



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CONSTITUTIONAL PETITION NO. 7 OF 2013**

**IN THE MATTER OF ARTICLES 3, 10, 20, 22, 23,27,28,43,47,50,53,55,159 AND 258 OF THE  
CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTIONS 6, 11, 19 AND 37 OF THE EDUCATION ACT, 2013**

**AND**

**IN THE MATTER OF SECTIONS 4, 28, 30, 32, 34, 39 AND THE FOURTH SCHEDULE OF THE  
BASIC EDUCATION ACT, 2013**

**IN THE MATTER OF UNPROCEDURAL, IRREGULAR AND UNCONSTITUTIONAL  
CONVERSION OF KIHUMBU-INI SECONDARY SCHOOL INTO A 'GIRLS' ONLY  
BOARDING SCHOOL**

**AND**

**IN THE MATTER OF SECTIONS 5, 7 AND 22 OF THE CHILDREN'S ACT 2001**

**STEPHEN MWANGI KANJA.....PETITIONER**

**VERSUS**

**BOARD OF MANAGEMENT**

**KIHUMBU-INI SECONDARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**PRESBYTERIAN CHURCH**

**OF EAST AFRICA.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY FOR EDUCATION.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The petitioner filed in this court a petition dated 27<sup>th</sup> August, 2013; initially, the petition was lodged at the registry at Nairobi but by the order of the court made on 4<sup>th</sup> December, 2013, it was transferred to this

court at Murang'a.

The reliefs sought for in the petition are framed in the following terms:-

***“25. This court being of competent jurisdiction as is empowered by Article 23 of the Constitution I hereby seek the orders as follows, that the 1<sup>st</sup> Respondent be declared illegally constituted and new appointments be made as according to the Basic Education Act 2013 section 27 and 56 and the P.C.E.A Practice and Procedure Document 19, Article A19.21.***

***26. A writ of injunction compelling the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to halt any and every action of converting and/or transforming Kihumbu-ini Secondary School into a ‘Girls Only Boarding School.’***

***25. The costs of this petition be borne by the Respondents.”***

The numbering of the reliefs sought looks unique because the petitioner did not delink the numbering of the paragraphs in the body of the petition from that of the prayers sought; the numbering was continuous but three of the twenty five paragraphs in his petition comprised the reliefs sought.

The petitioner described himself as a “concerned citizen of the Republic of Kenya, a community leader and a former principal of the school under review, (Kihumbu-ini Secondary School)”.

According to the petitioner’s petition, Kihumbu-ini Secondary School was started in 1966 by the local community as a ‘Harambee Assisted Mixed Secondary School’. The same community is said to have brought in the **Presbyterian Church of East Africa (PCEA)** in 1968 as its sponsor in accordance with **section 2(1)** of the **Education Act**.

Between 1984 and 1986, the Ministry of Education approved the school’s second and third streams; the petitioner claims that it was during his tenure as the principal of the school that these approvals were made.

The petitioner states that by a letter dated 15<sup>th</sup> November, 2011 from the Ministry of Education, the school was declared to be a girls’ boarding school only, an action that the petitioner is aggrieved with.

The petitioner has also taken issue with the composition of the school’s board of management which he claims to be in contravention of **section 11** of the **Education Act** and the Constitution of the Presbyterian Church of East Africa. According to the petitioner, under **Practice and Procedure No. A19.21** of the PCEA Constitution, the board should have been proposed by the congregational committee. Again the parish minister who approves and endorses the sponsor’s representative in the board of management should not have been a member of that same board because, in the petitioner’s view, that would create a conflict of interest.

The petitioner’s case is that as a concerned citizen, he has uncovered a plot to unconstitutionally and unprocedurally convert Kihumbu-ini Secondary School into a girls’ only boarding school without any colour of right and in total disregard of the relevant laws.

Based on the forgoing facts, the petitioner alleges that **articles 10(2)(a)** and **(b)** of the constitution have been violated as far as national values and principles of governance of social justice, equality and non-discrimination are concerned.

