



**Musoke (Suing on Behalf of Minor NEM and GPM)) v Alphax Academy Eldoret Limited & another (Petition E018 of 2025) [2025] KEHC 13192 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13192 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PETITION E018 OF 2025  
RN NYAKUNDI, J  
SEPTEMBER 25, 2025**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 27, 28,  
43, 53 AND 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 27, 28 AND 53 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT**

**BETWEEN**

**MULIRO MUSOKE ..... PETITIONER  
SUING ON BEHALF OF MINOR NEM AND GPM)**

**AND**

**ALPHAX ACADEMY ELDORET LIMITED ..... 1<sup>ST</sup> RESPONDENT  
THE HEADTEACHER ALPHAX ACADEMY ELDORET ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before Court for determination is the Petitioner's Petition dated 26/05/2025 wherein the Petitioner seeks the following prayers:
  - a. A declaration that the Respondents actions denying GPM and NEM access to classes, assessments and school transport due to delayed fee payments are unconstitutional and violate Articles 27, 28 and 53 of *the Constitution* of Kenya, 2010.
  - b. An order directing the Respondents to immediately reinstate GPM and NEM to full participation in classes, assessments and school activities including access to school transport.



- c. An order restraining the Respondents from subjecting GPM and NEM to any form or discrimination or undignified treatment on account of delayed fee payments.
  - d. An order directing the Respondents to provide psychological support and counselling to GPM and NEM to address the mental distress and trauma caused by their actions.
  - e. General damages for the by violation of children's fundamental rights and freedoms.
  - f. Costs of this Petition.
  - g. Any other relief that this Honourable Court may deem just fit to grant.
2. The Petition is further supported by the Affidavit sworn by Muliro Musoke on the same date.
  3. The Petitioner deposed that he is the father of PM and NM, minors and students at Alphax Academy Eldoret, that GPM and NM are enrolled at Alphax Academy Eldoret, a private educational institution managed by the 1<sup>st</sup> Respondent and administered by the 2<sup>nd</sup> Respondent.
  4. The Petitioner maintained that he has been diligently his children fees on time and the minors have schooled in the 1<sup>st</sup> Respondent's institution for past 1 year and 5 years respectively. The Petitioner added that due to financial constraints, he experienced delays in paying the school fees for the minor for the term commencing in May, 2025.
  5. The Petitioner contended that since 15/05/2025, the Respondents have denied his children access to continuous assessment tests (CAT) and regular classes, directing them to remain in the school's ICT laboratory during school hours and that the same was communicates by the 1<sup>st</sup> Respondent's account one Bernard Toroitich Kibor through cellphone number XXXXXXXX. The Petitioner further contended that the Respondents have also denied the minors access to school transport forcing them to seek alternative means to attend school which has caused them significant inconvenience and distress.
  6. The Petitioner further deposed that on 20<sup>th</sup> May, he wrote a letter to the institution to rectify the anomaly in terms of discrimination, promising to offset the outstanding fees but the same was not responded to and that on 22/05/2025, the 2<sup>nd</sup> Respondent wrote to him demanding all the fees arrears before the minors could be allowed in school.
  7. He contended that on 23/05/2025, while other students were permitted to leave the school premises at the end of the day, his children were detained in school causing them severe emotional and psychological trauma and that on 23/05/2025, the 2<sup>nd</sup> Respondent in WhatsApp text alerted him that the minors are not attending classes and he should remove the minors from the compound.
  8. The Petitioner maintained that the actions of the Respondents have subjected his children to humiliation, stigmatization and mental torture as they have been singled out and treated differently from their peers solely due to delayed fee payments which will be fully paid before the end of the term.
  9. According to the Petitioners, the Respondents' actions constitute discrimination, violate his children's right to human dignity and denies them their Constitutional right to education as guaranteed under Articles 27, 28 and 53 of *the Constitution* of Kenya, 2010. Further, the Petitioner deposed that the ongoing denial of education and the degrading treatment has caused his children significant mental anguish and he fears for their psychological well-being if this situation persists.
  10. The Petitioner maintained he has attempted to engage with the 2<sup>nd</sup> Respondent to resolve this matter amicably but his efforts have been unsuccessful necessitating this petition.



