



REPUBLIC OF KENYA



KENYA LAW
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**Maroa & another v Ministry of Interior & Coordination of National
Government & 3 others; Bugumbe Council of Elders (Interested Party)
(Petition 11 of 2015) [2023] KEHC 2046 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2046 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION 11 OF 2015
RPV WENDOH, J
MARCH 14, 2023
IN THE MATTER OF ARTICLES: 1 (1), 2(2) & 5, 10 (2), (B) & (C), 20 (1), 21
(1), 22 (1), 27(1),
47(2), 48, 50 (1), 165 & 258 OF THE
CONSTITUTION OF
KENYA, 2010.
AND
IN THE MATTER OF : VIOLATION AND/OR INFRINGEMENT OF THE
FUNDAMENTAL RIGHTS OF THE PETITIONER
AND
IN THE MATTER OF: ISEBANIA AND MABERA DIVISIONS
AND
IN THE MATTER OF: BUKIRA AND BUGUMBE CLANS
AND
IN THE MATTER OF: ISEBANIA BOYA HIGH SCHOOL
AND
IN THE MATTER OF: ST. ANNE'S GILRS BOARDING PRIMARY
SCHOOL
AND
IN THE MATTER OF: THE CONSTITUTION OF KENYA(PROTECTION OF
RIGHTS &
FUNDAMENTAL FREEDOM) PRACTICE AND



PROCEDURE RULES, 2013

BETWEEN

SAMSON GETOBAI MAROA 1ST PETITIONER
JOHN KIMWAMA MOHOCHI 2ND PETITIONER

AND

THE MINISTRY OF INTERIOR & COORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT

THE MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY 2ND
RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

BUGUMBE COUNCIL OF ELDERS INTERESTED PARTY

Failure to include a clan in the management of schools after donating land for the construction of public schools was not discriminatory.

The petitioners' grievance was that the Bukira Clan had been denied the management and managerial rights over and in respect to two public schools for which they had donated land for their construction. The court held that a public school encompassed a sponsored school and thus the two schools, the subject of the instant dispute, were public institutions. The court further held that the petitioners could not be locked out from having a say in the management of the schools even if the administrative headquarters were transferred to another division. The court also held that the Bukira Clan should be involved in the management of the schools because of the stake in the schools as could be gleaned from the history and that failure to include Bukira Clan in the management amounted to discrimination of the clan taking into account the history of the school and its situation.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - right to education and right to equality and freedom from discrimination - public schools - claim that a clan donated land for the construction of a public school - whether a public school encompassed a sponsored school - whether a clan which donated land for the construction of schools could be locked out from the management of the schools where the administrative headquarters of the schools were transferred - whether failure to include members of a clan which donated land for the construction of public schools in the schools' board of management mounted to discrimination - , article 53; , No 14 of 2013, section 2, 43(1)(a) and 54.

Constitutional Law - constitutional petitions - form and content of a constitutional petition - what were the elements to be contained in a constitutional petition and what was the nature of constitutional issues - , 2013, rule 10(2).

Words and Phrases - discrimination - definition of discrimination - implying distinction, exclusion, restriction or preference - Blacks Law Dictionary Pocket Edition (1996).

Brief facts

The petitioners' grievance was that the Bukira Clan had been denied the management and managerial rights over and in respect to two (2) educational institutions, Isebania Boys High School and St Anne's



Girls' Boarding Primary School (the schools). The petitioners contended that during the adjudication and demarcation process, the Bukira clan caused 2 portions of land to be reserved for public use, in particular towards the construction of public institutions including hospitals and schools respectively. Pursuant to the reservations, the properties allocated for public use were used in the construction of the schools for the benefit of the residents and members of Bukira Clan who ordinarily resided within Isebania and Kehancha Divisions respectively.

