



Khairati Girls Muslim Academy Malindi v Sub-County Director of Education Malindi Sub-County & 2 others (Constitutional Petition E003 of 2025) [2025] KEHC 12938 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION E003 OF 2025
M THANDE, J
SEPTEMBER 19, 2025**

BETWEEN

KHAIRATI GIRLS MUSLIM ACADEMY MALINDI PETITIONER

AND

SUB-COUNTY DIRECTOR OF EDUCATION MALINDI SUB-COUNTY 1ST RESPONDENT

COUNTY DIRECTOR OF EDUCATION - KILIFI COUNTY 2ND RESPONDENT

MINISTRY OF EDUCATION STATE DEPARTMENT FOR BASIC EDUCATION MALINDI SUB-COUNTY 3RD RESPONDENT

JUDGMENT

1. In a Petition dated 17.1.25, the Petitioner seeks the following reliefs:
 - a. A Declaration that the Respondents' arbitrary and unilateral decision to close down with immediate effect, the Petitioner's school, trading as Khairati Girls Muslim Academy Malindi, without any justified reasons, recommendations, any prior notice to that effect, or any information material to that decision and the same lacking in procedural considerations, was unconstitutional, unlawful and irregular and null and void for being in contravention of Articles 10, 27, 43, 47, 53, and 258 of *the Constitution* of Kenya, 2010 and section 4 and 5 of the *Fair Administrative Action Act*, and the Ministry of Education, State Department for Basic Education Directives.
 - b. A Declaration that the Respondents' notice dated 16th January, 2025, is irregular, and void for being in contravention of the clear provisions of Article 47 of *the Constitution* and Section 4 and 5 of the Fair Administrative Actions Act.



- c. An Order of Judicial Review in the nature of CERTIORARI to quash the decision of the Sub-County Director of Education Malindi Sub -County, acting on the delegated powers of the Minister of Education State Department for Basic Education Malindi SubCounty, dated 16th January, 205, to close down the Applicant’s school Khairati Private Girls Day and Boarding Muslim Academy situate in Malindi Sub County, Kilifi County.
 - d. An Order of Judicial Review in the nature of a Prohibition directing the Respondents, their officers and any other authority acting on their instructions from closing down and in any other manner interfering with the smooth running, management and learning in the Applicant’s school Khairati Private Girls Day and Boarding Muslim Academy situate in Malindi Sub County, Kilifi County.
 - e. An Order of Compensation does issue directing / compelling the Respondents to compensate for damages, and inconvenienced caused as a result of their Draconian Decision to close down the school with immediate effect, without any prior notice to that effect, vide a notice dated 16th Janaury, 2025.
 - f. Such other orders and or directives that this Honourable Court shall deem fit to grant in circumstances, pursuant to Article 23[3] of *the Constitution* of Kenya, 2010.
 - g. Costs of this petition be borne by the Respondents.
2. The Petitioner’s case as set out in the Petition and supporting affidavit by Hamisi Ramadhan Kiwaka, its director sworn on 17.1.25, is that it is a duly registered a private girls’ day and boarding secondary school, since 2017, and trading as Khairati Girls Muslim Academy Malindi. The Petitioner’s complaint is that on 16.10.24, officials from the Malindi Sub- County Director of Education visited the School and made comments in the visitors’ book that the boarding section be closed. They however did not indicate any defects or specific areas to be improved. By a report on Quality Assurance dated 15.1.25, the Malindi Sub-County issued a conclusion that the boarding section of the School be closed. Thereafter and based on the said report, the Respondents issued a directive dated 16.1.25 to close down the whole School with immediate effect, “until all the Recommendations and Ministry of Education Policy Safety for learners are adhered to”. The Petitioner asserts that the Respondents have arbitrarily and unilaterally closed the School in total disregard of the plight of the students in the School. Further that this was done just when students had reported and were readying themselves to register for final exams without offering alternatives.
 3. The Petitioner terms the Respondents’ actions as draconian, irrational, unconscionable, unjustified, unconstitutional, malicious and illegal. That the actions of the Respondents amount to unfair administrative action within the meaning of Article 47 of *the Constitution* and the *Fair Administrative Action Act*. Further that the actions of the Respondents being in violation of the provisions of Articles 10 and 47 and the FAAA warrant the Court’s intervention.
 4. The Petition is opposed by Rashid Roba Adan the 1st Respondent vide a replying affidavit sworn on 22.1.25. He challenged the Petitioner’s locus standi to sue in its name as it is not an incorporated entity capable of suing and being sued in its name and since it purports to have a Board of Management, the Board is the one to sue in its name. Further, that even if the applicant has locus standi, the Petition has been filed without exhausting the existing mechanisms under the *Basic Education Act* where Section 85 provides for appeals on decisions of County Education Board to the Education Appeals Tribunal.
 5. The 1st Respondent further stated that the Petitioner has been operating the School illegally; that it was issued with the Provisional Certificate of Registration to enable it operate as a private girls’ day and boarding school, on 20.1.17; that under Section 50[3] of the *Basic Education Act*, a provisional



