



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 41 OF 2020

IN THE MATTER OF: A PETITION BY G.A.M. H.O

M.O.O (Suing of their own Accord and on behalf of SSAMPGA-Parents and Guardians of Minor Students Enrolled in SHREE SWAMINARAYAN ACADEMY MOMBASA)

AND

IN THE MATTER OF: ARTICLES 22, 23, 27, 28, 43 AND 165 CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CHILDREN RIGHTS UNDER ARTICLE 53 CONSTITUTION OF KENYA, 2010

THE CHILDREN ACT, CAP. 141, LAWS OF KENYA

THE BASIC EDUCATION ACT, 2013, LAWS OF KENYA

AND

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

CONSUMER PROTECTION ACT, 2012, LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 10, 19, 20, 27, 28, 32, 33, 43, 46, 47, 53 AND 258 CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 4, 5, 9, 12, 13, 14, 15 and 84 CONSUMER PROTECTION ACT, 2012, LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 3, 4, 5(2)(c) and 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015, LAWS OF KENYA

AND

IN THE MATTER OF: BREACH AND THREATENED CONTINUED BREACH OF THE BILL OF RIGHTS UNDER ARTICLES 27, 28, 32, 33, 43, 46, 47 AND 53 CONSTITUTION OF KENYA, 2010

BETWEEN

1. G.A.M.

2. H.O.

3. M.O.O. (Suing of their own Accord and on behalf of SSAMPGA-Parents And Guardians of Minor Students Enrolled In SHREE SWAMINARAYAN ACADEMY MOMBASA).....PETITIONERS

VERSUS

1. THE REGISTERED TRUSTEES OF THE SHREE CUTCH SATSANG

SWAMINARAYAN TEMPLE CHARITABLE TRUST

2. SHREE SWAMINARAYAN ACADEMY MOMBASA.....RESPONDENTS

JUDGMENT

1. The Petitioners are stakeholders in Shree Swaminarayan Academy (herein after “the 2nd Respondent”) by virtue of the enrolment of their children in the said institution for purposes of provision of Educational services.
2. The 1st Respondent is a registered trustee that owns and manages the 2nd Respondent.
3. The 2nd Respondent is an institution engaged in the provision of education services within Mombasa-Kenya to Minors of all ages.
4. By a Petition dated 30/6/2020 and filed on 21/7/2020 the Petitioners seek the following orders:
 - a) **A DECLARATION** that the Period between closure of the Respondent’s School on 15/03/2020 and the normal reopening thereof as directed by the Ministry of Education, Republic Of Kenya and/or the Curriculum Administrator, Pearson Edexcel is **NOT** a Normal School Term;
 - b) **A DECLARATION** that the Engagement of Any/All of the Respondents’ Learners during the period contemplated in Prayer (a) above does **NOT** amount to a Normal School Term;
 - c) **A DECLARATION** that the Period between closure of the Respondent’s School on 15/03/2020 and the normal reopening thereof as directed by the Ministry of Education, Republic Of Kenya and/or the Curriculum Administrator, Pearson Edexcel above is **NOT COMPULSORY** to Any Learners;
 - d) **A DECLARATION** that the Period between closure of the Respondent’s School on 15/03/2020 and the normal reopening thereof as directed by the Ministry of Education, Republic Of Kenya and/or the Curriculum Administrator, Pearson Edexcel above ought **NOT** to Attract Full School Term Fees;
 - e) **A DECLARATION** that the Respondents’ **DEREGISTRATION** and/or **DISCONTINUATION** of Any Learner from the 2nd Respondent Institution and/or 2nd Respondent’s Virtual Learning Education Online System on account of said Learner’s Parent(s)’ non-payment of Full “School Fees” demanded on or before 26/06/2020, during the prevailing **COVID-19** Pandemic is **UNCONSTITUTIONAL, NULL and VOID**.
 - f) **A DECLARATION** that by their Acts and/or Omissions subject of this Petition, the Respondents have **VIOLATED** the Petitioners’ Consumer Rights guaranteed under **Article 46** of the Constitution of Kenya, 2010 as read together with the Consumer Protection Act, 2012, Laws Of Kenya;
 - g) **A DECLARATION** that by their Acts and/or Omissions subject of this Petition the Respondents have **VIOLATED** the Petitioners’ Right to Fair Administrative Action guaranteed under **Article 47** of the Constitution of Kenya, 2010;
 - h) **A DECLARATION** that by their Acts and/or Omissions subject of this Petition the Respondents have **VIOLATED** and are in contravention of the Petitioners’ Rights to Equality Freedom from Discrimination, Human Dignity, Conscience, Belief, Opinion and Expression, Economic and Social Rights and their inalienable Rights of their Children as guaranteed under **Articles 27,28,32,33,43(1)(f) and 53** of the Constitution of Kenya, 2012;
 - i) **A DECLARATION** that the provision of Education Services by the Respondents through the **VLE** system without consulting the Petitioners and/or providing them with sufficient and relevant information for decision making was an Unsolicited Service within the meaning of the Consumer Protection Act;
 - j) **A DECLARATION** that the Unilateral Decision of the Respondents on provision of Educational Services through **VLE** at the Fees **EQUAL** to those provided during Normal Learning Sessions save for a Conditional Fee Rebate as communicated by the Respondents’ Representative and/or Application of Fees paid by a number of Petitioners for the **FULL SCHOOL YEAR 2019-2020** towards the Education Services provided in the VLE System was **Illegal, Unconstitutional, Unreasonable and therefore Null and Void** to the extent that:

- i. The same purported to vary the terms of the Consumer Agreement between the Petitioners and the Respondents through the provision of learning through a system which the Petitioners had not consented to;
 - ii. The same purported to induce the Petitioners to consent to the provision of learning through a newly introduced system at the same price as the one set for physical educational services during the school's normal sessions;
 - iii. The same purported to place any Parent or Minor Student who opted out of the Virtual Learning System and/or was unable to engage said System for whatever reason at a disadvantage for their decision not and/or inability to take up the unsolicited Service;
 - iv. The same is **DISCRIMINATORY** by its very nature.
- k) **A DECLARATION** that the subsequent Decisions of the Respondents to proceed to provide the Altered and/or Unsolicited services through VLE at an unfair price despite the Petitioners' concerns raised in that regard, was and remains a Breach of the Petitioners' Rights under **Articles 27, 28, 32, 33, 43(1)(f) and 53** of the Constitution of Kenya, 2010 and went against the guiding principles for provision of Basic Education under **section 4** of the Basic Education Act, 2013;
 - l) **A DECLARATION** that the Respondents' failure to establish a PTA and continue to operate as an institution for provision of basic education without having in place a PTA is a breach of **section 52(1)(a)** as read together with **section 55(3)** of the Basic Education Act, 2013;
 - m) **A DECLARATION** that the Respondents are obliged by Law and under constitution of Kenya, 2010 vide **Article 53(2)** to consider the Best Interest of the children in their Schools, whenever they make any policy decisions and/or changes that would affect the Children's School, including Virtue Learning and must consequently Consult and obtain Consent of their Parents before implementing the same;
 - n) **AN ORDER OF JUDICIAL REVIEW OF CERTIORARI** bringing into this Court the Decision of the Respondents made on **29/06/2020** and Quashing the same forthwith to the extent set out in Prayer (j) above;
 - o) **AN ORDER OF MANDATORY INJUNCTION** do issue **COMPELLING** the Respondents, whether by Themselves their Agents/Servants/Employees/Assigns to **REGISTER** Any/All Learners Deregistered and/or Discontinued from the 2nd Respondent Institution and/or the 2nd Respondents' Virtual Learning Education Online system on account of such Learner's Parent(s)' non-payment of Full "School Fees" demanded on or before **26/06/2020**, during the prevailing **COVID-19** Pandemic;
 - p) **AN ORDER OF A PERMANENT INJUNCTION** do issue **RESTRAINING** the Respondents whether by Themselves their Agents/Servants/Employees/Assigns from **INDUCING** and/or **UNDULY INFLUENCING** the Petitioners into rendering Any Consumer Agreements for provision of Altered and/or unsolicited services and from Victimizing them or their children as a result of their refusal to partake of any such services;
 - q) **AN ORDER OF PERMANENT INJUNCTION** do issue **RESTRAINING** the Respondents, whether by Themselves their Agents/Servants/Employees/Assigns from **DEREGISTERING** and/or **DISCONTINUING ANY** Learner from the 2nd Respondent Institution and/or the 2nd Respondent's Virtual Learning Education Online system on account of such Learner's Parent(s)' non-payment of Full "School Fees" demanded on or before **26/06/2020**, during the prevailing **COVID-19** Pandemic;
 - r) **AN ORDER** do issue **DIRECTING** the Respondents to forthwith Establish a Parents' Teachers' Association in terms of Article 36 of the constitution of Kenya, 2010 and section 55(3) of the Basic Education Act No. 13 of 2012 Laws of Kenya;
 - s) **AN ORDER** do issue **DIRECTING** the Respondents to engage the Petitioners directly or through the Parents' Teachers' association formed Under Order (j) above and in line with the guiding Principles Under Article 10 of the Constitution of Kenya as well as Section 4 of the Basic Education Act on the matter of provision of Educational Services through virtual class or digital class, the pricing thereof and any other matters affecting the provision and management of education services at the School.
 - t) **AN ORDER FOR PAYMENT OF SUCH COMPENSATION** for Breach of the Petitioners' Constitutional Rights as well as Damages under the Consumer Protection Act in such amount as this Honourable Court shall deem fit to determine;
 - u) The Costs of this Petition; and
 - v) Such other or further Orders or Directions as the Court may deem fit to grant so as to meet the interests of Justice.

The Petitioner's Case

5. The petitioners' case is that in response to the first reported case of the Coronavirus (**COVID-19**) Pandemic in the Republic of Kenya, vide Press Statement made on **9/3/2020**, His Excellency the President of The Republic of Kenya announced, *inter alia*, the closure of All Educational Institutions within the Republic, with effect from **10/03/2020**. Consequently, vide Directives issued on **15/03/2020**, the Ministry of Education directed that All Educational Institutions within the Republic of Kenya would remain closed up to and including **3/05/2020**. On **3/05/2020**, the Ministry of Education issued a directive, which extended the closure of said Educational Institutions up to and including **4/06/2020** and subsequently, beyond the said date.

6. It is the Petitioners' case that both the Kenya Private Schools Association (**KPSA**), to which the 2nd Respondent is affiliated, and the Cabinet Secretary, Ministry of Education, on **4/05/2020** and **7/05/2020**, respectively made the following pronouncements:

- i) *The Local Basic Education Curriculum is neither in 1st Term nor in 2nd Term, but on a **HEALTH CRISIS BREAK**;*
- ii) *Continuous Engagement of Learners in learning Activities through Online Platforms is highly encouraged using **AGE APPROPRIATE** and Prescribed Content;*
- iii) *Any Learning Activity engaged in during the **HEALTH CRISIS BREAK** be treated as a **SEPARATE PROGRAM/CONTRACT** from the Normal School Terms Programs/Contracts, and be made **OPTIONAL**;*
- iv) *Private Schools do **NOT** have the Authority to begin Second Term and/or Charge Fees for the same, as they are **NOT** Excluded from the Government's Directive on Schools remaining closed until **4/06/2020***

7. The Petitioners assert that Pearson Edexcel the institute that guides the Respondents' provision of Education Services vide communication expressly conveyed on their website, "**www.qualifications.pearson.com**", indicated the closure of the School Term leading up to the **May/June 2020** examinations effective **March, 2020**. The communiqué on its Website has comprehensively addressed the **Five (5)** issues hereunder, viz: **Unprecedented School Closures; non-testing of Learners through Usual Examinations; ex-Examination Grading; Free Teaching and Learning Support; non-indication of the next School Term.**

8. It is averred that vide various correspondences, the Respondents, through the Principal of the 2nd Respondent, intimated as follows:

- i) *Closure of the 2nd Respondent Institution with effect from **16/03/2020**;*
- ii) *Commencement of Home Learning as an **INITIAL SOLUTION** effective **6/04/2020** through dissemination of learning Tasks vide e-mail pending the set-up of the Online Platform;*
- iii) *Gradual roll-out of the Virtual Learning Experience (**VLE**) through the various Age Grades and awareness of the Challenges posed by the said Platform as well as feedback vide Expressions of Frustration by the Petitioners;*
- iv) *Commencement of Term 3 on **6/04/2020**, with the Pre-condition of **FULL PAYMENT** of the respective Age-Grade School Fees prior to:*
 - a) *Admission to the **VLE** Platform;*
 - b) *Eligibility to Rebates of:*
 - **65% - Play Group.**
 - **30% - Kindergarten;**
 - **10% - The rest of the School;**
- v) *Closure of the 2nd Respondent's School Offices with effect from **4/04/2020**;*
- vi) *Deregistration of Learners on account of Non-Payment of **FULL SCHOOL FEES** on or before **26/06/2020**;*

