



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 31 OF 2020

VS & 43 OTHERS (acting on their behalf and also acting as parents and next

friend of students learning at the Mombasa Academy).....PETITIONER

VERSUS

NYALI ACADEMIC SERVICES LTD t/a

THE MOMBASA ACADEMY & ANOTHER.....RESPONDENT

J U D G M E N T

1. In this petition the 44 petitioners approached the court in their capacities as the parents and next friends of the minor learners at the school run by the respondent. The petition was brought on behalf of the petitioners as such petitioners and on behalf of 59 learners at the school run by the 1st respondent.

2. The grievance against the respondents was pleaded to be that the 1st respondent had violated and failed to respect and abide by the various statutory provisions under the fair Administration Act, Children's Act, the United Nations Conventions On The Rights Of The Child, African Charter On The Rights And Welfare Of The Child, OAU DOC CAB/LEG/24.9/47(1990) as well as the various provisions of the constitution of Kenya 2020 in seeking to provide the learners at the school with online learning content, materials and lessons beginning 1.4.2020.

3. The Petitioners contended and asserted that there was a Service level agreement setting out the quantum of service provision in terms of hours per week and that the online learning introduced by the respondent diminished that level of service in terms of learning hours per week and was based on platform provided free online at no costs and therefore the 1st respondent had substantially altered the initial contractual obligations and rights yet the said respondent was insisting on full fees yet the pandemic had affected and regressed the global economy with the petitioners being no exception.

4. The grievance is then advanced that in demanding full fees and issuing invoices for such, the respondent made an administrative action with timelines for compliance with a default threat to withdraw the services from the defaulters, but without observance of the fair administration Act and other related statutes and constitutional provisions.

5. On feeling aggrieved, the petitioners engaged the 1st respondent by correspondence contending that the sums charged was not prorated to the services offered and when offered a reduction of 10% which the respondents considered insufficient.

6. The petitioners deem the demand for fees to take the shape and face of public policy application which when invited the application of public values of equity, social justice, equality, human rights, non-discrimination, transparency and accountability which, they contend, the respondents have failed and refused to observe and apply and therefore the best interest of the children had not been taken care of but threatened with violation. It was then added that the 1st respondent had acted in repugnance to principles of equity, justice and good conscience by among other things unilaterally and arbitrarily disbanding the parents Teachers Association which was their statutory body set to agitate for the student's rights thus leaving the petitioners with no forum for such agitation and that attempts at alternative dispute resolution had borne no fruits with the threat to discontinue provisions of services looming large.

7. On the basis of the foregoing grievances, as set out, the petitioner contended that the 1st respondent had violated the constitution by failure to observe the dictates of Article 10,45, 46, 53 and by curtailing the right to associate by forming and belonging to a Parent Teachers Association. Consequent to such alleged violations, the petitioners prays that the court, other than granting interim conservatory orders, grants to them, some twelve (12) substitutive orders and an alternative one as well as an order for costs of the petition. The prayers sought included, declarations, Judicial review orders as well as injunctions.

8. In support of petition there were filed supporting affidavits sworn by the 1st, 2nd and 3rd petitioners. The affidavit exhibited the documents relied upon to prove the grievances as well as authority signed by other parents to permit the filing of the petition as a representative Action.

9. There was also filed a notice of motion seeking the grant of interim conservatory orders which was placed before the court under a certificate of urgency on the 14/5/2020 when interim orders were issued in terms of prayers 2(a) (b) and (c). However, that motion was, with concurrence of the parties, marked abandoned for the sake of the petition being fast-tracked.

10. With the leave of the court the petitioner filed a further affidavit on 12/6/2020 as well as a supplementary affidavit on 12/6/2020. The gist of the further affidavit (under the rules, this ought to have been a supplementary affidavit) is that the replying affidavit was bad and defective and that it dwelt on happenings during 2nd term which happenings the petitioner had raised no issues with in the petition. It was then reiterated that the decision to offer online learning ought to have been made in consultation with the petitioners with the consequence that quality of the service was put to question financial and time of the petitioner had been affected with resultant sudden change of schedule on the basis that parents were left on the platforms without the teacher yet they had not been trained on the application a fact which clearly demonstrate shift of responsibility of teaching and supervision from the teachers to the parents. Stress was made of the fact that the online learning provided only skeleton of the class interaction during lessons and wholly incapable of physical interaction the learners had been accustomed to and abandons all extracurricular activities. In additional it was reiterated that the online learning presented own challenges and teething problems which have been shifted upon the petitioners to alleviate. It was then asserted that the reduction of fees by 10% and 5 % for various classes was unreasonable, not commensurate with demanded fees in the circumstances and that the respondent's records are not accurate for not disclosing the true state of fee payment by parents and that the recurrent expenditure on the respondents was not the same owing to the fact that only 215 students were physically attending school.

11. Despite the petitioners' description of online learning an upheaval from the normal learning delivery, for offering less than physical learning offered in school precincts, they confirm the desire to leave their children to continue receiving such instructions provided there be an acknowledgement by the respondent that the quality has not remained the same without discharge of the 1st respondents' responsibility to assure quality.

12. As a consequence of the foregoing the petitioners have taken legal advice that the decision affect the fundamental rights of the petitioners and the students had failed the constitutional thresholds of making such decisions and the threat to withdraw instructions from those who have failed to pay the demanded fees is a violation of the rights of the children.

13. On the other hand, the supplementary affidavit was to underscore the part that while the respondent asserts having no issues with PTA, the same had existed in the school but was frustrated and that if indeed there is no concerns with its reestablishment and operationalization, then the prayer on PTA should be granted as prayed. The fact that the online learning had diminished the physical interaction between learners and teacher was reiterated and that the decision indeed contravened the rights of the petitioners and their children.

14. In opposition to the petition, the respondents filed a replying affidavit sworn on the 22.5.2020 as well as a further replying affidavit. The gist of the two affidavits in reply was that the 1st respondent is a privately run educational institution providing quality education since 1978 and offering British National curriculum for children between pre-school classes to year 13 and 15 affiliated to **Pearson Examination Board** and had a student population of 215 catered for by a staff of 61 comprising teachers and non-teaching staff by the date the pandemic hit and schools ordered closed to enforce social distancing as a protocol of the Ministry Of Health. Owing to such difficult times, mocks and end of 2nd term examinations were prepared in hard copies and collected by parents for learners to write the examination which were then returned to school and marked by teachers. This followed a two weeks in which teachers prepared works to be done at home and fully covered the two weeks outstanding for term 2. Term 3 was then commenced by online learning as a way of continue imparting curriculum deliver while the learners remained at home.

15. Being faced with the prospects of total disruption of curriculum delivery, the respondents contended that there was a decision to acquire and roll out online learning programs which entailed training of teachers on the use and management of the platforms once 3rd term commenced on 14.4.2020 and, the respondent therefore issued a circular dated 1.4.2020 for that purpose. That three applications were acquired engaged; Google classroom for assignments, zoom for live class sessions while classtag was for communication mode with parents. With such preparedness, the 3rd term commenced virtually by the deployment of online learning environment albeit with teething problems including power cuts and loss of internet connectivity factors which were alleged to be clearly beyond the school's control. Even with such problems, it was asserted, the school attained up to 90% attendance and on 23.4.2020 the school issued invoices for term 3 in accordance with established fee structure initially communicated to parents at the beginning of the academic year.

16. On receipt of the invoices for fees, a group identifying itself as parents wrote to the school and requested for reduction of school fees by 50% which request was considered by the school by offering a discount of up to 10 % with an explanation with an explanation that the 50 % discount requested was not feasible. That offer was rejected with an assertion that the doctrine of *force majeure* had been invited to justify the demanded discount. Thereafter the demand was upped by the counsel for the parents to 70% discount with a threat to legal action. That request and demand was equally responded to by the counsel for the respondent with a justification for the inability to accede to the demand and seeking alternative dispute resolution with a meeting being set for 13/5/2020. Following the meeting, the school offered a further 5% to make an aggregate of 15% discount on fees for play group to year 2 classes among other concession including payment of fees by installments, but the same was flatly decline and was answered with the current petition.

17. On filling the petition, the respondents clarified, there was also filed Notice of Motion on which motion orders were granted in the interim prohibiting discontinuance of any student from the provided online learning services but the parents persisted in their failure to pay even the 50% they had offered to pay.

18. In order to offer the online learning services, it was averred, the school had to expend in hardware acquisition and utility costs beside the recurrent expenditure which had not changed. It was then added that it was unequivocal that the petitioners were keen that the learning services continue a position the respondents agree with, for the sake of engaging the children in their best interests, a fact which demonstrate that the school had acted in the best interests of the children and public interest at large. That being the position, that all side were keen to

have the online learning continued and perpetuated, the respondent took the position that the real dispute remains the quantum of fees payable, and if payable at all, which position was viewed by the respondents as not suitable for litigation as a constitutional issue but rather as a private contract dispute between the independently contracting parties.

19. In the further replying affidavit, the position taken is that the school is not averse to the existence of the parent's teachers association save that there did exist one which went into inaction and dereliction due to inertia. It was denied that the association was disbanded by the respondents

20. In urging the application, the parties filed written submissions and cited to court several decisions in support of the respective rival positions. As was expected the petitioners position is that by the decision complained about the respondents have violated their rights and the rights of the children under the various constitutional provisions cited over and above affronting the statutory provisions under the Children's Act, Consumer protection Act and the Fair Administration Act. Having been notified by the respondent that the respondents contests the threshold of the petition as raising a constitutional litigation Mrs. Ali Counsel for the petitioners cited to court the decisions in **Lipisha Consortium Ltd and another Vs. Safaricom Ltd (2015) eKLR** for the proposition of Law that it always rests at the shoulders and laps of the court to undertake due scrutiny of the pleadings and to determine whether the dispute and indeed the claim has taken a constitutional trajectory. That the alleged violations are to be evident and further that such scrutiny needs to remain painless because pleadings ought and must be so precise to clearly and obviously reveal the breaches or violations. In applying those principles to the fact of this case, Mrs Ali argued that there had been disclosed non-compliance with right to fair administrative Action. It was then contended that the letter of 1.4.2020 was done to convey a decision that was reached without recourse to the petitioners and never complied with the dictates of right to fair administrative action as stipulated under the Act.

21. On the merits of the matter, submissions were offered to the effect that by their actions in arriving at the decision in the letter of 1.4.2020 the respondents had violated and infringed on the provisions of articles 10, 27,36,46 47 and 53 of the constitution. The respondents were in particular faulted for violating or just ignoring the national principles and values while arriving at its decision to charge full fees for the 3rd Term on the face of the prevailing circumstances birthed by the pandemic. Counsel further cited the court the decision in **C R & 130 others vs Kenya National Examination council (2017) eKLR** which explained the application of public policy wherever there was to be an expansion of modification thereof and that even where there be no precedents the court will be guided by the light and principles underlying the fundamental rights in the constitution.

22. On article 27, it was submitted, while citing the decision in **Mark Ndumia Vs Nairobi & others (2018)eKLR** and **Fugicha Vs Methodist Church in Kenya (2016) eKLR** that an act may be discriminatory as a result of motive or from the effects on an identified class and category and that a complaint of discrimination requires the court to fully inquire if those rules, policy or actions which appears neutral and inoffensive on the face could have a discriminatory effect on their application and operation.

23. On article 36, freedom of association, as read with section 55 (1) of the Basic Education Act, it was submitted that the applicants' rights to be members of a **Parents Teachers Association**, as parents of learners in the respondents' school had been nuzzled and the contents of a letter dated 13.10.2016 which demanded that the association meetings be held outside the school and limited to one meeting per term was construed to have resulted into a technical dissolution of the PTA. It was however pointed out that there had been a disposition that the respondents do not resist the existence and operationalization of the association.

24. On Article 46, as read with Consumer Protection Act, the petitioners took the position that it was a requirement of the constitution that their economic interests in the services provided by the respondent be protected from being provided with a different and inferior service from the one contracted for and at additional costs incidental to online learning at the peril of their children being discontinued from learning in the event of failure to pay the demanded fees. To the petitioners the quality provided does not prorata the fees demanded and therefore the economic interests of the petitioners had been threatened with violation.

25. For article 47, as read with the Operationalizing statute the fair administration Act, the petitioners underscored and stressed the fact that the obligation is both upon state and non-state actors wherever one exercised administrative authority and by anybody whose omission or decision would affect the legal rights of those affected by such omission or decisions. It remained the contention and position of the petitioners that in demanding the fees for term 3 and setting up the online learning the respondent was bound to involve and consult the petitioners as parents to be affected by the decision an obligation that was sidestepped. It is contended further that the petitioners ought to have been consulted on basic questions including the availability of the electronic gadgets with regard to the fact that some parents have multiple children and that there would be financial implication in procuring the gadgets and utility costs. In additions, it was stressed that no reasons were proffered for the discount of 10% on the fees demanded.

26. On the best interests of the child under Article 53 as read with section 4 of the children's Act, it was submitted that the decision to charge full fees for Term 3 was not in the best interest of the children in the school but was purely commercially motivated and had driven the petitioners to the corner of inability to pay fees with the consequence that the children whose fees would not have been paid would be discontinued from the learning platforms. In the petitioners' view that would act discriminatorily against such children. For all the reasons and arguments advanced the petitioners urged that the petition be allowed as prayed with costs in order that the respondent be compelled to follow and abide by the law.

27. Mr. Hassan Advocate, who appeared with Mrs. Ali and Ms Waihenya for the petitioners, reiterated the submissions by Mrs. Ali and stressed the fact that while rights come with obligations, the right of the petitioners' children to education had been affected and threatened by the decision in the letter of 1.4.2020 yet the content, quality and quantity offered had been diminished thereby removing the right to insist for full fees.

28. For the respondents, the submissions offered by Mr. Noorani substantially relied on filed submissions filed on 7.7.2020 the two lists of authorities and the replying affidavits filed. Counsel isolated the principle issue and dispute to be the charge for fees for term 3 in the year 2020 while the curriculum was being delivered online. Counsel viewed that dispute to amount to no more than a contractual dispute that does not merit being elevated to the hallowed constitutional pedestal. He took the view that the decision in **Lipisha consortium Ltd (supra)** was made at an interlocutory stage and that the correct exposition of the law is to be found in **Isaac Aluoch Polo Aluochier Vs Kenya**

National Commission on Human Rights & 4 Others (2016) eKLR, for the proposition that the court cannot overlook the well-established principle of constitutional avoidance. Counsel took the view that the supreme court in **Communications Commission of Kenya Vs Royal Media Services (2014) eKLR** re-established the legal position that when a dispute, civil or criminal, can be determined on another basis without reaching the constitutional issue, the court will not entertain the matter as a constitutional litigation. He then cited to court the decision in **Mtalaki Vs HFCK (2015) eKLR** in which the courts reiterated the prohibition that the constitution must not be used and lowered as a means to litigate all civil disputes so as to be viewed as a substitute to known and conventional modes of litigating civil disputes whenever a litigant felt that there had been a failure to comply with the law. The stand taken is that the measure of fees payable for term 3 was a contractual question and not a constitutional one as the respondent was a private school with no obligation to provide its services for free on terms not contractually agreed. He argued that whether there had been frustration or alteration of terms of performance or just force majeure the proper and suitable forum was the commercial court and not the constitutional court.

29. The Counsel also cited to court the most recent decisions on the subject of online curriculum delivery and payment of fees, including **Petition by G.A. & 2 Others Vs Registered Trustees Of The Shree Cutch Sastang Swaminarayan (2020)Eklr**, **BPA Vs Directors, Brookhouse Schools & 3 Others (2020)Eklr**, **CIS Vs Directors, Crowford International School & 3 Others (2020)Eklr** & **OAPA Vs Oshwal Educational Relief Board (2020)Eklr** all on the position that court the court is ill equipped to evaluate the content of the curriculum, to renegotiate the fees payable, what amount is due as a rebate or discount on fees and that the duty to pay fees and the quantum of such fees is contractual and not a constitutional one. Those decisions being persuasive, the respondent asked me to stand persuaded and find as much.

Analysis of facts and the law:

30. I have benefited from reading the pleadings embodied in the petition and affidavits filed in support thereof as well as the responses filed in opposition thereof together with the submissions by the parties. Even though a lot of material was filed, the dispute to me seems to revolve around two issues namely:-

a) Whether a constitutional issue has been disclosed on the decision contained in the letter dated 1.4.2020.

b) Whether the respondents are bound to operationalize the statutory association mandated by section 55 (1) of the Basic Education Act.

31. In coming up with the two issues I have read and reread the petition and the three affidavits filed in support thereof. All disclose the complaint and grievance to be that while the petitioners do not object to the learners being offered online education content, the said content is said to have lowered and diminished the curriculum in both quality and quantity. The evidence of such diminution is alleged to be that the daily hourly engagement has been diminished as much as some content initially forming part of the contract between the parties cannot be offered online, and have been thus excluded, hence it was unreasonable and inconsiderable to demand and charge full fees.

32. From the very onset, I consider such dispute to fall squarely for determination as a commercial dispute. That dispute attains its only foundation in the contract for the provision of educational services between the parents and the school. In such a dispute a court would be able to investigate whether or not there was a negotiation and measure of the services to be offered against the school fees to be charged. It would call for evidence being led and tested by way of cross examination to prove that there was indeed need to prorate the fees against the changed circumstances. It would then be necessary to establish if there had been a frustration of the performance of the contract by the pandemic or if indeed the unfortunate events were indeed force majeure and how its effects impacted on the contract. All that endeavour would be one towards resolving a contractual dispute. It would matter less that the interrogation of such dispute has a remote impact on a constitutionally guaranteed right on fundamental freedom.

33. The question of how much fees is to be charged by private schools upon the parents of the learners is a matter not new nor novel to the pandemic environment since 15th March 2020. Way back in 2015, one JN and 28 others sued Emmaus school and another^[1] seeking the court's intervention. The matter went before Onguto J. and the judge in observing the age old doctrine of party autonomy and freedom to contract as against the right of the child to education held;

“The services offered by a private entity are akin to a contract where each of the parties has an obligation. The parents and guardians have to ensure that they pay the requisite fee so that the child offered the service rendered in private school. A private school cannot be equated to public school”

34. Earlier in the year 2014, the same question had been placed before Mumbi Ngugi J. in **JK VS board of directors of R. School and another (2014) Eklr**. The argument was that it was a violation of the child's rights under article 43 to be excluded from school on account of nonpayment of fees. The judge in disagreeing with the parties said-;

“... there is no obligation placed on a private entity to as the respondents' school to provide such right.”

35. In my view, while there is the right to the child to free education under article 43 of the Constitution and as operationalized under the basic education Act, that right is upon the parent and guardian to every child to exercise by taking a child to a public school where payment of fees is in fact outlawed^[2]. The obligation upon a parent under section 31 of the Basic Education Act is to enroll every child for basic education. It however leaves the room and choice of the school to effect such enrolment to the parent or guardian.

