



Githunguri Residents Association v Cabinet Secretary Ministry of Education & 5 others (Petition 464 of 2013) [2015] KEHC 7323 (KLR) (Constitutional and Human Rights) (29 May 2015) (Judgment)

Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR

Neutral citation: [2015] KEHC 7323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 464 OF 2013

I LENAOLA, J

MAY 29, 2015

BETWEEN

GITHUNGURI RESIDENTS ASSOCIATION PETITIONER

AND

CABINET SECRETARY MINISTRY OF EDUCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

NJOROGE BIYA 3RD RESPONDENT

DISTRICT COMMISSIONER, GITHUNGURI 4TH RESPONDENT

DISTRICT DEVELOPMENT COMMITTEE GITHUNGURI . 5TH RESPONDENT

DISTRICT EDUCATION BOARD, GITHUNGURI 6TH RESPONDENT

The right to free & compulsory basic education must be realised immediately and not progressively
Parents and schoolchildren from Githunguri District filed a petition challenging the imposition of unauthorized fees in public schools. They argued that levies such as activity fees and lunch programs led to some children being denied education, contrary to the constitutional guarantee of free and compulsory basic education. The petition also raised concerns about mismanagement of school funds and a lack of financial transparency. The High Court found that charging unapproved levies violated article 53(b) of the Constitution. It held that the right to basic education must be realized immediately, not progressively. The court ordered an audit of school accounts, prohibited unauthorized fees, and mandated financial transparency to ensure all children have equal access to education.

Reported by Teddy Musiga



Constitutional Law - *fundamental rights and freedoms – right to basic education – enforcement of the right to basic education – scope of the right to free and compulsory education – fees payable to access education - whether the charging of unauthorised levies leading in some instances to children leaving school was a violation of the right to education – Constitution of Kenya, 2010 article 53 (b)*

Brief facts

The petitioner sued on behalf of all parents and school children within Githunguri District in Kiambu County. Their major grievance before the court related to alleged malpractices, and the manner in which a number of schools within the District were being run. They many listed the malpractices and the major one was the charging of unapproved/ illegal fees in the public schools, the removal of children from schools for not paying fees and the lack of transparent/ accountable use of resources/ finances within the schools *inter alia*.

Issues

- i. What is the scope of the right to access free and compulsory education under article 53(b) of the constitution of Kenya, 2010?
- ii. Whether the charging of unauthorized levies leading in some instances to children leaving school was a violation of the right to education under article 53(b) of the Constitution of Kenya, 2010.
- iii. What is the scope of orders of prohibition and mandamus within the context of litigating disputes relating to violation or infringement of fundamental rights and freedoms?

Held

1. Article 53 of the Constitution of Kenya, 2010 provided that every child had a right to free and basic compulsory education. To give effect to that right, the Basic Education Act, No. 53 of 2013 was enacted and section 29(1) thereof provided that no public school could charge or cause any parent or guardian to pay tuition fees for or on behalf of any pupil in the school. However, other charges could be imposed at a public school with the approval of the Cabinet Secretary in consultation with the County Education Board provided that no child could be refused to attend school because of the failure to pay such charges.
2. The right to education was not merely an aspiration on the part of the state but indeed was an obligation. In that regard, article 26 of the Universal Declaration of Human Rights (UDHR) provided that everyone had the right to education and that right had to be free, at least in the elementary and fundamental stages and that elementary education had to be compulsory.
3. 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.
4. Education is one of the few rights for which it is universally agreed that the individual has a corresponding duty to exercise this right. While a child has the right to education, there is a corresponding compulsory duty on his/ her part to enjoy the right and that is why the right to education was both “free” and “compulsory”. States are under obligation in international law to enforce the attainment of that right. However, the inability of a parent to pay school fees or even extracurricular activities levy remains debatable as to how then the right to education can be enjoyed by the child.
5. The free school guarantee reflects the people’s judgment that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes



- no distinction between needy and non-needy families. Individual families, needy or not, may value education more or less depending upon conflicting budgetary priorities. Thus any fees payable is a breach of the right to free basic education. This finding is important in view of the proviso in section 29(2) of the Basic Education Act.
6. Categorization of students as “fee – paying” and “non – fee paying” is a degrading experience. Some students in the present petition had to leave school for failure to pay Ksh. 100/- activity fee was distressing to say the least. Empirical evidence strongly suggested that school fees are in fact not the primary financial obstacle to education. Rather, other education related costs such as transport, uniforms, food, books and stationary constituted for more serious barriers to access.
 7. Where an activity fund levy was saddled on to parents to pay and the said levy was admitted to be unlawful as was in the instant petition, therefore the right to free basic education under article 53(b) of the Constitution of Kenya, 2010 had been violated.
 8. The petitioner invoked the remedies of mandamus and prohibition by dint of article 23(3) of the Constitution as read with article 22 thereof which granted the instant court the jurisdiction to grant an appropriate relief including an order of judicial review in any proceedings where a person had claimed that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened with such breach or violation.
 9. Historically, the remedy of prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts. However, that remedy of prohibition as envisaged by articles 22(1) and 23(3)(f) was different from the above and was obviously granted to the instant court as a special jurisdiction to enforce the enjoyment of rights and fundamental rights. It is issued to restrain the offending party from either threatening the violation of such a right or fundamental freedom or restraining it from continuing such a violation.
 10. Mandamus on the other hand as known to traditional judicial review was defined as an order directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. However, within the context of articles 22(1) and 23(3)(f), it was a remedy that the instant court could issue to command a party to, for example, act and remedy the effects of a violation or breach of fundamental rights and to ensure that justice may be done in the circumstances.
 11. Since there was a clear and admitted breach of article 53(b) of the Constitution, the remedies sought were generally warranted save that in prayer (d) relating to procurement, there was no evidence on the issues of tendering and/or procurement and in any event, the order for an audit in prayer (b) could well unearth irregularities in the tendering and procurement in all the schools. Similarly, although there were some instances the activity fee levy was unprocedural, a blanket order to refund the same would be impractical and unrealistic and therefore prayer (j) could not be granted but, if in the cause of the audit of specific school accounts such a finding was made, then specific refunds could be ordered.
 12. The Petitioner pleaded alleged violations of articles 28, 35 and 47 of the Constitution. Those Articles relate to the rights to human dignity, right to information held by the State and right to fair, expeditious, efficient, lawful, reasonable and procedurally fair administrative action. With respect to the instant Petitioners however, nothing of substance was said in the Supporting Affidavit or submission to warrant the Court’s interrogation of the question whether those rights were violated and how. In any event, no specific remedy had been sought flowing from any alleged violation of those rights and it was obvious that the right to education was the focus of the entire Petition.
 13. In the implementation of the Constitution, 2010, many challenges will be faced. The Basic Education Act, 2013 was enacted with the clear intention that it will *inter alia* ensure the full enjoyment of the right under article 53(b) of the Constitution. The Government of Kenya has also created the Free Basic Education Fund and put aside billions of shillings to actualise the same right. How then can those charged with the duty of implementing the Act be the barrier to innocent children benefitting from



the enjoyment of the right to free education? “Free” means “free” and not subject to attendant costs in the name of activity fund, building fund, lunch and transport costs, etc. It is not surprising for example that in Githunguri Township Primary School these extra-curricular activity costs and specifically “*the lunch programme*” was estimated in 2013 to cost Kshs.12 Million all to be paid by parents. How can that be the case when fees are not supposed to be paid but parents still labour to raise that kind of money? It was therefore easy to understand why at Giiko Primary School, some students left school for inability to pay those extra costs riding on the free education programme.

14. The right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society where we live with great wealth disparities and million wallowing in abject poverty, only education can give everyone the chance and opportunity to realise their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition.

1.

Petition allowed.

Orders

1. *A declaration was issued that the actions of the Respondents infringed on the rights of the Children attending school in public schools within Githunguri to access free and compulsory basic education.*
2. *An order of mandamus was issued to compel the 1st Respondents to order an audit of the accounts of the following schools; Kahunira; Githunguri; Kanjai; Githiga; Njenga; Matuguta; Miiri; Gathanje; Ciiko; Ikinu; Kimondo; Ngemwa; Lioki; Karia; Miguta; Kiaibabu and Githioro.*
3. *An order of mandamus was issued to compel the 6th Respondent to disclose to the signatories of A/C No. 0930XXXXXX45 and to provide a statement on all the withdrawals and a proper account on the use of the funds withdrawn from the account.*
4. *An order of prohibition was issued restraining the 6th Respondent from imposing any unapproved activity fees.*
5. *Should it have been found during the audit in (b) above that specific unlawful fees were levied, then the 1st Respondent was at liberty to order a refund to affected parents.*
6. *Each party were to bear their own costs.*

Citations

East Africa

1. *Anarita Karimi Njeru v Republic* (1976-1980) 1 KLR 1272 – (Mentioned)

Nigeria

1. *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/07/10, Judgment of 6th December 2010 – (Followed)

United States of America

1. *Hartzell v Conne*, 679 P2d 35 (Cal 1968); 201 Cal Rptr 601; 679 P2d 35

– (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 22(1); 23(3) (f); 28; 35; 47; 53(b); 260 – (Interpreted)
2. Basic Education Act, 2013 (Act No 53 of 2013) section 29(1) (2) (b) – (Interpreted)
3. Education Act, (cap 211) Repealed section 33(14) – (Interpreted)

Texts & Journals

1. Hogg, QM, (Lord Hailsham) *et al* (Eds) (1987) *Halsbury's Laws of England* London: LexisNexisButterworths 4th Edn. Vol 1 p 268



International Instruments

1. Universal Declaration of Human Rights (UDCHR) 1948 article 26
2. UNESCO Convention Against Discrimination in Education (CDE) 1960
3. International Covenant on Social, Economic and Cultural Rights (ICESCR) 1966
4. Convention on the Rights of the Child (CRC) 1989

JUDGMENT

Introduction

1. The issue of education and the manner in which the right to it should be enjoyed in our constitutional re-birth is very close to many a Kenyan's hearts. The Petitioners like other Kenyans, are very concerned at the way primary school education is being undertaken more so when there is a stated and celebrated governmental policy that basic education shall be free.
2. In the Petition therefore they have pleaded that they are an association of parents residing within Githunguri District in Kiambu County ("the District") and have come to Court on their own behalf and on behalf of all parents and school children within the said District.

