



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 95 OF 2019

IN THE MATTER OF :

ALLEGED INFRINGEMENTS AND VIOLATIONS OF ARTICLES 27, 45 AND 55;

AND

IN THE MATTER OF :

ALLEGED CONTRAVENTIONS OF ARTICLES 3, 22, AND 258 OF

THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF:

DISCRIMINATION, UNFAIR ADMINISTRATION ACTION AND VIOLATION OF

THE BILL OF RIGHTS AND PROVISIONS OF THE CONSTITUTION IN

RELATION TO THE PETITIONERS;

-BETWEEN-

LEWIS MOSES ODHIAMBO.....1ST PETITIONER

MARY AKINYI ONYANGO.....2ND PETITIONER

VERSUS

MAHANAIM INTERNATIONAL HIGH SCHOOL...1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION,

SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through a Petition dated 12th March, 2019, seeks the following orders:-

a) A declaration be and is hereby issued that the 1st Respondent's conduct and action which are complained of in the Petition jointly and/or severally, singularly and/or cumulatively against the Petitioner are oppressive, unfair, unreasonable, irrational, illegal and an abuse of administrative power;

b) A declaratory order that failure by the 1st Respondent to release the 1st Petitioner's results, result slip, transcript and/or academic certificate for a period of more than 1 year in spite of several requests and demand by the petitioner is a fundamental breach of the 1st Petitioner's Constitutional right as provided under Articles 27, 45 and 55 of the Constitution;

c) An order that by virtue of the said violation the 1st Petitioner has been deprived and/or denied an opportunity to apply and further his education and training as provided under Article 55 of the Constitution;

d) An order of permanent injunction directing the 1st Respondent to release to the Petitioners the 1st Petitioner's year 12 Cambridge results, result slip, transcripts and/or academic certificate;

e) An order that the Petitioners are entitled to recover the excess school fees paid to the 1st Respondent being Kshs. 25,000/=;

f) An order that the Petitioner is entitled to compensation quantum of which shall be assessed by this Honourable Court for continued violation of the 1st Petitioner's Constitutional and Human Rights;

g) The Petitioner be paid costs of this Petition;

h) Any further Relief or Orders that this Honourable Court may deem just and fit to grant to meet the ends of justice.

THE PETITIONERS' CASE

2. The Petitioners' case is that, the 1st Petitioner had enrolled as a Cambridge student in the 1st Respondent's learning institution for Year 12 with an option of proceeding to Year 13 or an option of doing a Foundation and/or Diploma course after completing Year 12.

3. The 2nd Petitioner on the other hand is the biological and legal guardian to the 1st Petitioner whose main role was to ensure that all the academic requirements for the 1st Petitioner are provided in time and that the 1st Petitioner is able to attend school and sit for required examinations by paying the school fees and the required examination fees in time.

4. The Petitioners aver that the 1st Petitioner enrolled in year 12 as a Cambridge student and sat for his Year 12 examinations but was unable to proceed to year 13 due to unforeseen circumstances.

5. The 2nd Petitioner on her part had ensured that before the term ended, all the school fees and examination fees for year 12 examinations were fully paid to enable the 1st petitioner sit for his examinations.

6. The 2nd Petitioner contend that she was unable to meet her financial obligations for the 1st Petitioner for Year 13 and informed the 1st Respondent who informed her that she could pay whatever she had and the money paid would later be split between the 2nd Petitioner two sons, one of whom is the 1st Petitioner herein.

7. The 2nd Petitioner states that after making some payments to her two sons, she was surprised that the 1st Respondent had chased both the 1st Petitioner and his elder brother due to outstanding fees. This then compelled the 2nd Petitioner to discontinue the 1st Petitioner's year 13 education and to cause the moneys paid as fees for the 1st Petitioner for year 13 to be transferred by the 1st Respondent in favour of his elder brother.