The petitioners contended that despite the fact that the schools were situated within Isebania Division, the respondents transferred their administration to Maberu Division which fell within the Bugumbe Clan Area to the detriment and prejudice of the Bukira Clan. The petitioners were further aggrieved that the Bukira Clan had also been subjected to the management and administration by the Bugumbe Clan whose division fell at Maberu as opposed to Bukira Clan whose division was at Isebania. The petitioners pleaded that the actions complained of, had violated and/or infringed their fundamental rights and legitimate expectations contrary to the provisions of articles 10(2)(b) and (c), 27(1) and 56 of the 2010 (the).

The petitioners prayed for among other orders; a declaration that the actions and/or omissions of the respondents, including the removal and placement of the schools, under the administration of Maberu Division, as opposed to Isebania Division constituted and/or amounted to discrimination contrary to the provisions of article 27 of the ; and a declaration that the management and/or administration of the schools ought to be returned to Isebania Division.

Issues

- i. What were the elements to be contained in a constitutional petition and what was the nature of constitutional issues?
- ii. Whether a public school encompassed a sponsored school.
- iii. Whether a clan which donated land for the construction of schools could be locked out from the management of the schools where the administrative headquarters of the schools were transferred.
- iv. Whether failure to include members of a clan which donated land for the construction of public schools in the schools' board of management amounted to discrimination.

Held

1. Article 258(1) of the gave every person the right to institute legal proceedings claiming that the had been contravened or was being threatened with a contravention. Article 258(2)(b) stated that the proceedings could be instituted by a person acting as a member of, or in the interest of, a group of a class of persons. The guidelines of filing constitutional petitions were provided for in the , 2013 (*Mutunga* Rules).
2. From rule 10(2) of the , a petition had to be clear on the right infringed or likely to be infringed, how it had been infringed. There should be a precise nexus between the and the alleged violation. The petitions had to raise constitutional issues. Constitutional issues were those which confronted the various violations in respect to the bill of rights or the itself. A constitutional petition had to demonstrate the link between the aggrieved, the alleged breached constitutional provisions and the nature of the contravention or infringement.
3. The No 14 of 2013 was an Act of Parliament established to give effect to article 53 of the . It was enacted to regulate and promote free and compulsory education, governance and management of institutions of basic education, establishment of the National Education Board, the Education Standards and Quality Assurance Commission and the County Education Board. Section 2 of the defined a private school as one established, owned and operated by private individuals, entrepreneurs and institutions. Section 43(1)(a) of the defined public schools as those which were established, owned or operated by the Government and included sponsored schools. From the definitions, a public school encompassed a sponsored school. Therefore, the two schools, the subject of the instant dispute, were public institutions.



4. The petitioners had not laid any basis for the grant of prayers for the schools be returned to Isebania Division because it had not been established why the transfer was done. The Ministry of Education had to have had reasons for so doing and could have considered other factors such as the number of schools in either of the divisions, the population in the area and others. The petitioners did not demonstrate that as a result of the transfer for example they had shortage of schools in their area. It was not enough to allege.
5. Part VIII of the provided for the governance and management of basic education and training. On the management of public institutions, section 55 of the provided that they should be managed by a board of management. The composition of the board of management was outlined under section 56 of the and they were appointed by the County Education Board.
6. It was a requirement that there should be six persons elected to represent parents of the pupils in the school or local community in the case of county secondary school. There had been no attempt by any of the parties before the court to provide a list of the composition of the management of the schools for the court to decipher whether there was any discrimination against the petitioner. A petitioner had to not only allege violation of rights but had to demonstrate how those rights had been violated. The claim of discrimination had not been sufficiently proved.
7. Inasmuch as the petitioners alleged that their right to public participation contrary to article 10(2) of the was violated before the transfer or moving of the administration of the schools to the neighboring Maberera division, they had not demonstrated and/or produced minutes before the court to show that a decision was reached to their exclusion, hence the claim that their legitimate expectations were infringed.
8. The court could not ignore the fact that the evidence adduced by the petitioners on the allocation of the public land and construction of the schools had not been controverted. The petitioners could not be locked out from having a say in the management of the schools even if the administrative headquarters were transferred to the Maberera Division. The schools remained to be an identity that the people of the Bukira Clan took pride in as their effort in ensuring development of their community. In that regard, the petitioners together with the members of Bukira Clan were equal before the law and they had the right to be treated equally before the law. If the petitioners had not been included in the board, then they had been discriminated against and left out of the management of the schools irregularly. They should be involved in the management of the schools because of the stake in the schools as could be gleaned from the history.
9. The schools were public schools. They were funded and/or maintained by tax payers' money. In the same vein, the students attending the schools were not limited to those from the Bukira or Bugumbe communities but also from other parts of Kenya. Hence, the people of Bukira Clan could not claim exclusive management of the two institutions and neither could the people from the Bugumbe Clan. Section 54 of the provided community representation of six members from the community to include members of Bukira Clan. Failure to include Bukira Clan in the management amounted to discrimination of the clan taking into account the history of the school and its situation.

