



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**PETITION NO. 10 OF 2021**

**IN THE MATTER OF: ARTICLES 1,2,3,10,19,20,21,22,23,24, 24,25,27,28,47,50,53,159,165,185,258&259 OF THE  
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: RULES 3 &4 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE  
RULES 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF LAW**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF UNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 27,43,47 & 53 OF  
THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF: SECTION 4(3), (b), 5(2),8 (c), 7(2), 9,11 (1) OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015.**

**AND**

**IN THE MATTER OF: 76,77,79,80,81,82 & 83 OF PART X OF THE BASIC EDUCATION ACT NO. 14 OF 2013 LAWS OF  
KENYA.**

**AND**

**IN THE MATTER OF: CLOSURE OF TANA PROGRESSIVE SCHOOL VIDE LETTER DATED 7<sup>TH</sup> SEPTEMBER, 2019 BY  
SUB COUNTY DIRECTOR OF EDUCATION TANA RIVER COUNTY**

**BETWEEN**

**BEATRICE NAMIKOYI LIRU CHERETI T/A**

**TANA PROGRESSIVE SCHOOL.....PETITIONER**

**AND**

**JESICA MWENDE MOROWA.....1<sup>ST</sup> INTERESTED PARTY**

**RASHID OMAR JAMES.....2<sup>ND</sup> INTERESTED PARTY**

**VS**

**1. THE MINISTRY OF EDUCATION**

**2. THE COUNTY GOVERNMENT OF TANA RIVER**

**3. THE COUNTY PUBLIC HEALTH**

**OFFICE TANA RIVER COUNTY**

4. THE COUNTY DIRECTOR OF

EDUCATION TANA RIVER COUNTY

5. THE SUB-COUNTY DIRECTOR OF

EDUCATION TANA RIVER SUB -COUNTY

6. THE SUB COUNTY QUALITY ASSURANCE

AND STANDARS OFFICER TANA RIVER SUB COUNTY

7. THE AREA CHIEF-CHEWANI LOCATION

8. THE ATTORNEY GENERAL..... RESPONDENTS

JUDGMENT

The petitioner herein filed a petition together with a notice of motion application dated 20.11.2019 under certificate of urgency supported by an Affidavit sworn by the Petitioner on the same day. Their application moved the Court for orders:

*(i) Spent*

*(ii) That this Honourable Court be pleased to issue an interim Orders and direct that Tana Progressive Academy-Hola the Applicant herein be reopened and do continue operating as a basic education center in Hola as from 6<sup>th</sup> January, 2020 onwards and the pupils admitted therein be allowed to report to school and also the Applicant be allowed to continue admitting new pupils pending inter-parties hearing of the Application.*

*(iii) That upon granting prayer 2 above this Honourable court be further pleased to issue temporary injunction restraining the Respondents jointly by themselves, their servants, agents, representatives, assigns and any other person claiming under them from directing the closure, closing, halting the smooth running of education activities of the Applicant premises pending inter-parties hearing of the petition.*

*(iv) That upon inter-parties hearing this Honourable Court do further issue interim Orders and direct that Tana Progressive Academy -Hola the Applicant herein be reopened and do continue operating as a basic education center in Hola as from 6<sup>th</sup> January, 2020 onwards and the pupils admitted therein be allowed to report to school and also the Applicant be allowed to continue admitting new pupils pending the hearing and determination of the Petition.*

*(v) That upon inter-parties hearing this Honourable Court do further issue temporary injunction restraining the Respondents jointly by themselves, their servants, agents, representatives, assigns and any other person claiming under them from directing the closure, closing, halting the smooth running of education activities of the Applicant herein Tana Progressive Academy Hola and from adversely visiting the Applicant premises pending the hearing and determination of the Petition.*

*(vi) That in order to prevent the ends of justice from being defeated, this Honourable Court be pleased to make such other interlocutory Orders as may appear to be just and convenient.*

*(vii) That costs of this Application be provided for.*

The application was grounded upon the grounds espoused therein and by the sworn affidavit of **Beatrice Namikoye Liru** dated 20.11.2019.

The 8<sup>th</sup> Respondent filed a Replying Affidavit sworn by **Abdiaziz Abdi Noor** on the 5<sup>th</sup> day of December, 2019.