9. The Petitioners further aver that they communicated their position to the Respondents vide Fee Reduction Request - **SSAMPGA** Mombasa dated **14/05/2020**, inter alia; as hereunder:

- i) *Charges for **VLE** as pegged by the Respondents on the School Fees for Year **2019-2020** be reduced by **50%** in light of peculiar circumstances pertaining hereto;*
- ii) *There be an Opportunity for dialogue; and*
- iii) *Pending the dialogue and addressing of the Petitioner's concerns, that the Payment of School Fees be held in abeyance.*

10. It is averred that vide e-mail dated **21/05/2020**, the Respondents, through the Principal of the 2nd Respondent acknowledged receipt of the Petitioners' Petition for Fee Reduction and Intimated the Respondents' Appreciation of the Petitioners' Sentiments expressed therein. However, the Respondents reiterated their position on rebates and offered to "consider assisting Parents on an individual basis upon request, including payment by installments.

11. Being dissatisfied with the Respondents' response, the Petitioners and the wider Parents caucus "**SSAMPGA**" having congregated in an Online Discussion Forum on WhatsApp seeking to resolve the impasse subject hereof, authored a Letter dated **3/06/2020**, by which communication the Parents intimated their awareness of the unprecedented nature of the **COVID-19** Pandemic; their dissatisfaction with the Respondents' underwhelming and unsatisfactory response for failing to consider the gravity of the Parents' predicaments, including job

losses, pay cuts of over 50%, etc; their compulsion to invest in ICT equipment and instruct and manage the learners and their desire to meet with the Respondents' representatives on 9/06/2020, the Agenda whereof would be: The Petition; parents' concerns on the quality, effectiveness and challenges of the VLE; post-Covid precautions prior to resumption of physical learning; formation of a Parents Teachers Association;

12. A meeting was held on 19/06/2020 and the Petitioners conveyed their grievances: the quality of education disseminated by the Respondents vide e-learning was, is and remains sub-par; the WhatsApp system of instruction to the Kindergarten section of the School was, is and remains inadequate; the quality of education disseminated through the e-learning program was, is and remains not commensurate to the fees levied for such service; the absurdity of instruction involving coursework on e-learning and the eventual assignment of homework and studying to parents who do not understand such coursework, for example French.

13. It was averred that in the response, the Respondent stated that they had not increased School Fees for the past three (3) years whilst the school had incurred renovation costs; the fee reduction of 10% across the board was the culmination of an analysis on what percentage would enable the school function; the school was flexible to installment payments; the school's open-door policy was available to parents to air their grievances on the quality of disseminated education; no learner would be stigmatized or victimized owing to their parents' inability to make full school fee payments; the Respondents were uncertain on how to deal with the payments of School Fees and transport made during the previous truncated school term. Subsequently, vide Email dated 15/06/2020, the Respondents reiterated their response as captured in the Meeting held on 19/06/2020, with particular regard to their position that no further discounts shall be extended to parents; E-learning shall proceed "As Is"; the Respondents shall retain and pay all their staff full remuneration. Further, vide Communication made on 24/06/2020 and circulated on the Respondents' Online Portal, the Respondents threatened:

i) **Deregistration** from the Online Learning Facility on 29/06/2020 of All Learners who shall not have paid Term 3 School Fees in Full on or before 26/06/2020;

ii) **Discontinuation** from learning in the next term/year/grade of all learners whose fees shall not have been paid in full on or before 26/06/2020.

14. The Petitioners aver that on 29/06/2020, the Respondents **DISCONNECTED** E-Learning for all learners whose fees had not been settled in full by **COB 26/06/2020**, whilst: Parents of said minors were whimsically removed from the respective Age-Grade/Year WhatsApp Group Fora; the Respondents continue to deny the said parents audience and erased all school-fees related ultimatum correspondence from their Online Portal.

15. The Petitioners' case is that the learning through VLE only caters for a negligible fraction of the services which have historically been provided by the 2nd Respondent, and for which the Petitioners have paid for in the past, and the Petitioners aver that the same is a material change in the Consumer Agreement between them and the Respondents.

16. The Petitioners aver that since the Respondents Curriculum being administered by Pearson Edexcel Institute remains under the Directives of the Government of the Republic Of Kenya, to wit, the Ministry Of Education, thus, the Express (Mandatory) Provisions of: **The Constitution; the Children Act, Cap. 141; the Education Act, Cap. 211; the Basic Education Act, 2013; the Consumer Protection Act, 2012; the Fair Administrative Actions Act, 2015;** apply equally to all natural persons, incorporated entities and Unincorporated Associations within the Republic of Kenya, the Respondents included.

17. It is the Petitioners' contention therefore, that the Respondents have unprocedurally declared the commencement of a new school term effective 6/04/2020, contrary to the express and mandatory National Government Directives as to the formal closure of all educational institutions up to, and including 4/06/2020 and beyond as well as express communication from the various Institutes whose curriculum the 2nd Respondent offers to the Petitioners' children; unprocedurally commenced offering education services through a platform not contemplated by the respective Consumer Agreements between the parties; unprocedurally declared the conditional admission of learners into said Platform only upon payment of full school term 3 fees, contrary to the express and mandatory National Government Directives as to the non-commencement of any School Term prior to 4/06/2020 and beyond to **September, 2020**; non-demand for school fees prior to 4/06/2020 and beyond to September, 2020; Curriculum Administrator Directives as to the non-presentation of **any** examination for the May/June, 2020 session; and by their coercive and discriminatory acts and /or omissions subject hereof; unilaterally altered the Consumer Agreements between them and the Petitioners to the latter's obvious detriment; blatantly violated and continue to blatantly violate the Petitioners', the SSAMPGA'S and their Children's Fundamental Rights and Freedoms as contained in **the Constitution; the Children Act, Cap. 141; the Education Act, Cap. 211; the Basic Education Act, 2013; the Consumer Protection Act, 2012 and the Fair Administrative Actions Act, 2015.**

Response

18. The Respondents in opposing the Petition filed a Reply to Petition dated 24/7/2020, Replying Affidavit and a Further Affidavit sworn by **Ketan Patel**, the 2nd Respondent's Board member who has been duly authorised to swear the said Affidavit on behalf of the Respondents. It was deposed in the said affidavit, inter alia, that the 2nd Respondent is not a Member of the Kenya Private Schools Association (**'KPSA'**) because the 2nd Respondent offers an International Curriculum education under the Pearson Edexcel Certification process for both the IGCSE and GCSE levels. In fact, the membership of KPSA is comprised of private schools offering the Kenyan curriculum. Consequently, KPSA pronouncements do not bind it.