## The Respondent's Case

11. The Respondent opposed the Petition vide the Replying Affidavit sworn by Alulu Shallomic, on 11/06/2025, the 2<sup>nd</sup> Respondent herein.
12. He deposed that he is the 2<sup>nd</sup> Respondent herein and the Headteacher of the 1<sup>st</sup> Respondent. According to the 2<sup>nd</sup> Respondent, the petition is frivolous, vexatious, and constitutes an abuse of the Court process, having been instituted in bad faith and with ulterior motives.
13. The 2<sup>nd</sup> Respondent deposed that the Petition falls short of the threshold required for a constitutional petition as articulated in *Anarita Karimi Njeru vs. Republic* [1979] eKLR, in that it does not clearly set out the specific constitutional provisions alleged to have been violated, nor does it provide the particulars demonstrating the manner in which the said provisions are purported to have been infringed.
14. The 2<sup>nd</sup> Respondent added that the Petition is founded on a contractual relationship between the parties and that it is a well-established principle of law that this Honourable Court cannot rewrite the terms of a contract entered into by the parties, who are bound by its express terms and conditions.
15. The 2<sup>nd</sup> Respondent further deposed that on 27/01/2025 and 27/07/2021 respectively, the Petitioner voluntarily enrolled the subject minors, namely MGP and MEN, at the School and that upon enrolling the minors, the Petitioner read and executed the Admission Form, thereby accepting the terms and conditions of admission, including the obligation to promptly pay school fees, an obligation the Petitioner willfully breached, neglected, or refused to fulfill.
16. The 2<sup>nd</sup> Respondent maintained that as per the school practice, the Petitioner was Courteously reminded on several occasions to settle the outstanding school fees arrears to facilitate the uninterrupted learning of the subject, minors, but willfully failed and/or neglected to comply.
17. The 2<sup>nd</sup> Respondent added that notwithstanding the default in payment of school fees, the subject minors were at no point denied access to classes, continuous assessment tests, or transport services, as alleged by the Petitioner and that this is evidenced by the Class Register, which clearly reflects their consistent attendance.
18. The 2<sup>nd</sup> Respondent maintained that the subject minors were never denied the opportunity to undertake continuous assessment tests on 15th May, 2025, as alleged by the Petitioner, since the School: Calendar of Events distinctly provides that such assessments are administered during the month of June, that the subject minors were not detained at the School on 23/05/2025, as alleged by the Petitioner, and that their absence from school between 26<sup>th</sup> and 28<sup>th</sup> May was for reasons well known to the Petitioner, seemingly orchestrated to coincide with the filing of the present petition on 26/05/2025.
19. The 2<sup>nd</sup> Respondent further deposed that the Petitioner undertook to settle half of the term's school fees and to transfer the subject minors to another school by 4/06/2025.
20. The 2<sup>nd</sup> Respondent contended that the Petitioner cannot, in good faith, seek orders compelling the School to provide psychological support and counselling to the subject minors while having willfully failed to pay the requisite school fees and withdrawing the minors from school, actions which have, in themselves, contributed to the psychological distress now alleged, that the Petitioner cannot justifiably seek orders directing the reinstatement of the subject minors to full participation, in classes, assessments, school activities, and access to school transport, as the subject minors are currently enrolled and are fully enjoying all the services and facilities offered by the School and that the Petitioner



cannot allege violations of Articles 27, 28, and 53 of *the Constitution* of Kenya, 2010, while he has willfully failed to fulfil his obligation to pay school fees, an essential requirement for the provision of a conducive learning environment by the School.

21. The 2<sup>nd</sup> Respondent observed that while Article 43(1) (f) of *the Constitution* guarantees the right to education, this right is not absolute, particularly where a parent voluntarily enrolls a child in a private institution that relies on school fees for its operations. The 2<sup>nd</sup> Respondent deposed that such institutions cannot function effectively and efficiently where parents fail to fulfil their parental obligation to pay school fees.
22. The 2<sup>nd</sup> Respondent maintained that the Petitioner ought to appreciate that the 1st Respondent is a private institution which relies on the payment of school fees to operate effectively and maintain its standards and that the Petitioner cannot shift blame to us while he has failed to honour the agreed terms and conditions of admission.
23. In the end, the 2<sup>nd</sup> Respondent deposed that the Petitioner has the liberty to enroll the subject minors in a public school, where education is offered free of charge.

#### Submissions

It was directed and agreed that the Petition be canvassed vide written submission. The Petitioner filed submissions dated 27/06/2025 while the Respondents filed Submissions dated 11/06/2025.

#### The Petitioner's Submissions

24. In regard to whether the Petition is rightfully instituted before this Court, Counsel for the Petitioner submitted that under Articles 165(3)(b) of *the Constitution* of Kenya, 2010, the High Court has jurisdiction to determine questions regarding whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. Counsel observe that this Court is the appropriate forum for adjudicating this Petition, as it involves alleged violations of fundamental rights under Articles 27, 28, and 53 of the Kenyan constitution.
25. Counsel added that Article 22(1) and (2) of *the Constitution* of Kenya 2010 grants any person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated, including on behalf of another person who cannot act in their own name, such as minors. Counsel urged that the Petitioner, as the biological father of P.M and N.M, has locus standi to bring this Petition on their behalf.
26. Counsel relied on the case of *Anarita Karimi Njeru v Republic (1976-1980) KLR* and case of *Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*.
27. Counsel urged that Petitioner's pleadings clearly articulate the violations of Articles 27, equality and non-discrimination, 28, human dignity and 53, children's right to education and are supported by specific instances of denial of access to education, detention, and confinement in the ICT laboratory.
28. In addition, Counsel argued that the Respondents in their Replying Affidavit dated 11/06/2025 at paragraph 5, admit to violating the rights of the minors and they point that the Petitioner has not demonstrated sufficient ground for them to be enjoined from violating the rights of the minors, specifically, discrimination, detention and undignified treatment and that they argue that the Petition is frivolous and an abuse of the Court process. However, Counsel urged that no alternative remedy exists to address the constitutional violations suffered by the minors. Counsel thus submitted that where fundamental rights are violated, a constitutional petition is the appropriate recourse.



29. Counsel maintained that the Petition is rightfully instituted before this Court, as it meets the constitutional threshold for locus standi, jurisdiction, and specificity of claims, and no alternative remedy exists to address the violations. Counsel urged that Respondent has admitted to violating the rights of the subject minors for school fees which was ultimately paid, and the Respondent now has to make good for their violation. Counsel pointed out that through WhatsApp communication dated 26/05/2025, the Respondent wrote to the Petitioner informing him to come pick the minors as they were not attending classes." Kindly organize for means to pick your children from school as they are in the office not attending classes....." Counsel argued that this was at 8:29 am when the minors are supposed to be in class.
30. On whether the Respondents actions violated the minors' rights under Articles 27, 28 and 53 of *the Constitution*, Counsel submitted that Article 27(1) of *the Constitution* of Kenya 2010 guarantees every person equal protection and benefit of the law, while Article 27(4) prohibits discrimination on grounds including social or economic status. Counsel argued that the Respondents' actions in denying P.M and N.M access to classes, CATs, and school transport due to delayed fee payments constitute discrimination based on economic status. Counsel added that as evidenced by the documents filed by the Petitioner, he has been diligently paying fees for the minors, save for this occasion when there was a slight delay and the letter dated 3/06/2025 by the Respondent to Petitioner clearly show the bad faith in the Respondent. It started as a threat, but it was actualized.
31. Counsel submitted that from 15/05/2025 to 28/05/2025, the minors were singled out and confined to the ICT laboratory in the company of teacher Brian during school hours, while their peers with paid fees attend classes. According to Counsel, this differential treatment is solely attributable to the Petitioner's financial constraints, as admitted in paragraph 3 of the Petitioner's Supporting Affidavit.
32. Counsel cited the case of R v Independent Electoral and Boundaries Commission & Others Ex Parte Khelef Khalifa [2017]eKLR and he submitted that the Respondents' claim in their Replying Affidavit at paragraph 9 that the minors were not denied access to classes is contradicted by the Petitioner's affidavit and the Respondents' own letter dated 9/06/2025 which threatens to exclude non-paying students from school activities.
33. Counsel maintained that the Respondents' actions violated Article 27 of *the Constitution* of Kenya 2010 by subjecting the minors P.M and N.M to unequal treatment based on their economic status, without any reasonable justification, since the term had not ended and the Respondents could have had a recourse in Court for breach of contract against the Petitioner.
34. Counsel further submitted that Article 28 of *the Constitution* of Kenya 2010 guarantees every person the right to have their dignity respected and protected. Counsel argued that the Respondents' actions, including detaining the minors on 23/05/2025 and confining them to the ICT laboratory, constitute degrading treatment and grossly violated their dignity.
35. Counsel further argued that the detention of P.M and N.M on 23rd May 2025, as stated in paragraph 6 of the Petitioner's Supporting Affidavit, caused severe emotional distress and humiliation. Counsel added that Respondents' letter dated 9/06/2025, explicitly states that non-paying students "will spend their entire days in the dining hall unattended to, "indicating a deliberate policy of isolating and humiliating such students.
36. Counsel cited Lady Justice Mumbi Ngugi in the case of .N.N v Attorney General [2013]KEHC 6004 (KLR).
37. Counsel thus urged that Respondents' actions of detention and confinement in the ICT laboratory are degrading and violate the minors' right to dignity under Article 28 of *the Constitution*.