The petitioner also claims that the alienation of the community from benefiting from or having a say in the management of the school’s resources and facilities contravenes **articles 10(2) (b)** and **(d)** and **article 27(3)(4)(5)** of the **Constitution** with particular regard to public policy decisions, sustainable growth, equality and freedom from discrimination. By excluding the boys from Kihumbu-ini Secondary School, the petitioner claims that the respondents have denied a segment of the society basic education and thereby contravened **article 47(f)**, **article 53 (1) (b)** and **55 (a)** of the **Constitution** and **section 5 and 7** of the **Children Act (Cap 141)** that guarantees education to children.

The respondents opposed the petition and the filed replying affidavits in that regard. The replying affidavit on behalf of the first respondent was sworn by David Kang'ethe Ng'ang'a who described himself as the chairman of the board of governors of the first respondent and who is also a resident within the school's locality. In his affidavit Mr Ng'ang'a set out the chronology of events that led to Kihumbu-ini secondary school becoming a fully-fledged girls only school.

According to Mr Ng'ang'a, as early as the year 2009, the management of the school noted the uneven ratio of the number of girls to that of the boys in the school; in order to reduce this ratio to an acceptable level, the management decided to set aside a class specifically for boys, in an attempt to improve the number of boys in the school besides other efforts made to encourage and attract more boys to enrol.

When this issue was discussed in the school's annual general meeting held at the school on 10<sup>th</sup> July, 2010, which meeting was also attended by the District Education officer, it was proposed that the school be upgraded to a girls school and the boys who were there then be retained until the year 2013 when they were expected to complete their secondary education; the minutes of the meeting were exhibited on Mr Ng'ang'a affidavit.

This issue was again a subject of discussion on 19<sup>th</sup> November, 2010 when it was now resolved that the school be reserved for girls and an alternative school in the neighbourhood be set aside for boys; according to Mr Nganga, cases of indiscipline amongst the girls and which were directly attributed low enrolment of boys in the school were on the increase and the few boys in the school felt harassed and intimidated. The net effect of this problem was the school's poor performance in examinations and the only way to avert this negative trend was to separate the students based on their gender.

To compound the problem even further, Mr Ng'ang'a deposed that when the schools re-opened for the new year in 2011 none of the 150 students who applied and were enrolled in form one was a male student; they were all girls.

It is against this background and after several deliberations on this issue between the board of governors of the school and the Ministry of Education that Kihumbu-ini Secondary school was converted to a girls' only boarding school. This was confirmed by Ministry of Education vide its letter dated 15<sup>th</sup> November, 2011 and a registration certificate, by the same ministry, dated 12<sup>th</sup> July, 2012 confirming the registration of the school as a girls' school.

The minutes of the meetings in which the deliberations and resolutions on this issue were made together with the Ministry of Education's letter approving the decision to retain Kihumbu-ini secondary school exclusively for girls and the registration certificate to that effect are exhibited on Mr. Ng'ang'a's affidavit.

Mr Ng'ang'a thinks the petitioner's petition is not made in good faith; he complained that the petitioner ran down the school while he was its principal. According to Mr Ng'ang'a community that the petitioner is now purporting to represent is the same community that recommended his removal from the school after he ran it down.

To demonstrate the petitioner's bad faith, Mr Ng'ang'a's deposed that on 5<sup>th</sup> November, 2012 the petitioner wrote to the County Director of the Teachers' Service Commission making a raft of malicious allegations against the principal and the board of governors of the school. The Commission responded and undertook investigations into the allegations raised and in its report, a copy of which is exhibited on Mr Ng'ang'a's affidavit, all the petitioner's allegations were found to be baseless, malicious and aimed at tainting the principal's and the board's image. The report found that for the twenty seven years the petitioner had been at school he had not achieved anything close to what the principal against whom he complained has achieved in the development of the school.

Mr Ng'ang'a's position is that the reasons behind the conversion of the school from being a mixed school to one of students of one gender only were genuine and merited. If anything, the evidence

available expressly shows that the decline in the registration of boys in the school started and persisted during the petitioner's tenure as the head of the school. For these reasons Mr Ng'ang'a asked this court to dismiss the petitioner's petition.

