REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. E190 OF 2021

AND

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E191 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE SECRETARY, BOM, KAKAMEGA HIGH SCHOOL.....1ST RESPONDENT

THE CHAIRMAN, BOM, KAKAMEGA HIGH SCHOOL.....2ND RESPONDENT

EX PARTE: BOAZ VIDA

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 10 OF 2021

CHILD CARE LEGAL CLINIC (CHICALAC).....PETITIONER

VERSUS

THE BOARD OF MANAGEMENT KAKAMEGA SCHOOL.....RESPONDENT

AND

CABINET SECRETARY FOR MINISTRY OF EDUCATION.....INTERESTED PARTY

JUDGMENT

1. The matters in the intitulement are not consolidated. The judgment herein only relates to Kakamega HC Judicial Review Miscellaneous Application No. E191 of 2021, Kakamega HC Constitutional No. 10 of 2021 is only up for ruling on whether or not to grant conservatory orders, and for directions on disposal. The matters are being handled together, at this stage, only because they relate to the same subject-matter, and on account of urgency.

2. The *ex parte* applicant herein, Boaz Vida, obtained leave in Kakamega HC Misc. Application No. 190 of 2021, on 16th November 2021, to initiate Judicial Review proceedings against the respondents, that is the Secretary and Chairman of the Board of Management of the Kakamega High School, for an order of *Certiorari*, with respect to resolutions of the Board of Management of the School passed on 10th November 2021. It was ordered that the said leave do operate as stay of the said resolution. Due to the urgency of the matter, it was directed that the substantive Motion be filed and served by 23rd November 2021, to facilitate its hearing *inter partes* on 30th November 2021.

3. The substantive Motion, envisaged in the order of 16th November 2021, was filed in Kakamega HC Judicial Review Miscellaneous Application No. E191 of 2021. It is framed as seeking *Certiorari* for the purpose of bringing into court and quashing the resolutions of the 2nd respondent made on 10th November 2021, and communicated vide a letter dated 11th November 2021, requiring students to pay each a sum of Kshs. 9, 823.00, being costs for damage to students and school property on 6th November 2021.

4. Upon being served with the court order of 16th November 2021, and the pleadings behind it, the respondents filed their own Motion, in Kakamega HC Misc. Application No. 190 of 2021, dated 17th November 2021, seeking the setting aside, vacation, variation or review of the order for leave, to the extent that it granted stay of the resolution of the Board. The application was placed before the court on 19th November 2021, and it was directed that the same be heard *inter partes* on 30th November 2021. The court further varied the stay order of 16th November 2021, so that the same did not affect the reopening of the School and payment of all outstanding fees balances in full by the returning students, and limited the stay to the component on payment of Kshs. 9, 823.00, being with respect to the damage the subject of Judicial Review proceedings.

5. On 18th November 2021, a constitutional petition was lodged at the registry in Kakamega HC Constitutional No. 10 of 2021, arising from the same facts as Kakamega HC Misc. Application No. E190 of 2021, filed at the instance of Child Care Legal Aid Clinic, Chicalac, to be referred to hereafter as the petitioner, against the Board of Management Kakamega School, with the Cabinet Secretary for Ministry of Education being named as interested party. The concern of the petitioner is imposition of what is described as punitive fees on the students, which, it is submitted, is a violation of various Articles of the Constitution of Kenya, with respect to the students right to education. The petitioner seeks declarations that the decision to impose the impugned fees and to demand payments of any fees in arrears in full, as a pre-condition for readmission, was unconstitutional, and contravened the rights of the students to free and compulsory basic education, and to equal protection of the law. It also seeks a permanent injunction to stop the respondent from charging the sum of Kshs. 9, 823.00.

6. The petition was placed before the Judge on 18th November 2021, under certificate of urgency. It was directed that the same be served and mentioned on 30th November 2021, when Kakamega HC Misc. Application No. E190 of 2021 and Kakamega HC Judicial Review Miscellaneous Application No. E191 of 2021 were due for hearing *inter partes* of the two Motions as directed earlier. The court declined to grant interim relief, in view of the stay order granted in Kakamega HC Misc. Application No. E190 of 2021.