Petition dismissed.

Orders

- i. *The Ministry of Education (2nd respondent) through the Migori County Education Officer directed to avail to the court a list of the board members of the two schools to ascertain whether the Bukira Clan was represented.*
- ii. *In the event the Bukira Clan was not represented the court directed that the Migori Education Office reconstitute the schools' board within forty five (45) days and include representation of Bukira Clan.*
- iii. *In exercise of the directions in order i, the Migori County Education Office was to ensure an equitable representation to the management of the schools from the Bukira and Bugumbe Clans.*



- iv. *The Migori County Education Officer was to file a report in court within 14 days from the date of the reconstitution of the schools' board.*
- v. *Each party to bear costs of this petition.*

Citations

Cases

1. Abdi, Abdi Ahmed v Cabinet Secretary for Interior and Co-ordination of National Government & 7 Others (Petition 238 of 2015; [2017] KEHC 3302 (KLR)) — Mentioned
2. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1979) KLR 154) — Explained
3. Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others (Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR)) — Explained
4. Komora, Suleiman Abarufa & Another v County Government of Tana River & 2 Others (Petition 1 of 2019; [2020] KEHC 5984 (KLR)) — Mentioned
5. Fredricks & Other v MEC for Education and Training, Eastern Cape & Others ((CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693 ; [2002] 2 BLLR 119 (CC) (4 December 2001)) — Explained

Statutes

1. Basic Education Act, 2013 (Act No 14 of 2013) — Section 2,54(2), 55, 56, 56(1)(a) (e); Part VIII — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — Section 4 (2), 10 (2) (b) (c), 22(1),27 (1) , 53, 56, 258 (1) — Interpreted
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Constitution 2010, Sub Leg) — Rule 9 (b) (1) — Interpreted

Texts

1. Black, Thomas., (Ed) (1996), Black's Law Dictionary : Pocket Edition (London:Thomson Reuters Company, College & School Division)

Advocates

Mr. Mulisa for Petitioner.

JUDGMENT

1. The petitioners Samson Getobai Maroa and John Kimwama Mohochi are residents of Bukira West Location, Isebania Division within Kuria West District in the County of Migori in the Republic of Kenya. The petitioners also state that they are members of the Bukira Clan which is comprised of Bugumbe, Nyabasi, Bwirege and Bukira clans and they belong to the Bukira clans.
2. The 1st respondent, the Ministry of Interior and Coordination of National Government is a Ministry created by the Government of Kenya charged with the responsibility of supervising and/or undertaking security both within the counties and the national government.
3. The 2nd respondent, the Ministry of Education, Science and Technology is a Ministry created by the Government of Kenya charged with the responsibility of supervising and/or implementing education related activities and also ensuring education standards are maintained in educational institutions in the country.
4. The 3rd respondent, the Kenya National Bureau of Statistics is a Government Agency, charged with the responsibility of collecting, analysing and disseminating statistical data in Kenya.



