



**Wasike v Principal Secretary Ministry of Basic Education & 4 others (Petition E111 of 2024)
[2025] KEHC 8322 (KLR) (Constitutional and Human Rights) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8322 (KLR)

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

PETITION E111 OF 2024

LN MUGAMBI, J

JUNE 12, 2025

BETWEEN

MOSES WASIKE PETITIONER

AND

**PRINCIPAL SECRETARY MINISTRY OF BASIC EDUCATION 1ST
RESPONDENT**

**CHIEF PRINCIPAL ST. GEORGE'S GIRLS' SECONDARY SCHOOL
NAIROBI 2ND RESPONDENT**

**BOARD OF MANAGEMENT ST. GEORGE'S GIRLS' SECONDARY SCHOOL
NAIROBI 3RD RESPONDENT**

ATTORNEY-GENERAL 4TH RESPONDENT

TEACHERS SERVICE COMMISSION 5TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 18th March 2024 was amended on 15th May 2024. It is supported by the petitioner's affidavit in support of similar date and a further supplementary affidavit dated 18th June 2024.
2. The gist of this Petition is the 2nd and 3rd respondent's decision to charge parents remedial levy and other levies inclusive of dormitory project, budget deficit, and infrastructure fund purportedly collected as for development which according to the Petitioner is illegal and unlawful. The petitioner impugns the constitutionality of Regulation 2(6)c, d, e and f of the Third Schedule of the *Basic Education Act* for providing that parents may raise funds for physical development and maintenance yet this is an obligation vested on the government.



3. Consequently, the petitioner seeks the following reliefs against the respondents:
 - a. A declaration that the remedial levy is unconstitutional, unlawful and illegal and the already paid sum should be refunded.
 - b. A declaration that Section 2(6)c, d, e and f of the third Schedule of the [Basic Education Act](#) is unconstitutional.
 - c. A declaration that all other levies including dormitory project, budget deficit, and infrastructure Fund levied in the name of development by St Georges Girls Secondary School are unlawful and illegal.
 - d. A declaration that the Board of Management that authorized these illegal levies be disbanded and surcharged for the recovery of same.
 - e. Prohibit the Chief Principal, the Board of Management and their Agents from harassing, discriminating or victimization of any nature, physical, psychological or academic against the petitioner's daughter whose admission number xxx.
 - f. Prohibit the St Georges Girls Secondary School Nairobi from denying students admission in the school due to non-payment of remedial and development levy forthwith.
 - g. Prohibit the school management from charging parents' market prices of misplaced text books supplied by the state.
 - h. Compel the school management to reinstate the petitioner in the parents WhatsApp group forthwith.
 - i. Cost of this petition.
 - j. Any other or further relief that this Court considers appropriate and just to grant.

Petitioner's Case

4. The petitioner avers that his daughter is a student at St. Georges Girls Secondary School, (the school) where she enrolled in the year 2023. The petitioner avers that upon being admitted, he paid her school fees in full including for the second and third term, as was outlined in the fees structure.
5. He depones that thereafter during the parents' orientation meeting held on 16th February 2023, the parents were informed that they were to pay an additional Kshs.25,000 for the completion of a dormitory. He alleged there had been no prior consultation with the parents on this additional payment before this announcement was made to them in the meeting.
6. He avers that in addition to this, the Parents Association Chairperson encouraged the parents to pay the remedial fees of Ksh.3000 per term. It was however stated that this was not compulsory. Despite this, it is alleged that once the parents WhatsApp group for Class Form 1R was created, the elected representative and class teacher made demands for payment of the remedial fee.
7. He depones that these demands became more incessant towards the end of the first school term. Parents were even advised that failure to pay the full school fees which includes this fee, would see their child be denied entry upon re-opening of the next school term.
8. The petitioner states that when he sent his daughter to school on 10th January 2024, the school denied her entry. This was due to an alleged pending balance of Ksh.7220. This was despite the petitioner having paid a total of Ksh.40000 of the required Ksh.40800 fees for the term.



