REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 168 OF 2020

IN THE MATTER OF: A Petition /application by SPC (Suing as parents and/or guardians of

students minors currently schooling at SABIS® international School – Runda)

IN THE MATTER OF: The Right to 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 Constitution of Kenya,

sections 23(3)(f) and 27, 28, 32, 33, 44 and 165(6)

BETWEEN

SPG (Suing as parents and guardians of students minors currently schooling at

SABIS® INTERNATIONAL SCHOOL – RUNDA)..PETITIONERS

AND

THE DIRECTORS, SABIS® INTERNATIONAL SCHOOL - RUNDA....1ST RESPONDENT

SABIS® INTERNATIONAL SCHOOL - RUNDA....................................2ND RESPONDENT

THE HON. ATTORNEY GENERAL..3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION.................4TH RESPONDENT

RULING

1. The Petitioners through a Petition dated 18th May 2020 pray for the following reliefs:-

> ***a) That permission be granted to the Petitioners/Applicants by the Honourable Court to use the initials – "SPG" – as the Petitioners/Applicants are parents/and or guardians of minor children and it is 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 pending hearing and subsequent determination of the PETITION, a CONSERVATORY ORDER be issued staying the***

implementation of payment of full fees payable to the 1st and 2nd and in lieu they be allowed to offset up to 50% only of school fees pro forma for term 3 of the school year 2019-2020, and CAN only charge for the equivalent of the service offered, which is the virtual class or digital calls.

c) That an ORDER of mandamus is hereby issued directing the 1st and 2nd 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.

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

e) That there be no order as to costs.

2. The Petition was field simultaneously with a Notice of Motion of even date seeking the following orders:-

a) Spent (prayer 1)

b) That Permission be granted to the Petitioners/Applicants to use the initials – "SPG"- as the Petitioners/Applicants are parents /and or guardians of minor children and it is in the best interest that the names of the parents/and their children be sealed from the public as provided for under Section 76(5) of the Children's Act.

c) That pending inter parties hearing and subsequent determination of this APPLICATION and the PETITION, A CONSERVATORY ORDER be issued staying the implementation of payment of full fees payable to the 1st and 2nd and in lieu they be allowed to offset up to and 50% of the school fees, for term 3 of the school year 2019-2020 or as the court may order, for term 3 of the school year 2019-2020 or until Schools are reopened under the directions of the Ministry of Education, which every is later.

d) That ALTERNATIVELY pending hearing and subsequent determination of this APPLICATION and the PETITION, a CONSERVATORY ORDER be issued stopping the 1st and 2nd Respondent from discounting online or Virtual learning classes parents who have paid up to 50% of the school fees, for term 3 of the school year 2019-2020 or as the court may order, or until Schools are reopened under the directions of the Ministry of education, which every is later.

e) That in view of the extreme urgency of the matter; and social distancing directives, the Petitioner be permitted to effect service electronically through the email addresses provided herein.

f) That there be no order as to costs.

3. The application is premised on several grounds on the face of the application.

4. The Petitioners and the 1st and 2nd Respondents filed submissions in support of their rival positions.

5. I have carefully considered the application and parties rival submissions and from the same only one issue arise for consideration:-

a) Whether the Petition has met the threshold to warrant grant of conservatory orders sought in prayers nos. 2, 3 and 4 of the application.

6. The Petitioners under prayer No.2 of the application seek permission to be granted to the Petitioners/Applicants to use their initials – "SPG" as the Petitioners/Applicants are parents and/or guardians of minor children and it is urged, that it is in the best interest that the names of the parents and the children be sealed from the public as provided under ***Section 76(5) of the Children's Act***.

7. ***Section 76(5) of the Children Act*** provides :-

> ***"76. General principles with regard to proceedings in Children's Court -***
>
> ***(5) In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name, identity, home or last place of residence or school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise."***

8. The above section clearly provides in any proceedings concerning a child, whether under the Children Act or any written law, a child's name, identity, home or last place of residence amongst others and particulars that of the parent of the child or relatives shall not be published or revealed. The Petitioners therefore – seek permission to use initials to protect the identify of the Children and that of the Parents or relatives as provided under the Children Act.

9. I have perused the petition and the application which stands unopposed by the Respondents and I am satisfied the Petitioners have satisfied the criteria required to justify granting prayer 2 of the Notice of Motion; that the Petitioners be permitted to use the initials "SPG" of the Petitioners/Applicants herein.