7. By way of background to the three matters, a dormitory at Kakamega School caught fire and was destroyed on 6th November 2021. The management of the school made a decision to close the entire school, and send all the students home. Subsequently, the Board of Management of the School, decided, on 10th November 2021, to reopen the school on staggered dates between 15th November 2021 and 25th November 2021, with different classes reporting back on different dates. A communication from the Secretary of the Board of Management, by a letter dated 11th November 2021, required parents and guardians to pay Kshs. 9, 823.00 for each student as costs for damage caused to the dormitory and its contents, which, according to the letter, totalled Kshs. 21, 611, 360.00. The parents and guardians were also required to clear any outstanding fees balances or arrears in full. All these amounts were to be paid in full on the dates when the students were due to report back.

8. On 30th November 2021, I was addressed by Mr. Munyendo for the *ex parte* applicant, Mr. Nabasenge for the petitioner, Mr. Wasilwa for the respondents and Ms. Were for the interested party. Their arguments were on the substantive Motion for the Judicial Review order of *Certiorari*, and on where or not the interim relief should stay in force, particularly pending herein and determination of the petition, for the said proceedings would have the effect of the disposing of the substantive Motion for *Certiorari*.

9. The first speech was by Mr. Wasilwa. He started off by saying that the issue ought to be left to the respondents to deal with, on a case by case basis for the benefit of the students. He submitted that the constitutional window upon which a court applies the constitutional imperatives was Articles 10(2), 23(3)(f), 47 and 50(1) of the Constitution, and sections 7(2) of the Fair Administrative Action Act, No. 4 of 2015. He further submitted that the power to vary or set aside or vacate orders made under Order 53(1)(iv) of the Civil Procedure Rules in Rule 25 of the Mutunga Rules. The court can do so *suo moto*, or on invitation by a party. See *Republic vs. Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others* [2016] eKLR (Onguto J). He argued that the discretion was also subject to the *Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corporation* [1948] 1 KB 223 (Lord Greene, Somervell LJ & Singleton J). He submitted that the effect of the parameters set out in the Constitution and statutes is to compel the court to use restraint and exhaustion of its own jurisdiction principle. He argued that the right of the *ex parte* applicant was subject to the exhaustion principle, for section 34(6) of the Basic Education Act, No. 14 of 2013, gave a parent or student aggrieved by a decision of a school to complain to the school board. There is also section 94(1)(2) of the Basic Education Act. He asserted that sections 28 and 29 of the Basic Education Act, on the right to free and compulsory education, did not mention boarding facilities, indeed there was no mention of boarding facilities in the Act. He submitted that section 59(b)(c) of the Basic Education Act made for only two obligations, to ensure and assure proper and adequate physical facilities, which does not necessary mean it is free. He stated that the funding of infrastructure is State exchequer, but there is no provision for money for repairs arising from damage caused by students, and no insurance can underwrite such loss. He asserted that the Motion and the petition must fail on the basis of the exhaustion and restraint principle. He cited *Republic vs. Board of Management [Particulars Withheld] Schools & another Ex parte PK* [2019] eKLR (Mativo J), to submit that the court should be reluctant to substitute its decision on issues relating to education and educational institutions. He stated that the court ought to engage in a balancing exercise. He submitted that the right to shelter, safety and hygiene of the 1,100 students affected should remain at the centre of the mind of the court.

10. Mr. Munyendo, arguing with respect to final orders on the substantive Motion by the *ex parte* applicant, submitted that the respondents were justifying the levy based on doctored documents, as the same referred to installation works on a tuition block at Sigalagala National Polytechnic. He stated that the decision to close the school was an afterthought, since the same was made after the respondents were served with the order. He argued that the school was to resume, but after the respondents were served with the stay order, they decided to keep the rest of the students' home.

11. Mr. Nabasenge argued that the imposition of the fees was punitive and arbitrary as parents were not consulted. The students were not given a fair hearing before the decision was made, and it was against their interests. He submitted that under the Basic Education Act any

fees to be paid must be approved by the Ministry of Education. He submitted that the government had no locus to impose fees before the government approved. He submitted that the stay order sought to be reviewed was a prerogatory order, and once it was made, the court became *functus officio*. He asserted that the order was made in the best interests of the child. He argued that conservatory orders are made under Rule 23 of the Mutunga Rules, and in the instant case, if the stay order was vacated, then the petition would be rendered nugatory. He submitted that the said orders should remain in force until orders are made with regard to the proper fees to be paid. He stated that the petition was on who was entitled to charge fees, especially those related to damages.