The crux of the matter is that the 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> Respondents herein have maliciously, unjustifiably, without any tangible reasons or iota of consultation from the Petitioner ordered and directed the closure of **Tana Progressive School** despite the Engineers from Public works, NEMA, the public health and all other vital concerned offices visited, assessed and declared the school fit for providing basic education. That the illegal closure of **Tana Progressive School** has adversely infringed the Constitutional rights of the children/students herein contrary to the provisions of Article 53 of the Constitution Kenya 2010 because schools were to open and learning is likely to be jeopardized notwithstanding the Petitioner's right to economic income has of greatly been illegally compromised.

**THE PETITIONERS' CASE**

The petitioner herein is a teacher by profession having completed her P1 course from Garissa Teachers Training College and a Diploma holder in Early Childhood Development (ECD) from Bungoma District Centre. She avers that she is the registered proprietor of Tana Progressive School situated at Hola Town. That the 5<sup>th</sup> Respondent recommended for provision registration of the school on the 10<sup>th</sup> day of June, 2019 which by right and in accordance with the provisions of Basic Education Act No. 14 of 2013. That on the 4<sup>th</sup> day of October, 2019, the 6<sup>th</sup> Respondent came back with a group of officers including officers of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents who ordered and

directed that the school be closed on the same day, there was no official letter issued to her as the director of the school. That on the 8<sup>th</sup> day of September, 2019 she was given a letter by the 6<sup>th</sup> Respondent directing the closure of the school. She also avers in her Petition that on the 10<sup>th</sup> day of October, 2019 two Engineers from the County Public Works visited the school for assessment and declared the school building safe. A similar report was also made by the National Construction Engineers as well as the Tana River County Health Officer, she attached copies of the structural safety and integral report as well as the sanitary inspection report. That the continuous and illegal closure of the school without any tangible reasons or justification has a negative impact on both the innocent students and the parents which as consequently caused unnecessary confusion and psychological torture which is an outright injustice. That this Honourable Court has powers bestowed into it under Article 23 (3) of the Constitution of Kenya to allow the application and grant the orders sought in the interest of justice. That if the orders sought are not granted, the Constitutional rights of the children enrolled in the school stand to be highly violated thereby occasioning an irreparable loss and damage.

#### **THE 2<sup>ND</sup>, 3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS' CASE.**

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' response was by way of grounds of opposition dated 02.12.2019. The grounds of opposition were based on the following grounds;

- 1. The Petition and application are defective and cannot be salvaged for lack particularity and precision, in complete contravention of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.***
- 2. That the Petition does not disclose any reasonable cause of action against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.***
- 3. That the claim for violation of the Petitioner's rights in the bill of rights is unsustainable and cannot stand.***
- 4. The as taken out drawn and filed is a non-starter, incurable defective and unsustainable.***
- 5. That the Petitioner/Applicant has failed to establish the prerequisites to warrant grant of conservatory orders.***

#### **THE 6<sup>TH</sup> RESPONDENT'S CASE.**

The 6<sup>th</sup> Respondent filed a Replying Affidavit sworn by **ZIPPORAH WAMBUI NGARARIGA** on the 10<sup>th</sup> day of July, 2020 and filed on 13.07.2020. she avers that she is the Sub County Quality Assurance and Standards Officer Tana River Sub County employed by the Ministry of Education. She avers in her affidavit that the Ministry of Education is mandated with school management in the country and that the aspect of learner safety lies with the Directorate of Quality Assurance.

That the Ministry vide a circular dated 26<sup>th</sup> September, 2019 outlined measures to be taken with regard to schools that were operating illegally, schools that were not registered with the Ministry of Education and schools whose infrastructure had deteriorated were to be closed immediately.

That the assessment of Tana Academy/Tana Progressive School was carried out by a team led by the County Quality Assurance and Standards Officers on 1<sup>st</sup> October, 2019 and closure effected on 4<sup>th</sup> October, 2019. She further averred in her affidavit that on the 23<sup>rd</sup> day of October, 2019, the Sub-County director of Education received a letter from the Petitioner dated 17<sup>th</sup> October, 2019 seeking to open the school on the basis that the school was compliant and attached a certificate of compliance on infrastructure safety from the National Construction Authority and that vide a letter dated 19<sup>th</sup> January, 2020 she sought to verify the authenticity of the certificate from the National Construction Authority who confirmed that the same did not originate from the Authority and was thus not authentic.

She also averred that the Ministry takes the issue of learners safety to be very important that requires a serious approach and which the Ministry has placed personal responsibility to officers where schools in their jurisdiction shall be found operating without registration or having not complied with minimum basic requirements.