38. Counsel cited Article 53 of *the Constitution* on Children. He submitted that Article 53(1)(b) of *the Constitution* of Kenya, 2010 guarantees every child the right to free and compulsory basic education while Article 53(2) mandates that the best interests of the child be the paramount consideration in all actions concerning children. Counsel also observed that Section 13 of the *Children Act* further protects children's right to education. Counsel also relied on the proviso of Section 8(1) of the Children's Act.
39. Counsel argued that the minors herein P.M and N.M between dates 15/05/2025 to the 28/05/2025 were denied access to classes and CATs, as stated in paragraph 4 of the Petitioner's Supporting Affidavit. Counsel urged that Respondents' claim in paragraph 10 of their Replying Affidavit that CATs are scheduled for June is irrelevant, as the denial of regular classes constitutes a continuing violation of the right to education, and yet the fees is not discounted, and the minors were only reinstated to attend classes and use school transport upon filing this constitutional petition, clearly demonstrating the outright violation of their constitutional rights.
40. Counsel further argued that the Respondents' actions disregarded the best interests of P.M and N.M, as mandated by Article 53(2). Counsel urged that the confinement to the ICT laboratory and denial of school transport have caused psychological trauma and disrupted their academic progress, as stated in paragraph 9 of the Petitioner's Supporting Affidavit. Counsel thus urged this Court to find that the Respondents' actions violate Article 53(1)(b) and Section 13 of the Children's Act by denying P.M and N.M access to education and failing to prioritize their best interests.

### **The Respondent's Submissions**

41. On whether the Petitioner's Petition meets the threshold for a Constitutional Petition, Counsel for the cited Rule 10(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, on the essential elements that must be set out in a Petition. Counsel also cited the case of Anarita Karimi Njeru v Republic (Supra) and the case of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR.
42. Counsel submitted that from a cursory examination of the present Petition reveals that although the Petitioner has cited various Articles of *the Constitution*, he has failed to plead with reasonable precision the specific particulars of the alleged violations and the manner and extent to which the said constitutional provisions have been infringed.
43. In view of the foregoing, Counsel submitted that the instant Petition does not meet the requisite threshold of a constitutional petition, as it falls short of the precision test laid down in the authorities cited hereinabove. Accordingly, the Petition ought to be dismissed with costs to the Respondents.
44. Regarding whether the Petitioner's right to education has been infringed, Counsel appreciated that Article 43(1) (f) of *the Constitution* guarantees the right to education. However, Counsel observed that this right is not absolute, as it imposes a corresponding obligation on the parent or guardian who elects to enroll a child in school, particularly in a private institution, to meet the financial requirements, including the payment of school fees. Counsel relied on the case of IK (Suing Through His Guardian & Next Friend EKW) & Another v Principal M Academy & Another (Petition 13 of 2015)[2015] KEHC 514:(KLR).
45. Counsel argued that the 1<sup>st</sup> Respondent, being a private institution, is not under an obligation to provide educational services free of charge, as it operates as a business entity reliant on school fees for its sustainability and continued operations. Counsel also cited the case of
46. JK'(Suing on behalf of CK) v Board of Directors of Rusinga School & Another [2014]KEHC 7490 (KLR) and the case of NJ v Aga Khan Academy & 6 Others [2018] KEHC 10133 (KLR).



