



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 32 OF 2020

**IN THE MATTER OF: A PETITION BY PARENTS AND/OR GUARDIANS OF
STUDENTS/MINORS CURRENTLY SCHOOLING AT M. M. SHAH**

AND M.V. SHAH ACADEMY

AND

**IN THE MATTER OF: THE RIGHTS OF CHILDREN UNDER ARTICLES 53 OF THE
CONSTITUTION OF KENYA, 2010 AND THE CONSUMER PROTECTION ACT NO. 46 OF 2010**

AND

IN THE MATTER OF: CONSUMER RIGHTS UNDER ARTICLE 46 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 23, 27, 28, 43 AND 165 (6) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SUPERVISORY JURISDICTION OF THE HIGH COURT

UNDER ARTICLE 165 (6) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015, LAWS OF KENYA

AND

IN THE MATTER OF: BASIC EDUCATION ACT, 2013

BETWEEN

MICHAEL MAGOG & 179 OTHERS (Suing as a parent and a guardian of students/minors

currently Schooling at M.M. Shah and M.V. Shah Academy).....PETITIONERS

AND

1. THE JAIN EDUCATION BOARD/BOARD OF

GOVERNORS OF M.M. SHAH AND M.V. SHAH ACADEMY

2. DIPAN SHAH

3. RITEN SHAH

4. GEMINI SHAH

5. DHIREN SHAH

6. AJUL SHAH

7. KINNER SHAH

8. RAKHESH SHAH

9. PAREET SHAH.....RESPONDENTS

JUDGMENT

1. By a ruling delivered on 25/8/2020, this Court adopted the Respondents undertaking made in paragraphs 30 and 31 which are relevant for purposes of the application dated 7/9/2020 which is the subject of this ruling: -

30. In this particular instance, this Court commends the efforts made by the school to ensure that their students remain academically alert. There can be no argument that every institution of learning must find ways of ensuring the continuation of learning for their students during this pandemic. The Respondent herein must be commended for not only doing that but also making it free and optional, and further promising to re-start afresh the Term 2 syllabus when the pandemic is over, and undertaking to bring all students to par to avoid any element of possible disadvantage. The school has stated clearly, and this Court has accepted that statement and undertaking that:

(a) no student of the School is being mandated to register for, attend, participate in or engage in online learning through the platforms provided by the School;

(b) no parent or student is being charged for the online learning provided by the School;

(c) when the Government lifts the restrictions such that the School can physically re-open and welcome back the students to its premises, learning will resume from where it had left off on 16th March 2020 when the directive for closure came into effect; and

(d) no parent is being compelled to pay any fees for the Second Term 2020 until such time as the School physically re-opens.

31. The school must then be taken at its undertaking. It is only upon the breach of those undertaking that the Respondent can be faulted. And that can only take place when the restrictions on open learning are lifted and then it is shown that the school has failed in its undertaking.

2. The Petitioner in Application dated 7/9/2020 seeks the following orders –

1. Spent.

2. The Honourable court be placed to order that the 2nd -9th Respondents be summoned to attend Court on the next hearing date of this Application to show cause why they should not be committed to civil jail for a term not exceeding six (6) months.

3. The Honourable court be pleased to order that the 2nd -9th Respondent be committed to civil jail for a term not exceeding six (6) months for disobeying the Court orders issued on 31/8/2020 and consequently purge the disobedience of the Court orders.

3. The Application is premised on the grounds set out therein and is supported by affidavit of **Michael Magog** sworn on 7/9/2020 on his own behalf and on the behalf of 179 others.

4. The Petitioners avers that on 4/8/2020, the Respondents issued a newsletter referenced “**SEPTEMBER–NOVEMBER TUITION PROGRAM**” informing parents/guardians that the school will offer an optional tuition program for its learners from class 1-8 for a duration

of 13 weeks, starting 31/8/2020 and ending on 27/11/2020. The program fees was therefore listed as Grade 1 – grade 3 –Kshs. 24,000/=, Grade 4 –Class 8 – Kshs. 27,000/=, and that full fees was payable before commencement, and the deadline for registration was given as 25/8/2020. The letter further emphasized that when schools physically reopen, all learners will be required to sit for an assessment in each subject so that the teachers can gauge each learner’s level.

