



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.95 OF 2019**

**IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES 27, 28, 45 AND 55**

**IN THE MATTER OF ARTICLES 3, 22 AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF DISCRIMINATION, UNFAIR ADMINISTRATION ACTION AND VIOLATION OF THE BILL OF RIGHTS AND PROVISION OF THE CONSTITUTION AS THE SAME RELATE AND CONCERN THE APPLICANT**

**BEWEEN**

**LEWIS MOSES ODHIAMBO.....1<sup>ST</sup> PETITIONER**

**MARY AKINYI ONYANGO.....2<sup>ND</sup> PETITIONER**

**AND**

**MAHANAIM INTERNATIONAL HIGH SCHOOL.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF**

**EDUCATION, SCIENCE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Applicant's Application**

**1. The Petitioners/Applicants through a Notice of Motion dated 12<sup>th</sup> March 2019 seek the following orders:-**

a) **THAT** the present Application be certified urgent and orders be granted *ex-parte* in the first instance;

b) **THAT** pending the hearing and determination of this Application and Petition, an interim orders be hereby issued against the 1<sup>st</sup> Respondent to issue the 1<sup>st</sup> Applicant with his provisional results, result slip, transcript and/or academic certificate to enable him apply for a Diploma and/or Foundation Course;

c) **THAT** pending the hearing and determination of this present Application and Petition, conservatory orders be issued preventing and/or restraining the 1<sup>st</sup> Respondent from further withholding the provisional results, result slip, transcript and/or academic certificates for the 1<sup>st</sup> Applicant for year 12;

**2. The Application is premised on grounds (a) – (f) on the face of the application and supported by supporting affidavit of Mary Akinyi Onyango sworn on 12<sup>th</sup> March 2019 and annexed documents thereto **LMO 1-10**. The same is further supported by a further affidavit of Mary Akinyi Onyango sworn on 16<sup>th</sup> April 2019.**

**Respondent's Response**

3. The Respondents are opposed to the Applicant's application and rely on the Replying affidavit by Richard Ombwari sworn on 26<sup>th</sup> March 2019 and annexures thereto. The Respondents further rely on the supplementary affidavit sworn on 14<sup>th</sup> May 2019 by Richard Ombwari.

**Analysis and Determination**

4. I have very carefully perused the Notice of Motion, affidavit in support, the Replying affidavit and supplementary affidavit, the counsel rival submissions dated 25<sup>th</sup> April 2019 for the Applicants and 29<sup>th</sup> May 2019 for the Respondents. The issue arising for consideration are as follows:-

**a) Whether the Applicant has established sufficient grounds to warrant granting the prayers sought?**

5. In the instant suit, it is not in dispute, that the 1<sup>st</sup> Respondent is a private school offering the Cambridge system of education and it runs on school fees paid by the students. It is further not in disputed, that the 1<sup>st</sup> Applicant enrolled for only year twelve (12) in 2016/2017 academic year. The Applicant contention is, that the 1<sup>st</sup> Applicant sat for the year 12 examinations in the period of October/November 2017 and had before sitting for the examination, paid fully and cleared the school fees and fee balance of 12 academic years 2016/2017. The 1<sup>st</sup> Applicant attached exhibit to demonstrate, that he did not have any outstanding fee balance in the year 12 being the academic year 2016/2017 and, that he never joined year 13 in the academic year 2017/2018.

6. The 1<sup>st</sup> Respondent aver, that the 1<sup>st</sup> Applicant enrolled for year 12 only and had an option of sitting his exams in May/June session but he informed the school, that he was not prepared and would sit his exams at October/November session. That the 1<sup>st</sup> Applicant and his brother had fees balances with the 1<sup>st</sup> Respondent school and were sent home to collect fees. That when it became apparent, that the parent of the 1<sup>st</sup> Applicant could not pay the fees for tuition; the school on humanitarian grounds registered the 1<sup>st</sup> Applicant for his year twelve (12) exams. The parent paid for his examination fees which is a separate fee from the tuition fees; which amount the 1<sup>st</sup> Respondent contend it did not transfer it to itself. The 1<sup>st</sup> Respondent urges it is therefore not true that the 2<sup>nd</sup> Applicant had paid fully all fees for the 1<sup>st</sup> Applicant before he could sit for his year twelve (12) examinations. It is urged further the results for the October/November 2017 exams were released on 11<sup>th</sup> January 2018 but the 1<sup>st</sup> Respondent did not release the 1<sup>st</sup> Applicant's results because the student owed the school fees amounting to Kshs one hundred and fifty thousand (150,000/-).

7. The main issue of contention in the notice of motion relates as to whether the Applicants have fully paid fees towards the tuition. This is an issue related to debt whether owed or not. The 1<sup>st</sup> Respondent insist there is an outstanding debt of Kshs.150, 000/- whereas the Applicants states otherwise. The issue as raised cannot be fully determined by way of the two conflicting affidavits. Secondly the Applicants have demonstrated in the application the constitutional right which has been violated and how. The orders sought are in the nature of mandamus to compel the 1<sup>st</sup> Respondent to release results whether there is an outstanding unpaid school fees or not, which issue I find, that it cannot be determined through the Notice of Motion at this stage. However by granting the orders in interim, the Respondents would not be prejudiced as the issue between the two would be determined in the petition. Having considered the application and the responses, I find that the Applicants have established sufficient grounds to warrant granting the prayers sought in the Notice of Motion.

8. The upshot is that the Notice of Motion dated 12<sup>th</sup> March 2019 is granted in terms of prayers 2 and 3 of the application dated 12<sup>th</sup> March 2019.

9. Costs be in the cause.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2019.**

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**J .A. MAKAU**

**JUDGE**