



**IK (Suing Through His Guardian & Next Friend EKW) & another v Principal M Academy & another (Petition 13 of 2015) [2015] KEHC 514 (KLR) (18 September 2015) (Ruling)**

*I.K & another v Principal M Academy & another [2015] eKLR*

Neutral citation: [2015] KEHC 514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PETITION 13 OF 2015  
MN MWANGI, J  
SEPTEMBER 18, 2015**

**BETWEEN**

**IK (SUING THROUGH HIS GUARDIAN & NEXT FRIEND  
EKW ) ..... 1<sup>ST</sup> APPLICANT**

**MK (SUING THRO' HER GUARDIAN & NEXT FRIEND  
EKW) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PRINCIPAL M ACADEMY ..... 1<sup>ST</sup> RESPONDENT**

**M ACADEMY ..... 2<sup>ND</sup> RESPONDENT**

**Pegging non payment of school fees of one child with others who have fully paid is discriminatory**

*The case involved children of the same family who had been chased away from school on account of non-payment of school fees. The court held that the school did not have legal authority to chase away students whose fees had been paid in full on the basis that school fees for other children in the same family had not been paid in full.*

Reported by Teddy Musiga

**Constitutional Law** – fundamental rights and freedom – right to education – whether sending away children in a private school for non-payment of school fees is a violation of their right to education – Constitution of Kenya, article 43.

**Brief facts**

The petitioner brought the instant petition seeking a declaration that the pegging of non-payment of fees balance of BK and S to the Petitioners (IK and MK) being in school was unconstitutional and violated the petitioners right to education. He also sought an order of permanent injunction directed against the respondents banning them from sending the petitioners away as long as fees was paid in full and they abode by the school rules and regulations.



## Issues

- i. Whether a father to minors requires their consent to be enjoined as a guardian and next friend before instituting a suit on their behalf.
- ii. Whether sending away children in a private school for non-payment of school fees is a violation of their right to education.
- iii. Whether pegging of non-payment of school fees of one child with others who have fully paid is discriminatory.

## Held

1. The next friend (Mr. W) was empowered to file a constitutional petition on behalf of his children under article 258(2) (a) of the Constitution of Kenya, 2010 that provided that a person could institute a case in court acting on behalf of another person who could not act on their own behalf.
2. The right to education under article 43(1) (f) of the Constitution of Kenya, 2010 was not absolute when a parent took his child to learn in a private school which was managed through the school fees paid for the students. Such an institution could not run effectively if parents did not meet their parental obligations of paying school fees for their children.
3. On the other hand, the respondents in the instant matter did not have legal authority to chase away students whose fees had been paid in full on the basis that school fees for other children in the same family had not been paid in full.

*Petition allowed.*

## Citations

### Cases

*Giella v Cassman Brown* ([1973] EA 358) — (Followed)

### Statutes

1. Constitution of Kenya, 2010 — 2,20(1);21;22(2)(a)(3);23;27;43(1)(f); 159(2)(d);162(2); 165(3) (b);258(1)(2)(a) — (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution Sub Leg) rules 4(2); 6 – (Interpreted)

## Advocates

*Mr. Situma*

*Mr. Musieka*

## RULING

1. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners have through their guardian and next friend, EKW (Mr W) petitioned this court under the Constitution of Kenya and the Children's Act for the orders prayed in the petition dated September 7, 2015.
2. The parties were heard interpartes on 11/9/2015 after this court certified the notice of motion dated September 4, 2015 and the petition dated September 7, 2015 as urgent.

Mr Situma learned counsel for the petitioners submitted that the prayers the petitioners are seeking are for:-

- (i) A declaration that pegging of non payment of fees balance of B K and S to the petitioners being in school is unconstitutional and violates the petitioners' right to education.