12. Mr. Wasilwa, in his rejoinder, submitted that rights based on the Constitution also created obligations., and the court should balance the rights over the obligations, especially that to basic education as against the right to sustainable development, public policy, public hygiene, among others. He submitted that parties should not seek Judicial or constitutional remedies before they have exhausted other remedies, as may be provided by statute, and cited section 7(2) of the Fair Administration Action Act. He argued that the right to tuition was subject to the duty to provide safety. He asserted that the petition was not about illegal levies. He stated that in undertaking projects, holders of public duty have to take decisions for the benefit of users of resources. He submitted that the petition was not limited to Kakamega High School, but was about all schools in Kenya, which then should make it difficult for the court to address the issue of Kakamega High School students. He stated that no one knew the views of the students on the matter, as there was no evidential basis to the petition. He further submitted that the nugatory principle did not apply to interlocutory proceedings, but to appeals, for preservation of the substratum of the suit.

13. Ms. Were submitted that the funds in question were not school fees, but money to pay for the damage caused by some of the students. She explained that the decision by the respondents to raise a bill of quantities was necessitated by a circular from the Ministry of Education to effect that it would not fund repair of damage caused wilfully.

14. A party is bound by its pleadings, and the pleadings should be starting point with respect to any determination, for it is in there that a court discerns what the whole suit is about. When the *ex parte* applicant moved the court for leave to commence Judicial Review proceedings, it was "specifically to apply for the prerogative order of *Certiorari* to bring to this court and quash the resolutions of the Board of Management meeting held on the 10th Nov 2021." The leave that the court granted was to bring a substantive Motion along those lines. The courts have generally held that the orders sought in the substantive Motion ought to be the same as those specified in the chamber summons. Indeed, a party is should not file any other document apart from the Motion, for he expected to rely on the same statutory statement and verifying affidavit filed at the leave stage, with the chamber summons. Indeed, the case presented at the leave stage should be the same as that presented at the substantive Motion. Order 53 is clear on that, and that is why it requires that the substantive Motion be served together the statutory statement and verifying affidavit filed at the leave stage.

15. When the *ex parte* applicant filed his substantive Motion, he sought, in his wisdom, orders that are substantially different from those proposed in the chamber summons, and different from those for which leave had been sought and granted. His Motion is for "a prerogative order of *certiorari* to bring into this court and quash resolutions of the 2nd respondent made on 10th November 2021 and communicated to the exparte applicant vide letter dated 11th November 2021 more specifically the resolution requiring that each student do pay Ksh. 9,823/- as costs for damage to students and school property on 6th November 2021."

16. The 2nd respondent to the Motion is the Chairman of the Board of Management of the Kakamega School. The *ex parte* applicant is challenging a decision that was made on 10th November 2021, and which was communicated vide a letter dated 11th November 2021. The document that the *ex parte* applicant relies on, as evidence of the impugned decision, is a letter dated 11th November 2021, in the letterhead of Kakamega School, signed by Gerald Orina, Secretary of the Board of Management. The opening line reads: "Following the Board of Management Meeting held on 10th November 2021 at school, the following was resolved …" In my understanding, the letter is in the hand of the Secretary to the Board of Management, and it communicates a decision of the Board, and not of the Chairman of the Board. The court is being invited, through the Motion, dated 23rd November 2021, to quash resolutions of the 2nd respondent, yet there is no proof that the 2nd respondent ever made any resolutions that are available for quashing by the court.

17. As stated above, a party is bound by its pleadings, and the final determination ought to be based on those pleadings. In the instant case, I am being asked to quash resolutions that were made by the 2nd respondent on 10th November 2021. No evidence of such resolutions has been placed before me, for the resolutions that are in the letter the *ex parte* applicant relies on are not resolutions of the 2nd respondent. Even if I were to grant the order as prayed, it would not be capable of execution, for it would refer to non-existent resolutions. If the *ex parte* applicant had stuck to the leave as granted to him on 16th November 2021, he would have remained on safe ground. For avoidance of doubt, the order granting leave, as extracted, states as follows:

> "THAT the Applicant is hereby granted leave to commence Judicial Review proceedings, more specifically to apply for the prerogative order of *certiorari* to bring into this court and quash the resolutions of the Board of Management meeting held on the 10th of November 2021."

