infringed upon and/ or threatened with infringement as they had alleged. It was its case that any order stopping the classes as the Petitioners had been sought would have had the effect of jeopardising the rights of the affected children to education as provided for by the Constitution as they would not be taught while other children were going on with their classes.

14. It added that the subject matter of this suit, although disguised as a constitutional petition, was purely a contractual dispute falling within the jurisdiction of the Civil Division of the High Court. It pointed out that the agreements the schools had entered into with the Petitioners at the time of enrollment of their children were private contracts and the parties were bound by their terms. It therefore asserted that the schools enjoyed the right and prerogative to set their fees as they deemed fit because of the fundamental principle of party autonomy underlying negotiation of private contracts.

15. It was categorical that its fees were one of the fairest in schools, if not the fairest of its class. It asserted that it did not offer education for profit and it had no surpluses to run the schools. It explained that unlike public schools where the salaries of teachers and other staff were met by the Government, it relied entirely on fees to meet its salary obligations to teachers and other staff as well as pay for other costs such as electricity, security and all other overheads necessary for the day to day running of the schools.

16. It denied the Petitioners' allegation that the school had stood in the way of formation of a parents' association stating that in a Parents General Meeting called in 2014, the 1st Respondent facilitated a meeting during which the agenda was the formation of the Parent Teachers Association when it was resolved, among other things, that a joint sub-committee made up of parents' representatives and teachers be formed, to spearhead the writing of the Constitution of the said Association. It stated that the parents failed to actively participate in the process and argued that the formation of a Parents Teachers Association was as much the responsibility of the 1st Respondent as it was of the parents.

17. They further contended that the Petitioners, suing under the unregistered and amorphous name, KESPTA, lacked the authority and permission to represent all the parents and guardians of the children enrolled with the 1st Respondent, most of whom had no issue with its actions.

18. It was emphatic that this was not a constitutional matter and this honourable court not being a right forum to hear this matter, it lacked jurisdiction to hear and determine this case.

19. It asserted that the Petitioners had not adduced evidence to warrant the grant of prayers sought and urged this court to dismiss the petition with costs to be paid personally by the aforesaid Eric Ondiek for the reason that it lacked merit and was an abuse of its process.

20. To support its various arguments, it relied on several cases amongst them **James Kuria vs Attorney General & 3 Others [2018] eKLR, Hakizima Abdoul Abdulkarim vs Arrow Motors (EA) Ltd & Another [2017] eKLR, Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR** which this court carefully considered

THE 2ND AND 3RD RESPONDENTS' CASE

21. On their part, on 25th June 2020, the 2nd and 3rd Respondents filed a Replying Affidavit that was sworn on their behalf by Isaac N. Atebe, the County Director of Education, Kisumu County.

22. It was the 2nd and 3rd Respondent's case that the Petition did not raise any constitutional issue for determination but that it was clearly demonstrated in the body of the Petition and the Affidavit in support thereof that there existed a contractual relationship for provision of education and related services between the Petitioners and the 1st Respondent's schools. It pointed out that the contractual issues raised in the said Petition called for the analysis of the alleged facts and the application of relevant statutes.

23. It was their further averment that violations of constitutional rights must be demonstrated with precision in the body of a petition so as to invite the court to properly address itself on the alleged violations, which they averred was not the case herein.

24. They further argued that the prayers that had been sought against the 3rd Respondent herein were incompetent, bad in law, offensive to the fundamental doctrine of separation of powers.

25. They asserted that the reliefs sought as against them were untenable and that the 3rd Respondent was not bound by the advice of the 2nd Respondent, who was the Principal Legal Advisor to the Government.

26. They therefore urged this court to find the Petition unmeritorious and urged this court to dismiss the Petition herein with costs awarded to them.

27. To buttress their different arguments in response to the Petition herein, they placed reliance on the cases of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR**, **Justus Muthumbi & 9 Others vs Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 Others [2018] eKLR**, **Speaker of the National Assembly vs Karume [2008] eKLR** among others and which this court also considered while writing its decision.