10. The Law on granting conservatory orders is now well settled in this jurisdiction and is clearly supported by myraids of authorities. In the case of Centre for ***Rights Education & Awareness (CREAW) & another v. Speaker of the National Assembly & 2 Others (2017 eKLR*** the Court was emphatic that:-

> *"A party who moves the Court seeking conservatory orders **must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This** is so because **the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition."***

11. It therefore follows that conservatory orders would only issue in instances that present real impending danger to an applicant. Constitutional rights with the likely circumstances that an applicant or the public at large would suffer prejudice unless the court intervenes and grants the sought Conservatory Orders. The Court would issue conservatory order for the purpose of preserving the subject matter of the dispute.

12. The Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR;*** considered the guiding purposes for granting of conservatory orders at paragraph 86 where it stated:-

> *"**86. 'Conservatory Orders' bear a more decided public – law connotation:** for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. **Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case;** or "high probability of success" in the supplicant's case for orders of stay. **Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses."** (Emphasis added)*

13. The principles which ought to guide a court when dealing with the application for conservatory orders were further outlined by the Court in the case of ***Kenya Small Scale Farmers Forum & Cabinet Secretary Ministry of Education, Science and Technology & 5 Others (2015) eKLR*** where the late Justice J. Onguto stated:-

> *"For the grant of conservatory orders under Article 23(3) of the Constitution as read together with **Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:*
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> - ***The Applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: … It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success."***
> - ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights:***
> - ***If the Conservatory order is not granted, the petition or its substratum will be rendered nugatory:***
> - ***The Public interest should favour a grant of the conservatory order***
> - ***The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters:*** *(Emphasis mine)*

14. The Petitioners in arguing whether there is a strong, arguable case with probability of success referred to the affidavit of Robert Kleynhans dated 27th May 2020 and annextures –RK1 – a purported outline learning schedule at pages 2 – 10 and their annextures there below, where at paragraph 22 of the affidavit he avers thus:

> ***Contrary to the Application assertions, the School without delay sent out a letter to all the parents informing them of the online classes and making them aware of what was to happen during the lockdown period. Additionally, the School has continued to send regular updates to the parents of the statues of the learning during this period. (Copies of these correspondence appear at paged 49 – 59 of the exhibit)"***

15. The School avers that the contract between the parents and the school is a private contract and consequently the court ought not to intervene in these private matters.

16. The Petitioners on the other hand, rely on affidavit sworn by Lydia Byarugaba and in particular annexture "LB-1" disclose the parents supports the Petition. Annexture "LB-2" of the supporting affidavit dated 18th May 2020 which is a standard form contract between the parents and schools together with the brochure that promises the services that are on offer in school including the school profile, description of the education system, the skills that the school seek to impart, extra-curricular activities on offer and its supposed proven truck record.

17. The Petitioners seek to rely on ***Section 78(2) of the Basic Education Act*** which provides:-

"<u>A person may not us any premises or facilities to provide</u> education and training through face to face, <u>open distant or electronic learning or any other mode of delivery unless the institution has undergone quality review</u> and approved in accordance with this Act."

18. It is submitted by the petitioners that annextures L.B-3, 4, 5(a) and 5(b), 6 and 7 of the supporting affidavit dated 18th May 2020 should be read together as they set out the commencement of the pandemic and the effects that results in the closure of all schools in Kenya by the Cabinet Minister in charge of Education.

19. The Petitioners annextures "LB 9 (a) and 9 (d) constitutes of correspondences between the Petitioners and "1st and 2nd" Respondents. Annexture "LB 9(d) on email dated 28th April 2020; Robert Kleynhans states as follows:

"<u>We reconfirm our earlier position, communicated to our letter dated April 15th, to collect Term 3 tuition fees in full and refund Term 3 boarding and cafeteria fees, along with any unused portion of Term 3 transportation fees."</u>

20. The Petitioners aver that annexture "LB-1091) is a letter dated 4/5/2020 from the Association of Private Schools, which emphasises that "<u>any learning or activity of our member schools engage (sic) their learners in during this period should be treated as a separate program/contract from the normal school term programs/contracts and be made optional."</u>

21. The Petitioners further rely on annexture "L.B-11" which is a copy of the parliamentary Hansard, containing the deliberations between the Cabinet Secretary for Education, when he appeared before the Parliament on 7th May 2020, in response to the question about virtual learning and fees, and this is what he said:-

"…<u>When it comes to charging, they should talk to those parents because they are able to agree on a pro rata basis. If your are going to charge "X", then you charge "X" minus "A", "B", "C", in principle,</u> and since this is a free country, I do not see anything wrong with it. In any case, there are schools which charge up to Ksh.1 million per term. If they want to continue to give content to your child in addition to what we are giving, the question is: Are they charging the whole fee or pro-rating? There is absolutely nothing wrong with charging for the service delivered. The comfort is, event he children in private schools are our children. When the schools open, they should find their faculty in place to teach them.