The replying affidavit on behalf of the second respondent was sworn by Mr Samuel Waweru who described himself as the secretary of the Presbyterian foundation of the second respondent and in that capacity he was authorised to swear the replying affidavit.

The affidavit reiterates the depositions made in the affidavit sworn on behalf of the first respondent and in particular confirmed that the Ministry of Education upgraded the school to a girls only school on 8<sup>th</sup> November, 2011 and communicated its decision vide a letter dated 15<sup>th</sup> November, 2011; this decision was informed by the steady drop in the enrolment of boys at the school despite the necessary efforts to improve their enrolment having been made. The respondent enumerated the several meetings in which this issue was discussed and resolutions made as to the best course forward. Copies of the minutes of all these meetings were attached to Mr Waweru's affidavit.

Mr Waweru discounted the petitioner's allegations that under this arrangement, boys had been discriminated against because prior to reserving Kihumbu-ini Secondary School for exclusive use by girls, a study had been undertaken by the Ministry of Education which confirmed that there were several boys' secondary schools both day and boarding in the neighbourhood and boys who would otherwise have joined Kihumbu-ini Secondary School would conveniently be absorbed into any of these schools. The deponent attached to his affidavit a sketch map of these schools showing where they are situated and how far each one of them is from Kihumbu-ini Secondary School.

Mr Waweru dismissed the petitioner as someone who has over the years been interfering with the running and the management of the school to achieve selfish and ulterior motives. According to Mr Waweru, the petition has no basis and should be dismissed.

After considering the parties' pleadings, the factual basis of their respective positions and the submissions made on their behalf by their counsel I find that there are two main issues raised in the petition herein; the first of these issues is whether the conversion of Kihumbu-ini Secondary School to a girls' school was discriminatory against boys and therefore violated **articles 10(2) and 27(3)(4) and (5) of the Constitution and section 34.(2) of the Basic Education Act, 2013**; related to this issue is whether, by retaining Kihumbu-ini Secondary School exclusively for girls, the respondents thereby violated **articles 19(2), 43(f) 53, (1) (b) and (a) of the Constitution and section 4 of the Basic Education Act, 2013** that guarantee every child to, *inter alia*, free and compulsory basic education.

The second question is whether the first respondent is constituted in accordance with the law and closely related to this issue is whether the community within which Kihumbu-ini Girls Secondary is situated has been alienated from benefiting from the schools resources and in the management of the affairs of the school. Here, again the question is whether **articles 10 (2) (a) and (b) of the Constitution, sections 27 and 56 of the Basic Education Act, 2013 and article 19.21** of what has been described in the petition as "the P.C.E.A practice and procedure document" have been violated or breached.

The answers to these questions will determine whether this court should declare the first respondent as illegally constituted and therefore order fresh appointments in accordance with the Basic Education Act, 2013; the answers will also determine whether an injunction should issue against the first and the third respondents.

I must mention here that the issues raised are to a great degree intertwined and therefore, the answer to any one question may invariably settle another related question and ultimately dispose of the petition herein. The starting point in this regard is the question of discrimination.

The evaluation of the evidence presented before court reveals that the process of upgrading Kihumbu-ini Girls' Secondary School was gradual and the idea was mooted way back in the year 2010.

On 19<sup>th</sup> November, 2010, the school's Board of Governors deliberated on the school's poor performance and noted that indiscipline amongst the students was the main cause for this problem. The root cause of indiscipline was traced to the school being a mixed school and to compound the problem even further, some of the students were day scholars and the ratio of the number of boys to girls was quite high; in the face of these diverse factors within the student community, it had proved difficult to instil discipline amongst the students.

One of the ways identified to surmounting this challenge was to retain the school as a girls' school because the number of girls was way beyond that of boys and there were adequate boarding facilities for girls; accordingly, the Board of Governors resolved to restrict admission of girls to boarders only as from the beginning of the year 2011.

In arriving at this resolution, the Board noted that although efforts had been made to encourage more boys to enrol in the school, only seven boys reported for admission in the year 2010; as a result of this low enrolment, there were only two boys against fifty girls in each of the three streams. Since they were overwhelmed by the number of girls, the boys were stressed and intimidated. The Board resolved to take up the issue with the Education Office and identify a school where the boys in the area could be enrolled and reserve Kihumbu-ini Secondary School for girls only.

