Mutua & 6 others (Suing on their Own Behalf and on Behalf of 1,000/- Others) v St Bakhita Schools Limited & 3 others (Civil Case E084 of 2024) [2024] KEHC 8804 (KLR) (Civ) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E084 OF 2024

JN MULWA, J

JULY 15, 2024

BETWEEN

MARTIN MUTUA ..... 1ST PLAINTIFF

DAISY GATHONI MBUGUA ..... 2ND PLAINTIFF

NELSON MUHIA ..... 3RD PLAINTIFF

BELINDA NJERI ..... 4TH PLAINTIFF

MARY WANJIRU ..... 5TH PLAINTIFF

JUDITH MULWA ..... 6TH PLAINTIFF

JAIRUS KUTSURU ..... 7TH PLAINTIFF

SUING ON THEIR OWN BEHALF AND ON BEHALF OF 1,000/- OTHERS

AND

ST BAKHITA SCHOOLS LIMITED ..... 1ST DEFENDANT

ST BAKHITA DAYCARE & KINDERGARTEN LTD ..... 2ND DEFENDANT

ST BAKHITA JUNIOR SECNARY SCHOOL LTD ..... 3RD DEFENDANT

ST. BAKHITA HOLDINGS LTD ..... 4TH DEFENDANT

RULING

1. This is a representative suit. The plaintiffs are parents and or guardians of children/learners enrolled at St. Bakhita Schools Limited at various stages of learning. They sued on their own behalf and on behalf of other 1,000 parents as stated in the plaint dated 18/04/2024.

2. The 1st, 2nd and 3rd defendants are limited liability companies registered in Kenya carrying on business of provision of education services in both Nairobi and Machakos counties and own

   The 4th Defendant is described as a limited liability company incorporated in Kenya and carrying on business within Nairobi County.

   The four defendants own the "St Bakhita schools," and they collectively trade as St. Bhakita School to offer education and related services.

3. The interested party is the Parents Teachers Association (PTA) a registered association under the *Societies Act*, Cap 108 Laws of Kenya. It operates under a duly registered Constitution that governs the PTA's operations whose objective is primarily to promote and maintain a harmonious relationship within the school community fostering cooperation and open communication between the school management, academic staff, staff, parents and the learners.

4. The PTA represents approximately 4,000 parents, teachers, school management and staff and operates on principles of good faith, and fair dealing in contractual relationships, which are enshrined at clause 5 of the PTA's constitution.

5. The "St. Bakhita Schools" comprise of St. Baskhita Daycare & Kindergarten and St. Bakhita Junior Secondary School.

6. On or about 28/03/2024 the 4th Defendant issued a Notice to the Plaintiffs informing them of a decision by the 1st, 2nd and 3rd Defendants Board of Directors to increase school fees for Term II of 2024, hereinafter referred to as "the notice" stating that the increment would be reflected in the invoices for term II of 2024.

7. The said invoices were received on 9/04/2024, seven days of the notice, and 14 days to the opening of the schools after April school holiday. The plaintiffs and PTA committee, in their virtual meeting on 3/04/2024 raised objections to the increment of fees and the short notice given which concerns were expressed to the defendants by the PTA Chairman by a letter dated 5/04/2024, soon after the virtual meeting.

8. The Plaintiffs claim that the said invoices reflected an increment of:-

   a. Transport fees within a margin of 40-41%

   b. Tuition fees with a margin of 20-21%

   c. Co-curriculum activities within a margin of 20-40%

   It is upon the above background that the Plaintiffs approached the court by the motion under review.

9. In these proceedings, the plaintiffs are represented by Mr. Mwalimu instructed by CMC Advocates LLP. The defendants are represented by Dr. Mutubwa of Dr. Mutubwa Law firm while the Interested Parties (PTA) are represented by Mr. Owiti of Otiang'a Owiti & Co. Advocates.

10. Brought under provisions of Order 40 Rule (1) (2); Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Sections 1A, 1B and 3A of the *Civil Procedure Act*, the Applicants (Plaintiffs) seek orders:-

    1. Spent

    2. Spent

    3. Spent

4. That pending the hearing and determination of this suit there be on order of injunction restraining the defendant/Respondents whether by themselves or through their agents and/ or servants or other persons deriving authority from them from implementing the decision to increase fees as contained in invoices for Term II of year 2024.

5. That pending the hearing and determination of this suit there be a temporary order prohibiting the Defendants/Respondents by themselves, agents, servants, or whomsoever from the discontinuance of any learner from attending classes and other school related activities.

6. That there be no orders as to costs of this application.

11. Martin Mutua the 1st Plaintiff swore the Supporting Affidavit on 18/04/2024 and a Supplementary Affidavit on 17/05/2024.