19. The Respondents state that whilst the Kenyan academic year commences in January (First Term) and ends in late November/ early December (Third Term), the calendar for schools offering the International Curriculum commences in August (First Term) and terminates in June of the following year (Third Term). The IGCSE and GCSE examinations are held in May/June every year and obviously could not be held this year on account of the Global Covid-19 pandemic situation. Consequently, the National Government together with the Ministry of Education, in March 2020, directed all educational institutions to close, which directive has been extended to January 2021 when it is expected that schools shall re-open. In addition to this, all national school examinations in Kenya have been scrapped for 2020 and instead deferred to 2021.

20. The Respondents state that whilst the closure directive is said to apply to Schools offering the international curriculum, the directive does not effectively address the question of the International Examinations to be held by the International Boards who are setting their own regulations as regards this aspect. Further, the Respondent states that the Petitioners have deliberately chosen to ignore the guidelines by the Ministry of Education, which stipulates:

‘To ensure learners are engaged, the Ministry of Education will enhance remote learning (online, distance and e-learning) and explore innovative approaches to promote equity’.

21. The Respondents state that the National Government and Ministry of Education have not suspended learning entirely. To the contrary, it is actually being encouraged through innovative forums including virtual platforms. Consequently, the 2nd Respondent had to find innovative ways of survival in the ‘new normal’ with no short-term solution in sight presently and taking into account the Pearson Edexcel position as well as the International Curriculum status, the 2nd Respondent found it necessary to offer an initial learning solution on the Virtual Learning Experience online platform in order to keep the learners busy, with improvements being made as matters have continued to evolve that not only require maintenance and retention of teaching and ancillary staff, but also updating and maintenance of the infrastructure.

22. The Respondents state that contrary to the allegations made by the Petitioners, it is imperative to note from the foregoing that the circumstances applicable to the Kenyan curriculum and that of the international curriculum are distinctly different and all the directives applicable to the Kenyan system cannot be said to apply across the board. For instance, whilst the Kenyan KCPE and KCSE examinations have been deferred to 2021, this is not the case with the IGCSE and GCSE examinations under the international curriculum, which will be held in November 2020 for those students who opt to sit them.

23. The Respondents reiterate that whilst they accept, that each individual and their parents have a choice on how to deal with the issue and adopt what they perhaps feel is in their best interests, they appreciate and recognize every child has a right to education under the provisions of Article 43 of The Constitution of Kenya, a fact also clearly recognized by the Petitioners. In this context, whilst the Academy can strive to provide the platform for education, it is up to individuals to decide whether or not to avail themselves of such right.

24. It is the Respondents’ case that it has been extremely flexible and accommodating to individual circumstances, and has gone out of its way to make virtual learning affordable but also taking into account the fact that it retains a cost element that it must cover and maintain in order to retain the teaching and support infrastructure which needs to be maintained awaiting the resumption of physical learning. However, the Petitioners appear to be harbouring the notion that learners and/or their parents have no obligation to pay any fees for learning through the virtual online tools offered by the 2nd Respondent.

25. It is the Respondents’ case that for those who wish to continue with learning on the virtual online platform, the option is available at a cost which must be paid. Those who feel that their children’s interests are better served by not engaging on the virtual online platform through the education offered, are at liberty to opt out of the programme and rejoin the physical school attendance when physical learning will recommence. At present, it is premature to precisely state when this is likely to be.

26. It is the Respondents’ case that there are a total of 921 students at the 2nd Respondent’s institution. For the January – April 2020 (Second Term) of the Academy, 21 have failed to pay their school fees. For the April – July 2020 (Third Term) of the Academy, 720 have paid their fees in full, 59 have paid 50% of the fees and 56 in part through installments agreed upon; 78 have not paid any fees at all whilst 2 have opted out of e-learning. Therefore, the Petitioners are just but a minority. Consequently, the Respondent avers that this Court ought to weigh the rights of the 835 students to education and who are willing to meet the cost of the virtual online platform education programme as opposed to the 86 who seem to be intransigent in their attitude towards this programme. The Respondent avers that some parents appear to want to be part of the programme at no cost, which is not acceptable.

27. It is the Respondents’ case that the 2nd Respondent Academy operates under the 1st Respondent herein which is a Charitable Trust and is not operated as a ‘for profit organization’. It is for this reason that the 2nd Respondent is able, despite offering an international curriculum, to maintain fees at a fraction of the cost of other schools in Mombasa that offer similar curriculum namely Oshwal Academy, Braeburn International School and Mombasa Academy just to name a few. It is therefore not correct for the Petitioners to allege that The Academy is being unreasonable and unfair in offering the rebates it has.

28. It is the Respondents’ case that the question of fees and terms of engagement between the Academy and parents for the provision of educational services to the children is a contractual matter and one, which falls outside the ambit of a Petition in the nature now before the Court, which cannot re-write contracts between parties as sought by the Petitioners. Further, the Respondents state that the Petitioners cannot dictate the manner in which the Board manages the Academy and its activities as the Board has considered the fact that we are all experiencing unusual and unprecedented times that have come with their own challenges but it is important, in the same breath, to balance the various interests involved. If this is not done, the Academy faces the prospect of having to completely shut down operations for the foreseeable future, and certainly at least until physical school attendance is possible. Therefore, if the individual student or parent feels that the amount charged is not value for the education being provided, they are free to opt out of the Virtual Online Education Scheme as some others have done. But the Petitioners cannot compel the Respondents to allow participation at no cost or at a payment that is subjectively determined by the parents.

29. It is averred by the Respondents that so far, they have managed to retain all their staff. Therefore, terminating their services because of lack of resources would be short sighted and not in the interests of the children who are learners in the School, since the reality is that the staff will move on to other opportunities and it is the children who will be adversely impacted as the Respondents cannot then guarantee reengaging staff at the same competence or trained levels as they currently have.

30. The Respondents state that the Academy had a duty to ensure that the course units to be undertaken by the IGCSE and GCSE candidates were completed in their entirety given the model adopted by the Pearson Edexcel Board to ensure continuity so that their interests were not prejudiced as they progressed to the next class in September 2020. Besides and in any event, the Pearson Edexcel examinations board has

scheduled examinations in November 2020 and the interests of those students who will opt to take the examinations then must equally be taken into account together with the interests of those students who will be taking the examinations in June 2021. For the 2nd Respondent to wait until January 2021 to commence disseminating learning will be a huge disservice to such students as they will be at a complete disadvantage compared to their peer groups worldwide who will continue their educational training from August 2020.