Petitioner's case

3. The case for the Petitioner is set out in the Petition aforesaid, the Supporting Affidavit and Supplementary Affidavit of Paul Kamau Mwangi, sworn on 23rd September 2013 and 4th March 2014, respectively together with annexures, and Submissions filed on 7th March 2014. The principal complaint relates to alleged malpractices, and the manner in which the affairs of a number of schools within the District are being run. They have listed the malpractices as being;
 - (a) Boards of Governors election malpractices.
 - (b) Charging of unapproved/illegal fees in the public schools.
 - (c) Removal of children from schools for not paying ... fees e.g., the sending away of El Shaddai Hope Centre for Orphans from Githunguri Primary School for allegedly failing to pay school fees.
 - (d) Lack of transparent/accountable use of resources/finances within the schools.
 - (e) Nepotism.
 - (f) Illegal and corrupt tendering processes.
 - (g) Receiving of unauthorized money for use of school grounds.
 - (h) Disappearance of school resources such as books, chairs, fertilizers etc.
 - (i) Fraudulent receipt of money from parents under the pretext of college allocation.
 - (j) The closure of El Shaddai Hope Centre for Orphans and destitute children.
 - (k) The issue of temporary permits by the District Development Committee to allow bars to operate off hours.



(l) The issue of permits to bars within one hundred (100) metres of schools contrary to the law among others.”

4. It is their further case that although all the above matters were brought to the attention of the District Education Board, no remedial action was taken and they therefore sought the assistance of the Commission on Administrative Justice. Upon the intervention of that Commission, a report was prepared by the office of the 1st Respondent where an admission was made as to the allegations made by the Petitioner’s but nothing was done regarding the recommendations in the said report hence the present Petition.
5. In addition, the Petitioner has argued that the 1st Respondent has not taken firm steps to root out the alleged rot in the named schools and also failed to ensure that the right to free and compulsory basic education is realized for all school going children in the District.
6. As to alleged violations of the Constitution, the Petitioners pleaded as follows;

Violation of Article 53 of the Constitution

The 1st Respondent’s failure to take firm action against the Heads of Schools in Githunguri District, District Development Committees despite investigations confirming the malpractices complained by the Petitioners contravenes the Principles of good governance, integrity, transparency and accountability.

Violation of Article 53 of the Constitution

The 1st Respondents failure to issue firm and categorical directives to the relevant school heads after investigations revealed that;

- (a) Illegal/unapproved fees was being levied;
- (b) There was exclusion from Githunguri and Ciiko Primary Schools of pupils who could not raise the illegal/unapproved fees;
- (c) There were rampant malpractices in the appointment of Board of Governors and School Management Committees for instance in Kanjai, Ngemwa and Ikinu Primary Schools;
- (d) There was misuse and diversion of school resources and failure to properly account for the said resources. This affected A.K. Magugu Primary School that had incomplete audit and theft cases leading to loss of instructional materials.
- (e) There was lack of competitive bidding for suppliers in the majority of the schools, evaluation processes were flouted and the head teachers had a final say on who should be awarded tenders to supply instructional and other materials;

Contravenes the right of all the pupils learning in these institutions to free and compulsory educations as follows;

- (a) Some of the pupils have been excluded from the schools hence directly hampering their realisation of this right. Cases on point here are the exclusion of orphans from El Shaddai Children’s Centre for allegedly failing to raise unlawful levies imposed by the school and thirty two (32) pupils sent home from



Ikinu Williams Secondary School for failing to raise funds for a walk that was scheduled for 1st June 2013.

- (b) The corrupt/unlawful dealings in the schools ultimately have an impact on the quality of education offered in these schools hence infringing on the right of these pupils to access free and quality education;
- (c) The failure for instance, in Githunguri Township Primary School to have a BOG in place since 2011 has largely contributed to the mismanagement of the School thus affecting the day to day learning in the institution and ultimately affecting the quality of education in the school.
- (d) The opening of Paradise Bar by the District Commissioner, Githunguri on 24th November 2012 within less than 20 metres from Grather Academy School in Githunguri contrary to the provisions of the Alcoholic Drinks Control Act, 2010 infringes the right to access education for the pupils attending this school as well as their safety and well being.
- (e) The issue of temporary permits to bar owners within Githunguri to operate off hours hampers on the residents rights to a safe and secure as well as the right of the children living in the area. (sic)

Violation of Article 28 of the Constitution

The Respondents' actions and omissions enumerated above are a violation of the Petitioners' and the affected childrens' right to human dignity.

Violation of Article 35 of the Constitution

The Respondents' action of deliberately refusing/ ignoring/neglecting to give requisite information relating to the running of the schools and investigating complaints raised necessitating the involvement of the Commission on Administrative Justice is a violation of the Petitioners' right to information as the information is required for enforcement of the Fundamental Rights and Freedoms of the Petitioner.

Violation of Article 47 of the Constitution

The Respondents' actions of failing to investigate and take firm and definitive remedial action is a violation of the Petitioners' right to fair, expeditious, efficient, lawful, reasonable and procedurally fair administrative action.”