47. Counsel submitted that the Petition is premised on, a contractual relationship between the parties. Counsel argued that it is a well-settled principle of law that this Honourable Court cannot rewrite the terms of a contract voluntarily entered into by the parties, who are bound by its express terms and conditions.
48. Counsel relied on the case of *Kaycia Jinnah v Aga Khan Education Services, Kenya* [2020] eKLR and the case of *VS & 43 others (acting on their behalf and also acting as parents and next friend of students learning at the Mombasa Academy) v Nyali Academic Services Ltd t/a Mombasa Academy & another* [2020] KEHC 415 (KLR).
49. Counsel maintained that on 27/01/2025 and 27/07/2021, respectively, the Petitioner voluntarily enrolled the subject minors, MGP and MEN, at the School. Counsel submitted that upon enrolment, the Petitioner duly read and executed the Admission Form, thereby expressly accepting the terms and conditions of admission, including the obligation to promptly pay school fees, an obligation which the Petitioner willingly breached.
50. In view of the foregoing, Counsel submitted that the Respondents have not infringed on the right to education. Counsel observed that as a private institution, the 1<sup>st</sup> Respondent is not mandated to provide free education but offers educational services on a contractual basis. Counsel added that the Petitioner, having voluntarily agreed to the school's terms and conditions, including the obligation to pay fees promptly, and having breached that obligation, cannot properly invoke the constitutional jurisdiction of this Honourable Court. Counsel argued that the relationship between the parties is purely contractual in nature, and it is trite law that this Honourable Court cannot rewrite the terms of a contract freely entered into by the parties.
51. In regard to whether the Petitioner is entitled to the reliefs sought, Counsel submitted that having established the existence of a contractual relationship between the parties, and in view of the Petitioner's breach of the said contract through default in fee payment. Counsel further submitted that the Petitioner is not entitled to any of the reliefs sought in the Petition.
52. Counsel observed that despite the Petitioner's failure to meet his contractual obligation to pay school fees, the subject minors remain duly enrolled and continue to benefit from all services and facilities provided by the School. Counsel urged that given the circumstances, the Petitioner cannot legitimately claim a violation of Articles 27, 28, and 53 of *the Constitution*, having willfully defaulted on an essential obligation that enables the School to provide a conducive learning environment. Consequently, Counsel urged that the prayer for a declaration of the alleged constitutional violations lacks merit and ought to be dismissed.
53. Further Counsel submitted that the prayer for a declaration compelling the School to provide psychological support is unsubstantiated, particularly in light of the fact that the Petitioner has willfully failed to pay school fees an act which, in itself, may be contributing to any psychological distress now alleged.
54. In conclusion, Counsel submitted that there has been no infringement of the minors' rights to education, equality and freedom from discrimination, or human dignity. Counsel urged that Petitioner has failed to discharge, his contractual duty to pay school fees and cannot, therefore, compel the 1st Respondent, a private institution, to continue offering educational services without payment. Counsel added that that Petition is devoid of merit and should be dismissed with costs to the Respondents.

## **Determination**

55. The following issues arise for determination;



- a. Whether the Petition meets the threshold of a Constitutional Petition
- b. Whether the orders sought should be granted

### **Whether the Petition meets the threshold of a Constitutional Petition**

56. The principle established for the specificity of constitutional petitions was set down in the cases of *Anarita Karimi Njeru v Republic* [1979] eKLR (supra) and *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR (supra) which both highlight the threshold that a petition should meet in order for a constitutional Court to entertain the same. Further in *Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General* [2017] eKLR the Court held that:

It is not however, enough to allege that one's fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the *Evidence Act* Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior Courts including but not limited to the cases of *Anarita Karimi Njeru – vs- Republic* [1979] eKLR and *Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective Petitioner ought to set out his or her complaint with precision and clarity to enable the Court to ascertain whether or not a given right or fundamental freedom has been infringed.