9. Upon enquiry, the petitioner was informed by the Deputy Principal that the balance was Ksh.5000 for the remedial fees and Ksh.2210 for four textbooks which his daughter had lost. Stunned by this information, the petitioner sought an explanation as to why he was being forced to pay the remedial fees yet it is not compulsory.
10. The School informed him that the fee was mandatory and part of the school fees as approved by the Ministry of Education. Notwithstanding the payment he had already made and his pleas, he asserts that the School remained adamant that his daughter would not be allowed in school unless the balance was paid.
11. He depones that vide a letter dated 11th January 2024, he wrote to the 1st respondent questioning whether payment of the remedial fees was legal and sanctioned by the Ministry of Education. This letter was also copied to the Cabinet Secretary and the 2nd respondent herein but not the 3rd respondent. He informs that the 1st respondent is yet to respond to this letter.
12. It is averred that the 2nd respondent in a letter dated 17th and 18th January 2024 requested that the issue be handled in-house without involving the 1st respondent. It is alleged that in an attempt to justify its position, the 2nd respondent through their Counsel on 22nd January 2024 supplied the parents' meeting minutes for 16th January, 11th April and 20th June 2023.
13. The petitioner claims that these minutes are doubtful as were only signed by the Chairperson and Secretary but none of the parents. Moreover, he avers that the Minutes purport that the issue of remedial fees was agreed upon in the parents' orientation meeting and approved by the Ministry of Education through the Regional Director which is false.
14. The petitioner stresses that the 1st respondent affirmed that remedial fees as charged by Heads of primary and secondary schools are banned as seen in the Standard News Paper report dated 4th October 2023.
15. He further notes that the dormitory completion fees had also been charged on the previous parents which raises the question, for how long has this amount been paid by the parents? He stresses that the parents' indulgence on this issue was never sought and the fees has been illegally and unlawfully paid. Likewise, he points out that the School's Strategic Plan which ran from 2014 -2018 has since lapsed yet parents are still made to pay this amount. It is alleged that their decision to do so was never approved by the Ministry of Education.
16. In a meeting held on 25th January 2024, it is claimed that the 2nd respondent and class teacher although remorseful for how they treated his daughter, still insisted that the petitioner was bound to pay the remedial fees. He was also informed that he had been removed from the parents WhatsApp group as he would incite the other parents.
17. Additionally, they stated that the decision to reimburse the lost textbooks was made by the 3rd respondent and that there was no option of replacing them. He notes that the class teacher also cautioned against filing a suit against the school as the same would carry repercussions on the daughter.
18. The petitioner maintains that the remedial fees are illegal and unlawful. This is in addition to the other alleged unreasonable fees that are levied being the Dorm Project fees of Ksh.25,000, Budget Deficit fees of Ksh.10,000 and ICT infrastructure fees. The petitioner as well takes issue with these fees as being a public school, the development of the school rests on the State. Considering this, 3rd respondent should not grant themselves obligations that belong to the State. Consequently, the petitioner asserts that the respondents' actions are in violation of Articles 43(1)(f) and 53(1)(b) of *the Constitution* as read with Section 3 and 13 of the *Children Act* and Sections 4, 28, 29, 86, of the *Basic Education Act*.



Respondents' Case

19. The 1st, 4th and 5th respondents' responses and submissions to the petition are not in the Court file or Court Online Platform (CTS).

2nd and 3rd Respondents

20. In reaction to the petitioner's case, the 2nd and 3rd respondents through the 2nd respondent, Grace Wairimu Macharia filed the replying affidavit sworn on 26th April 2024.
21. The deponent contested the petitioner's claim that he had filed the instant suit not only for his own interest but also of other parents and insisted that the Petitioner does not have such authority. She also sought to have that her name struck out from the suit claiming that the petitioner had sued her in her personal capacity contrary the provisions of the [Basic Education Act](#).
22. On the issue of impugned fees, the 2nd Respondent stated that the said amount falls under the School's Performance Improvement Programme. She asserts that these fees were not created by the 3rd respondent but as a result of the parents (through the Parents Association) discussions which were approved at the General meetings especially the one held on 26th June 2023. Such fee is also provided for under Section 2(6) of the Third Schedule of [Basic Education Act](#). She alleges that the petitioner was as well present in the said meetings.
23. She adds that the authority to charge the same was also sought from the Ministry of Education and it was granted.
24. On the issue of the lost textbooks, she stated parents are given the option of paying or replacing the lost text book and this fact was communicated to the petitioner at the point of his daughter's admission and that he went on to acknowledge the same by signing the form.
25. On the claim that the Petitioner's daughter was denied entry into the school on 10/1/2024; She stated that no student has ever been barred from returning to school on account of unpaid school fees insisting that parents are only requested to sign a form of commitment to pay the outstanding fees. She maintained that the petitioner's daughter did not have any outstanding fees balance hence the allegation that the daughter was denied entry into the school is unfounded.
26. As pertains allegation of harassment of the petitioner's daughter, the 2nd Respondent stated that was a false and malicious claim intended at tarnishing the school's name insisting that the school has a duty of care to all the students and all issues concerning school fees are directly conveyed to the parents.
27. On the claim that the Petitioner was removed from the School WhatsApp, the 2nd Deponent clarified that this is not the school's official mode of communication and is thus not obliged to include the petitioner in the class WhatsApp group.
28. She equally contends that the instant petition was not filed in good faith and was brought with ill intent. This is because the issues raised had already been resolved between the parties in January.
29. Further that, when they confronted the petitioner about this issue, he claimed that he wanted to leave a mark in history as being the first parent to convulse an entire school system in the country and also tarnish the school's name.
30. In conclusion, she posits that the prayers sought are misplaced and overtaken by events. She as such avers that the petition ought to be dismissed as is misconceived, frivolous, vexatious and an abuse of the Court process.



