



**REPUBLIC OF KENYA**

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

**PETITION NO 10 OF 2014**

**KENYA NATIONAL ASSOCIATION PARENTS.....PETITIONER**

**(Through their Secretary General MUSAU NDUNDA)**

**-VERSUS-**

**THE CABINET SECRETARY MINISTRY OF EDUCATION SCIENCE AND**

**TECHNOLOGY PROF. JACOB KAIMENYI.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF EDUCATION**

**SCIENCE AND TECHNOLOGY (STATE DEPARTMENT OF**

**EDUCATION .DR. BELIO KIPSAN.....2<sup>ND</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**THE SECRETARY TEACHERS SERVICE COMMISSION**

**(GABRIEL LENGIIBONI).....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner, which describes itself as an association of parents and key stakeholders in the education sector and registered to manage and deal with the welfare of children or students and parents, has filed the present petition to challenge various aspects of the governance of basic education in Kenya and the setting of fees for schools.

2. The 1<sup>st</sup> respondent is the Cabinet Secretary in the Ministry of Education Science and Technology and is responsible for all matters relating to basic education and training as provide for under the Basic Education Act No. 14 of 2013 Laws of Kenya. He has been sued together with the Principal Secretary in the Ministry as the 2<sup>nd</sup> respondent, on the basis that he is charged, under **Section 68(2)** of the **Basic**

**Education Act**, with the responsibility of overseeing the administration of the department of education. The 3<sup>rd</sup> respondent, the Teachers Service Commission, is a constitutional commission established under **Article 237** of the **Constitution** and is responsible for all matters relating to teacher management, while the 4<sup>th</sup> respondent is the Secretary /Chief Executive Officer appointed by 3<sup>rd</sup> respondent under **Section 16 (1)** of the **Teachers Service Commission Act 2012** and is responsible for executing decisions of the 3<sup>rd</sup> respondent.

3. The petitioner has also joined to the proceedings the 5<sup>th</sup> respondent, the Attorney General of the Republic of Kenya whose office is created by dint of **Article 156** of the **Constitution**.

4. The petitioner contends that the respondents have failed or inadequately performed their respective duties to observe, respect, protect, promote and fulfil the right to education, and in particular, the right to free and compulsory basic education. It raises various concerns regarding the implementation of the Basic Education Act vis-à-vis the Constitution and the overall realization of the right to free education as provided under **Article 43** of the Constitution and seeks various orders to stop the respondents from performing certain acts which it deems as falling outside their mandate or to compel them to perform the functions which fall within their mandate but which it alleges that they have failed to perform.

### **The Petitioner's Case**

5. The petitioner's case is contained in their petition dated 13<sup>th</sup> January 2014 which is supported by an affidavit sworn by Mr. Musau Ndunda sworn on the same date, a further affidavit also sworn by Mr. Ndunda on 21<sup>st</sup> March 2014, and two sets of submissions dated 10<sup>th</sup> June 2014. It was presented by its Learned Counsel Mr. Osoro.

6. In the affidavit sworn by Mr. Ndunda, the petitioner avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed to develop regulations to operationalize the Basic Education Act, thereby causing confusion and anarchy in the state department of education and that they have failed to implement Section 4 of the Act under which the Government is required to ensure the right of every child to free and compulsory Basic Education as provided for Under **Section 28(1)** of the Act.

7. The petitioner avers further that the Cabinet Secretary has, in a discriminatory manner, categorised public schools into national, county and sub-county schools contrary to the Act and that he has further allowed public boarding schools to operate without proper regulations contrary to the Act; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed to implement the Basic Education Act both in its spirit and meaning by failing to provide appropriate incentives to learners such as free lunch programmes, uniforms and free shoes as provided under **Section 35** of the Act; that they have failed to have the Government execute its responsibility of providing free and compulsory Basic Education to every child, and ensuring compulsory admission and attendance of children of school going age at school as required under **Section 39** of the **Act** and **Article 43** of **Constitution**.

8. The petitioner accuses the Cabinet Secretary of failing to regulate all management of schools and has instead entrusted their governance and management to head teachers and principals without rules and regulations properly set for proper management as required by the Act; of failing to develop regulation to establish structures of governance to regulate both national and County Educational Boards, and of having failed, neglected, and/or refused to formulate rules and regulations to compel both public schools and institutions of basic education to publish their financial and governance reports for 2013 as required by **Section 60** of the **Basic Education Act**.

9. It is also its contention that the respondents have failed to develop regulations prescribing the composition, appointment and terms of service of the members of education standards and quality assurance council contrary to **Section 64(3)** of the **Basic Education Act**.