5. The 4th respondent, the Honourable Attorney General is the Principal Legal Advisor to the Government of the Republic of Kenya.
6. The Bugumbe Council of Elders were joined as an interested party in this petition. They describe themselves as the custodians of the interests of the Bugumbe Clan.
7. The petition before this court, is the one dated 2/10/2015 and it is supported by the affidavit of Samson Getobai Maroa sworn on 2/10/2015 and a supplementary bundle of documents dated 1/8/2016. The petitioners approached this court with the grievance that the Bukira clan has been denied the management and managerial rights over and in respect to two (2) educational institutions that is Isebania Boys High School and St Anne's Girls' Boarding Primary School (the schools).
8. The petitioners contend that during the adjudication and demarcation process, the Bukira clan agreed and therefore caused 2 portions of land to be reserved for public use, in particular towards the construction of public institutions including hospitals and schools respectively. Pursuant to the reservations, the properties allocated for public use were used in the construction of the schools for the benefit of the residents and members of Bukira Clan who ordinarily reside within Isebania and Kehancha Divisions respectively.
9. The petitioners pleaded that they independently and/or in conjunction with the Catholic Diocese, proceeded to and constructed Isebania Boys High School and St Anne's Girls Boarding Primary School to help improve the educational standards of the Bukira Clan.
10. The petitioners are contend that despite the fact that the two educational institutions are situated within Isebania Division, the respondents transferred their administration to Maberera Division which falls within the Bugumbe Clan Area to the detriment and prejudice of the Bukira Clan.
11. The petitioners are further aggrieved that the Bukira Clan have also been subjected to the management and administration by the Bugumbe Clan whose division falls at Maberera as opposed to Bukira Clan whose division is at Isebania.
12. The petitioners plead that the actions complained of, have violated and/or infringed their fundamental rights and legitimate expectations contrary to the provisions of articles 10 (2) (b) & (c), 27 (1) & 56 of the *Constitution 2010*. The petitioners are represented by Oguttu Mboya Advocates. The respondents were represented by Mr Eredi from AG's office, Mr Omonde Kisera represents the interested parties.
13. The petitioners prayed for the following orders:-
 - a. Declaration be issued to the effect that the petitioners are entitled to Protection under the *Constitution*.
 - b. Declaration that the actions and/or omissions of the Respondents herein, including the removal and placement of the Isebania Boys High School, St. Anne's Girls Boarding Primary School, under the administration of Maberera Division, as opposed to Isebania Division constitutes and/or amounts to discrimination contrary to the provisions of article 27 of the *Constitution, 2010*.
 - c. Declaration that the management and/or administration of Isebania Boys High School and St. Anne's Girls Boarding Primary School, ought to be returned to Isebania Division, wherein the two (2) Educational Institutions, lawfully and legitimately fall.



- d. An order of judicial review in the nature of mandamus to issue to respondents, compelling the respondents to return and restore the administration and management of the Isebania Boys High School and St Anne's Girls Boarding Primary School, to Isebania Division.
 - e. Costs of the petition be borne by the respondents jointly and/or severally.
 - f. The court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.
14. The petitioners also presented their case by *viva voce* evidence before justice Mrima. Samson Getobai Maroa testified on behalf of the petitioners. On the two institutions, it was his testimony that St Annes Girls is situated on a parcel of land known as Bukira/Buhirimonono/477 and the proprietors are the Abakira Clan through the Catholic Mission while Isebania Boys is situated on Bukira/Buhirimonono/405 and 58 with registration school no GP/Q/133/90. The registration shows that the school is in Bugumbe West Location in Maberera Division. It was his testimony that Bugumbe West and Bukira West are in different locations. The inhabitants of Bukira West are the Bakira Clan while the inhabitants of Bugumbe West are the Bugumbe Clan alias Abarenchoka.
 15. The petitioner further testified that Bukira/Buhirimonono/477 falls in Bukira West Location Isebania Division; that Isebania Boys was registered in 1977 under No. 3210 then under Bukira West Location and parcels 405 and 48 where Isebania Boys is situated. He further contended that it was wrong to state that Isebania Boys is in Bugumbe West and is currently being administered from Maberera Division whereas the school is in Isebania Division which should be the correct division to administer this school. Both schools are within the Bakira Clan who were very instrumental in building the schools.
 16. The petitioner testified that since the schools are now being administered from Maberera Divisions there has been civil wars between the clans posing insecurities. The complaint by the Bukira Clan is that the school is being managed by the Bugumbe Clan nstead of Bukira which has been denied the right to administer the school. It was further stated that the issue has been raised with the education Ministry and the former provincial administration but no substantial determination of the dispute has been made so far.
 17. The 3rd respondent entered appearance on 26/2/2016 through the firm of Josiah M Omosa & Co Advocates and filed a notice of preliminary objection dated 26/2/2016. The 3rd respondent also filed submissions to its preliminary objection. The 3rd respondent did not pursue the prosecution of the preliminary objection.
 18. The 4th respondent entered appearance on behalf of all the respondents and filed statement of grounds of opposition dated 20/5/2016 as follows:-
 1. That the petition is an abuse of the process of the courts of law.
 2. That the petition does not disclose any reasonable cause of action known or recognized in law.
 3. That the petition is based on clannish considerations which is an affront to the constitutional requirement on national values espoused in articles 4 (2) and 10 (2) of the Constitution.
 4. That the petition asks the court to grant discriminatory orders which if granted will be nugatory since in effect will alienate the rest of the public at the interest of a clan.
 5. That the petition has not demonstrated any prejudice or discrimination that will be suffered.
 6. That the petition is against the independence of education administration policy of schools administration and management.



7. That the petition is incompetent, bad in law, frivolous, vexatious, fatally and incurably defective and should be struck out *ab initio*.
19. The petitioners filed written submissions dated 14/2/2022. Counsel for the petitioner submitted that it has been established that the two educational institutions have been established and registered in Buhirimonono which lies in the Isebania and Kehancha Divisions where the Bukira Clan resides. The petitioners submitted that the administration of the educational institutions was transferred to a neighbouring division namely Maberu Division where the Bugumbe Clan resides.
20. The petitioners produced Green Cards (PEXH 1&2) in respect to LR Nos Bukira/Buhirimonono/405 & 477 respectively. Plot No 405 which was reserved for Isebania Secondary School while Plot No 477 is registered in the name of Catholic Mission and the two properties are situated within Buhirimonono registration section and fall within the Isebania and Kehancha Divisions where the Bukira Clan resides.
21. The petitioners also produced the contract of sale of land (PEXH-3) dated 13/5/1987 which was purchase for land parcel number Bukira/Buhirimonono/58 for the Isebania Secondary School. The petitioners produced (PEXH-4) being a letter from the District Education Officer, Kuria District dated 10/3/2003 which indicated that Isebania Secondary School was being administered from Maberu Division though the school is in Isebania Division. PEXH-5 is a certificate of registration of Isebania School which indicates that the said school is situated at Bugumbe West which is not the case.
22. The petitioners argued that it would only be fair for the administration of both schools to be managed at Isebania Division as they fall under the locality of the Bukira Clan. It was also argued that taking the administration of the schools to a different division, that is, Maberu Division was discriminatory contrary to article 10 (2) of the Constitution which prescribes for public participation. It is the petitioners' submission that the respondents were duty bound to adhere to this provision and ensure the schools in question were administered in the right divisions and there was need to transfer the management and/or administration to a different division, the decision ought to have been subject to public participation.
23. Further to foregoing, the petitioners submitted that the respondents have not adduced any evidence to the contrary neither did they call witnesses to controvert the evidence adduced by the petitioners. It was necessary for the respondents to demonstrate that the transfer of the administration of the schools was borne out of public participation and/or involvement of the Bukira Clan. To buttress their position, the petitioners relied on the cases of Abdi Ahmed Abdi vs Cabinet Secretary for Interior and Co-ordination of National Government & 7 Others [2017] eKLR and Suleiman Abarufa Komora & Another vs County Government of Tana River & 2 Others [2020] eKLR.
24. Counsel drew the attention of the court to the provisions of the Basic Education Act of 2013. It was submitted that section 54 (2) provides that the structures of governance and management of education established under section 1 encourage co-operation and collaboration among stakeholders in the governance and management of basic education. It was also submitted that section 56 prescribes for management committees which includes six persons elected to represent parents of the pupils in the school or local community in the case of county secondary schools. In this case, the Bukira Clan members who are also the local community were obliged to participate in the affairs affecting the school.
25. In conclusion, the petitioners stated that the decision to transfer the administration of the schools to another division was done in an arbitrary and discriminatory manner.
26. The respondents filed their written submissions dated 25/5/2016 and submitted on three issues.