18. Is the court dwelling on a technicality of procedure? I do not think so. Where a party comes to court and seeks an order, and that order is granted to it on certain terms, that party ought to comply with the terms of the order. Leave was given under certain terms, and the substantive application ought to have been brought in those terms. Failure to adhere to those terms has meant that the order sought is substantially different from that which leave was grant for. Secondly, the chamber summons is now spent, for its life was limited to grant of leave, and once leave was granted it was exhausted, and I ought not go back to it to authenticate the Motion. It was stated, in *Republic vs. Chief Magistrates Court Thika & another Ex-Parte Applicant Joseph Kamunya Kinuthia* [2016] eKLR (Odunga J), that:

> "It must be remembered that judicial review proceedings are commenced by the Notice of Motion and not the Chamber Summons. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings…"

19. With regard to merits, the principal complaint appears to be that the parents and guardians of the students of Kakamega School were not consulted before the decision on the repairs and arrears was made. It is argued that the conditions were punitive, and the resolutions were

contrary to Article 10 of the Constitution, and the parties were condemned unheard, contrary to Article 50 of the Constitution, and the resolutions were contrary to the Basic Education Regulations, 2015.

20. With respect to the parents being consulted before the matter of repairs and fees arrears were decided upon, the *ex parte* applicant has not pointed to me any law governing management of schools which would have required such consultation to be done as a matter of obligation. Governance and management of schools is provided for under the Basic Education Act. Section 55(1) establishes the Board of Management of public schools, like Kakamega School, while section 55(2) provides for a parents' association. The composition of the Board is set out in section 56, and it includes six persons elected by parents, a nominee of the County Education Board, representatives from teaching staff in the school, sponsors of the school, special interest groups in the community, persons with disability and students. The functions of the Board are set out in section 59, and include development of the school, promotion of quality education, provision of proper and adequate physical facilities at the school, management of the affairs of the school in accordance with rules relating to occupational safety and health, among others.

21. For avoidance of doubt, sections 55, 56 and 59 of the Basic Education Act state as follows:

"5. Board of management

(1) There shall be a Board of Management for every public -

(a) deleted by Act No. 3 of 2021;

(b) primary school;

(c) secondary school;

(d) adult and continuing education centre;

(e) multipurpose development training institute; or

(f) middle level institutions of basic education.

(2) Notwithstanding subsection (1) every school shall have a parents association which shall be constituted in the manner set out in the Third Schedule.

(3) Every private school shall establish a parents' teachers' association.

56. Composition of Board of Management.

(1) The Board of Management established under *section 55* shall consist of the following members appointed by the County Education Board:

(a) six persons elected to represent parents of the pupils in the school or 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; and

(f) one person to represent persons with special needs;

(g) a representative of the students' council who shall be an ex officio member

(2) Notwithstanding subsection (1) every school shall have a parents association which shall be constituted in the manner set out in the Third Schedule.

(3) The number of members of the Board of Management co-opted under subsection (2) shall not exceed three at any particular time and such members do not have a right to vote at the meetings of the Board.

(4) The members of the Board of Management shall elect their chairperson from amongst themselves provided that the member to be so elected shall not be a person who was appointed under subsection (1)(c).

(5) For public schools sponsored by faith-based organisations, the Chairperson of the Board of Management shall be appointed by the County Education Board in consultation with the sponsor.

(6) For a public school, the chairperson of the Board of Management shall be elected by the members in their first meeting.

(7) The conduct and affairs of the Board of Management shall be as set out in the Fourth Schedule.

(8) The conduct and affairs of the Board of Management shall be as set out in the Fourth Schedule.

(9) The provisions of *sections 54* to 57 shall apply mutatis mutandis to a board of management of any public-

(a) primary school;

(b) secondary school;

(c) adult and continuing education centre; and

(d) multipurpose development training institute.

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59. Functions of the Board of Management

The functions of the Board of Management of a Functions of the Board of management basic education institution shall be to-

(a) promote the best interests of the institution and ensure its development;

(b) promote quality education for all pupils in accordance with the standards set under this Act or any other written law;

(c) ensure and assure the provision of proper and adequate physical facilities for the institution;

(d) manage the institution's affairs in accordance with the rules and regulations governing the occupational safety and health;

(e) advise the County Education Board on the staffing needs of the institution;

(f) determine cases of pupils' discipline and make reports to the County Education Board;

(g) prepare a comprehensive termly report on all areas of its mandate and submit the report to the County Education Board;

(h) facilitate and ensure the provision of guidance and counseling to all learners;

(i) provide for the welfare and observe the human rights and ensure safety of the pupils, teachers and non-teaching staff at the institution;

(j) encourage a culture of dialogue and participatory democratic governance at the institution;

(k) promote the spirit of cohesion, integration, peace, tolerance, inclusion, elimination of hate speech, and elimination of tribalism at the institution;

(l) encourage the learners, teachers and non-teaching staff and other, parents and the community, and other stakeholders to render voluntary services to the institution;

(m) allow reasonable use of the facilities of the institution for community, social and other lawful purposes, subject to such reasonable and equitable conditions as it may determine including the charging of a fee;

(n) administer and manage the resources of the institution;

(o) receive, collect and account for any funds accruing to the institution;

(p) recruit, employ and remunerate such number of non-teaching staff as may be required by the institution in accordance with this Act; and

(q) perform any other function to facilitate the implementation of its functions under this Act or any other written law."

22. Although section 55(2) of the Act provides for a parents' association, the provisions governing its constitution and function are set out in the Third Schedule to the Act. What is of importance for the purpose of these proceedings are the functions of the parents' association. These are set out in paragraph 2(6) of the Third Schedule. They include promotion of the health care of the students, maintenance of good working relations between parents and teachers, discussing and exploring of ways to raise funds for the physical development and maintenance, motivation of teachers and students to improve their performance in academic and co-curriculum activates, discussing and recommending charges to be levied on pupils or parents, undertaking and overseeing development projects on behalf of the parents association, assisting school management in monitoring guidance counselling and disciplining students, and discussing and recommending measures for the welfare of staff and students.

23. For avoidance of doubt, paragraph 2(6) of the Third Schedule provides as follows:

The functions of the Parents Association shall be to—

6. (a) *promo*te quality care, nutritional and health status of the pupils;

(b) maintain good working relationship between teachers and parents;

(c) discuss, explore and advise the parents on ways to raise funds for the physical development and maintenance;

(d) explore ways to motivate the teachers and pupils to improve their performance in academic and co-curricular activities;

(e) discuss and recommend charges to be levied on pupils or parents;

(f) undertake and oversee development projects on behalf of the whole Parents Association.

(g) assist the school management in the monitoring, guidance, counseling and disciplining of pupils; and

(h) discuss and recommend measures for the welfare of staff and pupils."

24. From a reading section 59 of the Act and paragraph 2(6) of the Third Schedule, together, one sees a considerable overlap between the functions and roles of the Board of Management and the parents' association over a fairly wide variety of things. What that would mean is that the management and development of a school should be a collaborative effort between the two. With regard to development of facilities, however, it would appear that the parents' association has the biggest role, in terms of mobilising resources for physical development and maintenance of facilities, and related to that is the question of the association discussing and recommending levies on students or parents. That would suggest that the parents' association may play the role of initiating projects, mobilising funds and recommending what ought to be charged on pupils and parents, and the Board would be left with the role or function of implementation. What is clear from the Third Schedule is that parents have a major role in fund raising for development and maintenance, and levying of charges on parents or students. There is no complementary function or role of that kind on the part of the Board. Whereas the Board ensures development of the school, ensures provision of adequate physical facilities for the institution, administers and manages the resources of the school, and receives collects and accounts for any funds accruing to the institution; it has not been vested, specifically, with the function of fund raising, recommendation of levies on students or parents, among others.

25. The language of the letter dated 11th November 2021 is not very clear, but the sense that I make of it is that the students or parents are required to meet the cost of the damage caused by the fire that destroyed the dormitory. The cost is split into three: for the damage on the building, for beds that were destroyed and installation of CCTV on the building. Construction and reconstruction of a building amounts to development. That is a function of both the Board, under section 59 of the Basic Education Act, and parents, under the Third Schedule paragraph 2(6). The money to finance the development is, in this case, being raised from students or parents. Section 59 does not list fundraising as one of the functions of the Board, but paragraph 2(6)(c)(e) makes it a function of the parents' association. The language used is that that the association explores and discusses ways to raise funds for physical development and maintenance, and to discuss and recommend charges to be levied on pupils or parents. Whereas the Board has the role of ensuring development and provision of physical facilities for the institution; the fundraising role falls with the parents, and any levies or decisions on levies to be imposed on students or parents must be with the concurrence of the parents.

26. The construction or reconstruction of any building or structure amounts to development. Both the Board and the parents' association have roles in development of physical facilities at school. However, with regard to fundraising the parents' association appears to have a bigger role. Under paragraph 2(6)(c)(e), it explores with parents' ways of raising funds for development of physical facilities and their maintenance, and it discusses and recommends charges to be levied on students or parents with respect to such development. No complementary roles or

functions are assigned to the Board under section 59 of the Act. It would appear then that whereas the Board may come up with the ideas on the development projects of the school, parents have to be consulted on ways of raising funds to finance such projects, and particularly where the funds have to come from parents or students, the parents must come up with recommendations on any levies to be imposed. These are functions or roles that are assigned to parents by statute. They are statutory. They cannot be overlooked.

27. In the instant case, the idea of construction or reconstruction or rebuilding of the damaged dormitory naturally amounts to development. Both the Board and the parents' association have roles or functions in that. It would appear here that the decision to rebuild the dormitory came from the Board. It would also appear that the decision to fundraise by way of levies on parents or students came from the Board. The question then is whether the parents or their association were consulted on the matter, in view of the paragraph 2(6) of the Third Schedule?

28. The case by the *ex parte* applicant is that there was no consultation, and the parents only got to know of it through the communication in the letter dated 11th November 2021. In the affidavit sworn by the 1st respondent on 18th November 2021, there is no mention of a meeting of the parents' association being convened to deliberate on the reconstruction of the dormitory, so as to be in conformity with paragraph 2(6)(c)(e) of the Third Schedule. What the 1st respondent says the school management did was to ascertain the cost of the damage caused by the fire, and of the reinstatement of the building to its former state. Having done that a Board meeting was called, which decided that the cost of the repairs be met by students or parents, in line with the Ministry of Education policy. Clearly, parents, through their association, were not consulted. They, therefore, did not get to discuss, explore and advise parents on ways of raising funds for reconstruction of the dormitory, or discuss and recommend the charges to be levied on parents or students for that development or reconstruction.

29. I note that a large component of the Board comprises of parents' representatives, and it could be argued that parents were, therefore represented at the Board, and their representatives at the Board made the decisions corporately with the other members of the Board, and parents should not be heard to say that their voice on the matter was not heard. Parents who sit in the board are members of that Board, and execute the function of the Board as set out in section 59 of the Basic Education Act. The decisions of the Board that they are party to are of the Board and not of the parents' association. It cannot, therefore, be said that since some parents sit in the Board, there would be no need for the parents' association to sit and deliberate on the matter and pass its own resolutions. The functions of the Board and of the parents' association are distinct. Consequently, parents ought to have been consulted through their association. The 1st respondent is the secretary of the parents' association, according to paragraph 2(5) of the Third Schedule. He has not averred to having consulted the chairperson of the parents' association, or having initiated, a secretary, a meeting of the parents to discuss, the issue of fundraising for the reconstruction, and the levying of charges on parents or students, which fall within the mandate of the parents' association. Clearly, there is merit, that, although there is a statutory function or role for parents, through their association, on matters touching on fundraising for development of infrasctrure in the school, and for levying charges on parents or students, decisions were made without consultation with parents or their association. That raises serious questions on the propriety of the process that led up to the decision of 10th November 2021.

30. On the question as to whether the measures were punitive or not, I am not persuaded that the *ex parte* applicant has placed any material before me, which suggests that they were. I have pored through the affidavit verifying the statutory statement, and I have not seen a single averment that points to the fact that the charges were punitive. The *ex parte* applicant has not presented before me a valuation of the damage of his own or of other parents suggesting that the cost of the reconstruction of the dormitory was lower that what was projected by the Board.

31. Does it mean that the parents or students were being punished unfairly? The issue, as I understand it, from the perspective of the respondents, is that a dormitory, which housed a substantial number of students, was destroyed, which meant that these students were left without accommodation. The levy imposed was not meant to punish the student population in general, but to raise funds to restore the dormitory to its former state so as to provide shelter to the students affected. From the material on record, and I am hesitant to take judicial notice of anything relating to education policy, the cost of restoration of the building cannot be borne by the State through the Ministry of Education. It should be up to parents, based on the provisions of the Third Schedule to the Basic Education Act, to find ways of raising funds to restore the same. Someone has to bear the cost of restoring the building for the welfare of all the affected students. That burden cannot be borne by Government, and it would be unreasonable to expect that it would be borne by the students found to be culpable for the damage, who, in any event, are yet to be taken through the criminal process, to establish their culpability. The levying of the charge cannot, in the circumstances, be said to be punitive, either in terms of the cost of restoration being way above what would be reasonable in the circumstances, or of the students being punished for the destruction.

32. The *ex parte* applicant has cited Regulation 36(3) of the Basic Education Regulations, 2015, to argue that loss of the kind before us was to be borne by the person found to bear the greatest responsibility for the mass destruction. With respect, I think the *ex parte* applicant has misread that provision. The same ought to be read together with the other sub-regulations in Regulation 36, rather than in isolation. Regulation 36 progresses from Regulation 35, which deals with what should happen in the case of mass indiscipline in a school. Under the Regulation 35, the Board may close the institution, and sent students away for a period not exceeding two weeks. Regulation 36 is about the matter being escalated to the County Education Board, by way of a report of the mass indiscipline being reported to it by the Board. The County Education Board may confirm or end the closure of the school, determine conditions on which students are to be readmitted, or order their placement in correctional institutions. Where there was damage or destruction, in the course of the mass indiscipline, the school management may invite an assessor to determine the value of the loss, which, under Regulation 36(3) is to be met by the person bearing the highest responsibility for the mass indiscipline.

33. Was there mass indiscipline in this case, for Regulation 36(3) to kick in? The *ex parte* applicant has not averred that there was any incident of mass indiscipline at the school on the day the dormitory was damaged. Mass indiscipline has not been defined in the Basic Education Regulations, 2015. In ordinary everyday language, mass indiscipline would suggest lack of discipline, that is widespread, and involving a large number of people. The *ex parte* applicant has not attempted to paint a portrait of such mass indiscipline. He talks of Forms 1, 2 and 3 students being out of the dormitories doing morning "preps" in their classes, while Form 4 students were sitting an "exam" under supervision of teachers. That does not paint a picture of indiscipline, leave alone of the widespread or mass kind. Doing morning studies and sitting an examination in early morning point to order and discipline. There is not suggestion of chaos, anarchy and disorder that would be associated with mass indiscipline. The 1st respondent has not said much in his affidavit about the events of the morning of 6th November 2021, but he has annexed the minutes of the Board meeting of 10th November 2021, and Min. 4/11/21 describes in detail what transpired. That description fits in with the averments by the *ex parte* applicant, that there was no chaos, or anarchy, or disorder, or mass indiscipline. Students had gone for early morning studies at the tuition block, when the fire broke out. It was suspected that some students might have

remained behind, as their colleagues went to the tuition block, and it was the group that lurked behind that might have set off the fire. Clearly, the outbreak of the fire had nothing to do with mass indiscipline, for it is clear that there was no mass indiscipline. Consequently, Regulation 36(3) of the Basic Education Regulations is of no application whatsoever to the circumstances herein, and the issue of the loss or damage being borne by the person or persons found to bear the greatest responsibility for it should not arise. I should not be understood to be absolving anyone from liability or responsibility. What am stating is that responsibility arising from destruction caused by mass indiscipline does not arise in the context of this matter, but that does not mean that, should anyone be found culpable, that person cannot be made to meet the cost of the damage.

34. The issue of recovery of the full amount of outstanding school fees or arrears was part of the complaint. Ordinarily, students are required to settle school fees in full, for the funds raised from the fees are plied to meeting recurrent expenditure. In short, it is the funds raised through school fees that run the school. Without the money, the school administration would face hurdles in running the institution. Allowing students to stay in school without paying school fees in full is usually something within the discretion of the school, which the school administration determines on a case to case basis. It is something that the court ought not to engage itself in addressing or interfering with. In this case, the demand for full arrears is intended to mop up all the available funds for the purpose of getting the dormitory restored to its former state at the earliest possible time, to enable the students get on with their studies. I find nothing unreasonable about that.

35. Section 34(6) of the Basic Education Act was cited, with respect to the exhaustion of remedies principle, that a parent or child aggrieved by a decision of the school management or Board has a remedy through the County Education Board. With respect, the provision above has no application to the matter at hand. It deals with denial of admission of a student to a school at the first instance. That is not the case here. The dispute is not admission of students. No student has been expelled either, for the question of readmission to arise. The remedy provided through section 34(6) of the Basic Education Act would not be available for the purposes of the instant case. Section 94(1)(2) was also cited with respect to the same, however, that provision has nothing to do with remedies for any grievances, for it is about establishment of a council concerned with nomadic education. Perhaps the respondents had in mind section 93(1)(2), which establishes the Education Appeals Tribunal. However, the remedy through this route would have been of no assistance to the *ex parte* applicant, for he is not aggrieved by a decision of the County Education Board, whose decisions are appealable to the Education Appeals Tribunal.

36. On the merits, I could have found that there was a statutory duty to involve parents in the decision making, by virtue of Regulation 2(6) of the Basic Education Regulations, 2015, however, I have already held that the Motion, as framed, does not support grant of the orders sought. I cannot fashion a suitable remedy in the circumstances of this case, as what is before me is not a constitutional petition, but an application under the Civil Procedure Rules. The strict rules of procedure apply, with respect to framing of suits, and parties being bound by how they have framed their cases. Consequently, the Motion is incompetent.

37. On review of the stay order, the matter was coming up for the hearing of the substantive Motion. A determination of the Motion one way or the other would have the effect of disposing of the issue on whether or not to review the stay order, and, therefore, I need not consider the arguments made with respect to it, nor consider whether or not there is jurisdiction to review it.

38. Regarding the petition, the same is not for determination. The only thing to consider, with respect to it, is whether I should grant conservatory orders pending its hearing and disposal. Of course, the two processes were not consolidated, as indicated above, for one is based on the Law Reform Act, Cap 26, Laws of Kenya, and the Civil Procedure Rules, while the other is based on the Constitution and the Fair Administrative Actions Act. The parameters for their determination are different. The petition, therefore, will run its course, should the petitioner be minded to proceed with it after this delivery of this judgment.

39. What I have to determine now is whether I should make orders to preserve the subject matter pending the hearing and determination of the petition. The conservatory orders are sought in the Motion, dated 18th November 2021, principally on grounds that the amount of Kshs. 9, 823.00 is punitive, in the sense that it is meant to punish the students. I have, in the body of this judgment, found that that is not so. My understanding of it is that a dormitory was destroyed, students lost their accommodation in the process, there is need to restore the dormitory so as to accommodate the students, for them to continue their studies. The restoration requires money, which Government will not provide, and which should properly come from the parents, by dint of the provisions of the Third Schedule to the Basic Education Act. The levying of the fee on parents or students is, therefore, not intended to punish them, but to get the building reinstated to its former state. Failure to reinstate the building would mean that the students stay at home, for an indeterminate period, to their detriment, in violation of the best interests' principle. The parents have a duty to fund the restoration, the only thing that went wrong was that the Board overlooked the requirements of the Third Schedule, and ignored parents in their decision-making. I am not persuaded, therefore, that conservatory orders ought to be made with respect to the petition.

40. The final orders are as follows:

a. That the substantive Motion, dated 23rd November 2021, in Kakamega HC Judicial Review Miscellaneous Application No. E191 of 2021 is hereby dismissed, with the consequence that the stay order granted on 16th November 2021, in Kakamega HC Misc. Application No. E190 of 2021, and varied on 19th November 2021, is hereby discharged;

b. That the Motion in Kakamega Constitutional Petition No. 10 of 2021, dated 18th November 2021, is hereby dismissed;

c. That the files in Kakamega HC Misc. Application No. E190 of 2021 and Kakamega HC Judicial Review Miscellaneous Application No. E191 of 2021 to be closed;

d. That Kakamega Constitutional Petition No. 10 of 2021 to be fixed for directions on its disposal, and to be heard by a Judge other than Musyoka J; and

e. That each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 3RD DAY OF DECEMBER, 2021

W. MUSYOKA

JUDGE