certificate legally allows a school to operate for 1 year renewable for a further period of 1 year; that this affords a school time to meet the expected Standards of Operation and Safety pending the full certification upon application and approval by the Ministry of Education; that their records show that the Petitioner has never renewed the provisional certificate and continues to operate illegally contrary to Section 76 [1] of the *Basic Education Act*; that the Petitioner being an illegal entity cannot sue and benefit from this Court's orders as issuance of any order will be sanctioning an illegality.; that Sections 76 and 78 of The *Basic Education Act* prohibits the operation promotion and teaching of basic education without accreditation or being licensed by the Ministry of Education.

6. The 1st Respondent further stated that when they visited the School on 16.10.24, it was noted that the School and welfare of the learners in general were in a deplorable condition; that the report done by the Directorate of Quality Assurance and Standards indicated that the fire extinguishers were out of service, the windows and emergency exits were not in compliance with the recommended standards; that ventilation, spacing of the beds, kitchen and wash rooms were all against the recommended standards; that being mindful of the students who were to sit the national exams, the School was allowed to operate to enable the learners ample time to prepare and sit their exams, on condition that the areas that were non-compliant will be worked on during the holiday and that the boarding area should be closed down; that on 15.1.25 the Quality Assurance Department from Malindi Sub-County visited the School and to their dismay, nothing had been done in response to the recommendations and the boarding section was in operation illegally; that classrooms were used as boarding area at night and mattresses and beddings were taken to the rooftop during the day to hide the existence of a boarding section thereby posing a great danger to the lives of the students; that as a result they were forced to write to Petitioner to close the School with immediate effect until all recommendations and Ministry of Education Policy Safety Standards are met per the report of 16.10.24. The 1st Respondent urged that in the interest and welfare of the learners, the Petition should be dismissed in its entirety.
7. In his supplementary affidavit sworn on 29.1.25, Hamisi Ramadhan Kiwaka reiterated his earlier averments and dismissed the averments of the 1st Respondent as unsubstantiated, unfounded, false, misleading wishy-washy and in bad faith. He stated that the exhibited report and photographs are not of the School and that the same are doctored. He reiterated that the School had complied with all Ministry of Health guidelines and regulations, regulatory and safety standards, single business permit, school registration, sanitary inspection and all other requirements. He urged that the Petition be granted.
8. Parties filed written submissions which I have duly considered. As the Court considers this Petition, it is necessary to first determine the legal status of the Petitioner and its capacity to file the Petition herein.
9. The Petitioner described itself in the Petition as a “duly registered private girls day and boarding secondary school as a basic education institution, under the Ministry of Education, Science and Technology, State Department of Education since 2017”.
10. The 1st Respondent contends that the Petitioner is not a legal entity with capacity to sue. Further that the School has been operating illegally as having been issued with a provisional certificate in 2017, it never renewed the same. In spite of these very critical claims, the Petitioner did not see any need to address the same either in its supplementary affidavit or submissions.
11. Article 260 of *the Constitution* defines a person as:

“person” includes a company, association or other body of persons whether incorporated or unincorporated;



12. Similarly, Rule 2 of *The Constitution* Of Kenya [Protection Of Rights And Fundamental Freedoms] Practice And Procedure Rules defines a person as:

“person” includes an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated;

13. The Petitioner did not provide any registration certificate indicating that it is a registered entity, even after the challenge by the Respondents. While an unincorporated body may bring an action in court, it can only do so in the name of its office bearers or officials but not in its own name. This is because an unincorporated body is not vested with capacity to sue. This was aptly put by Munyao, J. in *Kipsiwo Community Self Help Group v Attorney General And 6 Others* [2013] KEELC 63 [KLR] where he stated as follows:

“38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

14. Without any evidence of any registration, the Petitioner has no legal capacity to institute this action. It could only have done so through its officials.

15. I now turn to the claim that the School has been operating illegally.

16. The *Basic Education Act* is expressed as an act of Parliament to inter alia, provide for accreditation, registration, governance and management of institutions of basic education. Part VII of the Act makes provision for private educational institutions. Section 50[1] provides that a person shall not establish or maintain a private school unless it is registered under this Act.

17. Section 50[3] provides:

“Subject to the provisions of this Act, the registration of any private school shall be provisional for a term of one year renewable for one further term of one year until the institution is quality assured and notice given in writing to the proprietor that the registration is final.”

18. The initial registration of a private school is provisional for 1 year and may be renewed for a further 1 year until the institution is quality assured and the proprietor is issued with a written notice to the effect that the registration is final.



19. From the exhibited certificate of registration, the School was duly registered on 20.6.17. The registration status is indicated as provisional, in terms of the above provision. The Petitioner did not controvert the Respondents' claim that the School was operating illegally, by exhibiting a renewed registration or the notice that the registration is final. With this failure, the Petitioner is deemed to have admitted the claim by the Respondents. I am duly guided by the decision in *Abok James Odera T/ A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 [KLR] where the Court of Appeal stated:

“With regard to the alleged appellants admission of the respondentsentire claim in HCCC No. 183 of 1998, we wish to refer to the case of *Choitram v Nazari* [1984] KLR 32], which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then [now order 13 rule 2]; that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint , the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words “or otherwise”

20. Without any evidence of registration, to traverse the claim by the Respondents, the only conclusion that can be drawn is that the School has been operating illegally.

21. The Court has made a finding that the Petitioner has no capacity to sue and further that the School is not duly registered. As such, the issues raised by the Petitioner regarding violation of the right to fair administrative action and whether the Petitioner exhausted all available avenues are now moot.

22. Having determined as I have, it follows that the Petition is incompetent and cannot stand. In this regard I adopt the finding in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 where Lord Denning delivering the decision of the Privy Council stated:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

23. Section 50[4] of the Act provides:

If any person—

- a. conducts a private school which is not a registered school or a provisionally registered school,
- b. being the proprietor of a private school does any act calculated to lead to the belief that the school is a registered school while it is a provisionally registered school, he or she shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both such fine and such imprisonment.



24. Section 76 of the Act prohibits any person from offering basic education in Kenya unless the person is accredited and registered as provided for under this Act. And Section 78 makes it an offence for a person to engage in the promotion, management, or teaching of basic education unless such person is accredited and registered in accordance with the provisions of the Act.
25. From the material before the Court and considering the cited statutory provisions, it is clear that the Petitioner has been operating the School illegally. As such, granting any prayers in favour of the Petitioner, an illegal entity will be tantamount to sanctioning an illegality. This, the Court will not do.
26. In the end and in view of the foregoing, the Petition dated 17.1.25 being incompetent is hereby struck out. The Respondents shall have costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025.

M. THANDE

JUDGE