22. The Petitioners in support of their application raised the issue of whether consumer rights are constitutional rights that ought to be protected. The Petitioners in support that consumer rights are constitutional rights that ought to be protected sought support from the decision of ***Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others (2014) eKLR***; where Supreme Court held: -

"If we would observe, in that context, that the Elections Act, and the Regulations thereunder, are normative derivatives of Article 81 and 86 of the Constitution; and thus, in their interpretation, a Court of law will probably be intimately involved in the interpretation of the Constitution."

23. The Petitioners urge that the recognition of certain "basic" higher –order consumer rights may be derived from the fact that being a consumer of some kind is a basic human condition. Further the concept of human rights traditionally refers to the nation of human beings as having universal rights which are commonly understood as ***"inalienable fundamental rights to which a person is inherently entitled simply because she/he is a human being."***

24. Under ***Article 46 of the Constitution***, it provides for protection of consumer rights. The Constitution clearly directs the Parliament to legislate on this area, hence the subsequent enactment of the ***Consumer Protection Act No. 46 of 2012***.

25. I find that it can safely be urged that the Act is therefore a normative derivative of the Constitution of Kenya 2010.

26. Further to the above it should be noted that on the International level, eight (8) fundamental consumer rights were first declared in the ***1985 UN Guidelines*** for consumer protection. These rights include the right to safety; to choice, to redress; to consumer education; and to a healthy and sustainable environment; along with the right to satisfaction of basic needs; the right to be informed and the right to be heard. In 1999; the aforesaid UN guidelines were supplemented by a new principle the right to sustainable consumption.

27. It is correct to state that in a number of respects, consumers benefit from human rights protection, being viewed in a broad context of consumer activity; for example, interest in human health and physical integrity – which indeed feed in to the right to life – one already well established in the case of protection; and then projection as consumer rights is then a matter of context.

28. The ***Consumer Protection Act No. 46 of 2012*** defines a consumer agreement as ***"an agreement between a supplier and a consumer in which the supplier agrees to supply goods on service for payment"***. While a consumer transaction is defined by the Act as "any act or instance of conducting business at other dealings with a consumer; including a consumer agreement".

29. In the affidavit of Robert Kleynhans dated 27th May 2020 at paragraph 45 alludes to a written contract signed between the parents and school for provision of teaching and other services that the school offers to give. However the only point of divergence is that this is a private contract and any party can walk away from it; which the Petitioners urge is not the answer against the provisions of the ***Consumer Protection Act No.46 of 2012***, particularly under ***Section 4(1), 13, 16 and 84 of the Act***.

30. The Petitioner on whether the contract between the school and parents falls under the purview of Consumer Protection Act, regarding the definition of the consumer urges under ***Section 2(a) of the Act*** includes within its ambit every end user of goods or services where such use

is consequent to the payment of consideration (which may be paid in any form of mediums) either directly or indirectly by a third party, with whose approval the user uses the goods or services; so long as such use of the goods or services is not for resale or any commercial purpose. It is further averred as in case of Tenm Service, the term consumer as defined in ***Section 2(a) (c)*** in which it has wide definition, whose scope far exceeds that of the definition ascribed to the term consumer in common parlance.

31. It is urged by the Petitioner that the core function of an education institution such as the SABIS® International School Ltd schools is with respect to imparting education and advance knowledge by providing instructional and research facilities to educate and train pupils for development of the country from the welfare of the people, and for their intellectual, academic, and cultural development. The functions and activities associated with it are inseparable and this is the statutory duty of the school as defined in the Basic Education Act.

32. The Petitioners contend that the school is under obligation to supply secondary and ancillary services, such as accommodation; boarding facilities, auditorium, library, laboratory, transport, internet services etc; that the school in addition to that supplies various goods to the students like text books, study material, notes, other electronic materials etc. The ancillary services provided by the 1st and 2nd Respondents, falls within the category of those services and provision of goods as per the ***Consumer Protection Article 14 of 2012***.

33. In the case of ***Central Academy Educational System v. Gorav Kumar*** it was held by the court that reading is not capable of marketization as opposed to the sale of books or provision of accommodation that is marketable and can be considered as service as per the Consumer Protection Act of 1986. In **Jai Kumar Mittal v. Brilliant Tutorials** it was held that the supply of defective study materials by an institute can sustain a valid claim against it for deficiency of service. Whilst in **Bhupesh Khurana v. Vishwa Budha Paarishad.** Due to misrepresentation about affiliation, the National Commission held, in respect of the recovery of the fees paid to the institute that the institute was liable to refund the fees, having lured the students to enrol in it through deceitful tactics.

34. The Petitioner further relies in the case of ***Sonal Matapurkar v. S. Niglingappa Institute***, admissions were made by the dental institute over the above the sanctioned seats as a result of which the students were not allowed to appear in the examination by the university. Since the students had paid huge donations and had also made an investment of time and energy, the National Commission held that there was the deficiency in service and the complainants were entitled to refund of the donation and compensation with interest and cost of the proceedings.