7. For the above reasons, the Petitioners now seek the following orders;

- (a) A declaration that the actions of the Respondent infringe on the rights of the Children attending school in public schools within Githunguri to access free and compulsory basic education.
- (b) An order of mandamus to compel the 1st Respondents to order an audit of the accounts of the following schools; Kahunira; Githunguri; Kanjai; Githiga;



Njenga; Matuguta; Miiri; Gathanje; Ciiko; Ikinu; Kimondo; Ngemwa; Lioki; Karia; Miguta; Kiaibabu and Githioro.

- (c) An order of mandamus to compel the 6th Respondent to disclose the signatories of A/C No.0930XXXXXX45 and to provide a statement on all the withdrawals and a proper account on the use of the funds withdrawn from the account.
- (d) An order of mandamus to compel the 1st Respondent to investigate the malpractices relating to procurement and take disciplinary action against the teachers and other officers involved.
- (e) An order of mandamus compelling the 6th Respondent to refund all tuition/ activity levy that was unprocedurally and unlawfully imposed on and collected from all pupils in the district.
- (f) An order of prohibition restraining the 6th Respondent from imposing any unapproved activity fees.
- (g) Any other relief that this Court may deem fit and just do grant ...”

1st, 2nd and 6th Respondents’ Case

8. The above named Respondents responded to the Petition by a Replying Affidavit and a Supplementary Replying Affidavit, sworn on 31st January 2014 by Dr. Belio Kipsang, Principal Secretary, Ministry of Education.
9. It is their case that they are not aware of any association by the name Githunguri Residents Association and they never received any complaint from that entity other than the information contained in the Ombudsman’s letter dated 30th August 2012.
10. In any event, that contrary to the assertions by the Petitioners, the performance of schools within Githunguri District has been improving continuously between the years 2008 and 2012 with the district mean score rising from 232.15 – 243.03 – 256.43 – 256.48 – 269.86 over those 5 years
11. On the alleged expulsion of students for non-payment of school fees, they deny that there were such expulsions and challenged the Petitioners to point out which pupil(s) and from which schools(s) such expulsions were undertaken. They admitted however that a parent removed his children, Samuel Njuguna and Catherine Wanjiru, from Githunguri Primary School on his own volition.
12. Regarding Githunguri Township Primary School, the 1st, 2nd and 6th Respondents contend that being a boarding school and due to its performance, it was authorized by the District Education Board to levy fees under Section 33(14) of the Education Act, Cap.211 (since repealed).
13. On financial records for schools within the District, it is their case that only Kanjai Primary School, Ngemwa Primary School, Ikinu Primary School and A. K. Magugu Primary School had failed to table their financial reports to their respective School Management Committees and action had been taken by the District Education Officer vide his letters of 30th July 2013 to the named schools.
14. On alleged nepotism, they deny that the practice existed and they demanded proof of the same from the Petitioners. The same denial was made of claims of corruption, illegal tendering processes and unauthorized and unapproved use of school monies.
15. They also deny that school facilitates were broken into and certain items stolen there from save that a theft was recorded at Ngemwa Primary School and that the police were dealing with that matter.



16. On the allegation that a certain primary school also has a college and that parents of that school were being asked to contribute money for the said college, they contend that no such college exists and the allegation made in that regard is unfounded.
17. It is their further case that indeed El Shadai Hope Centre, a Childrens' Home and not a school, was closed on health grounds by the District Public Health Office and not the District Education Officer as alleged by the Petitioners.
18. In addition to the above, in the Further Replying Affidavit sworn on 4th April 2014, Dr. Kipsang aforesaid stated firstly that, after El Shaddai Hope Centre was shut and students sent away, only six students were left behind to complete their KCPE Examinations. Secondly, that the District Education Officer was empowered by law to authorize the levying of fees to assist in running a particular school and the Petitioners' main complaint that the fees charged was exorbitant had no basis whatsoever.
19. In conclusion, the 1st, 2nd and 6th Respondents deny that there was any constitutional question raised in the Petition and declared the Petitioner Association a busy body which has bought forth disjointed issues with no clarity at all. That the Petition therefore ought to be dismissed with costs.

Case for the 3rd, 4th and 5th Respondents

20. From the record, the above parties did not participate in the proceedings at all and so their responses(s) to the issues raised in the Petition is unknown.

Determination

21. Having summarized the positions taken by each of the main protagonists to this dispute, I am of the view that the following are the issues arising for determination;
 - (i) Whether the Respondents actions have infringed on the rights of children attending public schools within Githunguri to access free and compulsory education under Article 53(b) of the Constitution.
 - (ii) Whether as a consequence of findings in (i) above, orders of mandamus and prohibition should issue as prayed.
 - (iii) Whether any other relief is appropriate in the circumstances of the Petition before me.

In distilling the above issues, I have deliberately disregarded any need to address the issue of locus standi raised by the 1st, 2nd and 6th Respondents as the issue is moot in view of the definition of "person" in Article 260 of the Constitution. The Petitioner is in any event properly before this Court.