27. On whether the petition raised any cause of action known in law, the respondents submitted that the idea of a public institution administration being only subject and limited to a particular clan is in itself an illegality and cannot be tenable in law; that if the prayers are granted, the same would amount to discrimination as granting the prayers will disentitle the rest of the public from enjoyment of the benefits from the two institutions.
28. On whether limiting the administration of the two schools is constitutionally measured against the national values, principles and public policy, the respondents submitted on the provisions of article 27 of the Constitution and stated that school administration is not supposed to be subject to a particular clan or section of A community but should be open to the public.
29. It was submitted that school administration is governed by the provisions of sections 54(2) and 56 The Basic Education Act 2013. That the petitioners ought to be challenging their exclusion from position provided for the community in section 56(1)(a) or (e) of the Basic Education Act. The Act provides the County as the lowest administrative entity before the school boards and therefore it can be safely surmised that the interest of the county are catered for which is inclusive of the Bukira Clan.
30. On whether the petition has a reasonable chance of success to warrant the courts entertaining, the respondent submitted that if the prayers are awarded by the court, the implementation of the same will be discriminatory to the rest of the community and nugatory, taking into account the provision of the Basic Education Act, 2013.
31. The interested party filed submissions dated 14/3/2022. They submitted that the petitioners' petition is inviting the court to settle issues of clan egos and/or superiority battles between the Bukira and Bugumbe Clans of Kuria Tribe; that matters of establishing schools are within the preserve of the Ministry of Education and related Departments; that the law on how to establish and operate public schools is well laid out in the relevant education laws.
32. Further, it was argued that public schools once established are not owned by tribal clans as the petitioner would want the court to believe. The interested party submitted that the petitioners have not furnished this court with evidence of the number of public schools within the Bukira and Bugumbe Clans in order to make an informed decision on the matter of alleged discrimination.
33. From the foregoing, the interested party stated that the Government has set out a criteria on admission into public schools and there is no clan consideration. Rather, schools are classified as sub - county, county or national schools. The autonomy or independence which the Ministry of Education enjoys in managing public schools should not be interfered with, without any good cause. The interested party urged this court to find that the petition falls short of the constitutional threshold and the same should be dismissed with costs.
34. I have carefully considered the petition as well as the response thereto, respective exhibits and submissions. On that account, it is this court's opinion that the issues for determination that arise therefrom are: -
 - a. Whether the petition has met the threshold Constitutional Petitions.
 - b. Whether the rights of the petitioners (if any) have been violated.
 - c. What are the appropriate and just orders this court can make in respect to the petition?
35. Article 258(1) of the Constitution gives every person the right to institute legal proceedings claiming that the Constitution has been contravened or is being threatened with a contravention. Sub - Article



2 (b) states that the proceedings may be instituted by a person acting as a member of, or in the interest of, a group of a class of persons.