35. Upon considering the Petitioners submission and authorities in respect of whether the contract between the school and the parent falls under the purview of the Consumer Protection Act, it clearly terms out that the Petitioners have proved that with regard to the application of the Act, they are justified in seeking the orders as regards Educational activity or service rendered by the educational institution. I find that there is no doubt that students are direct consumer or beneficiaries of the service or facility provided by the 1st and 2nd Respondents schools, though all kinds of activities performed by the schools may not be classifiable as marketable service because of the nature of those particular services but it does not support the complete exclusion of the school from the scope of consumer protection laws.

36. I note in this application Petitioners have besides the issue of basic rights of a child to gain an education in private schools, which have hitherto remained unregulated, raise several other public matters that ought to be ventilated before the court. These other issues, I find can await the hearing and determination of the main petition.

37. The Petitioners further on the question of novelty of questions rely on substantial question of law and refers to the case of ***Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & 3 Others*** where it was held thus:

> ***"…although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive."***

38. The Petitioners on balance of convenience and nugatory aspects urges that they have met both legal and evidentiary threshold for gnat of interim orders sought.

39. The Petitioners case is that now there is a totally different contract that has been brought about by the supervening circumstances that has been wrought by COVID-19. It is no doubt that the School is unable to meet its part of the bargain in the circumstances. This is not disputable by the school. That notwithstanding the school insists that parent must pay fees according to its terms as this is a private contract.

40. The Petitioners referred to Indian case of ***Rural Fairprice Wholesale vs. IDBI Trusteeship Services Commercial Suit (L) 307 of 2020***, the High Court of India, seating in Bombay stated that plaintiff had made a case that because of COVID -19, share market has collapsed and per share comes below Rs.100 and in view of that fact granted an interim injunction against the bank which was set to act on its notice of sale of the shares.

41. On perusal of the ***Consumer Protection Act, No.14 of 2012*** it is clear that it provides for situations when Court's can intervene to obviate contracts that are undoubtedly unconscionable, oppressive and unfair. The 1st and 2nd Respondent insist on full payment of the School fees when itself is unable to meet its part of the bargain due to conditions arising out COVID-19 pandemic and when its unable to discharge its part of the agreement fully. This is purely against clear provision of the Consumer rights as provided under the ***Consumer Protection Act, 46 of 2012*** which was enacted to meet constitutional objectives set out under ***Article 46 of the Constitution of Kenya 2010***.

42. It is noted in most schools contracts; these are adhesive contracts, the parents have no choice nor say either but must sign to have their children admitted to the school even when the same is unfavourable to the parent.

43. I have considered the issues raised and articulated by the petitioners which I find to be novel, raising substantial question of law and of great public importance. I further note this matter concerns private sector, in respect of private schools, which provide education services that

has remained unregulated, despite the right to education being an important and fundamental right.

44. The Respondents point out that conservatory orders are generally in the realm of public law and courts have shown restraint in granting such orders in private law disputes. For the court to grant conservatory orders, the applicant ought to demonstrate a prima facie case with likelihood of success and that he is likely to suffer prejudice as a result of the violation or threat of violation if the conservatory order is not granted.

45. I have considered the pleadings herein and rival submissions. I am satisfied the Petitioners have met the threshold to warrant granting of the conservatory orders sought. The Petitioners have demonstrated a prima facie case with a likelihood of success and that they are likely to suffer prejudice as a result of violation or threatened violation if the conservatory orders are not granted. That if the conservatory orders are not granted the Petition or its substratum will be rendered nugatory. I find the circumstances prevailing as of now dictates that the discretion of the court be exercised in favour of the applicants after consideration of all material facts placed before this court.

46. The upshot is that the Petitioners application for issuance of conservatory orders is meritorious. I proceed to grant the following orders:

> ***a) The Petitioners/Applicants are permitted to use initials – "SPG" as the Petitioners/Applicants are parents/and or guardians of minor children at respective schools and it is in the best interest that names of the parents and their children be sealed from the public as provided for under Section 76(5) of the Children's Act.***
>
> ***b) Pending hearing and subsequent determination of the petition, conservatory order be and is hereby issued staying implementation of payment of full fees payable to 1st and 2nd Respondents and in lieu, the Petitioners are allowed to offset upto and 80% for term 3, of the School year 2019 – 2020 or until schools are reopened under the directions of the ministry of Education.***
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> ***c) Costs of the application be in the cause.***

Dated, Signed and Delivered at Nairobi on this 30th day of July, 2020.

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J. A. MAKAU

JUDGE