5. It is the Petitioners’ case that the Respondent have deliberately and intentionally disobeyed the orders of the Court notwithstanding their knowledge of the same and that the disobedience of the orders of this Court is a manifestation of impunity and a slap of the face of the Court.

The Response

6. The motion is opposed by the Respondents vide Replying Affidavit sworn by **Gladys M. Juma** who is the 1st Respondent School Principal. The deponent denies any violation whatsoever of the orders of the Court and/or the undertaking given to Court vide her further Affidavit sworn on 3/6/2020.

7. The Respondents’ case is that when schools were initially closed on 16/3/2020, it was assumed that the closure would be for a relatively short period of time and that within two to three months, learners would be back at school, and normal learning would resume. It was on that assumption, that the school rolled out its online learning program and decided not to charge for it. However, the crisis did not abate. Therefore, the school started incurring its usual overhead costs including payment of salaries to its staff without any income.

8. The Respondents state that when the Government finally announced that schools would not reopen until January 2021, the school was compelled to reconsider its decision with regard to the free-of-charge online learning program in order for it to remain economically viable, and continue to exist up to January 2021 when it is expected schools will be able to reopen for physical learning. Consequently, the free-of-charge online learning program was halted on 7/8/2020 and a new optional online tuition program was commenced and communicated vide Newsletter dated 7/9/2020. The same would be open to any other student even if enrolled at another school provided there was payment of fees.

9. The Respondents state that on 1/9/2020, a series of meetings to sensitize and encourage parents to enroll their children to the online program were held, and during the said meetings, it was clarified that online tuition was optional and no unwilling student will be victimized and/or prejudiced, since when schools open, learning would resume from where it had been left off on 16/3/2020. Following the sensitization meetings, 174 learners were enrolled in the online tuition program subject to payment of requisite fees. Nevertheless, the school was still operating on a loss.

10. It is the Respondents’ case that the free-of-charge online learning program commenced on 4/5/2020 was purely discretionary and not contractual. Therefore, in exercise of the same discretion, the school opted to bring to end the free-of -charge program on 7/8/2020. Consequently, the undertaking given to Court simply lapsed concerning the free-of charge online learning program and no undertaking has been issued on the new online tuition program that commenced with effect from 31/8/2020.

11. It is also the Respondents’ case that the Petitioners have not demonstrated how the school has violated the undertaking or failed to comply with the directive of the Ministry of Education with regard to reopening of schools and resumption of physical learning when schools are yet to be reopened.

12. On the issue of demand of the outstanding school fees, the Respondents stated that in accordance to the school policy, 1st term fees was due and payable by 5/2/2020, at which time , the school was open for physical learning and in any event, the demand of 1st term fees does not in any way violate the undertaking given in respect of free-of -charge online learning program.

Submissions.

13. The Applicant filed submissions on the 28/10/2020, while the Respondent filed their submissions on 20/11/2020. All the Parties relied on their written submissions.

14. From the pleadings and submissions filed before this Court by the parties, the only issue for the determination is whether the Respondents are in contempt of the Court order issued on 31/8/2020.

Determination

15. As observed above, this Application alleges contempt of Court orders that were as a result of the undertaking by the Respondents. This court has considered this application and the response made by the Respondents. The Applicant is seeking to punish 2nd-9th Respondents for contempt of court orders issued on 31/8/2020, claiming that the Respondents have breached the said order. The Respondents on the other hand state that there has not been any breach of the said orders, and that in fact, the Applicant’s Application is premature since schools are yet to be re-opened for physical learning and there is no way the Applicants can demonstrate breach of the said Court orders.

16. The powers of this court to punish for contempt is donated by the Judicature Act (Cap 8 Laws of Kenya).

Section 5 thereof states;

"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and such power shall extend to upholding the authority and dignity of subordinate courts."

17. On the burden of proof placed upon the applicant to prove contempt of court, Section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

18. Although the proceedings are civil in nature, it is well established that an Applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the Respondents could be affected means that the standard of proof is higher than the requisite standard in civil cases. It is incumbent on the Applicant to prove that the Respondents' conduct was deliberate in the sense that they deliberately or willfully acted in a manner that breached the order.

19. In **PETER K. YEGO & 3 OTHERS V PAULINE NEKESA KODE [2009] eKLR** the Court stated:

“As contempt of court is criminal, it must be proved that one has actually disobeyed the court order before one is cited for contempt.”