In opposition to the application, the Director of St Bakhita Schools Felista Muthoki Mutuku swore the Replying Affidavit on 29/04/202 and also filed a Notice of Preliminary Objection.

In support to the plaintiffs cause, the Chairman of the PTA Charles Otiang'a Owiti also swore a replying affidavit on 15/05/2024.

12. On 27/05/2024 the court granted temporary relief to the Plaintiffs when it granted temporary orders of Injunction restraining the Defendants from implementing their decision to increase fees as contained in the invoices of term II year 2024 and further restrained them from discontinuing any learner from attending classes and other school related activities pending determination of the application.

Additionally, the plaintiffs were directed to pay school fees for term II (minus the increased fees) on or before 5th June, 2024.

13. On 29/04/2024, the defendants filed a Notice of Preliminary Objection premised on grounds that the plaintiff had neither issued a notice of the suit to the 1000 parents nor exhibited written authority of all the 1000 parents to commence this suit on their behalf.

Issues for Determination

1. Whether the Preliminary Objection by the defendants is merited

2. Whether the plaintiffs/Applicants have met the threshold for the grant of injunctive orders.

Parties Submissions On Both Issues

a. Plaintiffs Case and Submissions.

14. The plaintiffs' case is stated at the Pleadings, Affidavits in support of the motion and submissions dated 17/05/2024.

It is its case that the relationship between the plaintiffs and defendants is hinged upon a contract of services namely education offered by the 1st, 2nd and 3rd defendant being the only parties who are privy to the contract who can re-negotiate or terminate the same and all such parties are bound by the terms thereof.

15. It is their submission that the plaintiffs are protected by the Consumer Protect *Act No. 46 of 2012* the plaintiffs being the consumers and the defendants being the service providers.

Article 45 of the Kenya Constitution 2010 provides the consumers with rights thereunder and at (3) thereof clearly grants those rights to service offered by public entities and private persons

It is a further submission that under Article 47 of *the Constitution* every person has a right to fair administrative person that is fair, reasonable and procedurally fair.

16. On whether the plaintiff have established a prima facie case with probability of success, it is submitted, citing the case of Giella v. Cassman Brown Co. Ltd [1973] EA 358 that if the notice to increase school fees and related services is effected, the plaintiffs would suffer damages that cannot be compensated by costs as they would not only suffer economic duress due to the uncalled for and unconscionable increase and more so the very short notice period of 21 days to re-opening of schools in disregard to the schools policy on fees increments as established.

17. That as a result, the plaintiffs are left with no practicable alternatives but to either submit to the notice or withdraw their children out of the schools, being the stronger party in the contractual relationship.

Citing case of Court of Appeal LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Enwicklungsgesellschaft (DEG) & others [2011] eKLR was cited the plaintiffs urge that the court in such circumstances ought to interfere with the private contract between the parties.

18. On whether the plaintiffs would suffer irreparable injury, the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] eKLR for the proposition that existence of a prima facie case alone in itself is not sufficient, as the applicant is required to show that irreparable damages would occur if the injunctive order is not granted.

In that regard the plaintiffs further submitted that the defendants are an ongoing business so they would not suffer any loss worse that in economic situation in January 2024 in Kenya which was higher than in May 2024, and provided data by way of Consumer Price Index and finally submitting that should the orders not be granted, the plaintiffs children will be locked out of the schools which would cause irreparable injury not only to the learners/children but also the plaintiffs.

19. In the matter of balance of convenience, it is the plaintiffs case that the court should always opt for the lower rather than the higher risk of injustice as held in the case Amir Suleiman v Amboseli Resort Ltd [2004] eKLR, and therefore proposed that the plaintiffs be allowed to continue paying the school fees charged in term I of 2024 stating that economic factors have not changed significantly for period January 2024 and May, 2024 and abide by the established school fees policy of increment after every two years and the last such increment having been in 2023 the next expected increment was from 1st term January, 2025 and provided a pattern of increments from 2011 to date.

Further, the plaintiffs submitted that the notices having been issued by the 4th defendant who is not a party or privy to the contract for services, the said notices have no force of law for the 4th defendant being a stranger to the contract

b. Interested Parties (PTA) Case and Submissions

20. The Submissions are dated 4/06/2024 while its replying affidavit was sworn on 15/05/52024 by the Associations Chairman. Its case is that the defendants are obligated to exercise their discretion in increment of school fees and services in good faith and not to harm the schools as there has been a consistent two year school cycle established over time and therefore established policy.

Further, it is submitted that under this *Basic Education Act*, parents ought to be involved in matters affecting the learners including school fees and failure by the defendants to engage the plaintiffs and

PTA before and after the impugned notice, they have exercised their discretion in bad faith in PTA involvement in the running of schools.