When the Board of Governors met on 23<sup>rd</sup> July, 2011, it noted that as at that time no boy had sought admission in form one in that school and a representative from the District Education office advised that the few boys who were in the school were free to join other neighbouring schools but for those who chose to remain, they would still be catered for. There was evidence by way of a sketch map exhibited on the affidavit of Mr Samuel Waweru showing the other neighbouring schools were within a radius of between half a kilometre and four kilometres from Kihumbu-ini Secondary School.

In a meeting held on 8<sup>th</sup> November, 2011 the Gatanga District Education Board made several decisions with regard to certain schools within its jurisdiction. Three schools, that is, St. Augustine Mutundu Secondary School, Giachuki Secondary School and Chomo Secondary School were approved to operate as boys boarding schools; a set of three other schools were approved to operate as girls secondary schools and these were Kiunyu Girls Secondary School, Kihumbu-ini Girls Secondary School and Gatanga CCM Girls Secondary School. There were other three schools that were not approved for registration. It is apparent that the issue of the change of status of Kihumbu-ini secondary school was taken up in this meeting.

By a letter dated 15<sup>th</sup> November, 2011 addressed to the principal, Kihumbu-ini Girls Secondary School the Education Board confirmed its decision approving the school to operate as a girl's only school.

The meetings that culminated in the decision of the Ministry of Education to elevate Kihumbu-ini Secondary School were, no doubt, based on the Education Act (cap 211) which was the law that existed then. It is also apparent that the process was gradual and from the evidence presented before this court, the decision taken by the two boards was informed by what, in my view, were sound and valid reasons.

The petitioner's petition and the affidavit in support thereof also suggest that when these decisions were being made, the petitioner was aware but he never took any legal proceedings of whatever nature to arrest the situation if he thought that the path the education board and the school's board of governors had taken was contrary to law; as a matter of fact, nowhere even in the petition herein has it been suggested, for instance, that the constitution of the boards, the meetings they convened, or the resolutions they arrived at were contrary to the Education Act that was in force then. Neither have I heard the petitioner dispute the statistics exhibited on the affidavit sworn behalf of the first respondent showing the uneven ratio in the number of girls to that of the boys in the school and the steady decline in the enrolment of the latter.

What appears to come to the fore is that the petitioner who was previously the principal of the school in issue for twenty seven years has had several run-ins with the administration that succeeded him; this is clear from his own letter dated 11<sup>th</sup> April, 2012 exhibited on the first respondent's affidavit, the school

principal's letter dated 12<sup>th</sup> April, 2012 and the minutes of the board of governors' meeting held on 22<sup>nd</sup> February, 2013 in which the petitioner's conduct and allegations he had raised against the school's principal and its board of governors were extensively discussed; incidentally those allegations are the same allegations that have been raised in this petition.

At one point, the petitioner raised these allegations with the Teacher's Service Commission; the commission responded to the petitioner's complaints and undertook investigations in the school. In its report dated 13<sup>th</sup> February, 2013, a copy of which is exhibited on the first respondent's affidavit, the Commission exonerated the board and the principal of the all the allegations raised against them. Amongst its salient findings as far as this petition is concerned, the Commission concluded that the change of status of the school was procedural; the performance of the school in national examinations had improved; the board of governors was legally constituted; there was an upward trend in enrolment of students at the school; the petitioner had declined to respond and attend the board of governors meetings despite having been invited to air his concerns; and that the petitioner had been inciting parents not to enrol their children in the school. The report concluded by saying;

***“The allegations are malicious and aimed at tainting the principal/BOG reputation (sic) which is manifested by the irony of the complainant who was a principal of the school for 27 years and left the school with minimal facilities.”***

The picture painted of the petitioner was of a person who is a perennial irritant obsessed with finding non-existent faults in the management of the affairs of Kihumbu-ini Girls Secondary School.