10. The petitioner avers further that the respondents have failed to come up with structural system of education that can enable learners to access education at any level in a sequence and at a pace that may be

commensurate with the individual learners' physical, and mental ability under **Section 42** of the **Basic Education Act**, alleges violation of other provisions of the Basic Education Act, among them **Section 9, 32, 36, 41, 84(2), 90(3), and 95.**

11. It contends that it has persistently requested the 1<sup>st</sup> and 2<sup>nd</sup> respondents to implement **Section 55(2)** and **Schedule Three** of the **Basic Education Act** but all in vain, and that the respondents have failed to invite the petitioners to form regulations to provide for the establishment of schools, parents Associations and County parents associations. It claims that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have allowed the illegal organizations in the name of Board of Governors, Parents Teachers Associations and school management committees to operate contrary to **Section 55 (1) (2)** of the **Basic Education Act**; and further, that the 3<sup>rd</sup> and 4<sup>th</sup> respondents have violated the Constitution and the Basic Education Act by deploying Head teachers and principals in schools to execute duties of administration, financial management and control contrary to **Section 40** and **53(2)** and that the 3<sup>rd</sup> and 4<sup>th</sup> respondents actions of deploying and assigning County Directors duties of supervising, handing and taking over schools and other institution of Basic Education is contrary to **Section 54(7) (o).**

12. In his oral submissions, Learned Counsel for the petitioner Mr. Osoro, contended that there has been a violation of **Article 43(1)(f)** of the **Constitution** which guarantees free and compulsory education to every child, as well as **Section 40, 53** and **55** of the **Basic Education Act**. He submitted that the violation of the constitutional guarantee of free education is demonstrated by various fees structures annexed to the affidavit of Mr. Ndunda which the petitioner contends shows that the said fees structures are abusive in the manner they are charged.

13. The petitioner illustrates this claim with the fees structure for Embakasi Girls Secondary School, contending that the government has given a subsidy of **Kshs 10,265**, and therefore the parents should not be paying school fees of **Ksh 45,323** but only **35,058**. It is its case that the fees charged demonstrate the abuse by the 3<sup>rd</sup> and 4<sup>th</sup> respondent, and the violation of the **Basic Education Act** which provides at **Section 29(1)** that no public school should charge tuition fees.

14. Counsel submitted further that there are items charged on parents that are not authorized by the Minister; that **Section 29(2)** of the **Basic Education Act** allows fees to be charged to foreigners, not to citizens; that the Minister must authorize any charges in school; and that the charges are in violation of the Constitution and the rights of children to free basic education.

15. The second ground for complaint by the petitioner is that there has been discrimination in the selection and categorization of schools and classification of schools into day and boarding schools. Mr. Osoro submitted that under the Basic Education Act, there is no such classification of schools, that the Act provides for transition to secondary schools, and not for selection. It is the petitioner's contention that there should not be any criteria for admission to Form 1 as **Section 41** of the **Basic Education Act**, does not provide a criteria for one to move from one class to another. It is its case that selection of students for admission to secondary school based on performance hinders learners from achieving free and compulsory education.

16. Counsel submitted further that due to the high fees charged especially in public schools which should be free to enable every parent take their child to school, it is impossible for poor parents to take children to school. He contended that public schools have been developed by taxes yet the fees charged hinder parents from taking their children to well-equipped school so as to compete with others, hence the discrimination. He submitted that the respondents should be compelled to actualize and implement the Basic Education Act so as to eliminate the creation of arbitrary fees structures by schools.

17. It is the petitioner's contention that as a result of the 1<sup>st</sup> and 2<sup>nd</sup> respondents failure to implement the Act, the education system has been left in limbo and schools are operating without proper regulations as required under the Act. It therefore prays for the following orders:-

***(1) That the Honourable Court do compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to formulate***

*regulations on the implementation of the Basic Education Act 2013 No. 14 of 2013 both its spirit and purpose.*

*(2) That this Honourable Court do issue Conservatory stay Orders against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents against the Admissions of Form Ones and the Admitting Officers pending the formulation of regulations.*

*(3) That this Honourable Court do issue Orders against charging of school fees and other charges as it is in contravention of Section 29 (1), (2)(b),(c).*

*(4) That this Honourable Court do restrain the 3<sup>rd</sup> and 4<sup>th</sup> respondents from deploying and assigning the Head teachers and Principals duties of general administration in relation to admissions, discipline and suspension of learners and financial management and control as it is contrary to Section 53(2).*

*(5) That this Honourable Court do restrain the 3<sup>rd</sup> and 4<sup>th</sup> respondents from Appointing and deploying the County Directors and assigning them duties of supervising the handing and/or taking over of the Administration of the schools contrary to the law.*

*(6) That this Honourable Court do declare that the current Board of Governors, School Management Committees and Parents Teachers Association are all illegal, null and void.*

*(7) That this Honourable Court do compel the Respondents to formulate regulations to implement the Basic Education Act 2013 No. 14 of 2013.*

*(8) That costs of this Petition be provided for.*

*(9) Any other further relief that this Honourable Court may deem fit to grant.*

### **The Case for the 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> Respondents**

18. The respondents oppose the petition and have filed an affidavit in reply sworn by Dr Belio Kipsang, the 2<sup>nd</sup> respondent, on 19<sup>th</sup> February 2014, as well as submissions dated 30<sup>th</sup> April 2014. Their case was presented by Learned State Counsel, Mr Moimbo.