20. The Respondents have stated that their undertaking to offer free-of-charge online programme was based on a mistaken belief that the closure of learning institution would be for a short duration of one to two months. However, offering the same was no longer viable, since the school had to meet its fiduciary and financial obligations, which included paying of staff salaries without any income from the learners. For the foregoing reason, the free-of-charge online programme was halted on 7/8/2020. Therefore, the undertaking on offering the free-of-charge online learning programme also lapsed on 7/8/2020.

21. The explanation offered by the Respondents on the issue of the free-of-charge online learning programme has not been controverted. That notwithstanding, the explanation given by the Respondents appear to me to be based on a common knowledge that schools were subsequently indefinitely closed. The costs of running the free-of-charge online programme must be accountable during that long period of schools closure, and it makes sense that the free-of-charge online programme became financially untenable. Therefore, this Court finds and holds that the Applicants have not proved to the required standard that here has been willful disobedience of the Court order issued on 31/8/2020.

22. In as far as the online tuition that commenced on 31/8/2020 is concerned, the same in my view, a separate optional contract that was not before the Court when the said undertaking by the Respondent was made, and therefore, this Court can only interfere with the said online tuition if, and when the Respondents make the online tuition program mandatory contrary to its undertaking captured in the order issued on 31/8/2020.

23. As to whether the 1st term fees for 2020 was payable before one could enroll into the online tuition, it is evident that the fee demanded via letter dated 7/8/2020 was in relation to 1st term's fees, which became due when the school was still opened for physical learning in 2020. Further, it is noteworthy that the Respondents' response on the said issue was not controverted. Consequently, the letter dated 7/8/2020 on the issue of 1st term fees does not in any way violate and or disobey the order issued on 31/8/2020 which was related to payment of fees after the schools were closed in March 2020 due to Covid-19.

24. On the issue of assessment of learners, the Respondents have stated that the said issue was never a part of their undertaking. Nevertheless, the Respondents state that the assessment is for the purposes of gauging the learners on what they learnt just before physical learning was suspended, and the same will help the school teachers to know how best to resume from where they had left off on 16/3/2020, when the directive for closure came into effect. Further, the Respondents stated that the Petitioners grievance are premature since at the time of filling the instant Application schools were yet to resume physical learning.

25. From the foregoing, I find that the Petitioners have failed to demonstrate how the assessment of learners will violate the undertaking by the Respondents that learning would resume from where it had left off on 16/3/2020.

26. The upshot is that the Petitioners have failed to discharge their burden of proof, and accordingly, I find no basis for the Application dated 7/9/2020. The same is dismissed.

The Petition

27. This Court in the ruling delivered on 25/8/2020 stated that the issues raised in the application are almost similar with the issues raised in the Petition, except that the motion seeks interim conservatory orders pending the hearing of the Petition. Thereafter, this Court isolated the issues for determination and put them in abeyance as reflected in the Court order issued on 28/8/2020.

28. The prayers sought in the Petition are as follows:

a) A declaration that the Respondents' premature opening of term 2 of the school calendar for the year 2020 against the Government's directive extending the reopening date for term 2 to one month to give more room for the scale up of the national efforts to fight the spread of COVID-19 is unconstitutional and illegal.

b) An order of judicial review of certiorari bringing into this Court the decision of the Respondent to prematurely open term 2 of the school calendar for the year 2020 against the Government's directive extending the reopening date for the term 2 to one month to give more room for the scale up of the national efforts to fight the spread of COVID -19.

c) An order of injunction restraining the Respondents from prematurely opening term 2 of the school calendar for the year 2020

against the Government's directive extending the reopening date for term 2 to one month to give room for the scale up of the national efforts to fight the spread of COVID-19.

d) An order directing the Respondents to establish a Parents Teachers Association with the Petitioners in accordance with Section 55 (2) & (3) of the Basic Education Act.

e) An order barring the Respondents from victimizing the Petitioners and their children on account of instituting this action.

f) Such other orders or further orders or directions as the Court may deem fit to grant so as to meet the interest of Justice.

g) The costs of this Petition.

29. The undertaking by the Respondents that was adopted by this Court in its ruling delivered on 25/8/2020, compromised and put to rest most of the issues raised by the Petitioners. The only issues that come up for determination are the ones put in abeyance by this Court in its ruling and are as follows:

a) Whether this matter is a private contract dispute.

b) Whether there should be a PTA.