21. On balance of convenience, the PTA urge that failure by the defendants to engage with PTA for an amicable solution will cause irreparable damage and loss to the plaintiffs as well as the PTA which is a core stakeholder in the running of the schools.

22. It was further submitted that under the Basic Education No 46 Act 2013, the role of PTAs are defined, at its 3rd schedule as:- participation in the development of school, improvement plans participation in development and implementation of school financial plans discussing and making recommendations to the Board of Management on matters affecting the welfare and discipline of learners.

23. The parties therefore submitted that the defendants' actions and overlooking its involvement in the fees increment notice was in contradiction with the spirit of the Act regarding parental involvement and violates principles of procedural fairness as the act emphasizes collaboration and transparency in school governance, suggesting that stakeholders should be heard on matters affecting them.

    Additionally, it is submitted that the defendants unilateral decision in the fee increment disregards the duty of good faith as well as the duty to consult as it is an established practice of PTA participation in financial planning that creates a legitimate expectation of consultations which the defendants failed to uphold in the circumstances relying on the holding in the Mawego Primary Schools Parents Association and Another v Board of Governors of Mawego Primary School & Another [2019] eKLR

24. On irreparable harm, the PTA submitted that the plaintiffs would suffer irreparable harm citing the case Nguruman Ltd v Bonde Nielsen & 2 others [2014]eKLR for proposition that the envisaged harm cannot be adequately compensated by monetary means further adding interference with children's' education can have long lasting and negative consequences impacting on their academic progress and overall well-being that cannot be compensated in costs.

    Also cited is VS & 43 others v Nyali Academic Learning services Ltd T/A Mombasa Academy & Another [2020] eKLR

25. On balance of convenience, the PTA argued that had the defendants promoted open communication and collaboration with it as it had always been some of the financial strain and anxiety currently faced by parents could have been minimized under principle of proportionality as an injunctive relief, urging that denial of the relief by the court will result in irreversible hardship which outweighs any potential inconvenience to the school management.

26. In the end, the court is urged to find that the balance of convenience tilts in favour of the plaintiffs.

    c. Defence Case and Submissions

27. Dr. Mutubwa in his very spirited highlights of his submissions dated 24/05/2024 urged the court to find no merit in the motion dated 18/04/2024. It is his submission in support of the defendants pleadings that the current fees structure is not sustainable the last increment having been made in January, 2023 when it increased the fees by Kshs. 6,000/- only.

28. Whether the plaintiffs/Applicants have met the requirements for grant of injunctive orders, it is submitted that the principles set out in Giella v Cassman Brown Case (Supra) have not been met, and further that expounded in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Other [2003] eKLR, the defendants case that the plaintiffs expectation that fees would always be increased after every two years was misplaced as no such conditions is stated in the contract entered into by the plaintiffs and the defendants and cites the contract clause that the management reserves the right to vary fees at its sole discretion.

29. Additionally, the defendants urged that the contract is binding on the parties citing the case of *Waitaari & 11 others vs. Registered Trustees of Tele-Posta Pension Scheme (civil appeal no. 390 of 2019)* [2023] KECA 1171 (KLR) for the proposition that legitimate expectation cannot be invoked in a contractual dispute citing the Court of Appeal case of Royal Media Services Limited & 2 others v AG & 8 others [2014] eKLR, where in the court of appeal held that Legitimate expectation cannot prevail against a statute nor express provisions of *the constitution*, adding that in this case there being express contractual provisions, legitimate expectation cannot arise.

    In addition, it is argued that almost 70% of the parents had so far paid the impugned fees as a clear indicator that the proposed fee increment was by only the purported 1000 parents and not by majority.

30. On the matter of irreparable damage/harm, the defendant cited the case of the court of appeal in Nguruman Limited v Bonde Nielsen & 2 Others [2014] eKLR, for the proposition that if the plaintiffs pay the increased fees for term II of 2024 and the suit succeeds, the additional amount can always be refunded or carried forward to the next term.

31. It was emphasized for the defendants that the defendant schools are a private enterprise and by the service contract, the plaintiffs accepted the terms when they executed the said contract, citing affidavit by Felista Muthoki FFM 3A sworn on 29/04/2024 that "The management reserves the right to vary the fees at its discretion"

    The court was urged to find that the *Basic Education Act* does not apply to the instant circumstances as Kenya is a free market economy and the court should not determine how private schools are managed as that would in their view set a dangerous precedents and that the *Basic Education Act* does not give parents authority to determine school fees in private schools and therefore such obligation falls under the sole discretion of the management.

32. The defendants further submitted that in the current circumstances of economic distress, the balance of convenience tilts in favor of the defendants and in support cited the case of Pius Kipchirchir Kogo Vs. Ferank Kimeti Tenai [2018] eKLR for the proposition that it is the plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the plaintiff.