#### **THE 8<sup>TH</sup> RESPONDENT'S CASE.**

The 8<sup>th</sup> Respondent opposed the grant of the orders sought and argued that the petitioner made an application to have the school registered by the Ministry of Education as an ECDE and Primary School which prompted the 6<sup>th</sup> Respondent to undertake a standard assessment on the school to determine its suitability on the 28<sup>th</sup> day of March, 2019. That on the 20<sup>th</sup> day of June, 2019, the Tana River County Education Board acting on recommendation of the County Quality Assurance and Standards Officer did not approve the Petitioner's application for registration. That the 1<sup>st</sup> Respondent through the principal Secretary issued a circular dated 26<sup>th</sup> September, 2019 for implementation by all Regional Directors of Education and County Directors of Education across the country on safety of learners in basic education institutions. That on the 1<sup>st</sup> day of October, 2019, assessment was conducted on the school to ascertain its suitability and the same recommended for closure. That the school is not registered with the Ministry of Education as is required and that inspection was conducted in accordance with the provisions of the Basic Education Act and the Petitioner found to be non-compliant. That the Petitioner ought not to be allowed to use this Honourable Court to restrain any of the Respondents to carry out their lawful mandate as stipulated under the law and protect the rights of the children to access the basic and suitable standards of education and health as is required under the Constitution.

#### **ANALYSIS AND DETERMINATION**

I have considered the application which is the subject of this ruling, the various responses thereto, the submissions made on behalf of the

parties hereto and the authorities cited. I am duly guided that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

Before delving into the issues that fall for determination it is important to deal with what issues meet the threshold of a constitutional determination. This being a constitutional petition, it is important to set out the parameters that determine whether a matter raises issues for determination in a constitutional petition or whether the issues ought to be dealt with as an ordinary suit. It is important to note that even in ordinary civil disputes, it is not difficult to find that there is some underlying constitutional principle involved. However, the mere fact that some underlying principle may be gleaned from the pleadings does not necessarily raise the matter to the level where it may qualify for determination as a constitutional issue.

Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

***“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptizing such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”***

Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution, including ordinary civil courts, are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

This court is also guided by the Court’s position in **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR** that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”***

Similarly, in **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR**, Lenaola, J (as he then was) held that:

***“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”***

similarly, it was held in **Jemimah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012** that:

***“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”***

The rationale for this was given in **Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011** where it was held that:

***“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.***

***Mwita, J in Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers***

Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR held as follows:

*‘It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure. In that regard, it is worth remembering the warning sounded by Lord Diplock in the case of *Harriskissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none stating;*

*“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court...for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*

### **Right to education and extent of a State’s obligation**

The right to education is one of the new generation of fundamental rights protected under the Constitution. Under the **Universal Declaration of Human Rights** and the **International Covenant on Economic Social and Cultural Rights (ICESCR)**, the right is recognized as directed to the full development of the human personality and the sense of its dignity. The **Article 13(1)** of the **ICESCR** provides that, *“The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms...”* (See also **Timothy Wafula Makokha and Others v Council for Legal Education and Others**, Nairobi Petition No. 12 of 2012[2012] eKLR).

Likewise the importance of education is captured in the **ICESCR General Comment No. 11** on “Plans of action for primary education” (1999) at Para. 2 as follows; *“The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties ... is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.”*

The **Universal Declaration on Human Rights** embraces education as a basic human right. Other key international instruments ratified by Kenya recognizing and protecting the right to education include the **UN Convention on the Rights of the Child (UNCRC)**, **African Charter on Human and People’s Rights (ACHPR)** and the **African Charter on Rights and Welfare of the Child (ACRWC)**. These instruments now constitute part of the law of Kenya by virtue of **Article 2(6)** of the Constitution.

The right to education, like all human rights, imposes on States parties the obligations to respect, protect and fulfil. **Article 21(1)** of the Constitution provides that, *“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”* The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide while the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil or facilitate requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education (See **ICESCR General Comment No. 13** at Paras. 46, 47).

Turning to the local situation, **Article 43(1) (f)** of the Constitution enshrines the right to education as part of the economic and social rights. It provides that, *“Every person has the right to education.”* This provision is one amongst the other provision in the Constitution that deal with education. Under **Article 53(1)(b)** of the Constitution, children have the right, *‘to free and compulsory basic education.’* Under **Article 55**, the State is obliged to take measures including affirmative action to ensure that the youth have, *“access relevant education, training and employment.”* **Article 56(b)** provides that the minority and marginalized groups are to be provided with, *“special opportunities in educational and economic fields.”*