Whether the Respondents have breached the Right of access to Free and Basic Education

22. Article 53(b) of the Constitution provides as follows;
 - (1) Every child has the right -
 - (a) ...
 - (b) to free and compulsory basic education;



23. To give effect to the above right, the Basic Education Act, No.53 of 2013 was enacted and in Section 29(1), 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) ...”
24. It is important to state that Section 29(2)(b) of the Act creates a proviso to the effect that;
- (2) Notwithstanding subsection (1) –
 - (a) ...
 - (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”
25. In that context, the complaint by the Petitioner is that the management of public schools in Githunguri have continued to act unlawfully by charging unapproved and illegal fees. That pupils who were unable to raise such fees were excluded from learning and further, that there are a number of other issues raised including corruption, nepotism, irregular tendering, and operation of bars near schools which malpractices have allegedly affected the enjoyment of the right to education.
26. In answer, the 1st, 2nd and 6th Respondents have denied all the above allegations and have argued that the Basic Education Act, 2013 does not apply retrospectively and that the levies and fees charged by the District Education Board were lawfully charged under the Education Act, Cap.211 which was later repealed. In any event, that only two children, Catherine Wairimu and Faith Wambui were removed from school, voluntarily, by their father and that the allegation that 75 pupils were excluded from learning is untrue. Further, that all the allegations of nepotism, corruption, irregular tendering, or that bars have been allowed to operate within proximity of schools are similarly untrue.
27. I should begin by demonstrating that the right to education is not merely an aspiration on the part of the State but is indeed an obligation. In that regard, Article 26 of the Universal Declaration of Human Rights (UDCHR) provides that “everyone has the right to education” and that “education shall be free, at least in the elementary and fundamental stages”. It adds that “elementary education shall be compulsory”.
28. The UNESCO Convention Against Discrimination in Education (CDE) requires that State Parties should “promote equality of opportunity and treatment in the matter of education and in particular to make primary education compulsory and free”.
29. The International Covenant on Social, Economic and Cultural Rights (ICESCR) obligates State Parties to take steps to ensure that primary education is compulsory and free while Secondary education should be “generally available and accessible.” The same language is used in the Convention on the Rights of the Child (CRC) and the above background is important in understanding Article 53(b) of the Constitution which is borne of the international principles set out in the cited Declarations and Conventions.
30. Why is education such an important right? In Constitutional Law of South Africa/Commentary /Part 11, <http://products.jutaland.co.za>, Ste Woolman and Michael Bishop quoted the opening lines of the



Committee on Social, Economic and Cultural Rights' General Comment on the Right to Education to make the point that education is empowerment. The Committee stated thus;

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.”

31. I agree with the above sentiments and turning back to the Petition before me, I should begin by restating the oft-quoted statement that a party pleading breach of fundamental rights must do so with a measure of particularity and the manner in which the particular right has been violated – See Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272. The reason for this expectation of the law is that orders cannot be issued in a vacuum but tangibly so, to an existing situation, with facts leading to the conclusion of a violation.
32. I have elsewhere above reproduced, verbatim, the alleged malpractices forming the alleged facts relied upon to seek a finding that Article 53(b) and others have been violated. In his Affidavit, Paul Kamau Mwangi annexed the following documents;
 - (i) A document titled, “Githunguri Residents Complains” (sic)” which contains certain names, identity card numbers and signatures.
 - (ii) The school fees’ structure for Githunguri Township Primary School showing the fees payable for boarders and day scholars for the year 2013. Together with it is the School’s lunch programme showing the budget for the same as well as the budget for medical and administrative expenses.
 - (iii) Letter dated 21st February 2013 from the Office of the Ombudsman to the Acting Permanent Secretary, Ministry of Education on “complaint regarding tuition payment and overcharging of activities’ fees by Schools in the Githunguri District”
 - (iv) Letter dated 5th June 2013 form Prof. Godia, Permanent Secretary, Ministry of Education to the Office of Ombudsman. In that letter, he stated as follows;

Ref. No. MOE/G162/15/1(46) 5thJune, 2013

Dr. Regina Mwatha, MBS

Vice-Chair Person,

The Commission on Administrative Justice,

Office of the Ombudsman,

Office of the Deputy President,

NAIROBI.

Dear Dr,



RE: Complaint Regarding Tuition Payment and Overcharging of Activities Fees by Schools In Githunguri District

We are in receipt of your letter Ref. NO.CAS/M.EDU/013319/2012-SAK dated 21st February 2013. It has since been established that indeed the activity levy being charged was Kenya Shillings One Hundred only (Kshs.100/-). The money had been approved by the District Education Board against the normal procedure that any extra levies charged should have the approval and consent of the Accounting Officer.

All charges are paid to the school and co-curricular fees are remitted to DEB for use in the running of the activities. It appears that the approval was not sought. The District Education office has therefore, been directed to follow the right procedure to avoid confrontation on the issue of fees in the dispensation of free and compulsory basic education.

The delay in replying to you concerns was not intentional and is highly regretted.

Yours sincerely

SIGNED

PROF. GEORGE I. GODIA, CBS

PERMANENT SECRETARY.”