33. For the foregoing, the defendants urged for denial of the injunctive orders as granting the same will greatly hinder and deprive the schools of its working capital.

Analysis And Determination

A. The Preliminary Objection

34. In the classic and celebrated case of Mukisa Biscuits Manufacturing ltd v west End Distributors Ltd Civil Appeal No. 9 of [1969 EA 696] the court held that:-

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit.....
>
> It raises a pure point of law, which, if argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion".

35. In the case of Oraro v Mbaja [2005] I KLR, the court held:-

> " .....a Preliminary Objection correctly understood, is now well defined and declared to be a point of law which is blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle a true Preliminary Objection ..... Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

36. Additionally, in the case of Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Appeal case No. 464 of 2000, it was held:-

> " Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law"

In Alfred Njau& Others v City Council of Nairobi [1982], KAR 229 the court held: -

> " The term locus standi means a right to appear in court and conversely to say that a person has no Locus standi means that he has no right to appear or be heard in such and such proceedings".

37. The defendants relied on the provisions of Order 1 Rule 8, 13 and Order 4 Rule 3 of the CPR, which provide as hereunder:-

Order 1 Rule 8

1. "where numerous persons have the same interest in any proceedings, the proceedings may be commenced and unless the court otherwise orders continued by or against anyone or more of them as presenting all or as representing all except one or more of them.
2. The parties shall in such case of issue the notice of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable by public advertisement as the court in each case may direct.
3. Any person on whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.

38. Order 1 Rule 13 Provides:-

1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner,.....
2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

Order 4 Rule 3 Provides that:-

> Where there are several plaintiffs, one of them with written authority filed with the verifying affidavit may swear the verifying affidavit on behalf of the others."

39. The defendants submitted that the plaintiffs failed to comply with the mandatory legal provisions and therefore the entire suit and the application are fatally defective, specifically for lack of notice issued to the members that the plaintiff's represent as no such evidence provided to the court, replying on

the case of Rose Florence Wanjiku v Standard Chartered Bank of Kenya Ltd & 2 Others [2014]e KLR to the effect: -

> that a representative suit must be brought in the names of or against all members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to provisions of Order 1 Rule 8 of the Civil Procedure Rules.

That is the position as stated in Order 1 Rule 13 of the Civil Procedure Rules.

40. In response to the above submissions, the plaintiffs by their submissions on the issue cited the same legal provisions, adding that there is no legal requirement for written authority to swear affidavits on behalf of persons in a representative suit, but that under Order 1 Rule 13 one of the plaintiffs in a representative suit may be authorized by any other of them to appear, plead or act for such others in any proceedings.

41. I have perused the plaint and the verifying affidavit. There are seven plaintiffs suing on their own behalf and on behalf of 1,000 others. The citation is clear on this. An authority to plead is also attached thereto. It states:-"We, the undersigned plaintiffs do hereby authorize Martin Mutua to swear all affidavits related to the suit herein and make such other statements incidental to the pleadings herein".

The six stated plaintiffs have appended their signatures thereto. It is dated 18/04/2024 and was filed with the plaint.

42. What seems to be the main issue here is the interpretation and understanding of the legal provisions stated above.

The notice envisaged at Order 1 Rule 8 is a Notice of institution of the suit. It could be served to the plaintiffs by either personal service or public advertisement upon leave of court being sought and granted. That was the position in the 2010 CPR. The said rules have since been amended in 2020 Rule 22B thereof it provides other modes of notifying parties of institution of suits and service of court process by email, SMS or WhatsApp platforms, alongside others under the 2010 Rules.

43. What is the purpose of the notice envisaged under Order 1 Rule 8.

The Court of Appeal in Yiapas Ole Seese & 4 others v Sakita Ole Narok & 2 others [2008] eKLR rendered thus:-

> " the whole purpose of provisions of Order 1 Rule 8 is to ensure that all persons with un-litigated similar cause of action are desirous of having their cause determined are included in this suit for their own convenience and to obviate a multiplicity of suits---- it is to give them an opportunity to make an election whether or not to become parties".

See also the case J. Campos & Another v A. C. De Souza & 5 Others [19] KLR 86 where the purpose of the notice was stated as to bring the suit to the attention of and inform the persons interested to apply to be made parties to the suit.

44. Is the notice mandatory?

In legal jargon, the words "May" and "Shall" bear different meanings. The word shall is of a mandatory nature while "may" is not mandatory though it may be important. Failure to comply with a "may" action cannot be fatal, as opposed to "shall" nature that carries a mandatory nature albeit each depending on peculiar circumstances of each matter.

But even then, under Article 159 (2) (d) of *the Constitution* a procedural defect ought not void or invalidate an otherwise intentions of a party to the extent of voiding a suit summarily.