- (ii) An order of permanent injunction directed against the respondents banning them from sending the petitioners away as long as fees is paid in full and they abide by the school rules and regulations.
3. Mr. Situma submitted that the 1<sup>st</sup> petitioner is a fourth form student and the 2<sup>nd</sup> petitioner a form two student at M Academy, the 2<sup>nd</sup> respondent. He submitted that as of 11/9/2015, school fees had been paid in full for the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The said petitioners were sent away from school on 2/9/2015. He submitted that two other biological children of Mr E W K are in fees arrears, ie B in Standard 7 and S in Standard 4. Mr Situma submitted that their fees arrears cannot be pegged to that of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein.
  4. It was Mr Situma's submission that failure to have them in class after paying fees goes against the school's regulations and the Children's Act on the right to education. He also submitted that at this stage the children should be allowed to go back to class since as per the petitioners' parents records, there is no fees balance.
  5. Mr Musieka, learned counsel for the respondents relied on the replying affidavit of Mr George Mudanyi, a Director of the 2<sup>nd</sup> respondent, M Academy. The averments in the said affidavit show that the petitioners' guardian, Mr W has 4 children in M Academy. They all owe school fees. With regard to the 1<sup>st</sup> petitioner, he owes Ksh 5,300/= and the 2<sup>nd</sup> petitioner owes Ksh 1,500/= as at 1/9/2015. Some school fees was paid on 3/9/2015 after the children were sent home.
  6. Mr Musieka submitted that Mr W did not have consent to be enjoined as a next friend. He further submitted that the petitioners have not met the requirements for a grant of injunction, a prima facie case has not been established and the balance of convenience does not tilt in their favour.
  7. In reply to Mr Musieka's submissions, Mr Situma urged this court to invoke the provisions of article 258 of the Constitution which cures the mischief of who can represent a party in court. He also cited the provisions of the rules made under the provisions of article 22(3), 23 and 165(3)(b) of the Constitution, and in particular clause 6 of the rules made on June 28, 2013, by the Chief Justice. He submitted that the petitioners' father is a proper person to institute the suit. He cited the provisions of article 159(2)(d) of the Constitution which provides that Justice shall be administered without undue regard to procedural technicalities.
  8. This court has considered the petitioners' notice of motion dated September 4, 2015 and the averments in the supporting affidavit of Mr W whereby he states in paragraph 6 thereof that he has fully paid fees for the petitioners herein for the year 2015 and that the school fees was cleared on 3/9/2015.
  9. Mr W further avers that any fees balance by BK and SK cannot be used to send way (sic) petitioners in their respective capacity as pupils. He further states that sending away the petitioners on the September 2, 2015 violated the petitioners' rights to education and is unconstitutional.
  10. In his replying affidavit dated September 10, 2015, Mr George Mukiza Mudanyi, a Director of M Academy the 2<sup>nd</sup> respondent admits that Mr W's four children are pupils in his school. He indicates that for purposes of fees payment, the account for all the children has been one.

Mr Mukiza further avers that M Academy is a private institution maintained financially from fees paid by the parents and/or guardian (sic) upon agreed terms that are approved and legally binding.



Mr Mukiza refers to Mr W as a fees defaulter whose aim is to invoke judicial authority to evade civil liability by using his innocent children as pawns.