19. In his affidavit, Dr. Kipsang avers that the Ministry of Education is in consultation with stakeholders in the process of formulating regulations for the implementation of the Basic Education Act, that the Ministry and the Office of the Attorney General are working on the regulations; and that the Cabinet Secretary has already made the **Education Standard and Quality Assurance Regulations** which have been published.

20. He avers further that the **Basic Education Act** was passed on 25<sup>th</sup> January 2013, about 1 month or so to the general elections, and so the outgoing government did not have the time to constitute the institutions established under the Act. He avers therefore that it would be unfair at this point in time to allege that the current government, which took shape fully in June /July 2013, has failed or refused to formulate regulations for implementation of the Act.

21. Dr Kipsang states that the government pays a subsidy of **Kshs. 10,265/=** and **Kshs. 1020/=** for every student in secondary and primary schools respectively; that it has allowed schools to charge students not more than **Kshs. 18,000/-** as tuition fees over and above the **Kshs. 10,265** paid by the government; and that since 2008, the Ministry has not revised the subsidy.

22. Dr. Kipsang avers further that schools have been seeking approvals to levy higher fees to offset the effects of inflation; that in accordance with Regulations, the Boards of Governors of schools would consider proposals for higher fees presented to them by the Parents Teachers Associations after their

annual general meetings in order to cater for quality care, nutritional and health status for their students; and that while the Boards of Governors were empowered to raise fees, they were additionally required to seek the approval of the Cabinet Secretary through the District Education Boards.

23. The respondents concede that charging of tuition fees has been banned under the Act; that no school ought to charge any fees except for extra levies instituted in a school after approval by the Cabinet Secretary in consultation with County Education Boards; and that the institutions existing prior to the enactment of the Act such as the Boards of Governors and District Education Boards had been able to reign in unwarranted increments of school fees and other charges.

24. The respondents contend that the government is providing free day secondary education through the subsidy of **Kshs. 10265/-**; that in boarding schools, parents cater for boarding fees and other extra costs such as transport, electricity, administration costs, medical care and food occasioned by the presence of students in school on a full time basis; that the 2<sup>nd</sup> respondent issued to all public schools a Circular dated 7<sup>th</sup> February 2014 directing the schools to abide by the guidelines issued by the Ministry in 2005 on procedures of charging extra levies, and guidelines on implementation of free secondary education were issued in 2008.

25. They aver that in the said circular, the 2<sup>nd</sup> respondent directed the immediate suspension of all extra fees and other levies approved by Boards of Management and parents/teachers associations for 2014; that the cost of conferences and tours for the Kenya Secondary Schools Heads Association and any other school based non-student associations should not be loaded on to parents as fees; and that in order to ease the financial burden for parents, all fees payable by parents be spread out into the three terms of the school calendar.

26. The respondents state that an all-inclusive taskforce has been constituted and was launched on 17<sup>th</sup> February 2014 to look into the cost of secondary education in Kenya and make appropriate recommendations on the issue of school fees and other charges; and that it was expected that its report would be ready for implementation in the second term expected to start on 5<sup>th</sup> May 2014. It was averred that the said task force was composed of various stakeholders in the education sector including teachers unions, civil society and parents associations, and that the petitioner was represented in the said taskforce by its Secretary General, Mr. Musau Ndunda. The respondents contend that most of the issues raised in this petition are contained in the terms of reference of the taskforce and that the Ministry is committed to providing compulsory, affordable and accessible basic education to all.

27. With regard to the management of schools, the respondents aver that the National Education Board has already been constituted and appointments thereto made in accordance with the provisions of the Basic Education Act, and that the Board was inaugurated by the Cabinet Secretary in August 2013; that County Education Boards have already been constituted for the 47 counties as required under the Act and over 800 members appointed to the Boards; and that it is these Boards which have the mandate to appoint Boards of Management for schools.

28. The respondents therefore state that since the Boards of Management have not yet been formed, it is in the public interest and in the interest of the students that pending the publication of the Regulations, the Boards of Governors and head teachers continue managing the schools and their resources under the regulations and guidelines made under the repealed Act with the necessary modifications and adaptations to conform to the Basic Education Act, 2013; and further, that **Section 101(2)** of the **Basic Education Act** allows the existing Boards of Governors and the Teachers and Parents Associations to continue operating pending the constitution of the Boards of Management.

29. The respondents submit further that under **Section 24** of the **Interpretation and General Provisions Act, Cap. 2 Laws of Kenya**, the repeal of an Act does not automatically lead to repeal of the regulations, orders and directions made under the repealed Act, unless the repealing Act expressly provides for such repeal; and it is their submission therefore that subsidiary legislation, regulations, rules, directions and orders made under the repealed Act unless repealed by the repealing Act or replaced by subsidiary

legislation made under the repealing Act will continue to be in force as though they were made under the repealing Act and applied with the necessary adaptations and modifications to bring them into conformity with the repealing Act.