LEGAL ANALYSIS

28. The court carefully considered the Petitioners' Petition; and the Respondents' Replying affidavits as well as parties rival submissions and from the aforesaid, found the following to have the issues that had been placed before it for determination:-

- a. Whether or not the Petitioners had capacity to bring the suit as filed;**
- b. Whether or not the Petitioners' constitutional rights had been infringed upon;**
- c. If so, what reliefs were they entitled to;**
- d. Who was to bear the costs of this Petition.**

29. The court therefore deemed it prudent to address the aforesaid issues under the following distinct heads.

I. CAPACITY TO SUE

30. In respect of the first prayer that the Petitioners be granted permissions to use the initials "KESTPA" because they were parents and/ or guardians of children and that it was in the best interest of the children in terms of Article 53(2) of the Constitution that their names and those of their children be sealed from the public and as also provided for under Section 76(5) of the Children's Act

31. It was not clear to this court whether this was a representative suit or a suit filed on behalf of minors. The challenge that this court faced was the fact that even if it was to grant orders in favour of the Petitioners, it would not be possible to know who would enforce the same and who be granted the reliefs as the name "KESTPA" had neither been registered as a name under any of the statutes in Kenya.

32. It would also not be possible to enforce an order to offset up to thirty (30%) per cent of the school fees pro forma for term 3 of the year 2019-2020 as the parents and guardians were unknown bearing in mind that the 1st Respondent had indicated that there were parents and guardian who had not complained about the ten (10%) per cent reduction in school fees.

33. The importance of the identity of the Petitioners would be critical when addressing the issue of costs. If they were to be awarded costs, it was not clear who would be entitled to the same. If the court was to award costs against them, it would not be possible to know against whom the costs would be executed against.

34. This court therefore took the view that the prayer to use initials was untenable for the reason that the procedure of instituting proceedings was well set out in the Civil Procedure Code and hence the Petitioners did not have capacity to institute the proceedings in the manner that they did, which would have lent to the automatic dismissal of the Appeal herein.

35. This was irrespective that the 1st Respondent conceded that the Petitioners could use the said initials to institute the proceedings herein on 12th August 2020 as the Petitioners had contended. In any event, this court did not see any order in the file for that date showing that Prayer No 2 of their Notice of Motion application dated and filed on 22nd June 2020 had been allowed by the consent of the parties. It was proposed by the Petitioners but there was no order to that effect.

36. The consequences of lack of disclosure of the persons who filed the Petition was addressed later on in the Judgment herein as the court deemed it prudent to address its mind to the merits or otherwise of the Petition herein in the event it was found on appeal that it erred in having found that the Petition herein was incompetent and defective *ab initio*.

37. It therefore proceeded to deal with the issues under the separate and distinct heads shown hereunder.

II. CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS

A. CONSUMER PROTECTION

38. Notably, there was no dispute that there was a contract for provision of a service between the individual parents and the schools. The fact that the 1st Respondents provided the Petitioners services brought the dispute herein within the Consumer Protection Act where the court could intervene in the event there was any infringement.

39. In the said case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & Others** (Supra), Tunoi, JA (as he then was), rendered himself as follows:-

“The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so.

40. Whereas the facts of the case herein are distinguishable from the facts in the case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR**, the principle behind it is the court will intervene to protect a party who has little or no bargaining power and is being taken advantage of irrespective of the circumstances that put him in that position.

41. Indeed, the strong party in a contractual relationship should not be allowed to steamroll over the weaker party. If this was not so, consumer protection would not have been entrenched in the Constitution and Statute.

42. The Petition herein was to a large extent premised on Article 46 of the Constitution of Kenya which provides as follows:-

“46. (1) Consumers have the right—

- (a) to goods and services of reasonable quality;**
- (b) to the information necessary for them to gain full benefit from goods and services;**
- (c) to the protection of their health, safety, and economic interests; and**
- (d) to compensation for loss or injury arising from defects in goods or services.**

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.”

43. The preamble of the Consumer Protection Act, which is the Act of Parliament contemplated under Article 46(2) of the Constitution, provides that the enactment is an **“Act of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.”**

44. Section 3(1) provides that the *Act* must be interpreted in a manner that gives effect to the purposes set out in subsection (4^a) which is to promote and advance the social and economic welfare of consumers in Kenya by:-

- a. establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;**
- b. reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;**
- c. promoting fair and ethical business practices;**
- d. protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;**
- e. improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;**
- f. promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;**
- g. providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and**
- h. providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.”**

45. Under Section 3(2) of the Consumer Protection Act, the court may consider appropriate foreign and international law and appropriate international conventions, declarations or protocols relating to consumer protection.

46. The question this court was being called to determine was whether or not the Petitioners' consumer rights under Article 46 of the Constitution had been infringed upon as the Petitioners had contended and/or if the dispute herein was contractual as had been submitted by the Respondents herein thus removing it from the jurisdiction of this court sitting as a constitutional court.

