



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**PETITION NO. 32 OF 2020**

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

**AND**

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

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF: SUPERVISORY JURISDICTION OF THE HIGH COURT UNDER ARTICLE 165 (6) OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**AND**

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

**AND**

**IN THE MATTER OF: BASIC EDUCATION ACT, 2013**

**BETWEEN**

**MICHAEL MAGOG & 179 OTHERS**

**(Suing as a parent and a guardian of students/minors currently  
schooling at M.M. Shah and M.V. Shah Academy).....PETITIONERS**

**AND**

**1. THE JAIN EDUCATION BOARD/BOARD OF GOVERNORS OF M.M.**

**SHAH AND M.V. SHAH ACADEMY**

**2. DIPAN SHAH**

**3. RITEN SHAH**

**4. GEMINI SHAH**

**5. DHIREN SHAH**

**6. AJUL SHAH**

**7. KINNER SHAH**

**8. RAKHESH SHAH**

**9. PAREET SHAH.....RESPONDENTS**

**RULING**

1. The Notice of Motion application herein dated 18/5/2020 is hinged on petition herein of even date. The issues raised in the application are almost similar with the issues in the petition except that the motion seek interim conservatory orders pending the hearing of the petition. The prayers sought in the motion are as follows:

- a. This application be certified urgent and heard ex parte in the first instance.
- b. Pending the inter partes hearing and determination of this application, the court does issue an injunction restraining the Respondents from prematurely commencing term 2 of the school calendar for the year 2020 through online classes against the government's directive extending the reopening date for term 2 to one month to give more room for the scale up of the national efforts to fight the spread of COVID-19 and making requests for payment of term 2 fees.
- c. Pending the hearing and determination of this petition, the court does issue an injunction restraining the Respondents from prematurely commencing term 2 of the school calendar for the year 2020 through online classes against the government's directive extending the reopening date for term 2 to one month to give more room for the scale up of the national efforts to fight the spread of COVID-19 and making requests for payment of term 2 fees.
- d. Pending the inter partes hearing and determination of this application, the court does issue an injunction restraining the Respondents against issuing threats and /or intimidations to parents opposed to the Respondents directive on premature commencement of term 2 of the school calendar for the year 2020 through online classes against the government's directive extending the reopening date for term 2 to one month to give more room for scale up of the national efforts to fight the spread of COVID-19.
- e. Pending hearing and determination of this petition, the court does issue an injunction restraining the Respondents against issuing threats and /or intimidations to parents opposed to the Respondents' directive on premature commencement of term 2 of the school calendar for the year 2020 through online classes against the government's directive extending the reopening date for term 2 to one month to give more room for scale up of the national efforts to fight the spread of COVID-19.
- f. Costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of Michael Magog sworn on 18/5/2020 on his own behalf and on the behalf of 179 others, and a Further Supporting Affidavit sworn on 10/6/2020.

3. The petition and the motion herein are brought by parents on behalf of their minor children studying at the M.M. Shah and M.V. Shah Academy. The Respondents are sued as a Board of the said Academy.

4. The Applicants' case is that the Respondents have unilaterally, and on a short notice, purported to prematurely commence term two of the school calendar for the year 2020 against the government's directive extending the re-opening date for term two to one month to give more room for the scale up of the national efforts to fight the spread of Covid-19.

5. The Applicants' case is that following the outbreak and spread of Covid-19, the World Health Organization declared the same as a pandemic on 11/3/2020. Subsequently the Government of Kenya put in place measures to contain the spread of the disease. These measures included the closure of all schools in the republic prematurely before the end of the first term. However, the Applicants aver that despite the aforesaid government directive, the Respondents continued to offer education services to their students through virtual learning platform in pretense of completing the coverage of the remainder of the first term syllabus, but even this was not uniformly coordinated, and the same commenced at different times in different classes. This placed some students at a disadvantage for lack of adequate preparations, and also in terms of costs, with the result that those that enrolled late missed out crucial classes, a fact which will negatively impact in their academic performance.

6. The Applicants' case is that the Respondents issued a communication that the school would commence term 2 virtual classes on 4/5/2020 in line with the initial policy direction by the Ministry of Education that schools would open on 4/5/2020. It is evident, however, that this position has since been reviewed, and it is now not known when the schools will actually open. However, it is the Applicants' case that regardless on when schools will open, compulsory virtual learning should not be allowed, and that no parent should be forced to pay for it. Any virtual learning should be optional and treated as private tuition and that the actual syllabus coverage should only start when the schools officially reopen.

7. The Applicants also complain that the Respondents had issued invoices for term 2 fees without accounting for the fact that fees for term 1 had not been fully utilized due to premature closure of term 1.

8. However, the Respondents have not heeded the demands of the Applicants, but have instead threatened the Petitioners by telling them to withdraw their children from school if they were not prepared to follow the school directions.

9. The Applicants further aver that the high handedness of the school administration is a consequence of its failure to establish a Parents Teachers Association (PTA) as provided under Section 55 (3) of the Basic Education Act. The PTA would ensure constructive engagement between the school administration and the Petitioners in order to find the best way forward in such circumstances.

10. The Applicants therefore pray that the court intervenes and restrains the Respondents from prematurely opening the school against the directive of the government and issuing intimidating threats to the Applicants.

### **The Response**

11. The motion is opposed by the Respondents vide Replying Affidavit sworn by Dipan Shah on 19/5/2020 and a Further Replying Affidavit sworn by Gladys M. Juma on 3/6/2020.

12. The Respondents' case is that the M. M. Shah & M. V. Shah Academy (hereinafter referred to as the "School") is a private school in Mombasa managed by the 1<sup>st</sup> Respondent under the auspices of Shree Jain Shwetamber Derawasi Sangh, a charitable organization of the Hindu Jain community; that the School offers the local CBC/8-4-4 curriculum for children at Pre-school to Year 8, that is, nursery and primary school and as at 16/3/2020, catered for a population of approximately 950 students who are taken care of by a total of 84 teaching and non-teaching staff; that on 16/3/2020, the school had to close prematurely before the end of the First Term by reason of the Government Directive following the confirmation of the first COVID-19 case in Kenya; that the 1<sup>st</sup> Respondent immediately started to consider the options available to it to facilitate continued learning for its students from home, and acquired and rolled out online learning platforms through applications and/or programs called SeeSaw and Zoom; that with effect from early April 2020, the 1<sup>st</sup> Respondent had started training its teaching staff in the use and management of the online learning platforms and to run pilot programs to test them and observe the responsiveness of its students with the intention that the School should be ready to start online learning when the Second Term 2020 would begin on 4/5/2020 in accordance with the directive from the Ministry of Education; that following training of staff, successful pilot runs, and after dealing with and resolving challenges and teething problems that arose, the School was confident of being able to properly roll out the online learning system and accordingly, in the School's Newsletter for the beginning of the Second Term 2020 which was issued on 3/5/2020, the Principal of the School, Ms. Gladys Juma, announced online classes would commence from 4/5/2020. (A copy of the said Newsletter was annexed at pages 1 - 5 of DS 1); that on 3/5/2020, the Government of Kenya announced an extension of its directive for closure of all schools up to 4/6/2020; that by a letter dated 5/5/2020, the 1<sup>st</sup> Petitioner, purporting to have the support of 106 other parents, raised the following concerns about the School's roll out of online learning:

(a) that the Ministry of Education had directed that any learning that takes place during the period of closure of schools should be regarded as extra tuition and that when normalcy resumes, schools will be required to pick up teaching from where they had stopped in Term 1; and;

(b) the sentiments expressed by the CS for Education, Prof. George Magoha that if any learning does take place, it should be optional and not compulsory.

13. In response the school on 7/5/2022 issued a circular to the parents setting out the details of how the School's online learning program will work to provide continuation of learning during the period that the School remains closed by reason of the Government directive. In the said circular, the school emphasized that:

(a) the aim of the School was to ensure that its students remained positively and constructively occupied while they remained at home and continue to be in "learning mode" for their own benefit;

(b) the School had accordingly incurred costs in acquiring premium versions of e-learning software and applications, training staff in the use of the applications, engaging continuous IT support and creating a conducive virtual environment for learning;

(c) the School recognized that notwithstanding all the technology and efforts, virtual learning and the need to have devices and internet connections etc. placed a greater than usual burden on parents but encouraged them to do the best that they could and to seek help and support from the School;

(d) when the School re-opened following relaxation of the Government's measures, which could be on 4th June 2020 or later, the School will pick up teaching from where it had left off when the closure was mandated and that nobody will suffer a disadvantage as a result but warned that the program, at that point in time will likely be condensed and intensive;

(e) the School had raised invoices for tuition fees for 2nd Term 2020 but payment of those fees was not due until such time as the

School physically re-opens following relaxation of the Government directive. The school however, requested parents, as a matter of goodwill, to pay what they could in advance to help the School meet its financial obligations (see annexure DSI).

14. The Respondent's case is that the school intended to comply with the Government directives including keeping the premises of the school closed to students, keeping online learning an option and ensuring that once the School physically re-opens, learning will carry on from where it had been left off on 15/3/2020. In addition to that, the School made it clear to parents that it was not charging for the online learning it was offering, and that the fees for the Second Term was not due and payable until the school physically re-opens. Should any parent pay the tuition fees in advance, it will be credited towards the relevant student's fees for second term 2020. The standoff was however escalated as reflected by several letter correspondences between the parties, and having failed to find a solution, this petition was filed. The Respondent's case is that upon physical re-opening of the school, the teachers will revisit and cover any areas of the syllabus necessary to ensure that all the students have sufficiently covered it and will support any students that require specific assistance. Further, the Board made it clear what its offer was for the parents of the school and invited any parent who was not satisfied with the offer to withdraw their children from the school. The Board went to the extent of offering to waive the usual notice requirements for withdrawal and confirmed that any caution deposit would be refunded; that the Board also lamented that in the many discussions taking place on this issue on various public forums, including social media platforms, the language used was inappropriate, derogatory, hateful and defamatory and warned that it would take appropriate legal action to counter it.

15. The Respondent's case is that the factual basis on which the Petitioners' application is brought is entirely incorrect since no student of the School is being mandated to register for, attend, participate in or engage in online learning through the platforms provided by the School; no parent or student is being charged for the online learning provided by the School; when the Government lifts the restrictions such that the School can physically re-open and welcome back the students to its premises, learning will resume from where it had left off on 16th March 2020 when the directive for closure came into effect; and, no parent is being compelled to pay any fees for the Second Term 2020 until such time as the School physically re-opens.

16. The Respondent states that in the circumstances, the Petitioners have not established which of their (or their children's) fundamental rights and freedoms are being denied or affected by the actions of the 1<sup>st</sup> Respondent and the school, who have gone out of their way to offer its students an extra option, free of charge, of remaining positively and constructively engaged with learning and education for their own benefit, during the period that the school remains closed by reason of the Government directive. The Respondent states that the issues raised in the Petition are not true constitutional issues but are instead matters of private contract for which remedies are available in other legal forums, and that the Petitioners have failed to discharge the burden of showing that they are entitled to interlocutory injunctive relief pending the hearing and determination of the Petition.

17. The Respondent's case is that if this Court were to refuse the injunctive relief claimed by the Petitioners, it will make no difference to them or to their children who are enrolled in the school since the attendance of the online or virtual classes provided by the school is optional and therefore, any student who does not attend cannot and will not face any adverse consequences as a result of choosing not to attend or being unable to attend; the offer of online learning is not conditional upon the payment of any fees, let alone the fees for Second Term 2020, and therefore, the child of a parent who fails to pay will be treated equally with the child of a parent who has paid; both will be admitted to the virtual learning platforms without discrimination; and if a student enrolled at the school does not choose to attend the online learning program, he or she will not be disadvantaged since once the school physically re-opens, face-to-face learning will carry on from where it had left off when the School was closed on 16th March 2020.

18. On the contrary, however, if this Court were to issue orders of injunction restraining the school from continuing with online learning pending hearing and determination of the Petition, approximately 750 other students enrolled at the school, whose parents are not parties to the Petition, will be denied the opportunity to continue learning and remaining engaged with learning processes during the period that the school remains closed by reason of the Government directive.

19. The Respondent further avers that the school will provide appropriate channels of communication to enable parents raise any issues, concerns or queries that they may have in respect of the online learning platforms provided by the school and their operations; that as at 21/5/2020, out of a total student population of 944 at the school, 841 students had registered on the school's online learning platform, of which 550 students were actively participating in online learning on the platform. (A tabulated class-wise analysis of the student numbers registered and active on the platform as well as the parents connected on the platform as at 21/5/2020 is annexed at pages 19 to 20 of GMJ 1); that as at 30/5/2020, the number of active students participating in online learning on the school's online learning platform had increased to 764. (A tabulated class-wise analysis of the student numbers registered and active on the platform as well as the parents connected on the platform as at 30/5/2020 is annexed at pages 21 to 22 of GMJ 1).

20. The Respondent further states that it has compared the names of the Petitioners herein with the official records of the school and found that a number of the Petitioners, specifically, the 4<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 20<sup>th</sup>, 26<sup>th</sup>, 59<sup>th</sup>, 67<sup>th</sup>, 71<sup>st</sup>, 72<sup>nd</sup>, 82<sup>nd</sup>, 94<sup>th</sup>, 123<sup>rd</sup>, 126<sup>th</sup>, 142<sup>nd</sup>, 150<sup>th</sup>, 152<sup>nd</sup>, 157<sup>th</sup>, 160<sup>th</sup>, 167<sup>th</sup>, 170<sup>th</sup>, 171<sup>st</sup>, 172<sup>nd</sup>, 173<sup>rd</sup>, 174<sup>th</sup>, 175<sup>th</sup>, 177<sup>th</sup>, 178<sup>th</sup> and 180<sup>th</sup> Petitioners, do not appear in the official records of the school as parents or guardians of any of the students presently enrolled at the school. (A copy of the tabulation showing the said analysis is annexed at pages 23 to 29 of GMJ 1).

21. The Respondent avers that the Petitioners' allegations with regard to the school's communications and its alleged failure to respond to or deal with the Petitioners' and other parents' concerns are patently untrue and that the school operates a robust policy of communication with parents and parental participation in affairs of the school, particularly those affecting learning and other aspects related to the students, which in particular includes:

One-way communication WhatsApp groups, for all classes; a Suggestion Box at an accessible point where anyone - parent, learner or staff - can drop in a complaint or letter for action and the school discloses on all its written communications, the official phone numbers, and emails of the School and the official e-mail address of the Jain Education Board where a parent can write to the school on any matter.

22. The Respondent avers that the Petitioners have not proved that they are entitled to orders sought herein, and that the application should

be dismissed with costs.

### **Determination**

23. I have carefully considered the motion before the court. I have also considered the rival affidavits filed herein. In my view the issues for determination are as follows:

- (i) Whether the court should stop virtual learning.
- (ii) Whether this matter is a private contract dispute.
- (iii) Whether there should be a P.T.A.

### **Whether the court should stop virtual learning**

24. There is no doubt that the corona virus pandemic is a novel disease which has suddenly happened and overturned many aspects of life as was previously known. It's suddenness, and its health impact, have caused governments and institutions all over the world to rethink how to effectively adapt to the new reality. The education sector has been so adversely affected because the students or pupils can no longer gather together to study. When the Government directed the closure of all learning institutions with effect from 16/3/2020 as a measure to control the spread of the COVID-19 pandemic in Kenya, the principal concern of all educational institutions, including the school herein, its teachers and the Jain Education Board, was with regard to the children safety and the state of their learning. The teaching staff in the Respondent's school must have been particularly concerned that without ongoing learning, the students were at risk of learning loss, that is, regression and slippage of concepts and theories learned in class, and that for the benefit of the students' physical and mental health, it was important to maintain a semblance of normalcy in what were quite abnormal circumstances. In this case, the school immediately considered the options available to keep their students positively and constructively engaged while they remained at home and with the support of the Jain Education Board, decided to roll out online learning through web platforms called SeeSaw and Zoom which were acquired and appropriately tailored to meet the needs of the school. In doing so, the school was cognizant of the burden that would be placed upon parents, not only in terms of providing necessary supervision, particularly for younger learners, but also in financial terms with the need to purchase equipment and incur additional electricity and internet costs. Accordingly, the Respondent, and rightfully so in my view, ensured that the online classes would be provided free-of-charge to their students, and that in addition, the fees for the Second Term would not be payable until the school reopened for classroom learning after lifting of the directive by the Government. Further, the school also realized that notwithstanding their decision on the charges for online learning and the Second Term fees, some parents would still not be able to bear the financial burden of online learning and therefore, in accordance with the guidelines issued by the Kenya Private Schools Association and the Ministry of Education, the school resolved that the online classes would be optional and that when the school physically reopens with the students in the classrooms, learning will pick up from where it had left off when the school closed so that any student, who chose not to or could not participate in the online classes, would not be left disadvantaged. These decisions and resolutions were communicated to the parents through a circular dated 7/5/2020, a copy of which was annexed at pages 10 to 13 of Annexure DS 1 to the Replying Affidavit of Dipan Shah sworn on 19/5/2020.