While it is appreciated that the petitioner is entitled to initiate a constitutional petition such as the one filed herein, it is not clear why he did not challenge the Teachers' Service Commission report which arose out of investigations he had prompted but rather chose to target the same people he had complained against without disclosing to this court the findings of the Commission or even making reference to it.

Suffice it to say, looking at the material before me, I cannot find any basis for the petitioner's contention that the boy child within Kihumbu-ini Girl's Secondary School region has either been discriminated against or has been denied the right to education. From the evidence presented before me, there is none that suggests any boy from that region has missed out on education because he could not be admitted to Kihumbu-ini Girl's Secondary. I have noted that in the meeting in which it as resolved that Kihumbu-ini Girls' Secondary School should be registered as a girls school, there were other schools that were resolved to be registered as boys schools; Kihumbu-ini Girls Secondary School was not an isolated case.

It must be noted the registration of schools as exclusively girls' schools or boys' schools is not illegal; it is provided for in the Basic Education Act, 2013 which the petitioner claims has been flouted. **Section 34 (1), (2) and (3)** thereof provide:-

***34. (1) A child shall be admitted in a school at the commencement of the academic year or within such extended period as may be prescribed.***

***(2) A school or person responsible for admission shall not discriminate against any child seeking admission on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age, disability, language or culture.***

***(3) The provisions of subsection (2) shall not apply in matters relating to gender in cases where a school is registered for a particular gender.***

I note that counsel for the petitioner selectively quoted **section 34. (2)** thereof but omitted to go further and make any reference to **subsection (3)**.

Be that as it may, the point to note here is, while the petitioner has alleged discrimination in admission of students to Kihumbu-ini Girls Secondary School on the basis of sex, he has not raised any question on the constitutionality of **section 34 (3)** of the **Basic Education Act, 2013** that not only recognises registration

of certain schools as girls or boys schools but also prohibits the admission of students of the opposite sex in a school registered for a particular gender.

My conclusion on this question of discrimination is that the graduation of Kihumbu-ini Secondary School to a girls' school was neither discriminatory nor violated **articles 10(2) and 27(3)(4) and (5)** of the Constitution and **section 34.(2)** of the **Basic Education Act, 2013**. I also find that the registration of Kihumbu-ini Secondary School as an exclusively girls' school did not violate **articles 19 (2), 43(f) 53, (1) (b) and (a)** of the **Constitution** or **section 4** of the **Basic Education Act, 2013** that guarantee every child to free and compulsory basic education.

There is, therefore also, no factual or legal or legal basis for an injunction against the respondents to restrain them from transforming Kihumbu-ini Secondary School into a girls boarding school; and even if there was any plausible reason not to change the status of the school, the appropriate relief would not have been to seek to "**compel the 1<sup>st</sup> and 3<sup>rd</sup> respondents to halt any and every action of converting and/or transforming Kihumbu-ini Secondary School into a Girls Only Boarding School**" the petitioner claims because school is already registered as a girls school and going by the evidence on record boys were last admitted in this school in the year 2011. In short this prayer has long been overtaken by events.

The next question is the composition of the Board of Management of Kihumbu-ini Girls' Secondary school.

Under the repealed **Education Act (cap) 211**, the Board of Governors, which is the predecessor of the Board of Management under the current Act, would be established at order of the Minister who was in charge of education (see **section 10** of the repealed Act). The order establishing the Board would also provide for the composition and the constitution of the Board. **Section 11(b)** of the repealed Act provided that the membership of the Board shall be not less than five persons while **section 11 (c)** thereof provided for the calibre of the membership to include persons from the community served by the school, persons representing any voluntary body which was the founder of the school or its successor, and any other persons or representatives of bodies or organisations that, in the opinion of the Minister should be included. The tenure of the members to the Board was also at the discretion of the Minister (see **section 11(d)**).

The **Education Act (cap) 211** was repealed by **section 96** of the **Basic Education Act, 2013 (No. 14 of 2013)** which came into force on the 25<sup>th</sup> January, 2013. **Section 55** of this new Act provides for the establishment of a Board of Management which, for all intents and purposes, is the successor to the former Board of Governors.