31. The Respondents state that the Academy has not unilaterally altered the alleged Consumer Agreement in a coercive or discriminatory manner, and in violation of the Petitioner's rights. To the contrary, the Academy's Board has taken active steps in the best interests of the children at the Academy to present an alternative option to ensure that educational learning continues. Regrettably, it is the Petitioners whose actions are likely to cause the very infringements they are complaining of, as they appear not to be considering matters objectively and in the interests of the entire learning community in the school but rather only from a very narrow and subjective viewpoint.

32. It is the Respondents' case that the Petitioners have not furnished any material evidence to prove that the Respondents have engaged in any unlawful or illegal conduct as they allege. Consequently, the Petition has been brought for collateral purposes and without any regard for the rights of the majority of the children who are willing to embrace the virtual online learning programme, a thing being adopted in not only educational institutions world over but also in professional bodies in their professional learning and development programmes.

Submissions

33. The Petition was disposed of by way of written submissions. The Petitioners' submissions were filed on 30/7/2020 while the Respondents' submissions were filed on the 29/7/2020.

34. The first issue parties raised for determination was on jurisdiction. **Mr. Ngonze** Learned Counsel for the Petitioners submitted that the Petitioners are entitled to file a claim under Article 22 before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by Article 23 of the Constitution. Counsel cited the finding in **Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Petition No. 65 of 2010 [2013] eKLR** where the court held that the Bill of Rights can be enforced as against a private citizen, a public or a government entity and that under the provisions of Article 20(3) as read with Article 259 of the Constitution, this Court is obligated to develop the law to give effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights.

35. **Mr. Ngonze** submitted that neither the respondent nor the parents in the 2nd Respondent's institution have challenged the Government Directive on formal reopening of schools in January, 2021 and/or its applicability to all schools, including those offering International Curriculum. Therefore, there is no legal basis for their assertion that the Respondents can operate outside the direction of the County and National Governments simply because they run a private institution of basic education which receives no financial aid from the Government.

36. **Mr. Ngonze** further submitted that the Petitioners' consumer rights are guaranteed under Article 46 of the Constitution and are enforceable as constitutional rights, because the Respondents market themselves to attract students to their school and they charge tuition fees and other fees and failure to pay the said fees entitles them to refuse a child access to the classroom.

37. Counsel further submitted that the Respondents violated the Petitioners' right to a fair administrative action, by resorting to provide services through VLE and pricing the same as though it was normal school term, and thereby violating Article 46 of the Constitution. Further, the refusal by the Respondent to provide inclusiveness and openly address the issue of school fees and online engagement was a violation of the Petitioners' right guaranteed under Article 47 of the Constitution.

38. **Mr. Ngonze** submitted that the varying of the terms of the consumer agreement by the Respondents is meant to disadvantage the parents/minors who opted out of the virtual learning system.

39. **Mr. Khagram** Learned Counsel for the Respondents submitted that the Petitioners acknowledge the nature of relationship as being contractual. Counsel submitted that the said acknowledgment itself removes the matter from the constitutional perspective to contractual or commercial realm, in which case, this court lacks the requisite jurisdiction to entertain the matter.

40. Counsel submitted that there was prior notice before commencement of VLE, and that consent **was** sought from parents for that purposes. Further, no objection was received from the Petitioners, and as shown by the Schedule appearing in Exhibit 'KP 4' [Page 47], all but 21 of 921 students paid the fees for Term 2 (January/April 2020). In Term 3 (April/July 2020), 720 paid full fees, 59 paid 50% of fees, 56 paid in part and continue to pay in instalments whilst 78 have paid no fees at all. 21 students opted out of E-Learning and 6 left the school. Counsel, submitted that VLE was not imposed but was consented to by the parents, and, the Academy has adopted an open door and simple policy so that those who wish to continue with learning on the virtual online platform can avail themselves of it at a cost which must be paid. Those opposed to it are at liberty to opt out of the programme and re-join the physical school attendance when physical learning recommences.

41. With reference to the provisions of The Consumer Protection Act relied upon by the Petitioners, **Mr. Khagram** submitted that matters of breach of statutory provisions cannot be the basis of a constitutional petition as is the case here. Counsel cited 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** –where the court held as follows:

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. 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.”

42. Counsel submitted that the Basic Education Act, relied on in the petition deals with public schools and not private schools save for limited instances and in any event, no material evidence of infringement by the Respondents have been presented before the Court. Counsel relied on **N J V Agha Khan Academy & 6 Others [2018] eKLR** which he submitted is on all fours with the instant case, and where the court held thus:

“...unable to trace the link between the alleged agreement or undertaking by the respondents to allow the petitioner’s children to study freely at their institution and the alleged violation of the minor’s constitutional rights and fundamental freedoms to compulsory free education which is only applicable to public schools funded by the peoples and not private institutions...” and that ‘.....The petitioner failed to perform his obligation, and if unable, he could not force the respondents as private institutions to keep his child in school without paying fees. Having chosen to enrol the child in a private school, he was bound by the terms and conditions of admission but could not turn to claim that the child must remain in school without paying fees.”

43. **Mr. Khagram** urged the court to dismiss the petition which he submitted had not been proved.

Determination

44. I have considered the Petition and rival pleadings. I have also considered the submission and authorities relied upon by parties. Two issues arise for determination. These are:

i) Whether the Court has jurisdiction to entertain the Petition

ii) Whether there was a violation of the Petitioners’ rights and fundamental freedoms.

45. It is common ground that in response to the first reported case of the Coronavirus (**COVID-19**) Pandemic in the Republic of Kenya, vide Press Statement made on **9/3/2020**, the closure of all educational institutions within the Republic was communicated, with effect from **10/03/2020** up to and including 3/05/2020; vide Directive issued on **3/05/2020**, the Ministry of Education extended the closure of Educational Institutions up to and including **4/06/2020** and subsequently, beyond said date and the Directive has now been extended to January 2021 when it is expected schools shall reopen. It is arguable, therefore, that the 2020 school calendar year may be considered lost due to COVID -19 pandemic.