57. It was the Respondent's submission that the Petition in question does not meet the threshold of a Constitutional petition. The Respondent contended that although the Petitioner has cited various Articles of *the Constitution*, he has failed to plead with reasonable precision the specific particulars of the alleged violations and the manner and extent to which the said constitutional provisions have been infringed.
58. On the part of the Petitioner it was argued that the Petitioner's pleadings clearly articulate the violations of Article 27, on equality and non-discrimination, Article 28, on human dignity and Article 53(1)(b) on children's right to education and that the same are supported by specific instances of denial of access to education, detention and confinement in the ICT laboratory.
59. I have perused the Petitioner's petition that is dated 26/05/2025. The petition is premised on Articles 27, 28 and 53(1)(b), but substantively he focuses on the rights as guaranteed under Article 53(1)(b) of *the Constitution* of Kenya. The Petitioner alleges that that his children right to education has been infringed by the Respondents who have denied his children access to classes, assessments and school activities including access to transport. The Petitioner thus seeks inter alia for a declaratory order to be made by this Court that the Respondents' actions of denying the minors access to classes, assessments and school transport due to delayed fee payments are unconstitutional and violate Articles 27, 28 and 53(1)(b) of *the Constitution*.
60. In the circumstances of the case can it really be said that the Respondents violated the minors' rights under Articles 27, 28 and 53(1) of *the Constitution* as read together with Section 13 of the Children's Act. While appreciating that a child's best interests are of paramount importance in every matter



concerning the child as envisaged under Article 53 (2) of the Constitution, it would be my view naive to assume that a child's right to education is absolute.

61. In the case of H O O (a child suing through his father and next friend) P O O v Board of Management N School & 2 others [2018] eKLR the court in reference to Article 43 and 53 stated that:

The Constitution of Kenya 2010 expressly recognizes education as a right for all. Article 43(1) (f) provides that every person has the right to education while Article 53 provides for a wide array of rights of the children including the right to free and compulsory education and further, that a child's best interests are of paramount importance in every matter concerning the child. Article 53(1) (b) stipulates that "Every child has the right to free and compulsory basic education."

62. The Court further stated that:

It is also trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution.

63. From the pleadings, it evident that 1<sup>st</sup> Respondent is a private learning institution and thus governed by policies and frameworks that would not naturally governor public learning institutions and cannot be forced to offer education to any student who does not comply with its rules and regulations. The Petitioner herein voluntarily enrolled his children to the said learning institution having dully signed their respective admission forms. Further the Petitioner does not deny that he fell in arrears with regard to the minors' fees. There is evidence of correspondences between the Respondents and the Petitioner clearly showing the efforts by the Respondents to get the Petitioner to pay the sum in arrears. The Petitioner has also alleged various violations of the minors' rights with regard to their right to equality, non-discrimination and human dignity as provided for under Articles 27 and 28 of the Constitution. He however did not tender any evidence to support the said assertions save for mentioning in passing that his children were discriminated against by being denied access to classes, assessment and transport.

64. A cardinal requirement of the law is that whoever alleges must proof. The Evidence Act Cap 80 at Section 107 (1) aptly captures this requirement by providing thus:

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

65. This obligation was reaffirmed by the Supreme Court in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR where it held as follows:

"(49)Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."



66. I have considered the evidence on record and the averments of the Petitioner and I find that the Petitioner has failed to satisfy the burden of proof. The Petitioner’s children’s right to education has not been infringed by the Respondents for reasons that he voluntarily and independently admitted the said minors to the 1<sup>st</sup> Respondent’s learning institution in accordance with its approved admissions criteria. In any case, it is trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution which the Petitioner herein failed to comply with.
67. In the case of Joseph Njuguna & 28 others v George Gitau T/A Emmaus School & Another [2016] eKLR, Hon. Justice Onguto held;
- “The services offered by a private entity are akin to a contract (emphasis added) where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school.”
68. There is no dispute that the minors’ admission to the 1<sup>st</sup> Respondent’s institution was formalized through a contract, between Petitioner’s father and the institution. The Petitioner was contractually bound to pay school fees to the 1<sup>st</sup> Respondent, failure to which, the Respondent is legally entitled to take measures such as denying them class attendance and school transport to say the least. The Petitioner is the one to blame for failing to fulfil his contractual obligation, thus to pay the minors’ outstanding school fees or making arrangements on settlement of the same with the Respondents.

**Whether the prayers sought should be granted**

69. Given that the petition has failed to meet the threshold for a constitutional petition, or provide evidence that shows the extent of the alleged infringements, it follows that the prayers sought cannot be granted. In the circumstances, I direct that each party bears its own costs of the petition.

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