36. The guidelines of filing Constitutional petitions are provided for in the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules). Rule 9 (b) (1) provides as follows:-

The petition shall disclose the following—

The petitioner's name and address;

- (ii) The facts constituting the case;
- (iii) The nature of injury caused or likely to be caused to the petitioner, or in a public interest case to the public, class of persons or community;
- (iv) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which could be related to the matters in issue in the petition;
- (v) The petition shall be signed by the petitioner or his advocate;
- (vi) The relief sought by the petitioner;

37. From the above provision, a petition must be clear on the right infringed or likely to be infringed, how it has been infringed. There should be a precise nexus between the *Constitution* and the alleged violation. The petitions must raise Constitutional issues. In the case of *Marita Karimi Njeru vs Republic* [1979] KLR 154, the judge said as follows:-

“Petitioners have to demonstrate in their pleadings and affidavits that their rights have been violated and proceed to set out with a reasonable degree of precision that of which they complain as well as the provisions said to be infringed and the manner in which they are alleged to be infringed.”

38. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] eKLR had the following to say in the manner in which constitutional petitions should be filed:-

“Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

39. In the case of *Fredricks & Other vs MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court defined what constitutional issues entail as follows:-

“The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the Constitution itself...Constitutional matters must include disputes as to whether any law or conduct is inconsistent with the



Constitution, as well as issues concerning the status, powers and functions of an organ of State...the interpretation, application and upholding of the Constitution are also constitutional issues.”

40. From the foregone, the position is that constitutional issues are those which confront the various violations in respect to the bill of rights or the Constitution itself. A constitutional petition must demonstrate the link between the aggrieved, the alleged breached constitutional provisions and the nature of the contravention or infringement.
41. I have perused the Petition, the petitioner’s lament, that the management and the managerial rights over the Isebania Boys High School and St Anne’s Girls Boarding School (the schools) were divested from the Bukira Clan to the Bugumbe Clan and the aforementioned actions, the petitioners claimed violated the provisions of articles 10 (2) (c), 27 (1) and 56 of the Constitution; The petitioners therefore alleged infringement of their right against discrimination under article 27(1) of the Constitution and breach of article 56 which provides for participation by minorities and marginalised groups to participate be represented in guaranteed and other spheres of life.
42. The Basic Education Act No 14 of 2013 is an Act of Parliament established to give effect to article 53 of the Constitution of Kenya. It was enacted to regulate and promote free and compulsory education, governance and management of institutions of basic education, establishment of the National Education Board, the Education Standards and Quality Assurance Commission and the County Education Board.
43. Section 2 of the Basic Education Act defines a private school as one established, owned and operated by private individuals, entrepreneurs and institutions. Section 43(1) (a) of the Basic Education Act defines public schools as those which are established, owned or operated by the Government and includes sponsored schools.
44. From the above definitions, a public school encompasses a sponsored school. Therefore, the two schools, the subject of this dispute, are public institutions. This is also affirmed by the averments in paragraphs 7, 8, 9 and 10 of the petition where the petitioners pleaded that during the adjudication and demarcation process, the Bukira Clan agreed and caused two portions of land to be reserved for public use. As a result, the Isebania Boys High School and St Anne’s Girls Schools were constructed.
45. As to the request that the two subject schools be returned to Isebania Division, the petitioners have not laid any basis for the grant of such prayers because it has not been established why the said transfer was done . The Ministry of Education must have had reasons for so doing and may have considered other factors such as the number of schools in either of the divisions, the population in the area and others. The petitioners did not demonstrate that as a result of the transfer for example they have shortage of schools in their area. It was not enough to allege.
46. Part VIII of the Basic Education Act provides for the governance and management of basic education and training. On the management of public institutions, section 55 of the Basic Education Act provides that they should be managed by a Board of Management. The composition of the Board of Management is outlined under section 56 of the Basic Education Act and they are appointed by the County Education Board as follows: -
 - a. six persons elected to represent parents of the pupils in the school local community in the case of county secondary schools;
 - b. one person nominated by the County Education Board;
 - c. one representative of the teaching staff in the school elected by the teachers;