30. The respondents deny that there is any discrimination in the classification of schools as either national, county or sub-county. They submit that such classification is provided for by **Section 95(3) (i)** and **(j)** of the **Basic Education Act**; that the classification of some schools as national schools is aimed at fostering national integration and cohesion and that national schools are required by the Ministry's policies and guidelines to admit students from all parts of the country. They argue that extra-county schools also promote national integration and cohesion as they are required to admit 40% of their students from the whole nation, 40% from the county in which the school is located and 20% from the sub-county in which the school is located. It is their case therefore that the classification of schools is not in any way aimed at allocating resources to schools based on any form of differentiation or discrimination.

31. They submit, however, that in any event, the petitioner does not specify how the classification of schools is discriminatory. They rely on the decisions in **Anarita Karimi Njeru –vs- The Republic (1976-1980) 1 KLR 1272** and **Trusted Society of Human Rights Alliance -vs- The Attorney General & 2 Others Petition 229 of 2012** to submit that constitutional petitions should be clear about which provisions of the Constitution have been infringed and the manner of infringement; and that even though there should not be undue regard to technicalities, constitutional petitions should be fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case. It is their submission that the claim of discrimination has not been properly substantiated, and the respondents are thus denied a chance to respond adequately to it.

32. The respondents submit further that there is no evidence before the court that the State has refused, failed or neglected to perform its obligations under **Article 53** of the **Constitution** or under the provisions of the Basic Education Act; that the evidence presented by the respondents shows that the State is taking steps to ensure the realization of free and compulsory basic education in line with the provisions of **Article 53**; that the petition would have been unnecessary had the petitioner read and correctly interpreted the Act or had it sought information from the State on the steps it is taking to ensure the implementation of **Article 53** through the **Basic Education Act**; that the right to education guaranteed under **Article 43** of the Constitution is an economic and social right the realization of which is not immediate but is subject to the availability of resources; and that in as much as **Article 53(1) (b)** states that every child has the right to free and compulsory basic education, the right is subject to **Article 21(2)** which recognizes that the right may not be achieved immediately but may be achieved progressively.

33. It is their contention therefore that the State will be seen to have complied with its fundamental duty to implement the right of every child to a free and compulsory basic education if it takes legislative, policy and other measures aimed at achieving the progressive realization of the right. The respondents have relied on the decision of the Supreme Court in **the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR; City of Johannesburg and others -vs- Mazibuko & others(489/08) [2009] ZASCA; Mitu-Bell Welfare Society vs- Attorney General & 2 others [2013]eKLR** and **Michael Mutinda Mutemi -vs- Permanent Secretary, Ministry of Education & 2 Others, Petition Number 133 of 2013** in support of their submissions with regard to progressive realisation of the right to education and the steps that they are taking towards realisation of the right. They have enumerated and expounded on a number of policy and legislative measures which I need not reproduce here.

34. With regard to the implementation of the requirements of the Basic Education Act, it is their contention that there is no time prescribed under the Constitution within which the right to free and compulsory basic education must be realized, and the petitioner must therefore allow a reasonable transitional period for the full implementation of the Act. They therefore ask that the petition be dismissed.

**The Case for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

35. The Teachers Service Commission (TSC) and its Secretary have filed an affidavit in opposition to the petition sworn on 6<sup>th</sup> March 2014 by Mr. Simon M. Kavisi, the Director in Charge of General Administration of the 3<sup>rd</sup> respondent's office, and submissions dated 3<sup>rd</sup> June 2014. Their case was presented by their Learned Counsel, Mr. Sitima.

36. The 3<sup>rd</sup> and 4<sup>th</sup> respondent submit that the present petition is not tenable in law as the petitioner appears ill informed and/or not properly advised on the legal framework upon which the TSC is founded and operates. Mr. Kavisi avers that the TSC is established under **Article 237** of the **Constitution** with its primary functions being the general management of teachers in teaching service and the regulation of the teaching profession. Its obligations are underpinned by the provisions of the Teachers Service Commission Act No 20 of 2012, the Code of Regulations for Teachers published pursuant to **Section 47 (2) (a)** of the **Teachers Service Commission Act**, the Code of Conduct and Ethics for Teachers, administrative circulars and various internal policy documents.

37. He depones that as a creature of the law, TSC is bestowed with a broad legal mandate that comprises the handling of all issues touching on the employment of teachers including the deployment, assignment and promotion of teachers; that it deploys teachers to public educational institutions except universities and in doing so, seeks to achieve, among other things, optimal utilization of teachers and to provide competent administrators for the said institutions.