- (v) Letter dated 6th June 2012 by the Githunguri District Education Officer to all Head Teachers in the District informing them of the decision of the District Education Board reached at a meeting held on 5th June 2012, that for the year 2012, an activity fund levy of Kshs.100/- was to be charged and Kshs.220/- for the year 2013 was also to be charged. Payments were to be made to the Githunguri District Education Board Account No.0930XXXXXX45, Equity Bank, Githunguri Branch.
- (vi) Letter dated 18th June 2013 from the Office of the Ombudsman to Prof. Godia raising all the other issues forming the subject of this Petition and which I have reproduced above including alleged nepotism, corruption and irregular tendering.
- (vii) Letter dated 2nd August 2013 from one, Margaret Okemo, writing on behalf of the Permanent Secretary, Ministry of Education, Science and Technology. She stated partly as follows;

Kindly find attached the MOE earlier report on this case (Appendix 1) and current DEO's report on this matter (Appendix 2)

From the above cited documents the issues raised by the complainant have been addressed and appropriate warnings given to head teachers concerned.

In view of the changes in the Management of Education as per the Basic Education Act 2013, it will be mandatory for all schools to have Boards of Management. Levies on tuition have been outlawed and any other levies will require to be approved by the Cabinet Secretary in consultation with the County Education Board.”

I will revert to the contents of the Report by the District Education Officer shortly.

- (viii) Letter dated 14th August 2013 from the office of the Ombudsman to the Principal Secretary, Ministry of Education wherein the Ombudsman wrote as follows;

Our Ref: CAJ/M.EDU/013/319/2012-SAK



Your Ref: MOE/G162/15/1(46)

14th August, 2013

Principal Secretary,

Ministry of Education,

Jogoo House "B" Harambee Avenue,

PO Box 30040-00100,

Nairobi.

ATTN: Mrs. Margret O. Okemo

RE: Complaint Regarding Tuition Payment, and Overcharging of Activities Fees by School In The Githunguri District

Kindly receive warmest compliments from the Commission on Administrative Justice.

We acknowledge receipt of your letter dated 2nd August 2013 and the enclosures therein, contents whereof we noted and forwarded to the complainant.

We appreciate the substantive and detailed reports on the matters but note that it would have been prudent to interview the complainant or their representatives to enable you to get a clear position of the Parents on this matter.

Furthermore, we would like it to be considered that these matters had been forwarded to District Education Officer and no substantive response was received on the same, prompting the complainant to lodge a complaint with the commission.

Nonetheless, we appreciate the effort put by the District Education Officer in investigating this particular inquiry. The Commission expects that there will be compliance with the Ministry of Education's rules throughout the District and insists the various recommendations both implemented and adhered to.

We pay particular attention to the following;

1. The children who were chased away from some of the schools for non-payment of the unauthorized levies.
2. The misuse and non-accountability of the utilization of public funds.
3. The loss/theft of school materials should be duly investigated by the police and adequate security measures instituted to ensure the loss does not happen again.
4. Ensure strict adherence to the public procurement requirement especially the Public Procurement and Disposal Act of 2005 and its attendant Regulations of 2006

Therefore, barring any consequential issues as may be raised by the complainant, we shall proceed to mark this particular inquiry as closed.

We assure you of our highest considerations and continued cooperation.

Yours sincerely,



Signed

Dr. Regina Mwatha, MBS

Vice-Chair Person

cc. Githunguri District Students and Teacher c/o Paul Kamau Mwangi

PO B ox 1450

Kiambu.

(Kindly find the letter of 2nd August 2013 and the substantive reports therein attached for your comments)”

33. From the above, documents, certain facts cannot be contested and they are firstly, that although by its decision of 5th June 2012 the Githunguri District Education Board instructed “all Head Teachers, Githunguri District” to levy an activity fund for 2012 and 2013, the Ministry of Education (sued through its Cabinet Secretary, the 1st Respondent) admitted that the said levy was done “against the normal procedure” and that the District Education office had been directed ”to follow the right procedure to avoid confrontation on the issue of fees in the dispensation of free and compulsory education.”
34. Secondly, in the “Report on alleged tuition payment and overcharging Activity Fees by Schools in Githunguri District”, all the complaints raised in this Petition were detailed out at page 1 thereof and at page 3 the following is recorded;

- It was evident that most of the listed complains were arising from one human rights activist and the Director of El Shaddai Children’s Home.
- El Shaddai Children’s Home was closed for not meeting public health and hygiene standards.
- There were no individual schools’ audit reports. However, standards assessment of the schools was carried out on 5-12-2012.
- Some allegations were too general and required more time to establish facts.
- There was a sharp decline in pupils’ enrolment in Githiga Primary School. Enrolment has dropped from 1088 in 2008 to 702 in 2012.
- None of the schools had facility/ground for hire to the outsiders.
- There was no evidence of payment of money for applicants to secure vacancies in colleges.
- Some school charged levies for interviews, report books, watchman and examinations/evaluation and development. Levies had made some children drop out of some schools e.g. Ciiko Primary School.

Conclusion

Based on the findings and observations made, it was concluded that there were aspects of mismanagement of school resources in the schools mentioned.

It is also apparent that schools were overcharging activity fee and other levies.