- d. three representatives of the sponsors of the school;
 - e. one person to represent special interest groups in the community;
 - f. one person to represent persons with special needs; and
 - g. a representative of the students' council who shall be an *ex officio* member.
47. It is a requirement that there should be six persons elected to represent parents of the pupils in the school or local community in the case of County Secondary School. The petitioners are aggrieved that they have been excluded from the management of the schools. Although the petitioners alleged that they have been left out of the management, the respondents have generally denied it but this court would have expected the respondent to provide the composition of the Board of Management as provided under section 56 of [Education Act](#) in support of their defence. [Blacks Law Dictionary Pocket Edition](#) (1996) defines discrimination as implying distinction, exclusion, restriction or preference. There has been no attempt by any of the parties before this court, to provide a list of the composition of the current management of the schools for this court to decipher whether there is any discrimination against the petitioner. A petitioner must not only allege violation of rights but must demonstrate how those rights have been violated. The claim of discrimination has not been sufficiently proved.
48. In as much as the petitioners are alleging that their right to public participation contrary to article 10 (2) of the [Constitution](#) was violated before the transfer or moving of the administration of the schools to the neighboring Maberu division, they have not demonstrated and/or produced minutes before this court to show that a decision was reached to their exclusion hence claim that their legitimate expectations were infringed.
49. Be that as it may, this court cannot ignore the fact that the evidence adduced by the petitioners on the allocation of the public land and construction of the schools has not been controverted. The petitioners cannot be locked out from having a say in the management of the schools even if the administrative headquarters were transferred to the Maberu Division. The schools remain to be an identity that the people of the Bukira Clan take pride in as their effort in ensuring development of their community. In that regard, it is this court's finding that the petitioners together with the members of Bukira Clan are equal before the law and they have the right to be treated equally before the law. If the petitioners have not been included in the Board as alleged, then they have been discriminated against and left out of the management of the schools irregularly. They should be involved in the management of the schools because of the stake in the schools as can be gleaned from the history.
50. The two schools are public schools. They are funded and/or maintained by tax payers' money. In the same vein, the students attending the schools are not limited to those from the Bukira or Bugumbe Communities but also from other parts of the country. Hence, the people of Bukira Clan cannot claim exclusive management of the two institutions and neither can the people from the Bugumbe Clan. Section 54 of the [Basic Education Act](#) provides community representation of 6 members from the community to include members of Bukira Clan. Failure to include Bukira Clan in the management amounts to discrimination of the clan taking into account the history of the school and its situation.
51. In the end, the court will not grant any of the declarations and orders sought. But, this being a matter of grave public interest especially as respects the contribution of the Bukira Clan to the development of the schools from the inception of the schools and in doing my best to strike a balance;
- i. I direct that the Ministry of Education (2nd Respondent) through the Migori County Education Officer do avail to this court a list of the Board Members of the two schools to ascertain whether the Bukira Clan is represented.



- ii. In the event the Bukira Clan is not represented this court directs that the Migori Education Office do reconstitute the schools' Board within forty five (45) days and include representation of Bukira Clan.
- iii. In exercise of the directions in (i) above, the Migori County Education Office to ensure an equitable representation to the management of the Isebania Boys High School and St Anne's Girls Boarding School from the Bukira and Bugumbe Clans.
- iv. The Migori County Education Officer shall file a report in court within 14 days from the date of the reconstitution of the schools' Board.
- v. Each party to bear costs of this petition.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 14TH DAY OF MARCH, 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Mulisa for the Petitioner.

No appearance for the 1st, 2nd, 3rd and 4th Respondents.

No appearance for the Interested Party.

Nyauke Court Assistant