Petitioner's Submissions

31. Mokaya Omwoyo and Associate Advocates for the petitioner filed submissions dated 18th June 2024 and further submissions dated 1st October 2024. Counsel identified the issues for determination as: whether the Chief Principal St Georges Girls Nairobi is the right party to the petition; whether the rights of the student of Admission number 9077 under Article 53(1)(b) of *the Constitution* were violated; whether remedial and other development levies against parents are legal; whether Section 2 (6) (c) (c), (d), (e) and (f) of the Third Schedule of the *Basic Education Act* should be declared unconstitutional and unlawful; whether the petitioner should be reinstated to the parents WhatsApp group; and whether the student has been or is likely to be harassed because of this petition and whether the charges on the misplaced text books are justified.
32. On the first issue, Counsel submitted that Section 2 and 5 of the *Basic Education Act* defines Head of institution to include teacher, head teacher and principal appointed by the 5th respondent and outlines their functions. This person is charged with the duty of enforcing any order that maybe issued. Counsel in light of this asserted that the 2nd respondent being the Chief Principal was the proper party to sue in this matter.
33. Turning to the second issue, Counsel answered in the affirmative. This is because when the petitioner's daughter reported to school on 10th January 2024, she was not allowed due to the pending fee balance. It is alleged that this is contrary to her right to free and compulsory education under this Article. This is also echoed in Section 28 and 30 of the *Basic Education Act* and Section 3 of the *Children Act*. Equally this right is protected under Article 28(1)(a) to (e) of the Convention on the Rights of the Child. Likewise, Part IV of the Basic Education Regulations *Legal Notice No.39 of 2015*.
34. Reliance was placed in *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others* [2015] eKLR where it was held that:

“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*.

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.”

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.”

35. Counsel as such stressed that the respondents are bound to uphold the student’s rights as envisaged under this Article and Article 43(1)(f) as read with Section 28(1) and 30 of the [Basic Education Act](#).
36. Counsel further argued that in charging additional charges to the required school fees, the School was in breach of Section 29(2) of the [Basic Education Act](#) which states that 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.
37. Moving to the third issue, Counsel submitted the remedial and other development fees are illegal. First, since Section 37 and 84 of the [Basic Education Act](#) prohibits holiday tuition and sets out the official school hours. Counsel stated that the remedial fees were utilized for the academic improvement programmes such as the holiday tuition. Additionally, Counsel submitted that while the school can offer remedial classes, the same ought not to be at an extra fee thus the 2nd and 3rd respondents charge this fee illegally.
38. For this reason, Counsel submitted that Section 2(6) of the Third Schedule of the [Basic Education Act](#) is illegal as funding of basic education is the government’s responsibility. This fee is said to have already been collected from the parents in form tax for this purpose. Therefore, in seeking to have parents pay for additional fees constitutes a parallel funding model which amounts to double taxation and without any legal basis.
39. In the same manner, Counsel submitted that according to Section 39 and 89 of the [Basic Education Act](#), the infrastructure and development fees are supposed to be borne by the government not the parents as purported. Further this is carried out as per a Strategic Plan that runs for 5 years. It is alleged that the School’s Strategic Plan 2014 – 2018 lapsed and that there was no current Plan at the time of filing this suit.
40. Moreover, Counsel submitted that in its response, the School did not adduce any evidence to prove that the Ministry of Education had approved the illegal fees as claimed. As such, without this approval and a valid Strategic Plan, Counsel submitted that the school had no authority to charge extra fees outside the provided legal framework.
41. On the next issue, Counsel submitted that the petitioner under Article 35 of [the Constitution](#) has a right to access information. In this regard, it was argued that the WhatsApp group for Class 2R is administered by the class teacher. Counsel argued that the petitioner’s wife presence in the group does not mean that he has transferred his right to access the information and thus has a right to be in the group.
42. On the sixth issue, Counsel submitted that the petitioner’s daughter was likely to be harassed as was made plain by her class teacher in the meeting they had with the petitioner and the principal.
43. On the next issue, Counsel asserted that it was not justified for the school to charge fees for lost text books which are provided by the State. It is contended that a State produced text book cannot be the same price as one sold at market price. Considering this, it was stressed that charging of the lost text books at market price was illegal.

2nd and 3rd Respondent’s Submissions

44. On 23rd September 2024, the 2nd and 3rd respondents through their Counsel, Evans Thiga Gaturu, filed submissions which rebutted the petitioner’s issues as raised in his submissions.



45. Counsel on the onset challenged the petitioner's annexures adduced in the further supplementary affidavit as introduced, a recent Report 'Why remedial teaching should not be provided to all learners'; an affidavit by Nelson Kisiangani Mwandiki cited in support who is not a party to this suit, a petition and a newsletter. Counsel emphasized that these introduce new issues which were not alluded to in the petition.
46. On the first issue, Counsel maintained that the 2nd respondent cannot be sued in her personal capacity as was only implementing the decisions of the 3rd respondent as its secretary.
47. On the second issue on violation of Article 53(1)(b) of *the Constitution* with reference the additional fees, it was argued that Section 2(6) (a), (d), (e), (f) and (h) of the Third Schedule of the *Basic Education Act* allows the Parents Association to raise funds from parents for physical development and maintenance charges. For this reason, Counsel argued that this Article had not been violated as alleged.
48. Counsel on the third issue whether the remedial and other development fees are legal submitted that the cited legal provisions by the petitioner do not apply as he failed to prove that they apply in this matter. Counsel added that these laws had not been raised in the petition at the onset and thus the petitioner's call to apply this law retrospectively, should not be allowed. Counsel added that the 3rd respondent was not in breach of any law as was only carrying out what the law stipulates.
49. On the fourth issue, Counsel stated that the petitioner had not demonstrated why the impugned Section is unconstitutional as alleged.
50. Counsel on the next issue, reiterated the 2nd and 3rd respondent's argument that WhatsApp is not the School's official form of communication. It was asserted also that the petitioner's wife presence in the WhatsApp group was sufficient as inclusion in the group is based on the School's discretion.
51. Counsel as well submitted that the petitioner's allegations that his daughter was likely to be harassed, is based on speculation and is false. It is emphasized that his daughter was allowed to attend class the same day she reported to School. In addition, the alleged meeting where this alleged utterance was made is said to have never occurred. Nonetheless, it was argued that the petitioner had not proved this claim by adducing any evidence.
52. Counsel equally argued that the petitioner's argument on the charge for lost text books is misconceived and based on speculation.

Analysis and Determination

53. It is my considered take that the issues that arise for determination in this matter are as follows:
 - i. Whether the 2nd respondent is a proper party in this suit.
 - ii. Whether Section 2(6) (c), (d), (e) and (f) of the Third Schedule of the *Basic Education Act* is unconstitutional.
 - iii. Whether the impugned charges were lawfully processed and imposed by the 2nd and 3rd Respondents as required by the provisions of the *Basic Education Act*.
 - iv. Whether the 2nd and 3rd respondent's harassed, discriminated and victimized the petitioner's daughter as a result of this suit.
 - v. Whether the petitioner is entitled to the relief sought.



Whether the 2nd respondent is a proper party in this suit.

54. The 2nd respondent argued that she was sued in her personal capacity contrary the provisions of the *Basic Education Act*. Reacting to this, the Petitioner countered that Section 2 and 5 of the *Basic Education Act* defines who is the Head of institution and this includes the head teacher and principal appointed by the 5th respondent and outlines their functions hence the 2nd Respondent as Chief Principal was the person charged with the duty of implementing any decisions was thus a proper party for purposes of this suit.

55. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides gives guide on who be included as a Party in a suit. Rule 5 states:

Addition, joinder, substitution and striking out of parties.

5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
- b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
- c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
- d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
 - (i) order that the name of any party improperly joined, be struck out; and
 - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

56. Addressing this issue in *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] KECA 655 (KLR) the Court of Appeal opined as follows:

“62. ...Article 22 of *the Constitution*, which provides for enforcement of the Bill of Rights, obliges the Chief Justice to make rules of procedure to enable parties like the 1st and 2nd respondents, who allege that their rights under *the Constitution* have been denied, violated or infringed, to access the court for redress. Article 22(3) specifically demands that those rules shall ensure that formalities are kept to a minimum, to the extent of admitting proceedings on the basis of informal documentation. Pursuant to the above constitutional provision, the Chief Justice made *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013



whose overriding objective is, among others, to facilitate access to justice to all persons and to advance the realization of the rights and fundamental freedoms enshrined in the Bill of Rights as well as the values and principles of *the Constitution*. Rule 5 of the rules addresses the issue of non-joinder and misjoinder of parties... Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute.”

57. Under Section 2 of the *Teachers Service Commission Act*, Cap 212 defines ‘Principal’ as follows:

“principal” means the lead educator or administrator in a post-primary school level educational institution appointed by the Commission as such and responsible for the implementation of educational policy guidelines and professional practices”

58. This is the meaning adopted by the *Basic Education Act* Section 2 which provides that: "Principal" has the meaning assigned to it under the *Teachers Service Commission Act*.”

59. Moreover, part VIII of the *Basic Education Act* sets out the structure of Governance and Management of Basic Education and Training of which under Section 55 (1) establishes Board Management as the management body for every public school as follows:

Board of management

55 (1) There shall be a Board of Management for every public—

- (a) deleted by *Act No. 3 of 2021*;
- (b) primary school; (c) secondary school;
- (d) adult and continuing education centre;
- (e) multipurpose development training institute; or
- (f) middle level institutions of basic education.

60. The functions of the Board of Management are provided in Section 59 of the Act and include 59 (f) provide for the welfare and observe the human rights and ensure safety of the pupils, teachers and non-teaching staff at the institution; 59 (j) provide for the welfare and observe the human rights and ensure safety of the pupils, teachers and nonteaching staff at the institution; 59 (g) encourage a culture of dialogue and participatory democratic governance at the institution; 59 (o) receive, collect and account for any funds accruing to the institution; 59 (q) perform any other function to facilitate the implementation of its functions under this Act or any other written law.

61. Under Section 62 of the *Basic Education Act*, Cap 211; the head of a basic education institution shall be the secretary to the Board of Management.

62. As the School Principal, a position that the 2nd Respondent does not dispute she holds in the school, she bears the responsibility of executing management policies at the Institution she heads together with the School Board of Management hence in her position as the Chief Principal she is a proper party in this suit that directly relates to the management of the Institution. Indeed, the petition shows that contrary to her claims, the that the petitioner is sued in her personal capacity, she is in fact sued in official capacity of administrator of the school, the Chief Principal of St. Georges Girls Secondary and



not in her name, Grace Wairimu Macharia. I find that the 2nd Respondent is properly joined as a Party in this Petition.

63. In any event, even if there is misjoinder of any party that may not invalidate a suit as is clearly stated in the rules.

Whether Section Regulation 2(6) (c), (d), (e) and (f) of the Third Schedule of the Basic Education Act is unconstitutional.

64. The Parent’s Association is established under Section 55 (2) of the Basic Education Act, Cap 211 while the Third Schedule provides for its composition and the functions of which Regulation 2 (6) (c), (d), (e) and (f) form part of.

65. Section 55 (2) states:

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

66. The Third Schedule provides:

“Third Schedule [s. 55(2)] Establishment And Functions Of Parents Association

1. There shall be a Parents Association for every public or private secondary school consisting of—
 - (a) every parent with a pupil in the school;
 - (b) a representative of the teachers in the school.
2.
 - (1) There shall be an Executive Committee consisting of representatives of each class and two teachers.
 - (2) The members of the Executive Committee of Parents Association shall be elected during an annual general meeting of parents and teachers.
 - (3) The Parents Association shall, at its first meeting, elect a Chairperson from amongst the persons elected under paragraph 2 of this Schedule.
 - (4) The Chairperson and two members of the Association shall be co-opted to the Board of Management.
 - (5) The Head or Principal shall be the Secretary to the Association.
 - (6) The functions of the Parents Association shall be to—
 - a. promote quality care, nutritional and health status of the pupils;
 - b. maintain good working relationship between teachers and parents;



- c. discuss, explore and advise the parents on ways to raise funds for the physical development and maintenance;
 - d. explore ways to motivate the teachers and pupils to improve their performance in academic and co-curricular activities;
 - e. discuss and recommend charges to be levied on pupils or parents;
 - f. undertake and oversee development projects on behalf of the whole Parents Association.
 - g. assist the school management in the monitoring, guidance, counseling and disciplining of pupils; and
 - h. discuss and recommend measures for the welfare of staff and pupils.
- (3) The Parents Association shall hold such number of meetings at such places and at such times as the Association shall consider necessary for the proper discharge of its functions.
- (4) Subject to the provisions of this Schedule, the Parents Association shall regulate its own procedure.
- (5) There shall be established National Parents Associations, County Parents Associations and Sub-County Parents Associations elected by Parents Associations from schools through a delegate system.”

67. The Petitioner specifically disputes the constitutionality of Regulation 2 c, d, e & f of the Third Schedule which are set out above as part of the functions of the parents’ association.

68. Courts have held that where it is contended that a Statute is unconstitutional; the Court has a duty to ascertain whether there is a possible construction that permits the application of the statute without reaching a finding of unconstitutionality. In the persuasive authority of *Crowell v Benson*, 285 US 22, 62 (1932) the Court elaborating on this principle held:

“When validity of an Act of congress is drawn in question, even if a serious doubt of constitutionality is raised, it is cardinal principle that this Court will first ascertain whether a construction of statute is fairly possible by which the question may be avoided”

69. First, the Court has to identify object and purpose of the legislation as was explained in *Geoffrey Andare v Attorney General & 2 others* [2016] KEHC 7592 (KLR) as follows:

“It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in *R vs Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 enunciated this principle as follows:



“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

70. Moreover, holistic or harmonious interpretation may also be applied as was explicated in Republic v Kenya Medical Laboratories Technicians and Technologists Board Ex-Parte Archdiocese Nairobi Kenya Registered Trustees [2018] KEHC 9303 (KLR) the Court reasoned as follows:

“ 23. It is an elementary rule of statutory construction that no one provision of the statute is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. It is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the legislation and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the purposes of the legislation...”

71. The petitioner contended that Regulation 2(6) c, d, e & f of the Third Schedule of the Basic Education Act are unconstitutional as funding of basic education is solely responsibility of the government and not the parents. The 3rd respondent in reply asserted that those levies fall under the School’s Performance Improvement Programme approved by the Parents Association pursuant to Rule 2(6) as per the Third Schedule of Basic Education Act in the Annual General meetings.

72. The Constitution at Article 43 states

43 (1) Every person has the right

.....

(f) to education

73. Article 53 states:

53 (1) Every child has the right –

.....

b) free and compulsory basic education

74. The question is, does the fact that this regulation allows the parents association to deliberate and come up with strategies on ways to raise funds for the physical development and maintenance of the school, motivation of teachers and pupils to improve their performance in academic and co-curricular activities; discuss and recommend charges to be levied on pupils or parents and/or undertaking or overseeing development projects on behalf of the whole Parents Association violate a Child’s right to education?

75. In my view, no Constitution provision is violated if the parents in any school coalescing as the parents’ association agree to deliberate and propose ways in which they can raise resources to support the school



community as one of the major stakeholders. They can agree to support the school infrastructure development or any other programme in the school including those that are meant to motivate the teachers and the students under the performance improvement programme and this and I see no justifiable ground for declaring such an initiative unconstitutional. Nonetheless, any extra or additional levies must not be implemented in a way that destabilize or violates any child's right to free and compulsory education meaning that such levies should never give room or excuse for excluding child's entry into the school, sending away from the school any child or in any way allowing any child to be harassed for non-payment of such extra or additional levies. From a Constitutional view-point, objectives of the Regulation 2(6) c, d, e & f in the Third Schedule they be impeached. Only the conduct of school may be impeached if it victimizes the child.

76. However, if the resolutions so reached are implemented are processed in the manner that is not authorized by the law or are implemented in a way that that interferes the child's right to free and compulsory basic education, there will be cause of action founded on Article 53 (1) (b) of *the Constitution* hence each case will depend on its own specific facts and not the general condemnation of the Third Schedule Regulation 2 (6) c, d, e, & f. If the enforcement of any resolutions reached in the meeting of the parents' resolution victimizes the child by interfering with the right to free and compulsory basic education, then there would be a violation of Article 53 (1) (b) of *the Constitution*.
77. The *Basic Education Act* has in addition provided safeguards to ensure that the right of every child to free and compulsory basic education under Article 53 (1) (b) of *the Constitution* is not unnecessary compromised by such payments by requiring a strict procedure of approval in respect of such charges despite any such resolutions being made.
78. Section 29 (2) (b) of the *Basic Education Act* stipulates that that any additional charges in a public school can only be made with the approval of the Cabinet Secretary in consultation with the County Education Board and further declares that 'no child shall be refused to attend school because of failure to pay such charges.'

It states at 29 (2) (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.'

79. Regulation 2(6) c, d, e & f of the Third Schedule of the *Basic Education Act* is not unconstitutional. It would only be unconstitutional where such resolutions are implemented in a way that violates a child right to free and compulsory education that would make the specific case action complained of and not the regulations.

Whether the impugned charges were lawfully processed and imposed by the 2nd and 3rd Respondents as required by the provisions of the *Basic Education Act*

80. Section 29 of the *Basic Education Act* provides for free tuition and precludes payment of any other charges unless approved by the Cabinet Secretary in consultation with the County Education Board. It states:

'Free Tuition

1. No public school shall charge or cause any parent or, guardian to pay tuition fees for or on behalf of any pupil in the school.
2. Notwithstanding subsection (1)—



- a. tuition fees may be payable by persons who are not Kenyan citizens;
 - b. other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the county education Board provided that no child shall be refused to attend school because of failure to pay such charges;
 - (c) no person shall collect levies without issuing an official receipt.
81. Three fundamental mandatory conditions must be satisfied for public school to levy additional charges:
- i. the approval by the Cabinet Secretary in consultation with the County Education Board must be sought and obtained;
 - (ii) No child shall be refused to attend school for non-payment of such charges.
 - iii) No levies shall be collected without issuance of official receipts
82. The fact that the parents' association may meet and propose that payments be made towards supporting a school project or the school improvement programme as was done in the meeting of 26/6/2023 is not sufficient authority for the school to levy any charges in a public school. Section 29 (2) (b) of the *Basic Education Act* must be fully complied with by ensuring that the necessary approval is obtained from the Cabinet Secretary in consultation with the County Education Board.
83. Despite the 2nd and 3rd Respondent maintaining that they had sought and obtained the approval from the Cabinet Secretary to levy the impugned remedial charges and other charges including the dormitory project fees and the budget deficit amount, they only exhibited the requests for the authority but apart from those requests, no actual authority was exhibited from the Cabinet Secretary authorizing the levying of the said charges.
84. As was held by the Court in Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] KEHC 9435 (KLR)
- “7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality.”
85. It is my finding therefore that the said remedial charges and all the extra charges demanded were not lawfully processed and as required by Section 29 (2) (b) of the *Basic Education Act*, Cap 211.

Whether the 2nd and 3rd respondent's harassed, discriminated and victimized the petitioner's daughter as a result of this suit.

86. The decision of the Court on this issue is a question of evidence, that is whether the Petitioner has succeeded in establishing the claim that the daughter was harassed, discriminated and victimized due to his failure to pay the remedial charges that the school was demanding thereby violating her right to free and compulsory basic education under Article 53 (1) (b).



87. The Court of Appeal in *Kurshed Begum Mirza v Jackson Kaibunga* [2017] KECA 244 (KLR) explained thus:

“(16) ... According to Section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(17) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rests upon the claimant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence...”

88. The petitioner alleged that the class teacher in a meeting attended by the Petitioner and the 2nd respondent dated 25th January 2024, the class teacher made remarks to the effect that his daughter would be the one that will suffer because of the stance the petitioner was talking. The 2nd respondent who was said to be in that meeting categorically denied hearing such communication. It was thus the Petitioner’s word against hers.

89. Further, there was no evidence whatsoever that the daughter was discriminated or victimized or the schooling discontinued for the refusal to make the said payment. That allegation was made without proof and is thus rejected.

90. On the allegation that the Petitioner was kicked out of the school WhatsApp group, the question is, was there a school WhatsApp group that existed in fact? The 2nd Respondent denied that any existed.

91. The WhatsApp group was not shown to hinged on the School policy and was thus governed by informal internal rules that could be set by the administrator (s) of the forum. The administrators of such groups would consider what is appropriate or inappropriate to be posted in the group and with whom they shall associate with hence cannot be compelled to include persons into groups created using their own private/personal mobile lines and there is no formal arrangement or policy by the school on



creation of WhatsApp groups for the parents and teachers. It is thus preposterous to think that the administrator can be compelled to retain a member in his/her privately created WhatsApp group.

92. On the contention that the Petitioner must pay for the text books in cash as opposed to replacing the books, although the Respondents insisted that the option of replacing the books is provided, the school newsletter they sent to the parents dated 6th October, 2023 did not give the option of replacement. In fact, the word ‘pay’ is emphatically bolded meaning that there is credence in what the Petitioner swore. The said clause reads:

“Book Losses”

‘Students who have lost text books have been issued with a copy of lost books and the total cost of the books. Parents are to pay for the lost books as they report back.’

93. Although I am persuaded that the School has every right to demand the replacement of such text books from the parent or guardian for losses of text books lost by their children as part of instilling discipline and responsibility in a collaborative way between the school and the parents so as to protect public property from unnecessary wastage and losses; I find it difficult to understand why insistence must be made by the St. Georges School that such lost text books must be paid without the option of replacing them. The Respondents, perhaps having given a second thought to this condition changed tune in this case and in the replying affidavit deponed that the two options are available to the parent. This Court wonders why this fact could not be stated in the newsletter which had to bold the word ‘pay’. The Court thus doubts the sincerity of the 2nd Respondent in this regard.

Whether the petitioner is entitled to reliefs sought

94. Article 23 (3) prescribes the remedies the Court may grant in Constitutional Petitions but does not make them exclusive. It states that ‘a court may grant appropriate relief, including...’ meaning that the Court can fashion appropriate reliefs that it considers will best serve the interest of justice in the case.
95. Having regard to the foregoing, the Court makes the following orders:
- a. A declaration is hereby issued that it is unlawful to charge levies in any public school, including those that may be passed by resolutions of the parents’ association under the Third Schedule to the Act before seeking and obtaining the approval from the Cabinet Secretary in Charge of Education pursuant to Section 29 (2) (b) of the [Basic Education Act](#), 211.
 - b. That St Georges Girls Secondary School demanded payment of levies without proof of authority from the Cabinet Secretary as required under Section 29 (2) (b) of the [Basic Education Act](#), Cap 211 Laws of Kenya.
 - c. This Court having carefully considered the minutes of the Parents Association and the Annual General Meeting of the School, is of the view that it will not be in public interest or that of the school to order that the monies paid without the approval of the Cabinet Secretary be reimbursed to any parent who may have paid unauthorized levies as prayed by the petitioner, rather, it considers making an appropriate order for an audit to be conducted to verify if the money was properly utilized for purpose intended. I, thus issue an order of mandamus directing the Ministry to conduct an audit on the payments made and expenditure thereof in respect of the following funds at St Georges Girls Secondary School: the dormitory project fund, budget deficit fund, infrastructure fund and remedial/school performance improvement programme for the period covered by this Petition and to file a report to this Court within next three (3) months to inform any further necessary action, if need be. I make



this order conscious of the fact that it is the Ministry which should have taken the initiative to address these concerns but the letters by the Petitioner on this issue went unanswered contrary to what is expected of a public entity Article 232 (1) (c) leaving with him no option but to approach this Court for a remedy.

- d. The practice of the St. Georges Girls Secondary School of demanding that lost text books issued must be fully accounted for is aimed at ensuring there is collaborative effort between the school and the parents in instilling discipline and responsibility to safeguard public property from loss and this aligns with Articles 201 (d) and 232 (1) (b) of *the Constitution* hence is neither unlawful nor unconstitutional. It is however unreasonable for the School to insist that parents must only pay for the lost books in cash without giving them an option of replacing the text books which they may source from the market directly at affordable prices.
- e. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

.....

L N MUGAMBI
JUDGE