Under **section 56** of the new Act, members to the board are now appointed by the County Education Board; according to this provision a fully constituted Board of Management must have fourteen members drawn from diverse backgrounds including representatives of parents of the students in the school, a representative from the County Education Board itself, a representative of the teaching staff in the school and three representatives of the sponsors of the school. Other representations are one person representing special interest groups in the community, one person to represent people with special needs and a representative of the students' council who shall be an *ex officio* member.

None of the parties in this petition came out to state clearly when the current Board of Management of **Kihumbu-ini Girls' Secondary school** assumed office; however, read in their entirety, the affidavits and the pleadings filed on behalf of the parties suggest that the members of the Board were in office prior to the commencement of the **Basic Education Act, 2013**. The latest minutes of the Board of Governors exhibited to the affidavit sworn on behalf of the second respondent show that as of 12<sup>th</sup> April, 2012, the Board had fourteen members; however, apart from the Board Secretary who is the principal of the school, a representative of the Presbyterian church and the area councillor the backgrounds of the rest of the members is not apparent.

The question that appears to flow from the petitioner's petition is whether the Board appointed under the repealed Act is consistent with the requirements of **section 56** of the current law and if it is not, whether

the Board should be declared illegally constituted.

The direct answer to this question can be found in the saving clause in **section 101. (1)** of the **Basic Education Act, 2013**; it provides as follows:-

***Notwithstanding the repeal of the Acts (under all) acts, directions, orders, appointments, requirements, authorisations, 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.***

This provision is in tandem with **section 23(3) (b) and (c)** of the **Interpretation and General Provisions Act (Cap 2)** which provide a useful guide on interpretation of the repealed or amended law vis-à-vis the repealing or the amending law. **Section 23. (3) (b) and (c)** of that Act provides:-

***Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not-***

***(a)...***

***(b) affect the previous operation of the law so repealed or anything duly done or suffered under a written law so repealed; or***

***(c) affect a right, privilege, obligation or liability acquired, accepted or incurred under a written law so repealed;***

My understanding of these provisions is that the Board appointed pursuant to the provisions of the repealed **Education Act** did not, *ipso facto*, become illegal with the enactment of the **Basic Education Act, 2013** as long as the appointment under the repealed Act was *duly* done. I have not found any reason to suggest that the appointment duly undertaken under the repealed law was in the words of **section 101 (1) of the Basic Education Act**, inconsistent with that Act. If anything, the rationale behind the appointment of a Board of Governors under the old Act is the same rationale that informs the appointment of a Board of Management under the new Act; the only difference in the appointments under the old Act and the new Act is the size of the membership, the composition thereof and the appointing authority.

As far as the appointment of the Board of Governors is concerned I cannot see any intentions under the new Act to affect the previous operation of the repealed law or anything done or suffered under the repealed Act in the context of **section 23(b)** of the **Interpretation and General Provisions Act**. If the repealing Act had any intentions of nullifying the appointment under the old Act, it would have expressly stated so in no uncertain terms.

It is also noted that pursuant **section 3(2)** of the **Fourth Schedule** to the **Basic Education Act**, the reappointment of members to the Board is staggered and the reason given in that section for this mode of reappointment of the board members is to ensure continuity in the affairs of the Boards of Management; the entire board cannot be replaced at once.

The appointing authority under the new Education Act is now the County Education Board and its mandate in this regard is provided for under **section 56 (1) of the Act**. The County Education Board is established under **section 17** of the **Basic Education Act, 2013** and it is described in that section as an agent of the National Education Board which is itself established under **section 5** of the Act.

Although the Act provides that the term of the members of the Board shall be three years, it does not specify when the first appointments under the Act would be made; the presumption, in my view, is that upon expiry of the term of the appointments made under the old Act, new members would be appointed in accordance with the requirements of the new Act. This presumption is informed partly by **section 101** of the new Act which, as noted earlier, preserves and carries over the acts done under the old Act. It is also consistent with **section 31 (2)** of the **Sixth Schedule** to the Constitution of Kenya, 2010 which provides

that a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with the Constitution, shall continue to hold or act in that office as if appointed to that office under the Constitution. This provision is relevant to the issue at hand because the **Basic Education Act, 2013** was enacted to, *inter alia*, give effect to **article 53** of the Constitution of Kenya, 2010.