38. It is also his averment that heads of public institutions, as defined under **Section 2** of the **Teachers Service Act**, are appointed by the Commission in accordance with the TSC Act and various policy manuals; that the roles of the said heads is exercised at two levels, as school managers and lead educators where they undertake institutional management duties and teacher management duties respectively; that the dual role is necessitated by the special nature of the school community at large.

39. The respondents aver that where allegations relating to the contravention of any law relating to education or the Public Finance Management Act are made, the TSC undertakes disciplinary measures against the teacher or head of institution on behalf of the State.

40. Further, it is their submission that the powers of head teachers are incidental to their substantive appointment as members of the teaching service and any deployment that follows their appointment to the teaching service cannot be perceived as contravention of the laws as alleged by the petitioners. It is also their case that the exercise of powers by heads of educational institutions relating to admissions, discipline, suspension of learners, financial management and control is not contrary to the law but follows the dictates and inherent nature of their appointment as lead educators in public educational institutions, and further, that their dual role does not limit, diminish, or adversely affect the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents set out in **Section 53** of the **Basic Education Act**.

41. The 3<sup>rd</sup> and 4<sup>th</sup> respondents argue that in accordance with its mandate, the TSC has appointed 47 County Directors to perform all the teacher management duties; that their mandate is restricted to teacher management issues and does not encroach on the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in any way and that in any event, the said Directors' duty is to complement the role of other government agents in the education sector with a view to achieving harmony and does not in any way contradict or conflict with the powers and functions of the Ministry of Education or any of its officials at the county level.

42. It is also their contention that pursuant to **Section 54 (7)** of the **Basic Education Act**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, through the County Director of Education, Boards of Managements and other agents are the lead actors in the handing and taking over exercise. Further as required under **Section 54 (8)** of the **Basic Education Act**, they have executed the said mandate by incorporating the Teachers Service County Directors in their handing over Panels.

43. The respondents aver that the petitioner has misconstrued, misapplied or misinterpreted the provisions of the Basic Education Act, the Teachers Service Commission Act and the principles set out in the Constitution, and in so doing has arrived at an erroneous and misleading position in law. They rely on the

decision in **National Association of Parents –vs- Teachers Service Commission and 2 Others, Petition No 158 of 2014** for the proposition that in giving effect to the provisions of the Constitution, the court should not undermine the existence of a constitutional body by interpreting a constitutional provision in a manner that will cause chaos within the education sector and create a situation where good governance is undermined.

44. The respondents submit that the petition and the orders sought against the 3<sup>rd</sup> and 4<sup>th</sup> respondents are untenable as they are likely to adversely affect the cordial, constructive and practical working relations between two institutions in the same sector, and they pray that the petition be dismissed with costs.

### **Determination**

45. The critical place that education plays in the life of an individual and communities cannot be overemphasised. It has been recognised as a fundamental human right and as essential for the exercise of all other human rights. It is through education that individual freedom is promoted, and individuals and communities empowered. As the Economic and Social Council of the United Nations noted in its **General Comment No. 13** on the right to education guaranteed under Article 13 of the **International Covenant on Economic, Social and Cultural Rights**:

*“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 exploitative and hazardous labour and sexual 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: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”*

46. **Article 13 of the Covenant**, so far as is relevant for present purposes, provides that

*1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(a) Primary education shall be compulsory and available free to all;*

*(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

*(c) ...;*

47. The right to education has been expressly provided for in the Constitution of Kenya at **Article 43 (1) (f)**. With respect to children, the right to education is captured in **Article 53 (1)(b)**, which provides that *“Every child has the right to free and compulsory basic education.”*

48. **Article 43** contains the constitutional guarantee to social and economic rights, including the right to

education, which, in accordance with **Article 21(2)**, are to be realised progressively:

***(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.***”

49. It is the right to education guaranteed under **Article 43(1)(f)** and **53(1)(b)** specifically in respect of children that the petitioner alleges violation of by the respondents. It also alleges violation of **Article 27** which guarantees to all non-discrimination and equality before the law. The petitioner has also alleged a violation by the respondents of the provisions of the Basic Education Act, 2013. Its grievance appears, from its pleadings and submissions, to arise from a dissatisfaction with the manner in which the provisions of the Act have been implemented, in particular the steps or actions taken by the government with regard to implementation of the Act.

50. I have already set out above the prayers that the petitioner is seeking. However, it is worth repeating them, albeit in a summary form, as they are fairly drastic, and in considering whether to grant them or not, weigh them against the provisions of the Constitution and the International Covenant on Economic Social and Cultural Rights set out above with regard to the attainment of the right to education.