47. The Petition herein was a reaction to the downturn in the economy as a result of the outbreak of the coronavirus disease. The Petitioners' argument was that the reduction of the school fees by ten (10%) per cent and not thirty (30%) per cent was a violation of their consumer rights contrary to Article 46 of the Constitution because the introduction of online classes watered down the services that the 1st Respondent offered them. In other words, it was their contention that the online classes were not value for money.

48. The government of Kenya took immediate interventions and adopted teaching through virtual platforms. The Petitioners failed to demonstrate that the pricing was not commensurate with the services that were offered to their children by the 1st Respondent herein. The offer of a reduction of the fees was a counter-proposal which the Petitioners were not obligated to accept. Their counter-offer to reduce the fees by thirty (30%) per cent was not acceptable to the 1st Respondent and consequently, taking up the virtual classes implied that the Petitioners had accepted the 1st Respondent's offer of reduction of fees by ten (10%) per cent.

49. It is trite law that he who alleges must prove. They ought to have placed before this court evidence of false and or unconscionable representation on the part of the 1st Respondent. They did not demonstrate that the pricing of virtual classes and/or the decision of the schools to adopt online teaching violated their consumer rights and/or demonstrate any unfair practices as envisaged in Sections 12 and 13 of the Consumer Protection Act. The reduction of fees by less than ten (10%) per cent may have been minimal compared to reductions by other schools as was contended by the Petitioners herein. However, the same was not unfair, illegal or unconscionable.

50. The 2nd and 3rd Respondents therefore correctly argued that they could not wade into the issue of fees charged by private schools as the same falls within the realm of private service contracts.

51. It was therefore the considered view of this court that the Petitioners' assertions were amorphous and were not discernible which individual Petitioner's consumers' rights were infringed upon and consequently, their arguments in this regard fell by the wayside.

B. RIGHT TO EDUCATION

52. The Petitioners tied the alleged infringement of the Petitioners' rights as consumers to alleged violation of other constitutional rights being the right to education under Article 43(1)(f), the right of a child to free and compulsory basic education under Article 53(1)(b), and the principle of the best interests of a child in every matter concerning the child as promulgated in Article 53(2) of the Constitution.

53. The Petitioners did not demonstrate that the charging of higher fees than those of other private schools of similar status denied their children their basic right to education. The mere fact that a school charges high fees is not a violation of the Constitution of Kenya.

54. This court was not persuaded that it could determine prices of goods and/or services in the market and/or fix the price without prejudicing the providers of products or services and/or interfering with the economies of scale. It must be appreciated that the decision regarding the amount of fees to be levied is a complex one and many factors come to play. Even where schools are said to be of the same status, the facilities and the calibre of the teaching staff may be different. The pricing may differ due to the locality, clientele and infrastructure. This list of factors to be considered when fixing what fees would be payable is indeed not exhaustive but a mere illustration of the many considerations that may be made.

55. As was submitted by the 2nd and 3rd Respondents, there was need for private investors to assist the government in the fulfillment of its constitutional obligation to provide free and basic education. Although basic education is supposed to be free for all children, parents who opted to enroll their children in private schools were expected to meet the cost.

56. It would be unjust for parents who willingly and voluntarily enroll their children in private schools to demand a reduction of school fees on the ground that the fees charged violates the constitutional right to free and basic education. It was in fact a case of a willing seller willing buyer where the market dictates the cost of a product or service and the consumer purchases the product he or she can afford.

57. In this regard therefore, this court found and held that it could not therefore intervene and re-write the contract for the Petitioners and the 1st Respondent herein.

58. Going further, this court found that it was also ill-equipped to make a determination that a reduction of schools fees by a particular percentage was more appropriate and fair. Were the court to take on the responsibility of determining the discount that should have been offered by 1st Respondent, it would have been required to conduct extensive research outside the evidence placed before the court by the parties, which authority and/or mandate this court did not have.

59. The conservatory order seeking to stay the implementation of payment of full fees payable to the 1st Respondent and in lieu they be allowed to offset up to thirty (30%) per cent of school fees pro forma for term 3 of the year 2019-2020 was thus not sustainable.

60. This court also came to the conclusion that it was not necessary to consult the Petitioners prior to introducing online learning. The onset of the Covid-19 was sudden and abrupt and called upon the entire world to be innovative to carry out their functions to as near as normal as possible. It was a trial and error period with hits and misses.