Recommendation



- Further investigation by the DEO should be carried out to ascertain the facts about collection of unauthorised levies by school administration and management.
 - There should be thorough audit of the individually mentioned schools' accounts.
 - The process of nomination and appointment of the BOG for Githunguri township should be hastened to allow it to be managed legally.
 - Schools should cease charging extra levies unless such levies are approved by the Ministry upon recommendation by the D.E.B.”
35. Thirdly, the office of the Ombudsman, upon interrogating all the complaints placed before it, concluded that “barring any consequential issues as may be raised by the complainant; [that office] shall proceed to mark this particular inquiry as closed”
36. With the above facts in place and noting the evidence placed before me, it follows that the substantive complaint which I should interrogate in this Petition is the charging/overcharging of activity fees. In saying so, the following complaints were merely pleaded but evidence was neither tendered in proof thereof, nor were submissions made on the same;
- (i) Election malpractices in Boards of Governors.
 - (ii) Nepotism,
 - (iii) Illegal and corrupt tendering processes,
 - (iv) Receipt of unauthorized money for use of school grounds,
 - (v) Disappearance of school resources such as books, chairs fertilizers etc,
 - (vi) The issuance of temporary permits by the District Development Committee to allow bars to operate outside the licenced hours.
 - (vii) The issue of permits to bars within one hundred (100) metres of schools contrary to the law.
37. As regards, El Shaddai Hope Centre for Orphans and destitute children, I am satisfied with the explanation given by the 1st, 2nd and 6th Respondents that it was closed for health reasons and I see nothing unconstitutional about that action which was in any event taken in the wider interests of the children resident there.
38. It is also my conclusion that the above complaints were vague, generalized and cannot be the basis of any finding of a violation of the Constitution.
39. Having so said however, in the Report aforesaid, it was admitted that “levies had made some children drop out of some schools” e.g. Ciiko Primary School. Earlier, I indicated that there was also an admission that in fact the levy itself was unprocedural and therefore unlawful.
40. It was also further admitted that “there were aspects of mismanagement of school resources in the schools mentioned”, hence the recommendation that “there should be a thorough audit of the individual mentioned school’s accounts.”
41. The above conclusions would then lead me to the question whether the charging of unauthorized levies leading in some instances to children leaving school is a violation of the right to education under Article 53(b) of the Constitution.



42. By now the answer to that question must be obvious. In Economic, Social and Cultural Rights, Ed. Asbjorn Eide, Catarina Kaue and Allan Risas, the author of Chapter 14, in that book, Manfred Novak, stated as follows;

Education is one of the few human rights for which it is universally agreed that the individual has a corresponding duty to exercise this right.”

43. This statement is important because while a child has the right to education, there is a corresponding compulsory duty on his/her part to enjoy the right and that is why elsewhere above, I indicated that in Article 53(b) of the Constitution the right to basic education is both “free” and “compulsory”. I also indicated that States are under an obligation in international law to enforce the attainment of this right. Inability of a parent to pay school fees or even extra-curricular activities levy has dominated the debate as to how then the right to education can be enjoyed by a child. In *Hartzell vs Connel*, 679 P2d 35 (Cal 1984), for example, the Court held that;

The free school guarantee reflects the people’s judgment that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and non-needy families. Individual families, needy or not, may value education more or less depending upon conflicting budgetary priorities.”

44. In the above case, the issue was whether a fee waiver policy for children who were unable to pay extra-curricular activity fee was lawful and the Court still held that with or without the fee waiver, any fees payable is a breach of the right to free basic education. That finding is important in view of the proviso in Section 29(2) of the Basic Education Act, 2013.

45. In fact, Bird CJ in *Hartzell* (supra) found that the stigmatization that flows from categorising students as “fee-paying” and “non-fee paying” and the learned Judge went further and both the waiver procedure and its outcome as “a degrading experience”. In the present Petition, that some students at Ciiko Primary School had to leave school for failure to pay Kshs.100/- activity fee is distressing to say the least, if looked at within the context of the constitutional guarantee to free basic education. *Sti Woolman* and *Michael Bishop* (supra) indeed stated that in South Africa, “the empirical evidence strongly suggests that school fees are in fact not the primary financial obstacle to education. Rather, other education – related costs – transport, uniforms, food, books and stationary, constitute for more serious barriers to access”

46. The above statements apply squarely to Kenya as it does to South African and although not raised in this Petition, it is very easy for the Respondents to argue that cost-sharing is important because the Government does not have sufficient funds for the free primary education programme. An even more ridiculous argument was made by the Government of Nigeria in *SERAC vs Federal Republic of Nigeria* and *Universal Basic Education Commission ECW/CCJ/APP/07/10*, Judgment of 6th December 2010. It argued that because of corruption, funds destined for basic and primary education were no longer available and as a result it was not able to meet its obligations. The ECOWAS Court in dismissing that defence held that a right to primary education is universal and not subject to any resource limitations and ordered Nigeria to rectify that unlawful action.

47. From what I have said above, the only logical conclusion I can reach is that where an activity fund levy is saddled on to parents in Githunguri District and the said levy is admitted to be unlawful, then the right to free basic education under Article 53(b) of the Constitution, has been violated.



Whether orders of mandamus and Prohibition should issue

48. Prayers (b), (c), (d), (e) and (f) relate to orders of Mandamus directed at the 1st and 6th Respondents to;
- (i) Order an audit of the accounts of certain named schools.
 - (ii) Disclose the signatories of Account No.093029497035 and to provide a statement on all withdrawals and a proper account on the use of the funds withdrawn from the account.
 - (iii) Investigate the malpractices relating to procurement and take disciplinary measures against the teachers and other officers involved.
 - (iv) Refund all tuition/activity levy that was unprocedurally and unlawfully imposed on and collected from all pupils in Githunguri District.

