



**KWG (a Child Suing Through her Father and Next Friend PGK) v  
Aga Khan Academy, Mombasa & 2 others (Constitutional Petition  
E044 of 2023) [2023] KEHC 22918 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 22918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E044 OF 2023**

**OA SEWE, J**

**OCTOBER 2, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 3, 10, 19, 20, 21,  
22, 23, 27, 28, 29, 43, 47, 53, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**KWG (A CHILD SUING THROUGH HER FATHER AND NEXT FRIEND  
PGK) ..... PETITIONER**

**AND**

**AGA KHAN ACADEMY, MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL, SENIOR SCHOOL AGA KHAN ACADEMY,  
MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**AGA KHAN EDUCATION SERVICE, KENYA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated 24<sup>th</sup> August 2023. It was filed by K W G (the petitioner), a minor suing through her father and next friend P G K under Article 22 (1), Article 23 (1) and (3) of *the Constitution* of Kenya and all enabling provisions of the Law for the following orders:
  - (a) Spent.
  - (b) Spent
  - (c) That the petitioner/applicant be re-admitted to Aga Khan Academy, Mombasa, the 1<sup>st</sup> respondent herein, pending the hearing and determination of the Petition.



- (d) That a temporary order of injunction be issued restraining the respondents from suspending or discontinuing the petitioner/applicant on the grounds forming the basis of the discontinuation letter dated 5<sup>th</sup> of July 2023 pending the hearing and final determination of the Petition.
- (e) That costs of this application be borne by the respondents.
2. The application is based on the grounds that the applicant was enrolled as a student at the 1<sup>st</sup> respondent, alongside her twin brother and three other siblings, to undertake her studies under the International Baccalaureate (IB) curriculum offered by the International Baccalaureate Organization for a worldwide community of schools, such as the 1<sup>st</sup> respondent. It was further the contention of the petitioner that she successfully completed her Primary Years Programme (PYP), a five year programme, before transitioning to Middle Years Programme (MYP) which is also a five year programme.
  3. The petitioner's father asserted that over the course of her academic studies, the applicant battled and suppressed a mild learning challenge related to reading and writing, which elicited concerns from her teachers; and that these concerns prompted the petitioner's parents to seek professional assessment to understand the root cause of her academic difficulties. It was thereupon that the petitioner was diagnosed with mild dyslexia, a learning disorder affecting reading and writing skills.
  4. The petitioner's father averred that, upon the diagnosis being made, measures were put in place to assist the petitioner in overcoming her challenge. He was therefore irked that despite the commendable efforts and resources being put in place to assist the petitioner, and in spite of the petitioner's commitment to her studies, the 2<sup>nd</sup> respondent, vide a letter dated 5<sup>th</sup> July, 2023, shockingly and without proper justification, chose to discontinue the petitioner's studies. The petitioner was thus advised that she would not be transitioning to year 9 of the International Baccalaureate (IB) Programme.
  5. According to the petitioner's father, the sole reason for the impugned decision was that the petitioner had not met the academic threshold to transition to Year 9. He explained that the petitioner had only two years left to conclude her Middle Years Programme (MYP) having already completed three years of the programme. He therefore averred that this abrupt expulsion from school had left the petitioner in emotional distress and eroded her self-esteem to the detriment of her well-being, granted that she had been forced to remain at home as her other siblings, including her twin brother, continued with their studies at the institution of the 1<sup>st</sup> Respondent. The petitioner's father also mentioned that during this period, she has been experiencing feelings of hopelessness, deteriorating self-confidence and considerable distress due to the abrupt expulsion as well as the challenges posed by her mild dyslexia condition.
  6. Further to the foregoing, the petitioner's father deposed that the implications of the 1<sup>st</sup> respondent's action to discontinue the petitioner from its institution are far-reaching, considering that the discontinuation was done midway through her programme, with only two years left for her to complete her Middle Years Programme (MYP). He added that the petitioner lacks alternative programmes that are compatible and commensurate with the International Baccalaureate (IB) curriculum to join or transition to, given that she is already eight years into the programme.
  7. Accordingly, the petitioner's father posited that the action taken by the respondents to discontinue the petitioner from her studies is draconian, unreasonable, oppressive and against the best interests of the petitioner as a child and that he same also violates and infringes on the petitioner's constitutional and fundamental right to education and freedom from discrimination as enshrined under Articles 43 and 27 of *the Constitution* of Kenya. He accordingly invoked the interest of justice in seeking that the orders



- sought herein are granted, and was confident that no prejudice will be suffered by the respondents should the court grant the orders sought.
8. In response to the application, the respondents filed Grounds of Opposition dated 4<sup>th</sup> September 2023. They thereby contended that:
    - (a) The 1<sup>st</sup> respondent is a private educational institution, with the liberty to set its own rules and regulations.
    - (b) The constitutional responsibility under Article 43 of *the Constitution* is placed on the State to achieve the progressive realization of the rights set out therein; and therefore there is no obligation placed on a private entity to provide such a right.
    - (c) The petitioner is guilty of laches.
    - (d) The petitioner has withheld material facts from the Court relating to her parents' conduct in the matter.
    - (e) There has been no breach of any provisions of *the Constitution*.
  9. In addition to the Grounds of Opposition, the respondents relied on the affidavit of Nancy Oruko, a member of the Senior School's Faculty who also serves as the Middle Year Programme (MYP) Coordinator. She deposed that the 1<sup>st</sup> respondent is authorized to implement the IB curriculum offering the Primary Years Programme for (PYP) for Grades 1-5, the Middle Years Programme (MYP) for Grade 6-10 and the Diploma Programme for Grades 11-12. She added that she is responsible for student transition from the MYP into the Diploma Programme as well as quality assurance in the implementation of the programme. She also serves as the Vice Principal of the MYP Programme Curriculum. She is therefore familiar with the petitioner's case.
  10. Ms. Oruko averred that, in implementing the IB Programme, the 1<sup>st</sup> respondent is guided by various policies as mandated by the IB, in addition to the Laws of Kenya, including *the Constitution* and the *Children Act, 2022*. She therefore pointed out that students' welfare is paramount to the 1<sup>st</sup> respondent; and that appropriate decisions and action are taken on the basis of what is in the best interest of the student, within the range of options available to the Academy. Hence, at paragraphs 10, 11 and 12 of her affidavit, Ms. Oruko adverted to certain aspects of the 1<sup>st</sup> respondent's Inclusion Policy and pointed out that one of them is to eliminate all forms of discrimination in the school community. And, at paragraphs 13 to 30 the affiant made reference to the 1<sup>st</sup> respondent's Admission Policy and explained the circumstances that led to the discontinuation of the petitioner.
  11. Ms. Oruko annexed copies of the policy documents and letters written by the 1<sup>st</sup> respondent on the basis thereof as annexures in support of her averments. She concluded her affidavit by denying that the petitioner's father ever shared the petitioner's diagnosis with the 1<sup>st</sup> respondent or any of its employees. She averred that instead of getting an assessment done by a professional psychologist, the petitioner's parents engaged a special education teacher to assist the petitioner. She likewise denied that the 1<sup>st</sup> respondent's actions were draconian, oppressive or against the petitioner's best interest. She conceded that the petitioner has good attitude and is well-behaved, but added that, unfortunately, she cannot keep up with the IB curriculum; and therefore that it is to her academic and mental detriment for her to remain at the Academy. It was therefore her assertion that there is no legal basis for the grant of the orders sought either in the application or the Petition.
  12. The application was urged by way of written submissions; to which end counsel for the parties filed and exchanged written submissions dated 7<sup>th</sup> September 2023. Accordingly, Mr. Nduati for the petitioner submitted on the applicable law and legal principles. He cited Articles 20 and 23(3)(c) of *the*



- Constitution as well as Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which give the Court power to grant conservatory orders. He also relied on the case of *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Limited* [2003] eKLR as to the applicable legal principles.
13. Thus, it was the submission of Mr. Nduati that since Article 20 of the Constitution applies the Bill of Rights to all state organs and all persons, the interpretation that must be given is one that most favours the enforcement of a right or fundamental freedom. He reiterated the factual basis of the application and urged the Court to find that the petitioner's right to education under Article 43(1) (f) of the Constitution has been infringed by the respondents. He further submitted that, given her condition, the petitioner's right to freedom from discrimination as guaranteed under Article 27(5) of the Constitution was also violated. He made reference to the Access and Inclusion Policy of the IB curriculum and endeavoured to demonstrate instances where, in his view, the respondents breached not only its policy requirements but also the Constitution of Kenya.
  14. Counsel further submitted that a prima facie case need not be one that must succeed. In this regard, he placed reliance on *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Kenleb Cons Ltd v New Gatitu Service Station & Another* [1990] eKLR and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR in urging the Court to find that the petitioner has satisfied the first limb of the prerequisites for the grant of a conservatory order.
  15. On whether the petitioner stands to suffer irreparable harm, Mr. Nduati urged the Court to take into consideration the deleterious effect of the abrupt termination of her studies at the 1<sup>st</sup> respondent's school, after having undergone 5 years of the Primary Years Programme and 3 years of the Middle Year Programme. He made reference to the observations of the professional dyslexia assessor, Ms. Manisha Shah, which indicated that, with the requisite support and proper interventions, there is a possibility that petitioner could overcome her challenge. According to him the opportunity could be lost forever unless the orders sought are granted by the Court. Thus, counsel concluded his submissions by positing that even the balance of convenience is in favour of the prayers sought being granted pending the hearing and determination of the Petition.
  16. On behalf of the respondents, Mr. Weru relied on the written submissions dated 7<sup>th</sup> September 2023. He reiterated the assertion by the respondents that the 1<sup>st</sup> respondent is guided by policies mandated by the International Baccalaureate Organization in implementing the IB Programme. He then pointed out the specific aspects of the policies that warranted the withdrawal by the 1<sup>st</sup> respondent of the admission of the petitioner. He also urged the Court to note that multiple attempts had been taken prior to the decision to assist the petitioner to no avail.
  17. It was further the submission of Mr. Weru that the 1<sup>st</sup> respondent is a stranger to the Access and Inclusion Policy relied on by the Petitioner; and that what is in the best interest of a child should be determined on an individual basis, considering the child's personal context, situation and needs. In this regard, counsel relied on *M A K v R M A A* (Petition 2 (E003) of 2022 [2023] KESC 21 (KLR) (Civ) (2 March 2023) to buttress his submissions. And, in support of the argument that there is no obligation placed on a private entity to guarantee everyone the right to education, counsel relied on *Joseph Njuguna & 28 Others v George Gitau T/A Emmaus School & Another* [2016] eKLR; *J K (suing on Behalf of C K) v Board of Directors of R School & Another* [2014] eKLR and *H O O (a child suing through his father and next friend) P O O v Board of Management N School & 2 Others*.
  18. In support of his argument that the petitioner is guilty of laches, Mr. Weru pointed out that the letter of discontinuation was written on 5<sup>th</sup> July 2023 at the end of the school term; and that the new school year was to commence on 9<sup>th</sup> August 2023. He urged the Court to note that the petitioner's



parents opted to take no action until 11<sup>th</sup> August 2023 when they met with the MYP Coordinator to discuss the discontinuation. He was therefore of the view that, since no reason had been advanced by the petitioner's parents for their failure to act expeditiously on such a serious matter, the delay was inexcusable.

19. Mr. Weru relied on *Matatu Welfare Association (suing through its registered officials) & 3 Others v Cabinet Secretary for Transport and Infrastructure & 6 Others* [2015] eKLR in which it was held that a party seeking interim orders should approach the court as soon as the threat of violation of their right arises; and that the Court should decline to grant such orders if the party waits until the last minute to file the application. He likewise relied on *Judith Karigu Kiragu & 2 Others v County Government of Nairobi; Attorney General & Another (Interested Parties)* [2021] eKLR where the Court declined to grant interim orders on the ground that the petitioner was guilty of unexplained delay in approaching the Court. He further submitted that interim orders cannot be issued to stop something that has already happened. He therefore prayed for the dismissal of the application contending that there is no legal basis to grant the orders sought therein.
20. As the application was brought under a Certificate of Urgency, an order was issued on the 29<sup>th</sup> August 2023 that the application be served for hearing inter partes on 5<sup>th</sup> September 2023. The application was urged orally on 19<sup>th</sup> September 2023, whereupon interim orders were granted on the 20<sup>th</sup> September 2023 for the re-admission of the minor pending the Court's ruling on the interlocutory application.
21. I have given careful consideration to the application, the responses thereto as well as the submissions made by Counsel for the parties, including the authorities cited by them. It is important to bear in mind that at this stage, the Court need not examine closely the merits of the petitioners' case. The need for caution to not delve into the merits prematurely was aptly expressed thus by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR:

“In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the “trial” and upon completion thereof when a final judgment is to be delivered.

As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case.

The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a-vis the case of either parties. This principle is similar to that in temporary at or interlocutory injunctions in civil matters.



22. Similarly, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, the view was expressed that:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

23. Expressing itself on the matter of conservatory orders, the Supreme Court, in the case of Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others [2014] eKLR offered the following viewpoint (at paragraph [86]):

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

24. Accordingly, the majority of the cases relied on by counsel were prematurely cited in so far as they delve deep into the substantive issues in contest herein. I similarly did not consider the issue of laches to be a pertinent issue at this point, the Court having already granted orders commanding the re-admission of the petitioner. Thus, the only issue for consideration is whether the petitioner has given justifiable cause for the issuance of the remaining orders prayed for in the Notice of Motion dated 24<sup>th</sup> August 2023.

25. For purposes of constitutional petitions, Article 23(3) of *the Constitution* provides that:

In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.



26. Moreover, Rule 23(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules states:

“Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”

27. Accordingly, it is now settled that an applicant for conservatory orders for purposes of Articles 22 and 23(3)(c) of *the Constitution* must satisfy the Court as to the following three considerations:

- (a) That he/she has a prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in his/her favour.

28. It is also noteworthy that one of the two outstanding prayers sought for by the petitioner is a prayer for temporary injunction. The guiding principles for the grant of orders of the temporary injunction are well settled and are set out in *Giella v Cassman Brown* (supra). This position has been reiterated severally and more particularly in the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR, where it was held: -

“...In an interlocutory injunction 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 rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially...”

29. Hence, a prima facie case was defined in the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) where the court held: -

“... in civil cases, 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 which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

30. It is manifest from the material placed before the Court that, thus far, there is no dispute that the petitioner was enrolled to the 1<sup>st</sup> respondents school alongside her twin brother and 3 other siblings to undertake the International Baccalaureate (IB) curriculum offered by the Organization to a wide community of schools in the country. It is also common ground that the applicant has completed her Primary Years Programme, and remains with two years to complete the MYP Programme. There is equally no dispute that, by a letter dated 5<sup>th</sup> July 2023, the 1<sup>st</sup> respondent discontinued the petitioner from the programme on the ground that she did not meet the set criteria for transition to the next stage of the curriculum.



31. While the petitioner's father contends that the discontinuation was unjustified and amounted to a violation of the petitioner's fundamental right to education and freedom from discrimination, the 1<sup>st</sup> respondent maintained that its decision was made in accordance with *the Constitution* and the IB Policies; and was therefore made in the best interest of the child. It is noteworthy, however, that the petitioner's father deposed that the implications of the 1<sup>st</sup> respondent's action to discontinue the petitioner from its institution are far-reaching, considering that the discontinuation was done midway through her programme. He added that the petitioner lacks alternative programmes that are compatible and commensurate to the International Baccalaureate (IB) curriculum to join or transition to, given that she is already eight years into the programme. It was further averred that given her condition, the petitioner was entitled to additional attention under the IB Access and Inclusion Policy, to facilitate her full and uninterrupted participation in the Programme.

32. In the light of the foregoing, I am convinced that the petitioner has made out a prima facie case to warrant the issuance of the orders sought by her. Indeed, in *Kevin K Mwitwa & others v Kenya School of Law & others* (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required- indeed it is forbidden- from making definite and conclusive findings on either fact or law.

33. Also noteworthy is the admission by Ms. Oruko, at paragraph 37 of her affidavit, that the parents of the petitioner were yet to furnish the 1<sup>st</sup> respondent with an assessment of her condition by a professional psychologist. I am therefore convinced that, taking into account the best interest of the child, as mandated by Article 53(2) of *the Constitution*, the current status quo, by which is meant the status quo brought about by the interim orders of the Court dated 20<sup>th</sup> September 2023, be maintained pending the hearing and determination of the Petition as no prejudice will be suffered by the respondents.

34. In the result therefore, it is my finding that the application dated 24<sup>th</sup> August 2023 is meritorious. The same is hereby allowed and orders granted as hereunder:

- (a) That the interim orders issued herein on the 20<sup>th</sup> September 2023 be and are hereby confirmed. The same to subsist pending the hearing and determination of the Petition.
- (b) That a temporary order of injunction be and is hereby granted restraining the respondents from suspending or discontinuing the Petitioner/Applicant from the International Baccalaureate Programme on the basis of the discontinuation letter dated 5<sup>th</sup> of July 2023 pending the hearing and final determination of the Petition.
- (c) The costs of the application to be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2<sup>ND</sup> DAY OF OCTOBER 2023**

**OLGA SEWE**



**JUDGE**

