



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PET. NO. E001 OF 2020

**IN THE MATTER OF ARTICLES 20, 21, 22, 232, 25, 27, 28, 29, 43, 47, 48, 50, 53, 55, 56, 156, 159, 165, 258, 259 and 260 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLE 20 OF THE CONSTITUTION OF KENYA ON THE APPLICATION OF BILL OF RIGHTS

AND

**IN THE MATTER OF ARTICLE 21 OF THE CONSTITUTION OF KENYA ON THE IMPLEMENTATION OF RIGHTS AND
FUNDAMENTAL FREEDOMS**

AND

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA ON THE ENFORCEMENT OF BILL OF RIGHTS

AND

IN THE MATTER OF ARTICLE 28 OF THE CONSTITUTION OF KENYA ON

HUMAN DIGNITY

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA ON FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF ARTICLE 53 OF THE CONSTITUTION OF KENYA ON THE

RIGHTS OF CHILDREN

AND

CHARLES ANDERSON OTIENO.....PETITIONER

VERSUS

VICTORY CHILDREN'S HOME FOUNDATION...1ST RESPONDENT

HUMPHREY WANDEO, KISUMU COUNTY

DIRECTOR OF CHILDREN SERVICES.....2ND RESPONDENT

MINISTRY OF LABOUR AND

SOCIAL PROTECTION.....3RD RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS

JUDGMENT

The Petition before me is premised upon the provisions of Articles 20, 21, 22, 23, 25, 27, 28, 29, 43, 47, 48, 50, 53, 55, 56, 156, 159, 165, 258, 259 and 260 of the Constitution of Kenya.

1. The Petitioner, **CHARLES ANDERSON OTIENO** told the Court that he had lodged the said Petition in his personal capacity and as the next friend to the 38 children whose names he provided.
2. It was the assertion of the Petitioner that he had brought the Petition in the best interests of the 38 named children.
3. It is common ground that by an Agreement dated 8th February 2013, the 1st Respondent, **VICTORY CHILDREN'S HOME FOUNDATION** took over the Institution named **COVENANT CHILDREN'S HOMES**.
4. The Petitioner asserted that although the assets of the Covenant Children's Homes were transferred to the 1st Respondent;

***“..... the original mission, vision management and objectives of Covenant Children Home, as an orphanage/charitable children organization remained*”**
5. Notwithstanding that understanding, the 1st Respondent is said to have sought approval and/or authority to unilaterally convert the institution from an orphanage/charitable children organization, to a Bible School.
6. According to the Petitioner, if the conversion was approved or actualized, the result will be a violation of the rights to shelter and to human dignity, of the children residing at the institution.
7. It was the Petitioner's case that the proposed conversion would be a contravention of the Change of Ownership Agreement between the 1st Respondent and Covenant Children's Home.
8. It was the Petitioner's further case that the proposed conversion would expose the children to economic exploitation, purely to the benefit of the 1st Respondent.
9. The Petitioner's fear was that the multitude of street children who are hosted by the 1st Respondent would be evicted from the institution, when it was converted to a Bible School.
10. Such eviction would deny the children their constitutional rights to Basic Nutrition; Shelter; Healthcare; Protection from abuse; Protection from Neglect and harmful cultural practices.
11. It was for that reason that the Petitioner asked the Court to Preserve and Protect the rights of the vulnerable children.
12. In the face of the threatened action, the Petitioner lodged a complaint with the 5th Respondent, the **NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION BOARD**.
13. However, by the time the Petition was lodged in court, the 5th Respondent had not yet taken any action on the complaint.
14. Ultimately, the Petitioner sought the following reliefs;

“1. A DECLARATION that the Respondents are in breach of their constitutional and statutory mandate by failing to protect the best interests of the Petitioner and the children, as Citizens of Kenya.

2. A DECLARATION that the Respondents are in breach of their constitutional and statutory mandate by failing to discharge a fair administrative action while handling the matter of the Petitioner as a Citizen of Kenya.

3. AN ORDER OF MANDAMUS to compel the 1st, 2nd and 3rd Respondents for the unconditional return of all the children removed from the 1st Respondent's institution and that in future there should be no movement, reconciliation or relocation of the children without the knowledge, authority and consent of the Petitioner or without the involvement and/ or an order from the Children's Court.

4. AN ORDER FOR PERMANENT INJUNCTION restraining the Respondents either by themselves or servants, agents or any of them in any manner whatsoever or otherwise from processing, sanctioning and approving any proposed change of the objectives of the 1st Respondent to a Bible School or any other form of institution, or interfering in any manner whatsoever with the operations, mission and vision of the orphanage or howsoever interfering with the interests of the vulnerable children.

5. A DECLARATION that the 1st Respondent and all other Charitable Children Organization as defined under Section 58 of the Children Act No. 8 of 2001 must for all intents and purposes be treated and interpreted to be equivalent to a person charged with Parental Responsibility as defined under Section 23 of the Children Act, and that the 1st Respondent and all other Charitable Children Organizations must in the exercise of the duty and responsibility placed upon them ensure that all children placed under their care are protected from neglect, discrimination and abuse.

6. Costs of the Petition.”

15. In answer to the Petition the 1st Respondent denied the allegation that it had evicted any children from its institution.

16. The 1st Respondent explained that it had sent children back home, in compliance with the Government directive to close down all learning institutions.

17. It is a matter of common notoriety, about which the Court can and does take Judicial Notice, that Kenya and literally the whole world is faced with the “Corona Pandemic”.

18. As a result of the harsh realities brought about by the said Pandemic, the Government of the Republic of Kenya, through its Ministry of Health published guidelines which are intended to help curb the spread of the disease associated with the pandemic.

19. I find that the decision by the 1st Respondent, to send children home was made in compliance with the Presidential Directive on Containment of the Corona Virus (Covid 19).

20. The said directive was relayed to, inter alia, the Director, Social Services through an Internal Memo dated 18th March 2020. The said Memo [Exhibit “HW6”] was signed by the Principal Secretary, Ministry of Labour and Social Protection.

21. The directive required all officers manning institutions to ensure that, where possible, the learners/residents were released from their institutions to their homes.

22. In the circumstances, the decision to have the children sent home, from the institution, did not emanate from the 1st Respondent.

23. Secondly, the action of sending the children home was not

“under the guise or excuse of Covid-19.....”

24. The children were sent home in compliance with a Presidential Directive, which was intended to help in the containment of the Corona Virus (Covid 19).

25. I find that the Petitioner has failed to demonstrate how the compliance with the directive was either illegal or not in the best interests of the children.

26. The Petitioner has submitted as follows, concerning the request made by the 1st Respondent, to have the institution converted into a Bible School;

“That the 1st Respondent has by a letter dated 22nd June 2020, addressed to the 2nd Respondent, sought an approval and/or authority to unilaterally convert the composition of the 1st Respondent as an institution from an institution from an orphanage/charitable children organization, mandated with the delicate responsibility of catering for the needs of homeless children, to a Bible School, which conversion if approved or actualized will result into a violation of the rights to shelter and human dignity of the children residing therein”

27. It is to be noted that the Petitioner stated as follows at Paragraph 3 of the Petition;

“The 2nd Respondent is a Director of Children Services appointed pursuant to the provisions of the Children Act of 2001, with the statutory mandate of safeguarding the welfare of children, assisting in the establishment, protection, co-ordination and supervision of services and facilities designed to advance the well-being of children”

28. It therefore appears that the Petitioner acknowledges the pivotal role of the 2nd Respondent in the advancement of the well-being of children.

29. I find that when the 1st Respondent sought approval or the authority to convert the institution, the said 1st Respondent had taken the appropriate step. The action of seeking approval or the authority of the relevant officer cannot be construed as a desire to make a unilateral decision.
30. There is nothing unconstitutional in the step taken by the 1st Respondent to seek either the approval or the authorization of the proposal to convert the institution to a Bible School.
31. After all, it is not known whether or not the 2nd Respondent will give his approval or authorization.
32. Meanwhile, the Petitioner has now submitted that the 2nd, 3rd and 4th Respondents have been indolent or sleeping on their jobs, by allowing the 1st Respondent to operate illegally for almost 7 years.
33. In that respect, I wish to point out that the Petition did not contain any prayer to have the 1st Respondent shut down.
34. It is ironical that whilst the Petitioner begun by urging the court to order the 1st Respondent to take back the children who had been sent home, the Petitioner's later submissions suggested that the 1st Respondent be closed down because it was a home that was unfit and non-compliant for purposes of providing the necessary protection to the children.
35. According to the Petitioner, the 1st Respondent was operating illegally. If that be the case, the Petitioner would actually be telling the court not to have any of the children returned to the 1st Respondent's institution. Yet, the relief sought in the Petition was the very opposite of this contention by the Petitioner.
36. In order to give a declaration that the children should be returned to the 1st Respondent would imply that the said Respondent was duly registered as an institution duly authorized to operate as an orphanage or charitable home for children.
37. Once the Petitioner has come to the conclusion that the 1st Respondent was not licensed or authorized to operate as an orphanage or a charitable home for children, it follows that the court cannot now grant the orders to compel the 1st Respondent to return the children to the institution.
38. I also decline to order the 2nd, 3rd and 5th Respondents to advise the 4th Respondent to immediately shut down the operations of the 1st Respondent. The reason for that decision is that the question as to whether or not the operations of the 1st Respondent should be shut down, did not fall for determination in the Petition. If anything, the Petition sought to have the 1st Respondent continue to operate as an orphanage.
39. I further decline to order the Office of the Director of Criminal Investigations and the Director of Public Prosecutions to investigate the affairs of the 1st Respondent, with a view to possibly arresting and prosecuting the Board of Directors of the 1st Respondent. The Petition contained no prayer for such relief.
40. As regards the conduct of the officials of the 2nd, 3rd, 4th and 5th Respondents, over their handling of the issues raised in the Petition, the Petitioner failed to demonstrate to the court why the said officials should be censured.
41. Finally, there is absolutely no basis in law to warrant an order directing the 1st Respondent to transfer back to the Trustees of Covenant Homes Organization, the assets which that organization had earlier transferred to the 1st Respondent. If the Covenant Homes Organization had the intention to take back the assets in question, they would need to negotiate directly with the 1st Respondent, and thereafter comply with all the requisite provisions of the law.
42. But the court noted that the Petitioner conceded that Covenant Children's Home was dissolved in the year 2013. By a letter dated 20th August 2013, the NGOs Co-ordination Board granted permission to the said Covenant Home Organization to officially dissolve. In the circumstances, if the court were to order the 1st Respondent to Covenant Home Organization or Covenant Children's Home, the court would have in vain. The court declines to grant an order which would, in any event, be incapable of enforcement or implementation.
43. I find that the Petitioner has not given any legal or factual justification for seeking orders that would compel the Respondents, or any of them, to notify him, or to seek either his authority or his consent before they could take steps at the 1st Respondent's institution.
44. In conclusion, I find no merit in the Petition. It is therefore dismissed.
45. The Petitioner is ordered to pay to the Respondents, the costs of the Petition.

DATED, SIGNED and DELIVERED at KISUMU

This 3rd day of February 2021

FRED A. OCHIENG

JUDGE