Despite the crucial role it plays in the appointment of Board of Management, the County Education Board was not made party to the petition; while I appreciate that a petition cannot be defeated by reason of misjoinder or non-joinder of parties it would, in my view be unfair and prejudicial to order a party, and in this particular regard, the County Education Board to make any appointment on the basis of allegations to which it has not been given opportunity to respond. The basic tenets of natural justice demand that a party must be heard before being condemned. The petitioner chose to omit the board and all I can say in this regard is that he is bound by his own pleadings.

The Petitioner also urged this court to find that the first respondent was not properly constituted and new appointments be made in accordance with **section 27** of the **Basic Education Act** and **article 19.21** of the **P.C.E.A Practice and Procedure Document Act**.

**Section 27** of the **Basic Education Act** defines the role of a sponsor of a school; that section provides that the sponsor shall, among other things, participate in the development of the syllabus and the school curriculum; participate in Board of Management; provide spiritual nourishment and development services; and offer financial and infrastructural support. The petition has not indicated how the sponsor which, in this particular case is the second respondent, has failed in any of the roles expressed in the foregoing provision and if it has how such failure affects the validity of the Board of Management of Kihumbu-ini Girls' Secondary School as currently constituted. I am unable to see how **section 27** of the **Basic Education Act, 2013** has been violated.

As noted earlier in this judgment, the appointment to any Board of Management is a function of the County Education Board; this is specifically provided for under **section 56** of the Act. This court could not ascertain the County Education Board's position on the appointment of the Board of Management of Kihumbu-ini Girls Secondary School because it was not made a party to the petitioner's petition. Without having heard from the Education Board, this court cannot proceed on speculations or presumptions on what the Board did or omitted to do.

As far as **article 19.21** of what the petitioner described as the "P.C.E.A Practice and Procedure Document" is concerned, I could not make out from his petition how that article has been violated and if indeed there was such a violation, how such violation has affected the composition of the Board of Management of the school in issue. A copy of the extract of the so-called "Practice and Procedure Document" exhibited on the petitioner's affidavit shows that the article in issue refers to nomination of representatives to "**every school committee of primary schools**" under the jurisdiction of the sponsor's congregational committee. The functions of that committee are stated in **articles 19.20 to 19.24. Article 19.21** which the petitioner cited states, amongst the stated functions:-

***"To nominate three representatives into every school committee of primary schools under their jurisdiction."***

It is manifestly clear here that the nomination referred to in this article has nothing to do with nomination of representatives to secondary schools of which Kihumbu-ini Girls Secondary School is one. Certainly, the test for nomination of representatives to primary school committees cannot be used to question the legal basis of representatives in a Board of Management of a Secondary School.

In any event, even assuming that the second respondent is not adequately represented in the Board as the petition seems to suggest, such inadequacy is not fatal to the proceedings of a Board of Management; this is because, under **section 7(2)** of the **Fourth Schedule** to the **Board of Education Act, 2013**, as long as there is a quorum, the Board may conduct its business and affairs notwithstanding there is a vacancy in the membership. The section states:-

**7. (2) Subject to the provisions of subparagraph (1) no proceedings of a Board of Management shall be invalid by reason only of a vacancy among the members thereof.**

My overall impression of the petitioner's petition is that it falls below the threshold set out in **Anarita Karimi versus Attorney General (1979) KLR 154 (No.1)** on petitions which involve the interpretation of the Constitution whenever constitutional rights are alleged to have been violated. At **page 156** of their decision, the learned judges (Trevelyan and Hancox JJ, as they then were) were clear that:

***“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to have been infringed.”***

In my humble view, the link which the learned judges attributed to, that is the connection between the complaint, the provisions in the constitution alleged to have been infringed and the manner in which they are alleged to have been infringed does not exist or it is too weak to justify the grant of prayers sought in this petition. They are simply not warranted and on that note the petition is dismissed with costs.

**Signed, dated and delivered in open court this 27<sup>th</sup> day of June, 2014.**

**Ngaah Jairus**

**JUDGE**