Prayer (g) on the other hand relates orders of prohibition to restrain the 6th Respondent from imposing any unapproved activity fee.

49. The remedies of mandamus and prohibition have been invoked by the Petitioner by dint of Article 23(3) of the Constitution as read with Article 22 thereof which grants this Court the jurisdiction to grant “an appropriate relief including – an order of Judicial review” in any proceedings where a person has claimed “that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed,” or is threatened with such breach or violation.

50. The traditional meaning of prohibition was captured in Halsbury’s Laws of England 4th Edition Vol.1 page 268 as follows;

Historically, Prohibition was a writ whereby the royal Courts of common law prohibited other Courts from entertaining matters falling within the exclusive jurisdiction of the common law Courts”

51. The remedy of prohibition envisaged by Articles 22(1) and 23(3) (f) is different from the above and was obviously granted to this Court as a special jurisdiction to enforce the enjoyment of rights and fundamental rights. As I understand it therefore, it is issued to restrain the offending party from either threatening the violation of such a right or fundamental freedom or restraining it from continuing such a violation.

52. Mandamus on the other hand as known to traditional judicial review comes from the latin word, “mandare”, meaning “we command.” In Halsbury’s Laws of England (supra), it is defined as an order;

... directed to inferior Courts and tribunals, and to public officers and bodies, to order the performance of a public duty.”

53. Again, in the context of Articles 22(1) and 23(3)(f) it is a remedy that this Court can issue to command a party to, for example, act and remedy the effects of a violation or breach of fundamental rights and to ensure that justice may be done in the circumstances.

54. It is clear that noting my finding that there was in the circumstances of this Petition a clear and admitted breach of Article 53(b) of the Constitution, the remedies sought are generally warranted save that in prayer (d) relating to procurement, I saw no evidence on the issues of tendering and/or procurement and in any event, the order for an audit in prayer (b) may well unearth irregularities in the tendering and procurement in all the schools. Similarly, although I have found that in some instances the activity fee levy was unprocedural, a blanket order to refund the same would be impractical and unrealistic and



therefore prayer (j) shall not be granted but, if in the cause of the audit of specific school accounts such a finding is made, then specific refunds may be ordered.

Whether any other relief is appropriate in the circumstances

55. The Petitioner pleaded alleged violations of Articles 28, 35 and 47 of the Constitution. Those Articles relate to the rights to human dignity, right to information held by the State and right to fair, expeditious, efficient, lawful, reasonable and procedurally fair administrative action. With respect to the Petitioners however, nothing of substance was said in the Supporting Affidavit or submission to warrant this Court's interrogation of the question whether those rights were violated and how.
56. In any event, no specific remedy has been sought flowing from any alleged violation of those rights and it was obvious to me that the right to education was the focus of the entire Petition.

Conclusion

57. In the implementation of the Constitution 2010, many challenges will be faced. Old habits, they say, die hard. The Basic Education Act, 2013 was enacted with the clear intention that it will inter alia ensure the full enjoyment of the right under Article 53(b) of the Constitution. The Government of Kenya has also created the Free Basic Education Fund and put aside billions of shillings to actualise the same right. How then can those charged with the duty of implementing the Act be the barrier to innocent children benefitting from the enjoyment of the right to free education? "Free" means "free" and not subject to attendant costs in the name of activity fund, building fund, lunch and transport costs, etc. it is not surprising for example that in Githunguri Township Primary School these extra-curricular activity costs and specifically "the lunch programme" was estimated in 2013 to cost Kshs.12 Million all to be paid by parents. How can that be the case when fees are not supposed to be paid but parents still labour to raise that kind of money?

It is now easy to understand why at Giiko Primary School, some students left school for inability to pay these extra costs riding on the free education programme.

58. It is therefore the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society where we live with great wealth disparities and million wallowing in abject poverty, only education can give everyone the chance and opportunity to realise their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition.

Final orders

59. Having held as I have done, the final orders to be made are as follows;
- (a) A declaration is hereby issued that the actions of the Respondents infringe on the rights of the Children attending school in public schools within Githunguri to access free and compulsory basic education.
- (b) An order of mandamus is hereby issued to compel the 1st Respondents to order an audit of the accounts of the following schools; Kahunira; Githunguri; Kanjai; Githiga; Njenga; Matuguta; Miiri; Gathanje; Ciiko; Ikinu; Kimondo; Ngemwa; Lioki; Karia; Miguta; Kiaibabu and Githioro.



- (c) An order of mandamus is hereby issued to compel the 6th Respondent to disclose to the signatories of A/C No.0930XXXXXX45 and to provide a statement on all the withdrawals and a proper account on the use of the funds withdrawn from the account.
- (d) An order of prohibition is hereby issued restraining the 6th Respondent from imposing any unapproved activity fees.
- (f) Should it be found during the audit in (b) above that specific unlawful fees were levied, then the 1st Respondent is at liberty to order a refund to affected parents.

60. As to costs, the Petition was filed in public interest and therefore let each party bear its own costs.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY, 2015.

ISAAC LENAOLA

JUDGE

In the presence:

Miron – Court clerk

No appearance for Parties

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

29/5/2015