36. That is the choice the parents of the children enrolled in the respondents' school have made to enroll them in private schools and not a public one with the concomitant obligation to pay the fees prescribed. That is the obligation that was voluntarily assumed and it cannot be altered at the unilateral behest of the petitioners just because there has been a change of circumstances. It remains a contract and a contract is consensual so that if there be need to tinker with its terms the tinkering must be consensually arrived at. For the court to be called upon to interfere the parties contract is to call upon the court to negotiate, conclude and rewrite for the parties their bargain. That is never the duty of

the court unless, coercion, undue influence or fraud be pleaded and proved.^[3]

37. I have said enough to show that the dispute here is contractual and ought to be litigated in the usual manner and not as a constitutional question. I therefore find that none of the remedies sought in the petition on the basis of the letter of 1.4.2020 are available for grant as constitutional remedies.

38. However, there was the less contested prayer concerning the necessity of there being a in the school. This to me is a matter that need to have not reached the court if there had been good faith between the parties because the words of section 55 (3) of the basic education Act is couched in mandatory terms.

39. In fact, there is no evidence that the association was disbanded or otherwise done away with by the school management. What I get from the averments in the affidavit of VS at paragraph 26 and 27, the affidavit sworn on the 13.5.2020, and the paragraph 30 of that sworn by DYG on 27.5.2020 as well as the supplementary affidavit sworn by the same Mr. G at paragraphs 3,4, and 5, is that there was indeed a PA in the school but the same was either disbanded or frustrated by the 1st respondent into going outside. That accusation was specifically countered by the respondent supplementary affidavit sworn by CY on 5.6.2020. The gist of the response is that the association existed up to the year 2016 but ceased operations due to lethargy leading to low turnout and the failure by office bears to lay before the AGM the mandate books of accounts. Such position was never contested nor controverted. The assertion of disbandment is to that extent half-heartedly made without any proof being offered.

40. I do find, on the material available, that there was never disbanding of the association but that it went into dormancy which I am unable to blame the respondents for. I do find that there was indeed an association envisaged under the statue which was established prior to 2016 in compliance with the section 55 (3) of the Act and that to that extent, the obligation of the respondents was thus discharged.

41. Now that both sides agree that there exist no Parents Association, I think there has accrued, a fresh, an obligation upon the 1st respondent to reestablish the association so as to be in compliance with the law. I direct that within 45 days from the date hereof, there be a consultative meeting between the administration of the school, in a forum to be agreed upon and which satisfies the ministry of health protocols, and to agree on the re-establishment of the association. For avoidance of doubt, the association must be in operation by the 30.01.2021.

42. Having said so, I read the stipulation in the Act and the regulations under schedule 3 of the Act not to demand that the association be formally registered elsewhere as contended by the respondents at paragraph 6 of the supplementary affidavits. May that, never again, be a justification or excuse to disregard the existence of the association at the school or just failure to cooperate with it by giving it the due space to operate as envisaged by the statute.

43. In the end the petition succeeds to the extent that the Parents Association be reestablished and operationalized it the school not later than the 31.01.2021, By way of monitoring compliance, this matter shall be mentioned before the presiding judge, Mombasa, on the 4.2.2021 to confirm that the orders shall have been complied with.

44. On costs I order that it being a public interest litigation and to preserve the existing and future relationships between the parties, each shall bear own costs.

Dated, signed and delivered online by MS TEAMS, this 17th day of November 2020

P.J.O. OTIENO

JUDGE

^[1] (2016)eklr

^[2] S 32. No payment of fee for admission

No person shall while admitting a child to a public school or a basic education institution collect any admission fee.

^[3] National Bank Of Kenya Ltd Vs Pipeplastic Samkolit Ltd (2001)elkr