



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**HUMAN RIGHTS & CONSTITUTIONAL DIVISION**

**PETITION NO. 391 OF 2015**

**JOSEPH NJUGUNA & 28 OTHERS.....PETITIONERS**

**VERSUS**

**GEORGE GITAU t/a THE EMMAUS SCHOOL.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATION COUNCIL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners, suing on behalf of some twenty nine minors, allege that there has been violation of their rights as to education, fair hearing, fair administrative action and the freedom and security of person as a result of what they term was an arbitrary increase of school fees and the subsequent closure of the Emmaus School (“the school”) by the 1<sup>st</sup> Respondent. Particulars in support of the various violations have been set out in the Petition.
2. In the circumstances, the Petitioners seek for orders that:
  - a. *A declaration that [the] respondent’s actions contravenes the minors’ rights and interests as guaranteed under Articles 28, 29, 47, 50, 43 and 53 of the Constitution.*
  - b. *An order restraining the respondent from transferring and selling the school until the candidates sit for the examinations.*
  - c. *An order directing the respondents to facilitate the candidates in sitting for the examinations by providing the necessary facilities and resources.*
  - d. *An order that the respondent herein compensates the minors herein in general damages for the violation of their rights.*
  - e. *Cost of the suits in the courts interest rate.*

**The Petitioners’ case**

3. The Petitioners’ case is set out in the Petition dated 25<sup>th</sup> September, 2015 and the affidavit in support deposed by Joseph Njuguna dated 14<sup>th</sup> September, 2015 on behalf of the Petitioners. There is also sworn a supplementary affidavit by Joseph Njuguna dated 16<sup>th</sup> December, 2015.
4. The Petitioners contend that in May 2015, the 1<sup>st</sup> Respondent arbitrarily closed the school where

the minors were registered as candidates in the Kenya Certificate of Secondary Education examination due in November 2015, now past. It is averred that the closure was occasioned by the increase in school fees which was unaffordable to the Petitioners. According to the Petitioners, the 1<sup>st</sup> Respondent's conduct towards the minors prejudices the minors interests contrary to Article 53(2) of the Constitution and various provisions under the Education Act, the Basic Education Act and the Kenya National Examination Council Act.

5. In consequence thereof, the 1<sup>st</sup> Respondent's actions and conduct towards the minors is an affront and violates the minors rights as to education, fair administrative action, fair hearing, freedom against inhuman and degrading treatment and freedom against psychological and physical torture as guaranteed under Articles 53, 43, 47, 50, 28 and 29 of the Constitution.

### **The 1<sup>st</sup> Respondent's case**

6. The 1<sup>st</sup> Respondent's case is set out in the Replying Affidavit deposed by George Gitau, the proprietor of the school on 3<sup>rd</sup> November, 2015. The 1<sup>st</sup> Respondent in opposing the petition avers that the school was not arbitrarily closed as alleged by the Petitioners, but was as a result of the abandonment by the minors whose parents had failed to pay their school fees as requested.
7. It is the 1<sup>st</sup> Respondent's case that the increase in school fees was reached after consultative meetings with the minors' parents and the Board of Management of the School. Further, that there is a court order issued at Thika dated 2<sup>nd</sup> February 2015, requiring the school to remain open upon payment of the requisite fees by the parents to the minors. The 1<sup>st</sup> Respondent contends that the Petitioners in total disregard of the court's orders failed to pay the required fees making it impossible to sustain the minors, their teachers and subordinate staff in the school. Further, that the minors were able to sit for their exams.

### **Arguments in court**

#### ***The Petitioners' submissions***

8. Mr. Kamau submitted on behalf of the Petitioners. He stated that the increase in school fees and the subsequent closure of the school was a violation of the minors' right to education, fair hearing, fair administrative action and freedom and security of the person as guaranteed under Articles 43, 53, 50, 47 and 29 of the Constitution.
9. Counsel submitted that Article 43 guarantees education to every child. However, since the government has scarce resources, it allows other entities to do so but regulates them. The Petitioners contend that the closure of the school by the 1<sup>st</sup> Respondent violated this right in light of the fact that the minors were to sit for exams. Secondly, failure to give notice and a hearing to the Petitioners before increasing the fees and closing the school occasioned violation of the right to fair hearing and fair administrative action under Articles 50 and 47 of the Constitution.
10. It was also contended that the Replying Affidavit contains several falsehoods, forgeries and misleading facts.

#### ***The 1<sup>st</sup> Respondent's submissions***

11. Mr. Chiva on behalf of the 1<sup>st</sup> Respondent argued in opposition to the petition. Counsel submitted that the school was not arbitrarily closed and was open by an order of the Court at Thika. It was submitted that, in the second term, the parents were required to pay balance of school fees to enable the running of the school, an amount arrived at after a consultative meeting.
12. It was argued that when the minors failed to report back to school, the 1<sup>st</sup> Respondent consulted the 2<sup>nd</sup> Respondent on the issue of exams and was advised that the exams were to go on. While accommodating the Petitioners, it was Counsel's submission that the 1<sup>st</sup> Respondent acted in good faith even without the payment of school fees by the Petitioners. This it was submitted was in line with Articles 43 and 53 of the Constitution. Further, it was argued that the parents failed to act in accordance with section 23 of the Children Act and section 30 of the Basic Education Act.

According to the 1<sup>st</sup> Respondent, the Petitioners could not expect provision of education facilities without proper facilitation. Thus, the limitation on learning activities, it was contended was caused by the Petitioners.

13. Counsel relied on the case of **Obondo Victor v Law Society of Kenya [2015]eKLR** where the court stated that a party has to prove violation.
14. With regard to fair hearing under Article 50 of the Constitution, it was Counsel's submission that the increased school fees was arrived at after consultation with the Petitioners. This, it was urged, amounts to fair hearing. On torture, and in rebutting this assertion, Counsel submitted that the Respondents provided learning facilities, employed teachers and basic needs, thus the same cannot be equated to torture. However, it was submitted that the 1<sup>st</sup> Respondent could not accommodate the minors in the absence of payment of school fees. As regards perjury, Counsel submitted that there is no proof of perjury and that the Petitioners had not brought experts to support their allegations.

## **Discussion**

### ***Fair hearing***

15. The notion of a fair hearing is contained in Article 50(1) of the Constitution that provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
16. **H.W.R. Wade and C.F. Forsyth in Administrative Law, 10<sup>th</sup> Ed. at page 402** state that:

***'It is fundamental to fair procedure that both sides should be heard: audi alteram partem, 'hear the other side'. This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great detail.'***

17. The Petitioners contend that the 1<sup>st</sup> Respondent did not grant the minors any notice of the intended closure of the school, neither did it give the minors adequate time to find an alternative school. It is further contended that the 1<sup>st</sup> Respondent did not afford the Petitioners an opportunity to air their views or suggestions as stakeholders in the school.
18. In my view, fair hearing entails two parties going before an independent and impartial arbiter, be it the court, a tribunal or body to ventilate its concerns. In this instance, I would envisage a third party hearing the Petitioners and the 1<sup>st</sup> Respondent. Thus, the notion of fair hearing cannot arise where two parties have an interest or stake in a matter and each of them would want to advance their views and then they seek to determine it (the issue) themselves. The 1<sup>st</sup> Respondent in any event cannot be viewed as an independent arbiter who would 'hear the other side' where it requires the Petitioners to fulfill certain 'contractual' obligations.
19. It is my considered view that this limb of the Petitioners' argument must fail.

### ***Fair Administrative Action***

20. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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.
21. Section 2 of the Fair Administrative Action Act, 2015 provides that, 'administrative action' includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
22. Further, section 3 of the Fair Administrative Action Act, 2015 states that the Act applies to all state and non-state agencies, including any person exercising administrative authority; performing

- a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
23. The Petitioners contend that the 1<sup>st</sup> Respondent's decision to close the school was never communicated to the minors or the Petitioners nor was the manner in which it was done. This, they argue amounts to violation of fair administrative action.
24. Article 53 of the Constitution makes provision for the rights of children. The Petitioners contend that the actions of the 1<sup>st</sup> Respondent infringed the minors' rights as to education. Further, they argue and in accordance with Article 53 (2) that the child's best interests are of paramount importance in every matter concerning the child.
25. A child's best interests are indeed paramount. However, one needs to look at the circumstances of a particular case. In the instant case, the one has to look at whether the 1<sup>st</sup> Respondent was in violation of the minors' right at to education. This limb shall be determined in the ensuing discussion.

### **Violation of the Right to Education**

26. It is the Petitioners' case that the 1<sup>st</sup> Respondent's actions deprives the minors of their right to basic education.
27. Article 43 of the Constitution *inter alia* provides that, every person has the right to education. Article 53 (1) (b) of the Constitution guarantees every child the right to free and compulsory basic education. In fact, the best interests of a child are of paramount importance in every matter concerning the child and in accordance with Article 53 (2) of the Constitution.
28. Under Article 28 of the Convention of the Rights of the Child, State parties are enjoined to recognize the right of the child to education. Further, Article 26 of the Universal Declaration of Human Rights provides that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Any treaty or convention ratified by Kenya forms part of the law of Kenya: see Article 2(6) of the Constitution.
29. Basic education is statutorily underpinned under the Basic Education Act, 2013. In its preamble, it states that *it is an Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.*
30. Section 2 of the Basic Education Act (*supra*) states that basic education means the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic education and education offered in pre-primary educational institutions and centres. Section 28 on the other hand makes provision for the right of the child to free and compulsory education. It provides that:

***“The Cabinet Secretary shall implement the right of every child to free and compulsory basic education.”***

31. To ensure that the government is able to offer basic education, the Basic Education Act, (*supra*) provides under section 29 that no public school shall charge or cause any parent or guardian to pay tuition fees for or on behalf of any pupil in the school. Further, and as prescribed by section 30 of the Basic Education Act (*supra*), every parent whose child is Kenyan or resides in Kenya is by law required to ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of physical, mental, intellectual or social development of the child. A parent who fails to take his or her child to school commits an offence.
32. It is therefore the responsibility of every parent or guardian to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution.
33. Basic education institutions as stated under section 43 of the Basic Education Act (*supra*) are categorized as public schools which are schools established owned or operated by the Government and includes sponsored schools; private schools as those established, owned or operated by private

individuals, entrepreneurs and institutions. Any person requiring basic education may attend a private school as stated in section 51 of the Basic Education Act (*supra*). In order to ensure that private schools meet the threshold to offer basic education, the Basic Education Act (*supra*) outlines the duties and rights of private schools under section 52. In particular, section 52 (2) provides that, *‘The County Education Board in consultation with the Teachers Service Commission shall assess a private school, including teachers, non teaching staff, the school’s educational programmes and the school instructional materials, to inspect the school’s facilities and to perform such other appropriate functions with respect to the private school as the Cabinet Secretary may require.’*

34. From the foregoing, it is clear that basic education may be offered by private schools, however, such private schools have to conform and meet the threshold set under the Basic Education Act (*supra*) for their establishment. The same can be equated to setting out minimum standards. To further ensure that there is proper management of institutions offering basic education, the Cabinet secretary is enjoined by regulation to establish such structures of governance and management at national and county levels as may be appropriate. Such structures of governance and management apply to both public and private schools.
35. Every private school is required to establish a parents’ teachers association as provided under section 55(3) of the Basic Education Act (*supra*). Under the Third Schedule to the Act, rule 6 thereof sets out the functions of the Parents’ Teachers’ Association. It states that:

***The functions of the Parents Association shall be to-***

- a. ***promote quality care, nutritional and health status of the pupils;***
- b. ***maintain good working relationship between teachers and parents;***
- c. ***discuss, explore and advise the parents on ways to raise funds for the physical development and maintenance;***
- d. ***explore ways to motivate the teachers and pupils to improve their performance in academic and co-curricular activities;***
- e. ***discuss and recommend charges to be levied on pupils or parents;***
- f. ***undertake and oversee development projects on behalf of the whole Parents Association;***
- g. ***assist the school management in the monitoring, guidance, counseling and disciplining of pupils; and***
- h. ***discuss and recommend measures for the welfare of staff and pupils. [Emphasis supplied]***

36. The Petitioners allege that that the 1<sup>st</sup> Respondent’s action of increasing school fees and closing the school was capricious and thus violated the minors’ right to among others, education.

37. It is not in dispute that the right to education is paramount in the development and well being of a child. As stated by Emukule J., in the case of **John Kiplangat Barbaret & 3 others v Attorney General & 4 others [2014] e KLR;**

***“Education is in a sense, the bedrock of the development of society. It provides for means by which an individual is able to pursue happiness, free himself from the bonds of poverty and ignorance and effectively participates in the governance and development of the State.”***

38. To emphasize this importance, the United Nations Committee on Economic, Social and Cultural Rights in its General Comment 13 stated that,

***‘Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation, promoting human rights and democracy, protecting the environment and controlling population growth. Increasingly, education is recognized as one of the best financial investments***

***States can make. But the importance of education is not just practical: well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.'***

39. It is key to observe that this right is placed on the State such that, where the State does not have resources to implement a right under Article 43, the State has to either show that it does not have the resources or it will give priority to ensuring the widest possible enjoyment of the right to prevailing circumstances, including the vulnerability of particular groups or individuals. The provision under the Bill of Rights applies to all law and binds all State organs and all persons. To ensure this right, the Basic Education Act (supra) enjoins the Cabinet Secretary to implement the right to basic education as enshrined under Article 53.
40. As stated above, public and private institutions are categorized as basic education institutions. However, what is the role of private institutions with regard to education? Are they enjoined to ensure the realization of the right to education and by extension, the right to free and compulsory basic education?
41. 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;”***

42. I do agree with the above proposition as the correct legal position.
43. I further wish to state that, 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.
44. The 1<sup>st</sup> Respondent argued that the school was only closed after the parents failed to pay the increased agreed amount of school fees. Further, that the school fees was agreed on after multiple consultative meetings with the Petitioners. To support this position, the 1<sup>st</sup> Respondent has annexed various minutes for meetings held on 29<sup>th</sup> January 2015, 6<sup>th</sup> 2015 and 6<sup>th</sup> February 2015 and 6<sup>th</sup> May 2015. The Petitioners on the other hand while acknowledging that there were indeed various meetings, state that they were never given an opportunity to be heard.
45. In my view, the Petitioners' argument is neither here nor there. However, being a private entity, the Petitioners contracted with the 1<sup>st</sup> Respondent who was providing a service. The consideration was increased even though the Petitioners allege that it was done arbitrarily. If the Petitioners were dissatisfied with the 1<sup>st</sup> Respondent, nothing stopped them from withdrawing their children from the 1<sup>st</sup> Respondent and taking them elsewhere. The 1<sup>st</sup> Respondent being a private entity cannot be said to have infringed the right to education and further, the right to free and compulsory basic education is an obligation of the State. It thus follows that a public entity is obligated to provide it. It does not fall within the purview of a private institution.
46. Therefore, it is my considered view that the Petitioners' arguments cannot stand. Thus, this limb fails. I find that the Respondents did not violate the right of the minors to education

### ***Right to life and freedom and security of person***

47. Article 28 of the Constitution makes provision for human dignity. Freedom of security of person is enshrined under Article 29. It states that:

***“Every person has the right to freedom and security of the person, which includes***

*the right not to be-*

- a. *deprived of freedom arbitrarily or without just cause;*
- b. *detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*
- c. *subjected to any form of violence from either public or private sources;*
- d. *subjected to torture in any manner, whether physical or psychological;*
- e. *subjected to corporal punishment; or*
- f. *treated or punished in a cruel, inhuman or degrading manner.”*

48. The right to dignity is itself a right which entitles one to the enjoyment of other rights. It is an inherent right. The Respondents contend that the minors were treated without dignity or humanity and that the 1<sup>st</sup> Respondent's actions have psychologically tortured the minors.

49. Having held the view that no obligation is placed on private entities to provide education, the arguments in support of this position also fail.

50. In the circumstances therefore, I do hold that the 1<sup>st</sup> Respondent did not violate the minors' rights as to education. With regard to fair administrative action, I am also of the view that there was no violation as the Petitioners engaged in various consultative meetings with the 1<sup>st</sup> Respondent. This view is further reinforced by the fact that there was indeed a consensual court order recorded by the Petitioners, or some of them, and the 1<sup>st</sup> Respondent in Chief Magistrates' Court case No. 982 of 2014 at Thika. The consent is itself an indication that the parties were engaged all along.

### **Allegations of perjury**

51. The Petitioner also contended that the replying Affidavit and the annexures thereto were riddled with falsehoods. The Petitioner unfortunately did not adduce any evidence in any form to show that the deponent of the Replying Affidavit had perjured himself. To this end it would be unnecessary to delve into this issue any further.

### **Disposal and costs**

This Petition ought to be dismissed. I so order.

52. As to costs, I take note of the fact that the Petition was commenced on behalf of minors. I exercise my discretion and decline to grant the successful Respondents any costs in the circumstances. Each party will consequently bear its own costs.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day February, 2016**

**J.L.ONGUTO**

**JUDGE**