The interested Party by their PTA chairman confirmed to the court by its Replying Affidavit sworn on 15/05/2024 that upon the impugned notice issued on 28/03/2024 by the Defendants to the Plaintiffs at paragraph *10* that he invited the parents/guardians to a virtual meeting on 3/04/2024 which was attended by over 850 parents including a significant representation of the PTA members.

45. It is also noted that the plaintiffs as parents/guardians of the learners in the schools have WhatsApp communication groups through which they speak and articulate issues concerning learning and welfare of their children. This is a communication model well recognized at Rule 22B as aforestated.

On lack of written authority under Order 4 Rule 3 it is the plaintiff's submissions that such requirement is not mandatory and if that was so, it would then defeat the purpose of Order 1 Rule 8 as analyzed above as all the rules under Order 1 CPR are not mandatory and that too is the position in regard to Order 1 Rule 13.

46. When a party gives another authority in writing to plead and swear all affidavits in respect to a particular case and such authority is duly filed together with the plaint, in my considered view, that authority represents the parties either the plaintiffs or the defendants or the interested parties. It cannot be that the donors of the authority especially in the numbers represented in this case must sign the written authority. Even if it was mandatory, each case must be treated individually as to their peculiar circumstances. In the short period the plaintiffs were given in the notice, they held virtual meetings confirmed by the PTA Chairman. It could not be that each parent would have signed the authority prior to filing the suit in court within the short period.

In Kahindi Katana Mwango & Another v Canon Assurance Co. Ltd [2013] eKLR, Samuel Cheboi & 3 Others v Paul Kanda & 4 Others [2022] eKLR and Jack Mukhongo Muniato v Nzoia Sugar Co. Ltd [2017] eKLR, the courts across board agreed that it is necessary to have an authority duly signed and filed in a representative suit donated to particular plaintiffs on behalf of the others.

47. However, if such authority is not signed by all the members as the defendants submit, it would not be a reason to strike out the entire suit in account of such procedural technicality as held in the case of Jack Mukhongo Muniato v Nzoia Sugar (Supra)

Assuming that the 1,000 parents did not give the necessary authority to the seven plaintiffs or one of them as is the case herein, to plead or swear affidavits on their behalf, the seven stated plaintiffs would still have their case sustained; with the rest having an option to apply to be joined into the suit as either plaintiffs or interested parties as clearly held in the case Chalicha Farmers' Co-operative Society Ltd v George Odhiambo & 9 others [1987]eKLR. Such authority can also be filed before the case is set down for hearing.

It is therefore evident that lack of such authority, which is not the case in this suit, does not void the suit, or render it fatally defective.

48. The Applicants/Plaintiffs in this application invoked provisions of Section 1A, 1B and 3B of the *Civil Procedure Act*, whose overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

So that when Article 159 (2) (d) calls upon the court to administer justice without undue regard to procedural technicalities, it is urged to accord every person a fair hearing. However, this is not to say that rules of procedure should be ignored but are made to uphold and promote the principles of *the constitution* being the supreme law of the land.

49. The old age case of Microsoft Corporation v Mitsumi Garage Ltd & Another [2001] EA 460 held that :-

> " Rules of procedure are the handmaids and not the mistress of justice and should not be elevated to a fetlish since theirs is to facilitate the administration of justice..."

Further in the administration of justice, where possible, and without regard to procedural technicalities, all disputes ought to be decided on merits and that errors or lapses especially by counsel, should not necessarily debar a deserving litigant from pursuit of his rights by striking out a suit. Needless to state that it has been held in a myriad of superior court decisions that striking out a suit is draconian, and the court should always strive to sustain the suit if possible, than to strike it out summarily.

50. For the foregoing, I am not to persuade that the Preliminary Objection dated 29/04/2024 is merited. There are numerous depositions by all parties that would need to be proved through the process of evidence, for instance the disputed service of notice of institution of the suit to the other plaintiffs, as well as to whether the other plaintiffs, other than the seven, indeed donated authority to them to represent them.

51. Further, the authority to plead or act on behalf of the 1,000 other Plaintiffs, can be filed as the case proceeds. It is not mandatory that lack of such authority filed with the plaint shall void the entire suit – see Microsoft Corporation Case (supra).

52. It is trite that a party may amend its pleadings before close of the pleadings without leave of court, or with leave of court after close of the pleadings as provided under order 8 of CPR.

53. For the foregoing, I find no merit in the Preliminary Objection. It is dismissed with no orders on costs.

B. Whether The Plaintiffs/Applicants have met the threshold on Grant of Injunctive Orders

54. In the case of Nguruman Limited v Jan bonde Nielsen & Another Civil Appeal No. 77 of 2012 [2014]eKLR the court of appeal held that:-

> " .....In an interlocutory application, the applicant has to satisfy the triple requirements to:-
>
> a. Establish his case only at a prima facie level.
>
> b. Demonstrate irreparable injury if a temporary injunction is not granted and;
>
> c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which vests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions are to be applied as separately distinct and logical handles which the applicant is expected to surmount sequentially.