61. The closure of schools was abrupt and unprecedented and there was no time for meaningful engagement. The 1st Respondent endeavoured to deliver its part of the bargain despite the changed circumstances by adopting online learning with a view to preparing the children for the examinations.

62. Whilst consultation between parents, guardians and the 1st Respondent is important by virtue of Article 10 of the Constitution of Kenya that calls for public participation, Covid-19 did not provide that opportunity in many spheres of life in 2020.

63. The court took the view that the introduction of online learning was positive and not negative and consequently, right to education to the Petitioners' children was not violated notwithstanding that no consultations were done. Indeed, the Petitioners did not provide this court with any documentary evidence to demonstrate how their children were prejudiced by the introduction of online learning.

64. They Petitioners did not place any evidence before this court to prove that the virtual or online learning failed to meet the basic requirements under the Constitution and the Basic Education Act requiring the intervention of the 3rd Respondent herein.

65. This court wholly associated with the holdings in the cases of **BPA vs The Director Brookhouse Schools & 3 Others [2020] eKLR**, **OAPA vs The Oshwal Education Relief Board & 2 Others [2020] eKLR** and **CIS vs The Director Crawford International Schools [2020] eKLR** that were relied upon by the 1st, 2nd and 3rd Respondents herein.

III. REGULATIONS AND PARENTS TEACHERS' ASSOCIATION

66. This court agreed with the Petitioners that there was merit in formulation of regulations on online learning to guide the delivery of the curriculum through online platforms and for the schools to have Parent Teachers Associations as contemplated by virtue of Section 55(2) & (3) and the Third Schedule of the Basic Education Act.

67. The Petitioners did not revert the 1st Respondent's assertions that it called parents and guardians to engage with a view to establishing a Parents Teachers Association. They failed to demonstrate that the 1st Respondent had contravened the law and hence, there would have been no legal basis to give the declaration to establish the Parents Teachers Associations as they had sought.

68. They did not prove that there was need for the 2nd Respondent to enquire whether the 1st Respondent was offering virtual or online learning that met the basic education requirements under the Constitution, the Basic Education Act and international conventions.

IV. ENACTMENT OF BILL TO CAP FEES

69. This court had determined hereinabove that it could not determine the pricing of school services as that would amount to micromanaging demand and supply mechanisms in the education sector. In the same breathe, the 2nd and 3rd Respondents could also not be compelled to develop a Bill for consideration by the National Assembly to regulate and control capping of school fees in private schools and schools offering international curriculum in Kenya and report on the progress in twelve (12) months' time.

70. In this regard, this court wholly concurred with the views of the 2nd 3rd Respondents that the mandate of the 3rd Respondent did not extend to the regulation of school fees in private schools and that his mandate only extended to public schools as was provided for in Section 29(2) of the Basic Education Act.

71. It was as was correctly stated by the 2nd and 3rd Respondents that interference by the 3rd Respondent would be contrary to the well set out principles governing privity of contracts. In addition, the 3rd Respondent could not take instructions from the 2nd Respondent as both offices were independent of each other.

CONCLUSION

72. While it is understandable that the Petitioners may have hid behind a mask known as KETSPA which they attributed to the fact of keeping the identity of the children private and confidential, so as not be victimised due to the stand that they had taken in terms of Article 53(2) of the Constitution of Kenya and Section 76(5) of the Children's Act, a Petitioner must have a face that is easily identifiable. The children's identity may have been concealed but not for the parents and guardians.

73. Failure to adhere to the correct procedures in instituting the proceedings herein made it difficult for this court to state as a matter of fact that the suit was either filed as a representative suit or if proceedings instituted for and on behalf of the minors. Article 22(1) of the Constitution provides that "every person has the right to sue." That person can either be a natural or corporate person.

74. Whereas Article 22(3)(d) of the Constitution of Kenya provides that while observing the rules of natural justice, the court shall not be unreasonably restricted by procedural technicalities disclosure of persons instituting causes of actions under the Constitution or any statute must be disclosed because consequences attach thereto.

75. It was the finding and holding of this court that the Petition was not successful as KESTPA had no *locus standi* to institute the proceedings herein as there was no evidence that it had been registered as a group under any of the laws of Kenya and thus have capacity to sue and be sued.

DISPOSITION

76. Accordingly, the Petition be and is hereby dismissed with but with no order as to costs as it not discernible against whom the award of costs if awarded to the 1st Respondent herein would be enforced against.

77. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH 2021

J. KAMAU

JUDGE