11. This court has carefully scrutinized the documents submitted by the petitioners and respondents and is satisfied that on 3/9/2015, the fees arrears of Ksh 1,500/= for M K was cleared by payment of a cash deposit of Ksh 1,500/= through Equity Bank of Kenya, Bungoma branch. The documents submitted by the respondents indicate M K owed Ksh 1,500/= as on September 1, 2015. The said amount having been paid on September 3, 2015, her school fees payment is upto date.
12. With regard to the documentation availed by Mr W, in respect to Isaac, Ksh 1,500/= was paid on September 3, 2015 by way of a cash deposit made to Equity bank Bungoma branch. The records availed by the respondents however show that IK school fees was in arrears of Ksh 5,300/= on September 1, 2015. This being the case, I still owes M Academy fees balance of Ksh 3,800/=.
13. The arguments by the respondents were indicative of the fact that that the fees account for all the children was one. This court does not agree with that argument as the petitioners herein were admitted to M Academy in their individual capacities, the only thing that they share in common is their next friend, their father, Mr W Even a look at the reconciliation reports availed by the respondents, clearly shows that I K's school admission No is [particulars withheld] whereas that of his sister M K is school admission No [particulars withheld]. Even for accounting purposes, it would be unrealistic to have one account for all the children. The bank deposit slips relied upon by the petitioners show that at the time of paying the school fees, the name of the child whose school fees was being paid had to be endorsed on the bank deposit slips. This is therefore indicative of the fact that each child had a separate school fees account.
14. Mr Musieka, learned counsel for the respondents submitted that Mr E K did not have consent to be enjoined as a guardian and next friend. Mr Situma's response to that legal issue was that this court has powers to invoke the provisions of article 258 of the Constitution which cures the mischief on who can represent a party in court.
15. Article 258(1) provides that "every person has the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention." Sub article 2 thereof provides that "In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:
  - (a) A person acting on behalf of another person who cannot act on their own name.

The petitioners' brought their petition under the provisions of articles 2, 21, 22, 23 and 27 of the Constitution of Kenya and the Children's Act. Mr Situma's submission therefore holds true in that under article 258 (2) (a), Mr. W is empowered to file a Constitutional Petition on behalf of his children. Secondly, article 159(2)(d) of the Constitution states that in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....
  - (b) Justice shall be administered without undue regard to procedural technicalities.

This court finds that the petition is properly before the court as article 20(1) of the Constitution states that "the Bill of rights applies to all law and binds all state organs and all persons"
16. In his submissions, Mr Situma cited rule 6 of the *Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013*, to show that the petitioners' father could legally file the petition the subject of this matter without filing a consent with Advocate to appear as



the guardian and next friend to the petitioners. The said clause is however inapplicable as it addresses the issue of a “friend of the court” and not the issue of “next friend.”

Rule 4(2) of the said rules is however relevant and is drafted in similar terms to articles 258(2) and 22(2) (a) of the Constitution which empowers a third party to institute court proceedings on behalf of another person who cannot act in their own name.

17. This court has considered the provisions of article 43(1)(f) of the Constitution which provides the right to education and finds that this right is not absolute when a parent takes his child to learn in a private school which is managed through the school fees paid for the students. Such an institution cannot run effectively and efficiently if parents do not meet their parental obligations of paying school fees for their children. On the other hand, the respondents herein do not have legal authority to chase away students whose fees has been paid in full on the basis that school fees for other children in the same family have not been paid in full.

18. After analyzing the documents on record, it is my finding that school fees for the 2<sup>nd</sup> petitioner M K was paid in full on September 3, 2015. As for the 1<sup>st</sup> petitioner, I K, this court finds that there is an outstanding fees balance of Ksh 3,800/=.

It is the finding of this court therefore that the petitioners have shown that they stand to suffer irreparable injury which cannot be compensated by award of damages unless the orders sought for an injunction are granted. The 2<sup>nd</sup> principle set out in the case of *Giella v Cassman Brown* (1973) EA 358 has been satisfied.

19. This being the case, the court makes the following orders:-

- (i) Mr EW, the petitioners’, guardian and next friend, should as a matter of urgency pay the fees balance of Ksh 3,800/= for his son IK so that he can be re-admitted in school to enable him sit for his fourth form examinations;
- (ii) A declaration that pegging of non-payment of fees balance by BK and SK to the petitioners herein being is school is unconstitutional and violates the petitioners’ right to education;
- (iii) A permanent injunction is hereby issued directed against the respondents, the principal M Academy and M Academy barring them from sending the petitioners IK and MK away from school as long as their school fees is paid in full and they abide by the school rules and regulations.
- (iv) Each party to bear its own costs.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2015 IN THE PRESENCE OF MR. SITUMA FOR THE PETITIONERS AND MR. MUSIEKA FOR THE RESPONDENT.**

**NJOKI MWANGI.**

**JUDGE.**