(a) Whether this matter is a private contract dispute

30. **Ms. Onyango** learned counsel for the Petitioners cited the Court of Appeal in **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR** as providing the grounds upon which courts can interfere with a contract and in their case, Counsel submitted that the Respondents have operated in an adhoc manner, in complete subversion of the due process and the rule of law by procuring and implementing the online program without consulting and considering the input of parents and students who are the end users of the online programs.

31. **Mr. Nurani** learned counsel for the Respondents distinguished the Court of Appeal case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others(supra)** and submitted that the contractual dispute between the parties is a preserve of a commercial Court as opposed to a constitutional Court. Counsel cited this Court's finding in **GAM & 2 others v Registered Trustees of the Shree Cutch Satsang Swaminarayan Temple Charitable Trust & another [2020] eKLR** where I stated that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of civil litigation.

32. Counsel also submitted that the new online program was a new optional service/product the school was offering since the Ministry of Education had suspended physical learning. Therefore, the new online program contained its own terms and conditions. At first, the school at its own discretion offered the said service free-of-charge. However, after sometime, the school opted to offer the online tuition program at a fee. Therefore, a contract was entered into between parents/guardians who paid and enrolled their children into the online program and the school. The said contract would last until physical learning resumes.

Determination

33. I have considered both arguments on the nature of the dispute. It is alleged that there was violation of the Petitioner's rights guaranteed under Articles 27, 46, 47 of the Constitution. It is my view that the undertaking by the Respondents that was communicated through this Court's ruling delivered on 25/8/2020 compromised the allegations by the Petitioners on violations of their aforesated constitutional rights. Further, I find that the new online tuition commenced on 31/8/2020, was not subject to this Petition and therefore, issues raised herein pertaining to the new online tuition commenced on 31/8/2020 cannot be determined in this Petition as is. No Application to amend the Petition was made by the Petitioners in order for the Petitioner to challenge the new online program commenced on 31/8/2020, which attracts school fees. Consequently, the alleged violations of the Petitioners' constitutional rights have not been proved to the required standard and the issue of whether the dispute is a private contractual matter is spent.

b) Whether there should be a PTA.

34. On the issue of formation of Parents' Teacher Association, **Ms. Onyango** submitted that Article 53(2) of the Constitution elevates a child's best interest, necessitating consultations between the school and the parents. This can only be achieved through the formation of a parents Teachers Association.

35. I have considered the argument by counsel on the formation of a Parents' Teachers Association. It is not in dispute that currently, a Parents' Teachers Association is non-existent in the Respondents' school. In fact, the 1st Respondent has not controverted the same and/or even submitted on the issue of formation of a Parents Teacher Association.

36. The alleged violations bring to light the provisions of Article **36 (1)**, of the Constitution reproduced below: -

Freedom of association.

36(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

37. Further, on the duties and rights of a private school, **Section 52(1) (a) of the Basic Education Act** stipulates:

(1) A private school shall—

(a) establish necessary educational and governance structures;

38. On Board of Management **Section 55** provides:

(1) There shall be a Board of Management for every public—

(a)...

(f)...

(2) Notwithstanding subsection (1) every school shall have a parents association, which shall be constituted in the manner set out in the Third Schedule.

(3) Every private school shall establish a parents' teachers association.

39. The P.T.A is therefore a mandatory requirement and is a legal instrument in the management of schools to deal with issues outlined under Rule 2(6) (e) of the Third Schedule of the Basic Education Act, which include, inter alia; discussions and recommendation of charges to be levied on pupils and parents.

40. In conclusion, I find that this petition partially succeeds and the Petitioners have proved that they are entitled to the following orders, which I hereby grant:

(a) A declaration be and is hereby issued that the petitioners are by virtue of Section 55(2) & (3) of the Basic Education Act, 2013 entitled to be members of an association of parents and Teacher of the 1st Respondent.

(b) An order is hereby issued compelling the Respondents to forthwith, and not later than 45 days from the date of this judgement, establish a parents' teacher association, which meets the requirements of the provisions of the Third Schedule of the Basic Education Act, 2013.

(c) This matter shall be mentioned on 3/6/2021 to confirm the established of the PTA aforesaid.

(d) There shall be no orders as to cost.

Dated, Signed and Delivered at Mombasa this 22nd day of April, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Khamis holding brief Nurani for Respondent

No appearance for Petitioners

Ms. Peris Court Assistant