25. It is clear that during the online classes, given that the syllabus for the First Term had almost entirely been covered, the school intended to cover Second Term 2020 syllabus in line with the Kenya Institute of Curriculum Development Syllabus which is delivering learning for all students countrywide through the national television and radio channels. (A copy of an e-mail dated 27/5/2020 from the Kenya Institute of Curriculum Development confirming that position was annexed at page 1 of GMJ 1).

26. It would appear that the Petitioners have misunderstood the contents of the School's circular dated 7/5/2020 in that respect and have concluded that the fact that the Second Term syllabus is being covered in the online classes means that the School's Second Term was commencing via online learning. While that may have been the impression created by the School's Newsletter which was issued on 3/5/2020, this position was subsequently clarified in the School's circular dated 7/5/2020 as well as the Jain Education Board's letter dated 14/5/2020 in response to the Petitioners' letters dated 5/5/2020, 9/5/2020 and 12/5/2020, a copy of which is annexed at pages 22 to 23 of Annexure DS 1 to the Replying Affidavit of Dipan Shah sworn on 19/5/2020.

27. I have considered the Petitioners' grievances. It would appear that while the Petitioners did have some initial concerns, many of these concerns were addressed by the school in the correspondences attached to this application. Indeed, some Petitioners have since abandoned their interest in this Petition because adequate explanation has been given by the school. (See pages 30-39 of the annexure GMJI).

28. Further, it is to be noted by this court that while the Government has directed that institutions of learning remain closed, and it would appear that the directive might not be lifted any time soon, the Ministry of Education has maintained that while the students are at home, learning must continue through broadcast, online and digital learning platforms, and has charged the Kenya Institute of Curriculum Development to deliver content to the students through the online platforms and has urged parents to guide and support their children in these programs. (A copy of the Ministry of Education Press Release dated 29<sup>th</sup> May 2020 is annexed at pages 100 to 101 of GMJ 1).

29. It is therefore clear that the Ministry of Education is supporting learning in the wake of the COVID-19 pandemic, and the continuation of teaching students while at home through alternative means including online platforms, accepting the reality that despite all efforts, it would be impossible to reach all learners in Kenya through such alternative means and confirming that the means of protecting those students who are not able to access online learning is by ensuring that when schools reopen, learning resumes from where it had left off such that online learning is meant to keep students constructively and positively engaged so that they do not engage in undesirable activities.

30. In this particular instance this Court commends the efforts made by the school to ensure that their students remain academically alert. There can be no argument that every institution of learning must find ways of ensuring the continuation of learning for their students during this pandemic. The Respondent herein must be commended for not only doing that but also making it free and optional, and further

promising to re-start afresh the Term 2 syllabus when the pandemic is over, and undertaking to bring all students to par to avoid any element of possible disadvantage. The school has stated clearly, and this Court has accepted that statement and undertaking that:

- (a) no student of the School is being mandated to register for, attend, participate in or engage in online learning through the platforms provided by the School;
- (b) no parent or student is being charged for the online learning provided by the School;
- (c) when the Government lifts the restrictions such that the School can physically re-open and welcome back the students to its premises, learning will resume from where it had left off on 16th March 2020 when the directive for closure came into effect; and
- (d) no parent is being compelled to pay any fees for the Second Term 2020 until such time as the School physically re-opens.

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

32. For the foregoing reasons, the application before the Court lacks merit and is not allowed.

33. Having dismissed the application on the first issue on whether or not to stop virtual learning, I consider it not necessary to determine the second and third issues of whether this matter is a private contract dispute, or whether there should be a PTA. These are issues which are expansive and should remain to be determined upon fully hearing the petition.

34. The costs of this application shall abide the petition herein.

**Dated, Signed and Delivered at Mombasa this 25<sup>th</sup> day of August,**

**2020.**

**E. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

M/s. Onyango for Petitioner

Mr. Noorani for Respondent

Mr. Kaunda Court Assistant