8. The 2nd Petitioner then proceeded to inform the 1st Respondent that the 1st petitioner would not proceed to year 13 and may opt to do a foundation or diploma course.

9. The Petitioners assert that, the 1st Petitioner proceeded to sit for his Year 12 examinations but when the results were out, the 1st Respondent declined to release the 1st Petitioner's results slips, transcripts and/or academic certificates upon the Petitioners' request on grounds of outstanding fees.

10. The 2nd Petitioner contend that she had fulfilled all her fee obligations of the 1st Petitioner to the 1st respondent with regards to his year 12 course and the 1st Respondent was therefore unjustifiably withholding his year 12 results on account of outstanding fees for year 13 that the 1st Respondent had opted to discontinue.

11. The Petitioners state that there was even an overpayment of Kshs. 25,000/= paid by the petitioners' which the 1st Respondent claimed is an outstanding sum.

12. The Petitioner claim there is unfair administrative action contrary to **Article 47 of the Constitution** on the part of school's actions to unjustifiably withhold the 1st Petitioner's results. The Petitioner further avers the contravention of **Articles 35, 50 and 55 of the Constitution** by the 1st Respondent necessitating the institution of this Petition.

THE 1ST RESPONDENT'S RESPONSE

13. The 1st Respondent filed their Replying Affidavit sworn by Richard Ombwori on 26th March, 2019, and a further supplementary affidavit dated 14th May, 2019.
14. The 1st Respondent is opposed to the Petition by stating that 1st Petitioner enrolled as a student in their school in year 12.
15. They state further that the 1st Petitioner was informed during admission on various types of education where A level is split into two as AS/A2, and AS refers to year 12 only while A2 refers to year 13 only and that A-Level is a combination of both AS and A2.
16. The 1st Respondent avers that the Petitioner sat for his year 12 (AS) examinations in October/November session of 2017.
17. The 1st Respondent state that it was agreed with the 1st Petitioner's father that the 1st Petitioner take the October/November exams of 2017 with a promise that he could try to pay school fees for him and his brother.
18. The 1st Respondent contend that there was an environmental management project the 1st Petitioner was doing and when they got wind of the financial difficulties by the 2nd Petitioner and her husband, the school accepted to receive fees in installments as the parents got it.
19. The 1st Respondent assert further that the school would occasionally ask the 1st petitioner and his brother to go home and collect fees when the delay went beyond the time the payments were supposed to be done.
20. The 1st Respondent states that at the beginning of term one 2017/2018 academic year (4th September, 2017 opening day), all the students who had reported to school without clearing fees were sent back home and the 2nd petitioner's sons were among them.
21. The 1st Respondent acknowledges that the 1st Petitioner's father made payments on 13th September, 2017 a total of Kshs. 213,000 to split between his two sons.
22. The 1st Respondent contend that the fee payment discussions were happening in September, 2017 and the 1st Petitioner exams were in the following month of October, 2017, however the school allowed the 1st Petitioner to sit the said exams despite not having cleared his fees.
23. The 1st Respondent proceeds further to state that the results for October/November 2017 were released on 11th January, 2018, however, the school declined to release the results to the 1st Petitioner because he owed the school a sum of Kshs. 150,000/= thereby justifying their actions.