51. The orders sought by the petitioner are far-reaching in their effect. The petitioner seeks an order to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondent to formulate regulations on the implementation of the Basic Education Act both in its spirit and purpose; to issue conservatory stay orders **“against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents against the Admissions of Form Ones and the Admitting Officers pending the formulation of regulations”**; to issue orders against charging of school fees and other charges as it is in contravention of **Section 29 (1), (2)(B) and (c)** of the **Basic Education Act**; to restrain the 3<sup>rd</sup> and 4<sup>th</sup> respondents from deploying and assigning head teachers and principals duties of general administration in relation to admissions, discipline and suspension of learners and financial management and control as it is contrary to Section 53(2) of **the Act**; restrain the 3<sup>rd</sup> and 4<sup>th</sup> respondents from appointing and deploying the County Directors and assigning them duties of supervising the handing and/or taking over of the administration of the schools contrary to the law; and to declare that the current Board of Governors, School Management Committees and Parents Teachers Associations are all illegal.

52. I must at the outset agree with one submission made by Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents: that the Basic Education Act, 2013, was assented to on 14<sup>th</sup> January 2013 and came into effect on 25<sup>th</sup> January 2013. Consequently, at the time of filing this petition in 2014, the Act had been in force for barely one year.

53. It must be recognised, also, that the Act did not come into force in a vacuum. Indeed, it was enacted at a time of great change in the governance of the country. As the respondents submit, 2013 was an election year, and a new government came into force some six months after the enactment of the Act. More importantly, the Act came into force about the same time as the devolved system of government was coming into effect, under which various functions are devolved to the county governments. This is, I believe, an important context to bear in mind when considering the petitioner’s claim.

54. It is also important to consider the objects and purposes of the Act. Its preamble 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.”**

### **Formulation of Regulations**

55. The petitioner seeks orders to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to formulate regulations under the Basic Education Act. It alleges that the respondents have allowed public schools to operate without proper regulations or governance structures at both national and county level. In response, the

respondents argue that in accordance with the provisions of the Interpretation and General Provisions Act, the regulations in force prior to the enactment of the Basic Education Act remain in force till they are repealed by new regulations, as they were not expressly repealed by the Basic Education Act. It is also their case that they have taken various steps, including the formation of a task force in which the petitioner is represented, to consider the implementation of the Act and make appropriate recommendations.

56. I am therefore satisfied, from the available evidence, that the respondents are in the process of formulating the necessary regulations for the implementation of the Basic Education Act, including the issue of the cost of education in secondary schools, through stakeholder consultation and in the circumstances, there is no basis on which the court should issue orders with regard to the regulations.

57. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also deposed, and this was not controverted by the petitioner, that the National Education Board contemplated under Section 5 of the **Basic Education Act** was constituted, appointments to the Board were made in accordance with the provisions of the Act, and the Board was inaugurated by the Cabinet Secretary in August 2013. It has also been argued, and not controverted, that County Education Boards have already been constituted for the 47 counties and over 800 members to the County Education Boards appointed; and further, that the **Basic Education (Education Standards and Quality Assurance Council) Regulations, 2013** were published vide Legal Notice No 11 of 2014; and further that the Ministry of Education, in conjunction with the Office of the Attorney General, is in the process of formulating further regulations for implementation of the Act, and draft Basic Education Regulations, 2013 are already in place.

58. The obligation of the state under **Article 21(2)** of the **Constitution** with regard to the right to education is to take *‘legislative, policy and other measures, including the setting of standards,’* to achieve the progressive realisation of the right. In the present case, I am satisfied that the state has taken appropriate steps towards the implementation of the Act.

59. Finally, it must be observed that the Act provides for the interim period between the enactment of the Act and the formulation of regulations under the Act. Section 101(2) thereof provides as follows:

***(2) All rules and regulations made under the repealed Acts and in force immediately prior to the commencement of this Act shall continue to be in force but may be amended or revoked by rules and regulations made under this Act.”***

### **Order to Restrain Admission of Form One Students**

60. The petitioner seeks an order to stop the admission of students to form one pending the formulation of regulations. This order was sought in January, 2014, and is presumed to have been directed at the admissions scheduled for that year. It is therefore, in my view, overtaken by events, and the submissions of the petitioner did not dwell on the issue. Nonetheless, even were the issue still live, I believe it is an order that the court could not properly grant.

61. First, it would have far-reaching, and, indeed, negative consequences, on children who are not represented in this matter. Secondly, the public interest would greatly militate against the grant of such orders. The public interest principle in the grant of conservatory orders was enunciated by the Supreme Court in the case of **Gatirau Peter Munya -vs- Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** in the following words:

***“Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

62. Thirdly, the respondents have demonstrated that there are regulations for the governance of the basic education sector which were in existence under the Education Act and have not been repealed by the new legislation. And finally, it is my view that no case has been made out by the petitioner to warrant the grant

of such an order pending the formulation of the regulations that it deems necessary.

63. Such an order, as observed above, would have the effect of harming the rights of children whose best interests, in accordance with **Article 53 (2)** of the **Constitution** should be the paramount consideration in matters concerning the child. While the petitioner argues that it is motivated by the desire to protect the right of children to education, the effect of this order would be to gravely harm the very right that it seeks to protect. It cannot be granted.