46. It is also common ground that the International Pearson Edexcel Board directed that students who were due to take IGCSE and GCSE examinations in June 2020 would not sit those examinations but would be graded based on estimations and predicted grades assessed by the teachers together with the respective learning institutions for purposes of issuance of the certifications. The Pearson Edexcel Board has further directed that should a student not be content with the grading in his subject(s), he or she would be at liberty to sit the examination in November 2020. While this is not common ground, applicable to all schools, some learning institutions have stated that any learning activity engaged in during the health crisis break would be treated as separate program from the normal school terms programs, and is optional, and the same is in line with the Ministry of Education directive that Continuous engagement of learners in activities through Online Platforms is highly encouraged using age appropriate and prescribed content.

47. From the foregoing, it would appear that prayers (a) (b) and (c) of the Petition are not, and cannot be disputed. Yet, this Court observes that those prayers refer to affirmative policy declarations which only the Ministry of Education can make. This Court must restrain itself in order not to make any decision which may conflict with policy pronouncement of the Ministry of education.

Whether this Court has jurisdiction to entertain the dispute before it.

48. As to whether this Court has the jurisdiction to determine this Petition, the parties herein expressed divergent view. According to the Respondent, there is an acknowledgment by the Petitioner that the relationship between the parties is contractual. Therefore, the alleged acknowledgment itself removes the matter from the ambit of constitutional Court.

49. The jurisdiction of a Court flows from the Constitution, or statute, or both, and is to be exercised as and in the manner, the same is conferred. In this regard, the Supreme Court stated in **Re The Matter of Interim Independent Electoral and Boundaries Commission, [2011]eKLR** thus:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...”

50. The general rule is that a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined based on pleadings and not the substantive merits of the case.

51. By virtue of Article 165 (3) (d) of the Constitution, the High Court has the jurisdiction to determine all matters in which it appears to the Court that the bill of rights or a right of a fundamental freedom is being or is about to be breached. The Court is merely required to weigh the probability of such eventuality happening. See **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...”

52. In the present matter, it is not arguable that the Petition raises constitutional issues, whether based on contract or commercial law, or whether based on Fair Administrative Action Act of 2015. Consequently, I decline the invitation to terminate these proceedings on the ground that the subject matter of this petition is based on contractual relationship, which has been admitted by the Petitioners.

Whether there was violation of the Petitioners’ rights and fundamental freedom.

53. Under this head, I will discuss the various allegations of infringement as posited by the petitioners.

Whether there was infringement of the Petitioner’s fair

administrative action rights.

54. The Petitioners argue that the Respondent has declined to engage them in a reasoned new mode for provision of Virtual Learning Experience, and further that the Respondent has employed a discriminative approach in undertaking the VLE. The Respondents reply that the matter of provisions of virtual learning is not administrative action within the meaning of ‘**administrative action**’ as defined in the said Act. It is rather a contractual matter and really an issue of contractual and commercial negotiation. That would mean that the respondents owe absolutely no obligation to engage Petitioners in the new virtual learning experience. However, this is not what the law says. **Section 3 of the Fair Administrative Action Act** provides that.

“3. (1) This Act applies to all state and non-state Application agencies, including any person

a. exercising administrative authority;

b. performing a judicial or quasi-judicial function under the Constitution or any written law; or

c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

ii. Public vs Private law.”

55. Article 47 of the constitution stipulates as follows:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

(2) 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.

47. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

3 (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

56. Section 4 of the Fair Administrative Actions Act provides as follows:

“1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2. Every person has the right to be given written reasons for any administrative action that is taken against him.

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

- d. *a statement of reasons pursuant to section 6;*
- e. *notice of the right to legal representation, where applicable;*
- f. *notice of the right to cross-examine or where applicable; or*
- g. *information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

4. *The administrator shall accord the person against whom administrative action is taken an opportunity to-*

- a. *attend proceedings, in person or in the company of an expert of his choice;*
- b. *be heard;*
- c. *cross-examine persons who give adverse evidence against him;*
- d...

5. *Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings."*

57. From the undated letter annexed at page 61 and a calendar of events annexed at page 64(A) of the Petitioners' bundle, it can be deduced that the VLE program commenced on the 6/4/2020 since there was no objection to the VLE by the Petitioners. The issue raised on schools fees were first raised a month later on 14/5 /2020 by parents of minors in the 2nd Respondent who requested for a 50% reduction of third term fees, and on 3/6/2020 the parent requested for a meeting with the Respondents' Board of Management.

58. On 19/6/2020, a meeting between the parents was held in a bid to discuss fee reduction. However, no consensus was arrived at and on 24/6/2020, the Respondents threatened to deregister students who would not have paid Term 3 school fees, and discontinuation from learning in the next term/year the student who would not have paid school fees on or before the 26/6/2020. On 25/6/2020, the 2nd Respondent via email reiterated that the institution would not consider a further school fee reduction as they had extended the fee discount to the limit and proposed to consider assisting each parent individually upon request and even suggested instalments payment.

59. From the above facts, it is clear that the parents were afforded an opportunity to be heard by the Respondent and indeed, on the 19/6/2020, the parents of the minors through their representatives had a meeting with the Respondents Board of Management. However, demification a consensus was never reached. In my view, the Respondent duly took into account the interests of the Parents who stood to be affected by the decision that was arrived at. Consequently, the subject dispute being a contractual matter; the Petitioners had the liberty to opt out from the VLE program. However, if the Petitioners chose to consent to the VLE program, then the same would come at a cost, which is payment of fees as required by the Respondent. See **Joseph Njuguna & 28 others vs. George Gitau T/A Emmaus School & another (supra)**

60. From the foregoing, I find and hold that the allegation that the Respondents violated the Petitioners right to a fair hearing is baseless. To the contrary, the Respondent afforded the Petitioner a fair hearing and an opportunity to air their grievances. That notwithstanding, the 2nd Respondent unnecessarily used a harsh and threatening language when it stated that it would not allow students who would not have paid school fees for third term to move on to new classes starting the new school year. That communication to the parents vide e-mail dated 24/6/2020 is in violation of the guidelines issued by Pearson Edexcel Board, directing that students who were due to take IGCSE and GCSE examinations in June 2020 would not sit those examinations but would be graded based on estimations and predicted grades assessed by the teachers together with the respective learning institutions for purposes of issuance of the certifications. The Pearson Edexcel Board further directed that should a student not be content with the grading in his subject(s), he or she would be at liberty to sit the examination in November 2020. Further, the Respondents in the Replying affidavit in opposition to the Petition averred that the Petitioners were at liberty to opt out of the VLE programme, and re-join the physical school attendance when physical learning recommences. Consequently, the Respondents are estopped from preventing a student from proceeding to the next class when the new school year commences, unless, as a new policy, it is applied uniformly and does not discriminate against those who may have opted out of the VLE Programme.

Whether the Petitioners' Consumer rights have been violated.

61. Article 46 outlines the rights of consumers of any goods or services, in the following terms:

46. Consumer rights

(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.*

62. **Mr. Ngonze** argued that the Respondents by material alteration of services contracted for in the existing consumer Agreement without the consent of the consumers infringed upon the Petitioners' consumer rights. Counsel argued that by refusing to address the Petitioners concerns relating the services offered through VLE, the Respondents limited the Petitioners' consumer rights under Article 46 of the Constitution.

63. **Mr. Khagram** submitted that the Petitioners are estopped from denying that the Academy gave every opportunity to the Petitioners and the entire school community to opt in or out of the virtual learning programme, which all but 21 students availed themselves of, in Term 2. The Petitioners cannot now be heard to state otherwise. In any events, Counsel submitted, no 'goods' are being supplied that can be deemed to be unmerchtable in quality.

64. In **James Kuria vs. Attorney General & 3 others [2018] eKLR**, the Court held as follows:

“Although issues of consumer rights affect only the parties, ‘their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand.

56. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases. [35]”

65. The Petitioners submitted that they did not consent to the material alteration of their consumer agreement with the Respondents and that their concerns on the VLE were never addressed. However, at page 61 of the Petition, there is an undated letter addressed to parents requiring parents to give their consent to VLE, and where there is no objection raised, the 2nd Respondent would assume consent. Since no objection to the VLE has been furnished to this Court by the Petitioners, and since no evidence has been led by the Petitioners to demonstrate how the Respondent violated their consumer rights, I find and hold that since the Petitioners consented to the VLE program, they are estopped from alleging that they were not consulted on the same, and/or that their views on the VLE were never taken into consideration by the Respondents. Therefore, it is the finding hereof that the Petitioners have not proved violation of consumer rights against the Respondents.

Whether the Respondents have violated the Petitioners' rights guaranteed under Article 27, 43(1)(f) and 53 of the Constitution.

66. The Petitioners argue that the continued provision of education services through the VLE without addressing their concerns is placing the Petitioners at a disadvantage in relation to those who have agreed to the alleged unconscionable terms, and the same is also discriminatory and denies the Petitioners children the basic right to education as it places financial interests above the best interest of the child.

67. The Respondents argued that the learners were given a choice to join the virtual learning programme which they all embraced in the first instance and only 21 students did not pay their fees for the January to April (Term 2) term. It appears to me that in this kind of contract, parties are able to contract at arm's length. Provision of education services is not a monopoly business in Kenya. There are many options or offers, even within the domain of private learning institutions. A parent who is not satisfied with any offer has so many other options. In this case, the parents who are not satisfied with the provision of Virtual Learning education scheme are at liberty to opt out. And those who opt in will not expect this court to decide the fees that they will have to pay.

68. Article 43(1)(f) provides that every person has the right to education while Article 53 provides for a wide array of rights of the children including the right to free and compulsory education and further, that a child's best interests are of paramount importance in every matter concerning the child. Article 53(1) (b) stipulates that **“Every child has the right to free and compulsory basic education.”**

69. I have noted carefully that the Petitioners' concerns relate to amount of fees chargeable for the VLE program and the cost of ensuring the said VLE program runs smooth from their end. Onguto J in **Joseph Njuguna & 28 others vs. George Gitau T/A Emmaus School & another [2016] eKLR** stated as follows:

“the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school, where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary.”

70. Similarly, Mumbi Ngugi J., while addressing the right to education and the place of private schools in the case of **J.K (Suing on Behalf of CK) v Board of Directors of R School & another [2014] e KLR**, observed that:

“It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article 43. However, there is no obligation placed on

a private entity such as the respondent school to provide such right;”

71. It is a fact that there exists a binding contract signed by the school, the minor and the parent. After the COVID -19 Pademic, the Respondent sought to vary the said contract for the duration the government of the Republic of Kenya has suspended physical learning. A letter communicating the intention to kick-start the VLE progam, which was to be optional, was issued. Twenty one (21) of the parents in the Respondent’s school opted out. However, the Petitioners by not filling any objection to the 2nd Respondent’s proposal, consented to the VLE program and even enrolled the minors into the said programme and as expected the fees applicable for third term was to be applied to the VLE. That being so, this Court finds that the argument by the Petitioners that they are being subjected to unconscionable bargain is an issue that falls squarely in the realm of private law. The principle that private law claims should not form the basis of constitutional Petitions and should be resolved by using the usual process of civil litigation is elucidated in **Maggie Mwauki Mtaleki vs. Housing Finance Company of Kenya Ltd [2015] eKLR** where the Court held as follows:

“Secondly and this is of paramount importance to litigants and counsel, the constitution is not to be used as a general substitute for litigating ordinary civil disputes. The petition herein is disguised as a constitutional petition for the redress of violation of fundamental rights when it is in fact on ordinary civil dispute elevated into a constitutional issue. There is no single constitutional issue raised in the petition. The question of social-economic right of housing and sanitation is a smokescreen for denial of contractual liability and is therefore both misconceived and misguided as argued by the Respondent....”

72. Agreeing with the Respondents, this Court must restate the old adage doctrine that a Court of law cannot purport to re-write a contract voluntarily executed by parties. It is clear that relationship between the parties in this case is governed by the contract in question. The petitioners are now inviting this Court, sitting as a constitutional Court, to rewrite that contract. This invitation must be bluntly declined. The Court cannot determine the appropriate rebates to be extended to the Petitioners. This is so because the Court has no skill to enable it determine the price of those services. But more importantly, when the parties entered into the contract for VLE, they were well aware of the COVID -19 Pandemic and its effect on their earning capacity and they are even now free to opt out of the VLE programme.

73. In **J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School [2018] eKLR**,Mativo J opined as follows:

“Its trite law that "the courts do not make contracts for the contracting parties. No. It is a matter purely between them sese ipse".[26] This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties. When a contract is clear and ambiguous, a Court’s role is to apply the parties’ contract as written and not rewrite the contract.”

74. From the foregoing, I find and hold that the Petitioners have the obligation to pay school fees as demanded and that their rights under Article 27 of the Constitution have not been violated. Further, the Petitioners have failed to adduced evidence to prove that the Respondents have infringed on their rights guaranteed under Article 27, 43(1)(f) and 53 of the Constitution.

Infringement of the Petitioners rights guaranteed under Articles

28, 32, 33.

75. In **John Kimanu vs. Town Clerk, Kangema NBI Pet. No. 1030 of 2007.**

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is twofold. First the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to men but specific rights defined and protected by the constitution. It is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the Constitution that has been abridged”

76. On the basis of above authority, I have observed that the Petitioners have made many allegations in the petition. Unfortunately, no evidence has been tendered to substantiate the allegations. The said allegations have not been proved and remain mere allegations.

Conclusion

77. In conclusion, this Court is satisfied that the Covid -19 Pandemic has brought challenges, which have never been chartered in history. The education sphere is arguably, the most affected. And whilst in the realm of Public Schools the Government is in a position to regulate the calendar of events and moderate policy including the charging of fees and the mode of payment and even the manner of provision of learning experience during the pandemic, the schools in the private domain are limited to consumer agreements that they have with parents. Yet, and this is arguable, Private Schools retain the domain name of their institutions: These schools provide the necessary physical and educational infrastructure; they provide the teachers and maintain the institution to their individual standards; they provide every required facilities which conform to their domain name; and they offer history as a test of their character, and a precedent of their academic performance. They make an offer to the parents. That offer is based on the full character and performance and history of the school. Where the parents accept that offer, the parents cannot at the same time dictate what academic programmes are to be offered or how the learning programme is to be transmitted to the students. That is the sole responsibility of the school, only subject to relevant policies and regulations of the Ministry of

Education. The role of the parents is to avail their children, and to agree on fees chargeable. Once that is done, further need to deviate or rearrange the format of engagement in the provision of the education services, or on the way the school is run, can only be negotiated through a validly registered Parents Teachers Association (P.T.A) whose existence is a requirement of the law. All other issues remain at the pleasure of the school, which retains the right to set the curriculum and determine its mode of transmission and the fees chargeable. Once the parents accept the offer of a place on such known terms, they cannot go back on that contract.

78. In this particular instance, parents who rejected the VLE or who do not want to pay for it have no option but to leave the school since they cannot purport to dictate the kind of curriculum or mode of its transmission. The learning institution cannot afford to run two systems: one for those who agree, and another for those who disagree.

79. On the rates chargeable as fees, it should be observed that Private, and even Public Schools, have got particular and specific standards to maintain. These standards give those learning institutions specific identity and character, which distinguish them from other institutions. This gives the learning institutions including the respondents herein, the right to safeguard their domain character or standards.

80. As I have stated earlier in this Judgment, provision of educational services in Kenya is not a monopoly. There are several options. The consumer rights of the children can be claimed and satisfied from several available options, without compromising the interests of the child. This Court cannot enter into the negotiating table to determine firstly, the content of the curriculum to be offered, and secondly, what to charge for it. This is more so in the recognition that even among the Private Schools, termly fees vary from as little as Kshs. 20,000/= to as much as Kshs. 2,000,000/=. This variation itself is enough to show that this Court has no valid skills to determine what a school should charge, and is content to leave such decisions to the contracting parties. Accordingly, the cases that have been cited in submissions, in which the High Court has ordered a particular percentage reduction in fees has not persuaded me. Further, those reductions were made as interim conservatory measures, and those matters are still active in Court and no final judgment has been delivered to enable this Court know the final outcome.

81. Finally, **Mr. Ngonze** has submitted that in reaching a decision in this matter the Court should look into the best interest of the child more than any other interest. That submission is correct. In looking at the best interest of the child, the Court must ensure that the school delivers the curriculum it is supposed to deliver, in a mode which it promised. There is no indication that the Respondents here have behaved in a way which may compromise the best interest of the child. Indeed the greatest interest of the child is to get learning. And despite the Covid-19 Pandemic, the Respondents have provided credible online learning experience to its students. I therefore reject the submission that the learners' best interests have been compromised.

82. Still on the issue of the best interest of the Child, it is noteworthy that in most private learning institutions, the best interest of the child merges with the best interest of the parent. A vast majority of private schools including the Respondent herein are offering, in addition to the academic learning experience, ostentatious lifestyle centres, where able parents march into contract with the satisfaction and conviction of their ability to pay school fees on offer. These schools embody the best learning experience as well as the best destination for what I may call parental self-actualization in terms of other amenities offered in these institutions. In most of these institutions, the best interest of the child merges with the best interest of the parent, and the deciding factor is affordability. That is why a reduction of fees by 20% by an institution where fees is 30,000/= per term is not commensurate with a reduction of fees by 20 % where the fees per term is Kshs. 1,900,000/=. It is therefore not logical for courts to attempt to determine what fees is payable for what programmes. The vast majority of the parents in private schools, and in the Respondents' school are clearly capable of negotiating fees chargeable by the learning institution, and as long as the Respondents herein do not run afoul the policies and regulations of the Ministry of Education, they are at liberty to negotiate with the parents fees chargeable.

83. It is to be noted, however, that the Covid-19 Pandemic has put the entire world in a difficult situation, which has never been precedented. This being so, the Respondents have a human responsibility to be sympathetic and a little generous in demanding what is due, and how to successfully steer the school during this time. It is not the time to use threatening language to parents, or the time to tell them to take away their children if they cannot afford the fees, or are uncomfortable with the VLE. What comes across is that such language or threat or misunderstanding of similar nature can effectively be removed if the parties are able to dialogue. Novel situations which have never been precedented can be solved through dialogue. The only forum which can bring the school and parents together is the P.T.A.

84. 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.

85. 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;

86. 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.

87. The P.T.A is therefore a mandatory requirement and is a legal instrument in the management of schools. There is no evidence that there is a PTA in the Respondent school herein. And because it is a requirement of the law to have a P.T.A, I hereby direct that the same be formed for the school herein and be in place within 90 days from the date herein.

88. In the upshot, I find that the vast array of allegations contained in the Petition have not been proved. However, the Petitioners have proved that they are entitled to the following orders, which I hereby grant:

(a) The Respondents are hereby ordered and directed to establish a P.T.A in terms of prayers (l), (r) and (s) of the Petition, to be in place within (90) days from the date hereof.

(b) A permanent injunction is hereby issued restraining the Respondents from preventing the students who opted out of the VLE program from progressing to the new school year once normal school learning resumes, or from any form of discrimination, or from any treatment, which does not uniformly apply to students in the same category

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

Dated, Signed and Delivered at Mombasa this 25th day of August, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in Chambers via MS Teams in the presence of:

Mr. Khagram for Respondents

Ms. Mwangi holding brief Ngonze for Petitioners

Mr. Kaunda Court Assistant