55. By her Replying Affidavit sworn on 29/04/2024, the Director of St. Bakhita Schools posited that the schools are owned and run by the four defendants and that the impugned terms and conditions of the contract between the plaintiffs and the defendants are not issued under any of the official letterheads or names of the defendants but that of the trading name, St. Bhakita school.

I have considered the said contract as per samples annexed as defendants exhibit "FMM 4". These are Pre-prepared forms that parents/guardians are required to sign to get admission of their children into the schools.

56. Of relevance in this dispute are two clauses:-

a. Clause 4 that requires a parent/guardian to give the school a one term notice or pay one term's fees in lieu of notice should they wish to the withdraw their children from the school and failure by their parent to give the said notice, the parent/guardian would be liable to the school to the tune of one term's fees.

b. Clause 10 Provides that the management reserve the right to vary fees at its sole discretion.

These clauses are the gravamen of entire suit and this application Annexures marked "FMM4" is a newsletter under the letterhead "St. Bhakita Holdings Limited and signed by the chairman, Frederick Murunga, Dated 28/03/2024. It is captioned "Review of fees for the 2024-2025 academic year." Which would take effect from term II of 2024.

57. A casual perusal of the impugned notice shows that the plaintiffs were given 21 days to take note and adjust to the increased fees structure at the middle of the year in disregard to the earlier 2023-2024 fees structure, which had been applied in January 2024.

Reasons for the said notices are stated as due to the financial realities the schools face to maintain the quality of education and provide essential services.

58. The plaintiffs in their Supporting and Supplementary Affidavits aver that the 4th defendant has no privity of contract with the plaintiffs despite its averments of being the parent and/or holding company and as such the notice of 28/03/2024 does not bind the plaintiffs in regard to their contracts at all, as prior notices had been issued by the 1st, 2nd and 3rd defendants, suggesting that the 4th defendant's notice of 28/04/2024 should be ignored for lack of legal basis. There is no dispute that previous notices on fees increment and/or adjustment were never issued by the 4th defendant. Exhibits referred to speak to the position.

59. Among the plaintiffs list of documents are the impugned notice dated 28/03/24, letter dated 2/04/2024 by the PTA calling for a virtual meeting with all the parents to discuss the 28/04/2024 notice on 3/04/2024 and a letter dated 5/04/2024 again by the PTA Chairman expressing their unacceptance of the notice of 28/04/2024. By the said notice, the plaintiffs were being told to take either of the three options:-

1. Pay fees accordingly or.

2. Transfer their children from the school or.

3. Re-adjust their financial plans, in that very short period.

60. The reasons for the sudden change of mind by the defendants having by then issued the 2024/2025 fees structure only three months after the effective date, January 2024 was not only unacceptable but also unconscionable, unfair and unjust in the circumstances, and contrary to fair administrative action envisaged under Article 47.

The defendants reason for their drastic actions were stated in the notices among others (annexures SBSP-1) as "High and overhead costs that are driven by inflation and other factors..... Global economic landscape has been tumultuous with a significant increase in the costs of essential resources including fuel and these have led to inflationary pressures across various sectors...."

61. While the above is true for all Sectors of the Kenyan economy as at 2024, and the defendants spirited submissions that should temporary injunction orders be granted, the schools would not be able to

operate, the Interested Parties (PTA) spoke loud that the defendants failed to engage the PTA yet it is a legal obligation under the *Basic Education Act* 2013.

At its Third schedule, the PTA's play a crucial role in governance of schools, whether public or private, specifically in regard to:-

a. In development of school improvement plans - (6a)

b. Participation in development and implementation of school financial plans. 6b

c. Discussing and making recommendations to the Board of Management on matters affecting the welfare and discipline of the learners.6g

1. Prima Facie Case

62. In Mrao Ltd v First American Bank of Kenya Limited [2003] eKLR, prima facie case was defined by the Court of Appeal as:-

> "----In a Civil Case, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right"

The plaintiffs' case is premised on three sub issues in my view:-

a. Doctrine of legitimate expectation.

b. Breach of contractual obligations between the parties.

c. Non-compliance with the *Basic Education Act* 2013 and role of PTAs.

63. Over the years, particularly from 2011, it was argued by the plaintiffs and the PTA that there existed an unwritten policy on increment of school fees and related services in a duration of two years evidenced by the fees structures provided for the period 2020-2021, 2021-2022, 2022-2023, 2023-2024 and 2024-2025 (annexure provided).