### **Orders to Restrain Charging of School Fees**

64. The petitioner has sought an order restraining the charging of school fees, on the basis that it is in violation of Section 29 (1), (2)(B) and (c) of the **Basic Education Act**. This section provides as follows:

***(1) 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.***

***(2) Notwithstanding subsection (1)-***

***(a) tuition fees may be payable by persons who are not Kenyan citizens;***

***(b) other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the county education Board provided that no child shall be refused to attend school because of failure to pay such charges;***

***(c) no person shall collect levies without issuing an official receipt.***

65. It must, I think be conceded that the cost of funding education to ensure that each child accesses quality education is a challenge within Kenya. While the ideal is a situation in which all children access basic education, it is recognised that this can only be done by the state “ *to the maximum of its available resources.*”

66. The policy and legislative position taken by the Kenya government, from the material placed before me, is that tuition fees would be met by government, but schools may charge additional fees for other requirements. The respondents have submitted that the government pays **Kshs 10,265/-** per year for every student in secondary school to cover tuition fees, which is utilized to pay salaries for critical non-teaching staff, water, electricity, local transport and travel, and repair and maintenance costs. In boarding schools, the government allows schools to charge students not more than **Kshs 18,627/-**.

67. The petitioner has annexed fees structures for various schools, with an invitation to the court to consider the structures and find that the fees charged are unlawful. This is an invitation, however, that the court will not accede to. This is because, as submitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents and conceded by the petitioner in its submissions dated 10<sup>th</sup> June 2014, the 1<sup>st</sup> respondent has already issued a circular suspending all fees structures issued in 2014 and cautioning heads of schools against such charges. More importantly, however, this court is not in a position to determine what are appropriate and realistic fees to be charged for secondary schools. As was deposed by the 1<sup>st</sup> respondent, a task force has been in force to consider the cost of secondary education, and it is in my view only through such stakeholder engagement and consultation that fees structures that take into account the interests of all parties can be arrived at.

### **Deployment and Assignment of Head teachers and Principals with General Administration Duties**

68. The petitioner is aggrieved by what it says is the usurpation of the roles of the 1<sup>st</sup> respondent by the 3<sup>rd</sup> and 4<sup>th</sup> respondents contrary to the provisions of Section Of 53(2) of the **Basic Education Act**. **Section 53** of the **Basic Education Act**, which provides for the governance and management of basic education and training, provides as follows:

**53. (1) The Cabinet Secretary shall be responsible for the overall governance and management of basic education.**

**(2) Subject to the provisions of this Act, the Cabinet Secretary shall by regulation entrust the governance or management of any aspect of basic education and training to any agency, body, organ or institution as may be appropriate for the purposes of this Act.”**

69. In support of its argument that there has been a violation of this provision, the petitioner states in its written submissions that the 3<sup>rd</sup> and 4<sup>th</sup> respondents appointing and deploying county directors to supervise handling and taking over of administration of schools is contrary to the law as the duty to appoint the school managers is the preserve of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

70. In his oral submissions in response to the submissions by TSC, Mr. Osoro argued that the role of the TSC is limited to teacher management and education of learners; that they have not been given the financial control of schools as is clear from Section 53 of the **Basic Education Act**, and that head teachers should not be the managers of schools as such managers should be appointed by the Cabinet Secretary pursuant to Section 53. It was also his submission that there should be a manager appointed by the Cabinet Secretary for schools, and that the head teacher and headmaster under the TSC Act do not have powers of management.

71. It seems to me that there may be a misinterpretation or misunderstanding of this provision by the petitioner. It appears to me that the section is intended to address the overall **“governance and management”** of basic education, and is not intended to deal with the day to day running of basic education institutions, as the petitioner seems to believe it is intended to address.

72. At any rate, I take the view that this aspect of the petitioner’s claim falls far short of a constitutional violation. Assuming there was a failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondent to take on the role of appointing managers for schools, which role has been left to the 3<sup>rd</sup> and 4<sup>th</sup> respondent, what is the constitutional violation that has resulted to warrant the petitioner’s claim? From the submissions before me, I cannot discern any.

### **Appointment and Deployment of County Directors**

73. The petitioner has sought orders to restrain the 3<sup>rd</sup> and 4<sup>th</sup> respondent from appointing and deploying county directors, as well as from assigning them duties. The petitioners arguments on this point appear to have been collapsed with the arguments with regard to the managers for schools which have been addressed above.

74. The position of County Directors of Education is defined in Section 2 of the **Basic Education Act** as being **“a director appointed under Section 52.”** However, this appears to be an error in the Act as Section 52 deals with the rights and duties of private schools. The position of County Directors of Education is dealt with in section 54 of the Act, which provides as follows at subsection (5):

**(1) ...**

**(2) ...**

**(3) ...**

**(4) ...**

**(5) There shall be a County Director of Education deployed by the Cabinet Secretary through an open and competitive process.**

**(6) The County Director of Education shall be Secretary to the County Education Board and**

***holder of the authority to incur expenditure of the educational account in the country.***

75. The duties of the County Director of Education are enumerated at **Section 54(7)** of the **Basic Education Act**. They include the implementation of education policies; co-ordination and supervision of all education officers and support staff at the County level; management of basic education, adult continuing education, non-formal, special needs education, tertiary and other educational programmes, and at **Section 54(7)(O)**, the ***“supervision of handing and taking over in schools and educational institutions in consultation with the Teacher Service Commission; oversee the proper management and maintenance of school buildings, property and infrastructure development.”***

76. The statutory responsibility for appointment of County Directors of Education is thus clear; it is the Cabinet Secretary who carries out the appointments through a competitive process. The petitioner has sought orders restraining the 3<sup>rd</sup> and 4<sup>th</sup> respondents from appointing and deploying the County Directors and assigning them duties. In light of the above provisions which are clear on whom the mandate for such appointment lies, it seems superfluous to ask the court to issue orders to restrain that which is already prohibited by law. I note from the averments by Mr. Kipsang that his office has already appointed 47 County Education Boards, whose secretaries are the county directors of education in accordance with **Section 54**. The TSC would clearly be in violation of the Basic Education Act if it purported to appoint County Director of Education.

#### **Validity of current Board of Governors, School Management Committees and Parents Teachers Association**

77. Finally, the petitioner questions the validity of the Boards of Governors, School Management Committees and Parents Teachers Association existing prior to the enactment of the Basic Education Act. It seeks a declaration that these bodies are all illegal, null and void.

78. As I observed elsewhere, the Basic Education Act was not enacted in a vacuum, nor was it intended, in my view, to sweep in like a tsunami from the sea, sweeping away everything in its wake without allowing for structures that conform with the new legislation to be put in place.

79. The respondents have submitted, and I agree with this submission, that measures are being taken towards the implementation of the Basic Education Act. It will doubtless take some time, given the extent and diversity of educational institutions offering basic education, for the requirements of the Act with regard to the management of these institutions to be fully implemented. It cannot, in my view, serve the interests of the children whose right to education the petitioner seeks to protect for the educational institutions they attend to be left rudderless with a sweeping declaration such as is contemplated by the petitioner.

80. The Basic Education Act provides for the formation of Management Boards for schools. It provides as follows at **Section 55**:

***(1) There shall be a Board of Management for every public -***

- (a) pre-primary institution;***
- (b) primary school;***
- (c) secondary school;***
- (d) adult and continuing education centre;***
- (e) multipurpose development training institute; or***
- (f) middle level institutions of basic education.***

***(2) Notwithstanding subsection (1) every school shall have a parents association which shall be constituted in the manner set out in the Third Schedule.***

81. With regard to the composition of the Boards, **Section 56** provides that it shall consist of: six persons elected to represent parents of the pupils in the school or local community in the case of county secondary schools; one person nominated by the County Education Board; one representative of the teaching staff in the school elected by the teachers; three representatives of the sponsors of the school; one person to represent special interest groups in the community; and one person to represent persons with special needs; as well as a representative of the students' council who shall be an ex officio member. All the members shall be appointed to the Management Boards by the County Education Board.

82. The situation as I understand it from the pleadings is that the 1<sup>st</sup> respondent has appointed 47 County Education Boards, one each for the 47 counties. It is these Boards which are required by law to establish Management Boards for each public institution in the county. The Management Boards are required to have representation from the stakeholders in the community. Until the Management Boards are appointed by the County Education Boards, the bodies existing prior to the enactment of the Act continue to be lawful in accordance with the provisions of **Section 101** of the Act:

***(1) Notwithstanding the repeal of the Acts under all acts, directions, orders, appointments, requirements, authorizations, decisions or other things given, taken or done under, and all funds, assets and other property acquired or disposed of by virtue of the repealed Acts shall, so far as are not inconsistent with this Act, be deemed to have been given, taken, done or acquired or disposed of under this Act.***

83. It seems to me that the petitioner should have perhaps exercised some patience before bringing the present petition. As a key stakeholder in the education sector, it probably understands better, or perhaps should understand better, the intricacies and difficulties inherent in implementing new legislation in a complex and vital sector such as education. Rather than calling for throwing out everything in existence prior to the new Act, it should start working closely and in consultation with the respondents and other stakeholders towards the implementation of the Act whose ultimate aim, as I understand it, is not to strengthen or weaken any institution or body in the education sector, but to strengthen and enhance access to education for all children in Kenya.

84. In light of the foregoing, I find no merit in this petition. It is hereby dismissed, but in light of the nature of the issues it raises and the parties involved, I direct that each party bears its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 16<sup>th</sup> day of January 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Osoro instructed by the firm of Osoro Juma & Co. Advocates for the petitioner**

**Mr Moimbo instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> respondent**

**Mr Sitima instructed by the firm of Allan M Sitima & Co. Advocates for the 3<sup>rd</sup> and 4<sup>th</sup> respondent**