As concerns the right to education, progressive realization does not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and monitor enjoyment of the right. As Bemih Kanyonge notes in **Promoting Education as a Human Right ienya (Hilde Back Education Fund, 2013)**, p. 11, *“It calls for more than just election campaign declarations and subsequent setting up of unsustainable projects in order to be seen to have fulfilled campaign pledge ..”*

The issue in this case is whether the issues for determination fall within the ambit of this Honourable court. The Ministry of education had observed that some basic education institutions have been established without due process. Most of those institutions do not meet the minimum standards required of them to be registered and some of them have infrastructure that are below standard and which pose danger to the children. The 6<sup>th</sup> Respondent has clearly stated that the Ministry of Education is mandated with school management in the country and that the aspect of learner safety lies with the Directorate of Quality Assurance. That stated, this Court has no obligation to monitor or license basic learning institutions to ensure the safety and wellbeing of school going children. This court is of the opinion that such an obligation falls within the Ministry of Education as well as the County Education Board.

The Petitioner has also averred severally in her Petition that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents maliciously, unjustifiably, without any tangible reasons directed the closure of **Tana Progressive School** despite the Engineers from the public works, NEMA, the public health and all other vital concerned offices visited, assessed and declared the school fit for providing basic education.

## **FAIR ADMINISTRATIVE ACTION**

Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Section 2 of the Fair Administrative Action Act, 2015 provides that, 'administrative action' includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Further, section 3 of the Fair Administrative Action Act, 2015 states that the Act applies to all state and non-state agencies, including any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

The Petitioners contend that the 1<sup>st</sup> Respondent's decision to close the school was done in a manner that was malicious, unjustifiable, and without any consultation with the Petitioner. This, she argues amounts to violation of fair administrative action.

Article 53 of the Constitution makes provision for the rights of children. The Petitioners contend that the actions of the Respondents infringed the minors' rights as to education. Further, they argue and in accordance with Article 53 (2) that the child's best interests are of paramount importance in every matter concerning the child.

A child's best interests are indeed paramount. However, one needs to look at the circumstances of a particular case. In the instant case, the one has to look at whether the Respondents were in violation of the minors' right as to education. This limb shall be determined in the ensuing discussion.

Having stated the applicable law, I will now proceed to apply that law to the facts of this case. The ex-parte Applicant accuses the respondents of acting in excess of jurisdiction. Its position is that the decision to close its schools was not based on the reports from the Public Works, NEMA and the Public health. I wish to draw attention to some provisions of the Basic Education Act. The said Act has set up the Education Standards and Quality Assurance Commission and the County Education Board which governs the quality and standard of learning institutions.

Section 66(2) provides that:

***“An officer appointed under this section shall have power to recommend temporary suspension of operations of institutions to the County Education Board for a specific period until the basic standards are met.”***

The cited provision cannot be read in isolation. It must be read in the context of Part IX (sections 64-75) of the Act which provides for Standards, Quality Assurance and Relevance. Section 66 specifically provides for the Powers of Quality Assurance and Standards Officers. A reading of Part IX clearly shows that those provisions are meant to monitor the quality and standards of the institutions that are already registered to provide basic education and training.

The provisions applicable to registration of schools are found in Part X (sections 76-85). Part X provides for licensing, registration and accreditation procedures in basic education. It is only after an application for registration is approved that the County Education Board informs the office representing the Education, Standards and Quality Assurance Council (“the Council”) at the county in the case of a pre-primary, primary or secondary school – see Section 76(4). Other roles played by the Council are found in sections 81 and 82 of the Act. Under Section 81 the Cabinet Secretary is expected to, in consultation with the Council and the relevant stakeholders, establish guidelines and prescribe rules and regulations for the establishment, licensing, accreditation and registration of basic education and training institutions. As provided by Section 82, before a basic and training institution is registered by the County Education Board, it must be inspected by the Council to ensure due compliance with the standards formulated and developed under the Act. To this end, the issues for determination in this Petition do not lie with this Honourable Court and it is also important to note that the Court is not a licensing body and the issues can only be determined by the Ministry of Education and Education Standards and Quality Assurance Council under the Basic Education Act. Having stated the above and from the analysis above, no remedy can be offered by the Honourable Court.

Reference is made from the following authority, **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ** held as follows;

***“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22).”***

The judge added that:

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is***

***available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”***

Therefore, it is my considered view that the Petitioner’s arguments cannot stand. I find that the Respondents did not violate any of the stated Constitutional provisions stated by the Petitioner. That the Respondents were only fulfilling their duties under the specific bodies they are constituted under to ensure safety of the learners. To this end, the Petition is therefore dismissed.

Each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 25TH DAY OF MAY 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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