THE 2ND RESPONDENT

24. No response. No submissions were filed on behalf of the 2nd Respondent.

THE 1ST AND 2ND PETITIONERS' SUBMISSIONS

25. The Petitioners vide their submissions dated 16th December, 2021, support the Petition.
26. The Petitioners reiterated that the 1st Petitioner having successfully enrolled in year 12 for the 2016/2017 was required to pay a total of Kshs. 435,000/= being tuition fees, Kshs. 55,200/= and Cambridge Examination Fees.
27. The Petitioners contend that the 1st Respondent refused to issue 1st Petitioner with his academic transcripts on the basis of non-payment of fees, however, the 1st and 2nd claimed as per their attached list of documents that they had paid all the requisite fee for Year 12 in the academic year of 2016/2017 which included tuition fee, miscellaneous fees and Cambridge fees to which they aver that the 1st Respondent issued a receipt to that effect.
28. The Petitioners argue that the 1st Respondent introduces new concepts that did not exist when the 1st Petitioner enrolled in their institution. They have also averred that there is no evidence adduced by the 1st Respondent in support of their averments.
29. The Petitioners argue that the 1st Respondent does not dispute that all fees were paid in excess of Kshs. 25,000/= but contend the fee for the academic year of 2017/2018, for the 1st trimester was not paid for, the Petitioners however, argue, that the 1st Petitioner was not a student thus he was not obliged to pay for a trimester he was not attending.
30. As a result the petitioners aver, the 1st petitioner's rights under **Articles 27, 45, 47 and 55 of the Constitution** were violated.
31. They cited the case of **Inganga Alfred Arunga vs University of Nairobi, Pet No. 1 of 2017**, in support of their assertions.
32. The Petitioners pray that their Petition be allowed.

THE 1ST RESPONDENT'S SUBMISSIONS

33. The 1st Respondent vide their submissions dated 29th May, 2019 opposes the Petition.
34. The 1st Respondent argued that the school runs on school fees paid by students and offered Cambridge system of education for the 1st Petitioner who had enrolled only for year (12) in 2016/2017 academic year.
35. The 1st Respondent aver that the 1st Petitioner could not sit for his May/June examinations since he was not prepared but opted to do examination in October/November 2017 exams.
36. The 1st Respondent insist that there were arrears even upon payment of the examination fees which were directly remitted to Cambridge which administers the said examinations.
37. The 1st Respondent relied on the case of *Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji & 9 others [1997] eKLR*, in support of their case.

THE BACKGROUND OF THE PETITION

38. The background of the Petition is that, the 1st Petitioner had enrolled as a Cambridge student in the 1st Respondent's learning institution for Year 12 with an option of proceeding to Year 13 or an option of doing a Foundation and/or Diploma course after completing Year 12.
39. The 2nd Petitioner being the biological and legal guardian to the 1st Petitioner ensured that all the academic requirements for the 1st Petitioner are provided in time and that the 1st Petitioner was able to attend school and sit for required examinations by paying the school fees and the required examination fees in time.
40. The Petitioners aver that the 1st Petitioner enrolled in year 12 as a Cambridge student and sat for his Year 12 examinations but was unable to proceed to year 13 due to unforeseen circumstances.
41. The 2nd Petitioner on her part had ensured that before the term ended, all the school fees and examination fees for year 12 examinations were fully paid to enable the 1st Petitioner sit for his examinations.
42. The Petitioners aver that, the 1st Petitioner proceeded to sit for his Year 12 examinations but when the results were out, the 1st Respondent declined to release the 1st petitioner's results slips, transcripts and/or academic certificates upon the Petitioners' request on grounds of outstanding fees.
43. The 2nd Petitioner avers that she had fulfilled all her fee obligations of the 1st Petitioner to the 1st respondent with regards to his year 12 course and the 1st Respondent was therefore unjustified in withholding his year 12 results on account of outstanding fees for year 13 that the 1st Respondent had opted to discontinue.
44. The Petitioners averred that there was even an overpayment of **Kshs. 25,000/=** paid by the Petitioners' which the 1st Respondent claimed is an outstanding sum.
45. The Petitioner avers there is unfair administrative action contrary to *Article 47 of the Constitution* on the part of school's actions to unjustifiably withhold the 1st petitioner's results. The Petitioner further avers the contravention of *Articles 35, 50 and 55 of the Constitution* by the 1st Respondent necessitating the institution of this Petition.
46. The 1st Respondent admit the 1st Petitioner was admitted to the School in year 12 and was allowed to sit exams of 2017 an understanding that he would pay school fees but particulars for the said to unpaid school fees is not disclosed. The 1st Respondent has refused to release the academic and related documents to Petitioners for failure to pay the balance of school fees.