It was also the expectation by the parents/guardians, collectively referred to as the plaintiffs, that there would be no variations to the fee structures in the middle of the periods, as had been the practise. The yearly Newsletter issued including the newsletter for the year 2024, having been so issued, the plaintiffs expectations were shattered by the notice dated 28/04/2024, giving them only 21 days to start of term II of year 2024 to pull up their socks, borrow, or whatever they would do to raise additional fees within 21 days as submitted and seen in their impugned Term II invoices issued barely nine (9) days to opening of schools term II.

64. The established practise carried implied terms creating legitimate expectations of continued adherence to the practise.

In the case Wandiga v Effecto Limited [2010], eKLR the Court of Appeal held that an established and recognised conduct created unwritten contractual obligations, even if not explicitly stated in the written contract.

Additionally, as ably submitted by the PTA Chairman, the Court in East African Portland Cement Co. Limited v Nyali limited [1986] K LR491 held the same sentiments that considering good faith and established practises in learning institutions, in particular the school Management ought not disregard involvement of PTA's in its roles being well spelt in statute; *Basic Education Act* [2013]. In disregard of engagement with PTA, the defendants unilateral decision making regarding the fees increase disregards the implied duty of good faith and potential duty to consult.

65. It has not been disputed that the defendants not only failed to consult the PTA when its need arose to increase school fees, but also cut off all communication channels with the plaintiffs to wit the WhatsApp communication platform that it had. These material facts have not been controverted by the Defendants either in their Replying Affidavits or in their submissions.

66. It is to be noted that private schools are not private clubs, which operate on their rigid rules; they are part and parcel of the bigger educational institutions that offer educational services and therefore bound by all legislation appertaining thereto, amongst them Article 46, and 43 of *the Constitution*, and the Fair Administrative Action as enshrined under Article 47 Laws of Kenya

67. The attributes are well captured in Constitutional Petition No. 158 of 2000 OAPA & 43 others v Oshwal Education Board [2020] eKLR (acting on their own behalf and also acting as parents and next friend of the students learning at the Mombasa Academy) v Nyali Academy Services T/A Mombasa Academy & Another [2020] eKLR for the proposition that school management must recognise PTA importance and consultations with the parents and guardians of the children, must empower the PTA and recognise its authority in advocating for the rights and interests of the school community, and create conducive platforms for constructive dialogue and conflict resolution mechanisms between the school administration, the parents and the teachers. It is the Defendants arguments that legitimate expectations cannot arise where there are express contractual provisions citing the case of Royal Media Services Limited & 2 Others v Attorney General & 8 others [2014] eKLR.

68. In the above case, the Court of Appeal expressed itself that "Legitimate expectation cannot prevail against statute nor express provisions of *the constitution*.

    Needless to state, constitutional obligations are far superior as *the Constitution* is the Supreme Law of the land. Article 43 on Economic and Social Rights provides:-

    43(1) (f) - Every person has the right to education.

    Article 53 on children's rights (2) a child's best interests are of paramount importance in every matter concerning the child

    Article 46(1) Fair administrative actions on Consumers rights.

    1. Consumers have a right to:-

        a. Good services of reasonable quality.

        b. To the information necessary for them to gain full benefit from goods and services.

69. It can therefore not be the sole discretion of the defendants as argued by the defendants that the school management can solely increase fees on the educational services without engaging the PTA. That itself is non-compliance with the *Basic Education Act*.

    The above was ably discussed in the case of OAPA v Oshawl Education Board [2020] eKLR (supra) Wherein adherence to constitutional and statutory provisions particularly the *Basic Education Act* 2013 was emphasised.

70. Whereas the defendants submitted that educational services do not fall under the *Consumer Protection Act* No. 46 of 2012 this has been put to rest by the Superior courts in decisions to the effect that indeed all Educational Institutions offer services to their students.

    The act defines consumer transactions as "any act or instance of conducting business and other dealings with a consumer, including a consumer agreement"

Article 46 (3) Provides:- This article applies to goods and services offered by public entities or private persons.

It is therefore evident and clear that the defendants being suppliers of services are bound to the rights that must be given to the consumers under *the Constitution*.

71. In the case International School, Runda and three others, [2020] eKLR in similar circumstances as in the present suit, the court observed that at its Judgement, paragraph *43*.

> " ---- I further note that this matter concerns private sector in respect of private schools which provide education services that has remained unregulated despite the right to education being an important and fundamental right."
>
> And therefore education is a service, and the *Consumer Protection Act* provides for situations when courts can intervene to obviate contracts that are undoubtedly unconscionable, oppressive and unfair to meet objectives set out under Article 46 Laws of Kenya.
>
> See also Central Academic Educational Systems v Gaurav Kumar Jai Kumar Mittal v Brilliant Tutorials and SPG (suing as parents and guardians of students minors schooling at Sabis (R) International School Runda v Directors Sabis (R) [2020] eKLR.
>
> For the foregoing it is evident that the plaintiffs have established a prima facie case with high probability of success.

2. Irreparable Damage.

72. The second pillar for grant of a temporary injunction is that the applicant must establish that it might suffer irreparable harm as held by the Court of Appeal in Nguruman Limited case (supra).

The applicants/Plaintiffs must establish the nature and extent of the harm, not just unfounded fear or apprehension. The injury must be real and substantial that an award of costs cannot be adequate and that monetary compensation cannot be an adequate remedy.

73. I need not repeat here what the plaintiffs would suffer by the impugned 28/03/2024 notice. Together with the interested parties, PTA they have stated their frustrations, to cite a few that the plaintiffs may resort to withdrawing their children from the schools, which would cause anxiety to the children and the parents being left to choose an option which in their views would be detrimental to their children. However, the contract between the plaintiffs and the schools is that a one terms notice to withdraw their children must be given or pay school fees equivalent to one term fees clause.

This, no doubt, is what has been defined as economic distress. Even if the parents were to be compensated in monetary award in costs, what would be compensation to the children whose ego, love of the school entail? Would this really be compensable by monetary award?.

74. On the part of the defendants, it is submitted that if the order of injunction is not granted, the plaintiffs will pay term II of 2024 fees and should the case succeed, the additional amount can always be refunded or carried forward to the next term. To the plaintiffs that is easier said than can be done. Having made plans, in whatever manner to pay school fees and services for the whole 2024 academic year, and having already paid for the first term 2024, it would be calling them to exercise either of the three options, to the detriment of their children's educational progress. It boils all to economic distress experienced by the defendants as well as the plaintiffs, and indeed all Kenyan Citizenry. It cuts across all sectors of the economy.

75. The defendants by their Replying Affidavit sworn by the Director of the school, they admitted that having been in the business of provision of Education services for 20 years, the business is an going concern and they would be able to compensate the plaintiffs should the plaintiffs succeed. Upon this admission, they urged the court not to deny or deprive them of their working capital which is derived from the schools fees.

76. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury. In the circumstances of these proposals of compensation to the plaintiffs, should the orders be denied there can be no adequate compensation to the plaintiffs for the harm they would deal with, by making a choice out of the three stated, which would result in irreparable hardship as the plaintiffs would be forced to either withdraw from the schools causing significant disruption to the children's academic progress, as well distress to the leaners.

In my considered view, the harm that may be caused to the plaintiffs and the children's interests outweigh the harm that the defendants may suffer if the temporary injunction is not granted.

3. Balance of Convenience.

77. The principle of balance of convenience has been enunciated in many decisions among them Pius Kipchirchir Kego v Frank Kimeli Tunai [2018] eKLR Amir Suleiman v Amboseli Resort Limited [2004] eKLR for the Proposition that the balance will tilt towards the party which would suffer greater harm and inconvenience than which would be caused to the defendants if an injunction is granted, should the suit be ultimately dismissed.

The court in the Pius Kipchirchir case (supra) referred the balance of convenience as a balance of inconvenience, and held that it is for the plaintiffs to show that the convenience caused to them will be greater than that, which may be caused to the defendants.

78. In terms of the Mrao limited v First American Bank of Kenya, (supra) I am satisfied upon the materials placed before the court that the plaintiffs have established a prima facie case with probability of success and the plaintiffs would suffer greater harm than the defendants would suffer should the temporary injunction they seek is denied.

For the forgoing, the balance of convenience tilts in the plaintiffs favour.

79. Consequently, I am persuaded that the plaintiffs have met the threshold for grant of temporary orders of injunction pending hearing and determination of this suit. These orders are directed to the defendants jointly and/or severally in terms of prayer No. 4 at the Notice of Motion Application dated 18/04/2024, and more specifically as hereunder:-

a. The Preliminary Objection raised by the Defendants by notice dated 29/04/2024 is hereby dismissed.

b. The Newsletter/Notice dated 28/03/2024 issued by the 4th defendant captioned “Review of fees for the 2024-2025 Academic year”, is hereby suspended pending hearing and determination of the suit.

c. Invoices for term II of year 2024 issued by the 1st, 2nd and 3rd Defendants to the Plaintiffs on/or about 9/04/2024 are hereby suspended pending hearing and determination of the suit.

d. That the Defendants fees structure for the period 2024-2025, prior to the impugned notice dated 28/03/2024 issued by the Defendants to the Plaintiffs shall remain in place and in force pending hearing and determination of the suit.

e. The court directs that this suit be fast tracked and be heard and concluded on priority basis due to its urgency, and in any event within 120 days from the date of this ruling.

f. Each party to bear own costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF JULY 2024.

JANET MULWA

JUDGE