ANALYSIS AND DETERMINATION

47. Having carefully considered the Petition dated **12th March, 2019**, the 1st Respondent's Replying Affidavit and Supplementary Affidavit, the Petitioner's and Respondent's submissions and all the Responses, I find that there arises a single issue for determination thus:-

a) Whether the Petitioners' constitutional rights have been violated to warrant a grant of the orders sought in this Petition;

48. The Petition filed herein, alleges violation of several constitutional rights requiring the determination by this Honourable Court.
49. The Petitioners allege that the 1st Respondent unlawfully held the 1st Petitioner's Cambridge International Examination Results on account of failing to pay a fee balance of Kshs. 150,000/= which the Petitioners had contended they fully settled through the 1st Petitioner's parents, thereby violating his constitutional right to education as well as engaging in unfair administrative action.
50. The Petitioner rely on documents attached to the 2nd Petitioner's witness statement referred to as list of documents.
51. On the examination of the Petitioner's list of documents, it is observed that the 1st Petitioner's trimester, the Petitioners paid a total of

Kshs. 197,000/= which was acknowledged as received by the 1st respondent on the 13th September, 2016 (Annexure LMO 2a(ii)).

52. For the 2nd trimester, the total fees of Kshs. 215,000/= has been paid in installments. Kshs. 100,000/= was paid on 9th January, 2017 as evidenced on the fees deposit slip acknowledged by the 1st Respondent on the 10th January, 2017, (Annexure LMO 2b (ii)) a balance of Kshs. 117,000/= was paid on the 6th of February, 2017, thereby clearing the 2nd semester's fees which has been acknowledged by the 1st Respondent (Annexure LMO 2c(ii)).

53. In the 3rd trimester, a total of Kshs. 75,000/= was paid. The total fees for the said semester was paid in stallments as follows, Kshs. 65,000/= was paid on the 27th June, 2017 (Annexure LMO 2e) leaving an outstanding balance of Kshs. 13,000/=, the said amount is indicated through the 1st Respondent's receipt dated 13th September, 2020, (Annexure LMO 2f), thereby indicating no fee balance for the year 2016/2017, for the 1st Petitioner.

54. There is also an examination fees of **Kshs. 46, 512/=** paid in favour of the 1st Petitioner to the 1st Respondent on the 9th of September, 2017(Annexure LMO 7).

55. I have equally examined the 1st Respondent's list of documents and they do appear to corroborate the Petitioner's list of documents.

56. Having extensively examined the evidence adduced by both parties, it appears that the 1st Petitioner fulfilled all his fee obligations for his study of Year 12 and the 1st Respondent has no justification to withhold the 1st Petitioner's results for the Year 12.

57. The High Court has been empowered by the Constitution under **Article 165 (3)(b) of the Constitution** to enforce fundamental rights and freedoms. Further, **Article 22 of the Constitution** provides that every person who claims that his fundamental rights and freedoms are threatened or have been violated has a right to move to the High Court for appropriate relief.

58. The Petitioners herein have pleaded that their rights under **Article 47 of the Constitution** have been violated by the 1st Respondent's actions of withholding the 1st petitioner's results despite paying the full fees.

59. Chacha Mwita J. in the persuasive case of **Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR**, stated that the right to fair administrative action is not only an integral part of the Bill of Rights but also an essential feature of our Constitution and the soul of a democratic society without which democracy and the rule of law cannot be maintained. This right is now firmly entrenched in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution.

60. **Article 47 of the Constitution** provides as follows:-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (Emphasis mine)

61. From the provision of **Article 47 of the Constitution**, it is clear that the Constitution now imposes a control on administrative bodies by requiring them to employ constitutional standards of legality, reasonableness and procedural fairness in any administrative actions. Under the said standards, the administrative bodies are also required to accord the person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons' right(s), the administrative body is required to give the persons written reasons for its actions. The right to fair administrative action is a right that must not be abrogated or compromised.

62. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014** the Court of Appeal held that:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

63. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in **Section 33 of the South African Constitution**:-

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed

comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

64. This matter cannot be concluded without referring to **Section 4 of the Fair Administrative Action Act, 2015** which reiterates the importance of this right by amplifying the prominence of **Article 47 of the Constitution** and the process to be followed in conducting administrative actions. A party coming to this Court on the basis that his or her right to fair administrative action was violated, must show that the standards enumerated in **Article 47(1) of the Constitution** as amplified by **Section 4 of the Fair Administrative Act** were nonexistent in that administrative action and or that they were violated, and only then should the Court summon its jurisdiction under **Article 165 (3) (b) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.** (Emphasis added)

65. Going by the above findings and looking at the petition herein, it is evident that the 1st petitioner’s rights to education has been infringed contrary to **Article 43(1)(f) of the Constitution** as a result the 1st Respondent’s arbitrary actions of unfair administrative actions of withholding the 1st Petitioner’s results.

66. Upon consideration of the evidence adduced by the Petitioners, and upon examination of the fees structure of the 1st respondent concerning the 1st Petitioner’s fees (Annexure LMO 1C) I find that it has been demonstrated that all the 1st Petitioner’s fees for Year 12 were paid in full and there is totally no justification for withholding the 1st Petitioner’s result.

67. I have equally examined the 1st Respondents unmarked evidence of the Kshs. 150,000.00 alleged balance of the 1st Petitioner’s fees in the invoice dated 13th September, 2019, but I finds no reasonable explanation advanced by the 1st Respondent to justify claim of this alleged fee balance because, the very fee structure of the 1st Respondent for the Year 12 (Annexure LMO 1C) lacks such a figure.

68. **Article 55(a) of the Constitution** provides that the State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training. This Court is alive to the Constitution mandate by the Constitution to protect the Petitioner’s right to access education and training. The impact of the illegal actions of the 1st Respondent have resulted to massive loss and damage to the 1st Petitioner’s mental health as evidenced by various annexures (LMO-9) and the same has impeded his access to education.

69. On the issue of alleged excess school fees allegedly paid to the 1st Respondent I find that there has been no sufficient proof of Kshs. 25,000.00/= excess payment by the Petitioners in their list of documents, I find that this limb of the claim fails.

70. **Having come to the conclusion that I have, I proceed to allow the Petitioner’s Petition and grant the following orders:-**

a) A declaration be and is HEREBY issued that the 1st Respondent’s conduct and action which are complained of in the Petition jointly and/or severally, singularly and/or cumulatively against the Petitioner are oppressive, unfair, unreasonable, irrational, illegal and an abuse of administrative power.

b) A declaratory order be and is HEREBY issued that failure by the 1st Respondent to release the 1st Petitioner’s results, result slip, transcript and/or academic certificate for a period of more than 1 year in spite of several requests and demand by the petitioner is a fundamental breach of the 1st Petitioner’s Constitutional right as provided under Articles 27, 45 and 55 of the Constitution;

c) An order be and is HEREBY issued that by virtue of the said violation the 1st Petitioner has been deprived and/or denied an opportunity to apply and further his education and training as provided under Article 55 of the Constitution;

d) An order of permanent injunction be and is HEREBY issued directing the 1st Respondent to release to the Petitioners the 1st Petitioner’s year 12 Cambridge results, result slip, transcripts and/or academic certificate upon service of this Courts Judgment.

e) A prayer for entitlement to release the excess school fees paid to the 1st Respondent being Kshs. 25,000/= not proved and accordingly rejected.

f) The 1st Petitioner is awarded general damages of Kshs.300,000/= for violation of Constitutional and Human Rights.

g) Costs of this Petition to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF NOVEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA