



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 408 OF 2019

- MN (Minor suing through JA as her next kin).....1ST PETITIONER**
- SAO (Minor suing through CAM as her next kin).....2ND PETITIONER**
- GW (Minor suing through SW s her next kin).....3RD PETITIONER**
- DO (Minor suing through FM as her next kin).....4TH PETITIONER**
- DN (Minor suing through JN as her next kin).....5th PETITIONER**
- ZZHS (Minor suing through HHS as next kin.....6th PETITIONER**
- DB (Minor suing through DJ as her next kin).....7th PETITIONER**
- CK (Minor suing through DK as her next kin).....8th PETITIONER**
- EG (Minor suing through IO as her next kin).....9th PETITIONER**

(together herein referred to as the Petitioners)

VERSUS

- THE PRINCIPAL H GIRLS HIGH SCHOOL.....1ST RESPONDENT**
- THE BOARD OF MANAGEMENT H GIRLS HIGH SCHOOL.....2ND RESPONDENT**
- THE COUNTY DIRECTOR OF EDUCATION FOR NAIROBI CITY COUNTY –**
- MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY.....3RD RESPONDENT**
- THE CABINET SECRETARY TO THE MINISTRY OF EDUCATION,**
- SCIENCE AND TECHNOLOGY.....4TH RESPONDENT**

JUDGMENT

1. The petitioners' through a petition dated 14th October 2019 seek the following reliefs:-

a) A **DECLARATION** be and is hereby issued that investigations on the petitioners by the 1st respondent against the petitioners with respect to fire violated their constitutional rights, and therefore unlawful, null and void *ab initio* and the subsequent disciplinary process by the 1st and 2nd Respondent was therefore unlawful, unreasonable, unprocedural, illegals and null and void.

b) An order of **CERTIORARI** be issued to quash the suspension letters dated 11th September 2019 issued to the parents/guardians of the Petitioners by the 1st Respondent suspending the Petitioners from the School and their effects and implementation.

c) An order of **CERTIORARI** be issued to quash the suspension letters dated 11th September 2019 issued to the parents/guardians of the Petitioners by the 1st Respondent suspending the Petitioners from the School and their effects and implementation and re-admit the students to school to undertake their third term exams.

d) An order of **PROHIBITION** directed to the 1st and 2nd Respondent prohibiting them, their agents, or servants from undertaking any disciplinary process against the Respondents in relation to the fire incident and/or issuing any adverse report or recommendation in respect of any of the Petitioners to any person or school until the police and the other relevant investigating agencies have finalised investigations to the cause of the fire and provided written reports directly linking the Petitioners to the cause of the fire.

e) An order that the 1st and 2nd Respondents bear the costs of this application in any event.

2. The petitioners' case is that on 3rd September 2019, a fire incident occurred at H Girls High School in which one of the school's dormitory together with assorted properties of students who were residents in the dormitory were burnt by the fire. The petitioners are students at the said school in various forms and were amongst the students who are residents in the affected dormitory and whose properties were destroyed. The fire incident did not injure any student as it occurred during dinner time where the dormitory was closed.

3. Arising out of the fire incident the petitioners' together with other students in the school were subjected to an investigation process by the school teachers. Upon completion of the investigation, the petitioners were verbally informed that they were suspected to have orchestrated the fire incident. It is petitioners' case that they have not so far been questioned by the police on the fire incident and that no investigation report has been provided by the police linking the petitioners to the fire incident.

4. It is petitioners case that on 11th September 2019, the parent/guardians of the petitioners were summoned to the school and issued with letters by the 1st Respondent suspending the petitioners from the school with effect from 11th September 2019 "*for suspected arson in the school*" which was arrived at on the basis of the investigations by the teachers and without any investigation from the police. The suspension letters required the parents/guardians to appear before the 2nd Respondent on 26th September 2019, being the 15th day from the date of suspension, for disciplinary process. The parents/guardians and petitioners appeared before the 2nd Respondent on 26th September 2019 as demanded through the suspension letters.

5. In the disciplinary process, the parents/guardians requested the 2nd Respondent to provide them with the report from the police and evidence linking the petitioners to the fire incident but the same was not provided, and the same is yet to be provided to date even after the petitioners complained to the principal secretary, state department of Early Learning and Basic Education through a letter of 4th October 2019.

6. The petitioner contend that the Basic Education Regulations 2015 (*the Regulations*) requires the 2nd Respondent to have communicated its findings to the County Director of Education within two days of the date of the disciplinary proceedings, which is urged to have ended on 28th September 2019, so as to enable the County Director of the Education with the County Education Board to provide the remedies provided in law. It is urged the 2nd Respondent has not communicated its recommendations to the County Director of Education to date but instead the 1st Respondent purported to invite the petitioners and their parents/guardians for another meeting with the 2nd Respondent on 17th October 2019; 36 days from the day of suspension and 30th October 2019, 49 days from the day of suspension through text messages. The petitioners and parent/guardians did not attend the meetings of 17th October 2019; asserting the Regulations (*in Regulation 38*) envisages only one meeting/appearance before the 2nd Respondent by the petitioners; which should happen within 14 days from the day of suspension and which the petitioners contended they attended on 26th September 2019 and secondly the petitioner aver that they had filed the petition by the time the two meetings were called, therefore any deliberations in the meetings would have been *sub-judice*.

7. The petitioners contend that they are unable to seek any relief; whether in interim or final, from the Education Appeals Tribunal, which is the body mandated to hear appeals from decisions made by the County Director of Education and the County Education Board because the 2nd Respondent has not communicated its recommendations to the County Director of Education and therefore the County Director of Education and the County Education Board have not made any decision.

8. It further argued by the petitioners as a result of suspension, they missed classes for the whole of 3rd term and missed their respective 3rd term examinations which are necessary for proceeding to another grade or for transferring to another school for any of the petitioners who would want to transfer. It is averred by the petitioners even if they are allowed to sit for supplementary examinations, they will miss the opportunity to be graded together with the other students in their respective classes and would not know where they are placed in their classes.

The 1st and 2nd Respondents' case

9. The 1st and 2nd Respondents are opposed to the petition. They filed Replying affidavit deposed by Margaret Moro Ounga, the Principal of H Girls High School sworn on 22nd October 2019 and further affidavit in response to the petition by Margaret Moro Ounga sworn on 15th November 2019.

10. The 1st and 2nd Respondents case is that on 3rd November 2019, a fire incident occurred and burnt down the school damaging school buildings and property belonging to the school and students worthy millions of Kenya shillings (*annexture MO-2 is a list of damaged properties and their value*). On 6/9/2019, the school formed a disciplinary committee to investigate the fire incident. That upon interrogation of the students the committee found the petitioners were involved in the fire incident (*see annexture MO-3 and MO-4 copies of minutes of the school Disciplinary Committee meeting held on 6/9/2019 and Report from school investigation committee dated 16/9/2019*).

11. The school subsequently issued the students said to be involved, with suspension letters also inviting students' parents/guardians to a hearing before the Discipline, Ethics and Integrity Committee of the school on 26th September 2019, in accordance with the rules less than two weeks from the date of the incident and suspension and therefore expeditious. That the committee found the case warranted to be forwarded to the full Board (*see annexture MO-5, a copy of the minutes of the Discipline, Ethics and Integrity Committee of 26/9/2019*). The school invited the parents and students to appear before the 2nd Respondent on 17/10/2019 to face disciplinary action so that the students could be questioned and their innocence or otherwise established; but on 17th October 2019, the petitioners and their parents failed to appear (*see annexture MO-6 copies of minutes of the full Board meeting held on 17/10/2019*).

12. The Respondents contend the school made further offer to invite the petitioners and their parents to a disciplinary hearing on 30/10/2019 through text messages and registered post but they failed to appear (*see annexture MO-7 copies invitation letters addressed to the petitioners parents/guardians*). It is further urged by the Respondents the petitioners have maintained that they will never be subjected to disciplinary process despite having been given yet another chance and invited to attend a disciplinary meeting before the 2nd Respondent on 30/10/2019 (*see annexures marked MO-8 a copy of petitioners' Advocates letter dated 25/10/2019*).

13. It is Respondents case that the petitioners have refused to appear before the 2nd Respondent to enable the disciplinary process to be conducted and therefore any delay in concluding the investigation and disciplinary process, has been occasioned wholly by the petitioners and as such they should not be heard to blame the Respondents for purportedly violating their rights to fair administrative action.

14. The Respondents assert that the petitioner is inviting the court to help the students legitimize on illegality that they have perpetuated by failing to appear before the 2nd Respondent to face a disciplinary action so that their innocence or otherwise could be established. The Respondents further urges the court not to interfere with the internal disciplinary process of the school as exercised through the legally mandated offices of the 1st and 2nd Respondents but instead allow the school to proceed with the investigations and disciplinary process against the petitioners/students.

15. The Respondents are concerned with reaction of the students who are currently in school who lost their property and dormitory to the fire and believe their lives are in danger, if the petitioners are re-admitted without being subjected to a disciplinary process in accordance with the school rules and the law as that would send a negative message to students in school across the Republic of Kenya, that disobeying the school rules and regulations attracts no consequences. It is Respondents contention that none of the rights and freedoms which the petitioners allege to have been violated is absolute as the same are enjoyable and exercisable within the limits of the law and school rules and regulations. It is further urged that when talking of rights of children, it is important to strike a balance and also consider the said rights of hundreds of students/children whose rights to property were violated, when their property were damaged as well as right to life, which was threatened by the act of arson believed to have been committed by the petitioners students. That as a result of the damage, all students, including the innocent majority through their parents will have to bear the burden and cost of repair and renovation.

16. The Respondents contend that the petition herein is premature and the petitioners should have availed themselves before the full Board of the management prior to resorting to judicial action.

17. The Respondents state that with regard to the 6th petitioner who is sitting for her Kenya Certificate of Secondary Education (**KCSE**), the 1st and 2nd Respondents have accorded her all the opportunity to sit and is indeed sitting for the said examination (*see annexture marked MO-9, a copy of the petitioners' examination timetable*).

Analysis and Determination

18. I have very carefully considered the petitioner's petition; affidavit in support; petitioners supplementary affidavit; the Respondents Replying affidavit; Respondents affidavit in response to the petition; petitioners submissions; petitioners further submission, the Respondents submissions, the parties list of annexures and rival oral submissions by the counsel. From the above the issues arising for consideration can be summed up as follows:-

a) Whether the school has powers to investigate cases of indiscipline and misconduct of criminal nature perpetrated by students?

b) Whether the suspension of the petitioners from the school for suspected arson was lawful on the basis of investigations conducted by disciplinary committee of the school?

c) Whether the petitioners fundamental rights were violated by the Respondents and whether the petitioners right to education was violated?

d) Whether the Replying affidavit offends the provisions of Rule 9 of the Oaths and Statutory Declarations Rule?

e) Whether the petition was filed prematurely?

f) Whether the 1st and 2nd Respondents defied the court order issued on 23/10/2019?

g) Whether the school has powers to investigate cases of indiscipline and misconduct of criminal nature perpetrated by students?

A) Whether the school has powers to investigate cases of indiscipline and misconduct of criminal nature perpetrated by students?

19. The petitioner's contention is that the respondents have no power to investigate cases of indiscipline and misconduct of criminal nature involving students and mete disciplinary action against the responsible students for indiscipline. It is petitioners position that cases of arson are of criminal nature and can only be handled by the police. The petitioners refer to section 2 of the **Fire Inquiry Act (Cap 103) Laws of Kenya** which provides:-

“Whenever any fire causing injury to person or property takes place in any part of Kenya, it shall be the duty of the police officer to whom the fire first becomes known to proceed himself or to send some other police officer forthwith to the spot where the fire has occurred , and the officer who so proceeds, after performing such services as he may be required to perform in the due execution of his duty as a police officer, shall make all due investigation into the origin or cause of the fire”.

20. The court reading and understanding of the above mentioned section is that it sets out the duty of police officer to whom the fire first becomes known to him or her and what the officer who proceeds to scene is required to do. It also makes it clear that it is the responsibility of the police to undertake investigations into the origin or cause of any fire incident in Kenya. The section however do not bar anyone else from investigating the origin of the fire as sometimes experts may be needed to determine the origin of the fire, which expertise the police may not have. In institutions like schools, the school may set up an investigations committee and that would not be illegal in doing so.

21. The Basic Education Regulations, 2015 provides for individual liability for discipline and mass indiscipline. **Rule 32 of the Regulation 2015** provides:-

"32. A learner shall be deemed to be individually undisciplined if involved in-

a) physical fights;

b) bullying of other learners;

c) Stealing;

d) Playing truancy;

e) cheating in examinations;

f) abusing teachers or other persons in authority;

g) defiance of lawful instructions;

h) drug trafficking or substance abuse; or

i) any other conduct categorized as indiscipline by the Board of Management."

Rule 33 of the Regulations 2015 provides:-

a) unlawful demonstration;

b) boycott of classes or meals;

c) the destruction of school property; or

d) invasion of other institutions, shopping centres or homesteads.

22. It is clear that reading from Rule 32(1) of the Regulation 2015, that Rule 32 of the Basic Education Regulations, 2015 is not exhaustive as it provides clearly that *"any other conduct categorized as indiscipline by the Board of Management"*. It therefore follows that the Respondents have powers to include heads of conducts which they consider to constitute indiscipline. The Rules having set up individual liability for indiscipline and mass indiscipline, it is logical that the institution should have their internal investigative mechanism in respect of cases of indiscipline. In view of the foregoing, I find contrary to the petitioners assertion that the schools have power to investigate case of indiscipline and misconduct of a criminal nature; such as arson; resulting in destruction of school property, involving students. Rule 33 (c) of the Regulation 2015 gives schools powers to investigate cases of arson resulting in destruction of school property. In the instant petition

the school property and property of students were destroyed, following a case of arson at the school and the school, was within its powers to investigate the case of indiscipline involving the students.

B) Whether the suspension of the petitioners from the school for suspected arson was lawful on the basis of investigations conducted by disciplinary committee of the school?

23. The petitioners aver that since the investigations undertaken by the teachers were unlawful, unreasonable and unprocedural the petitioners suspension from the school, for suspected arson on the basis of the investigation thereof was unlawful. In the instant petition the petitioners have failed to demonstrate the investigations conducted by disciplinary committee of the school was unlawful, unreasonable and unprocedural. The Respondents did demonstrate that the school has powers to investigate cases of indiscipline and misconduct of a criminal nature. The respondents have also demonstrated that the suspension was justifiable. **Rule 38(b) of the Basic Education Regulations, 2015** provides as follows:-

"If head of the institution is of the opinion that:-

a) the acts of indiscipline have persisted in spite of the warnings or corrective measures taken under these regulations; and

b) If the act of indiscipline is likely to threaten the safety of the other learners in the institution, the head of the institution shall issue the learner, with a suspension letter addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of Management of the institution."

39. (1) The particulars of the complaint preferred against the learner shall be read out to the parent or guardian and the learner at the meeting with the Board of Management under regulation 38, and the learner shall be asked to defend himself or herself."

24. In the instant petition there is no dispute that on 6/9/2019, the school formed a disciplinary committee to investigate the fire incident; which proceeded to interrogate the students and found that the petitioners were involved in the fire incident in their minutes and Report (MO-3). The petitioners were subsequently served with suspension letter. and which petitioners have admitted receipt. I have perused the copies of the suspension letters and note the petitioners and the parents/guardians were accordingly notified of the allegations made against the petitioners and thereafter invited to a hearing before the Discipline, Ethics and Integrity Committee of the school on 26/9/2019. The petitioners were invited within a reasonable time. I find from the above that the suspension of the petitioners was justifiable, as the formed disciplinary committee to investigate the fire incident, upon interrogating the students found that the petitioners student were involved in the fire incident. The petitioners and their parents guardians were duly notified of the allegations levelled against petitioners and given a date to appear before Full Board of Management.

C) Whether the suspension of the petitioners from the school for suspected arson was lawful on the basis of investigations conducted by three disciplinary committee of the school?

25. The petitioners assert that their constitutional rights to fair administrative action and right to education has been violated. It is trite that in order to obtain the intervention of the court, the party who alleges that his right has been violated or threatened must with reasonable precision state the Articles of the Constitution he/she alleges to have been violated or threatened with violation and state the manner in which they are violated and the harm he/she is likely to suffer (see **Anarita Karimi Njeru vs Republic (1976-1980) 1 KLR 1272**). I have perused the petition herein and have noted from the manner in which it is drawn and filed that it does not meet the threshold as set out in **Anarita Karimi Njeru vs Republic 1976-1980) 1 KLR 1272** in which the Court of Appeal stated as follows:-

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed', and the manner in which they are alleged to be infringed."

26. It is contended by the petitioner that their right to Fair Administrative Action were violated as the petitioners and their parents/guardians appeared before the 2nd Respondent on 26th September 2019 as required but the 2nd respondent affirmed the suspension and proceeded with the disciplinary process. **Article 47(1) of the Constitution** provides:-

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

27. To answer the petitioner's contention the issue for consideration is whether the Respondents complied with the constitutional requirements of fair administrative action. There is no dispute in this petition that on 3/9/2019, fire incident burnt down the H Girls school and damaged building and property belonging to the school and students, that after 3 days the school formed a disciplinary committee to investigate the fire incident; the committee interrogated a number of students and found the petitioners were said to have been involved in the fire incident. The petitioners were duly notified of the allegations made against them and thereafter invited to a hearing before Discipline, Ethics and Integrity Committee of the school on 26/9/2019, in accordance with the rules, less than 2 weeks or within a reasonable period, from the date of the incident and suspension, hence expeditious. The committee upon consideration of the case before it, it recommended the case be forwarded to the Full Board of the Management. The school invited the petitioners and their parents/guardians before the 2nd Respondent to appear on 17/10/2019 to take a disciplinary hearing, so that the petitioners could be questioned and their innocence or otherwise established but they declined to appear, forcing the school to invite them for 30/10/2019 through SMS and Registered post, but the petitioners failed to appear on the set date. The petitioners proceeded to prefer this petition maintaining, that they will not be subjected to disciplinary process, despite having been afforded an opportunity to be heard twice by the 2nd Respondent.

28. In the instant petition, the petitioners failure and/or refusal to appear before the 2nd Respondent to enable the disciplinary process concluded, has caused the delay in concluding the investigations and disciplinary process. It is the petitioners who are to blame for the failure to conclude the matter. It is my finding, that the petitioners who have delayed the process, cannot turn around and blame the Respondents for purportedly violating their rights to fair administrative action. The petitioners never at any one time appeared before the 2nd Respondent to face a disciplinary action so that their innocence or otherwise could be established. It is so far not clear who caused the fire as the petitioners are just mere suspects. It is upon the petitioners to choose to appear before the 2nd Respondent for the exercise or decide not to do so, failure whereby the petitioners shall not be heard to blame the 2nd Respondent, as students of the school following the report by Discipline, Ethics and Integrity Committee. The petitioners have the right to have their matter heard by the 2nd Respondent on appearing before the 2nd Respondent once invited so to do.

29. The school made further effort to invite the Petitioners and their guardians to a disciplinary hearing on 30/10/2019 through registered post. The Petitioners failed to appear on the said date. (See copies of the invitation letters annexed to the 1st and 2nd Respondents' response to the petition filed on 11/11/2019 and marked MO-7).

30. I find in the instant petition, the petitioners are being subjected to lawful internal disciplinary process of the school through the legally mandated offices of the Respondents and instead of the petitioners allowing the school to proceed with the investigations and disciplinary process provided for against the petitioners, the petitioners are urging, they would not be subjected to such process and seek intervention from this court. I find that it would not be proper and justified for the court to interfere with internal disciplinary process especially where it has not been demonstrated the process is contrary to law and is unconstitutional. I note the Respondents have demonstrated that they complied with the requirements of fair administrative action as envisaged by the constitution by informing the petitioner, in advance and in writing, of the charges levelled against them and were further granted several opportunities to defend themselves at a hearing before the Full Board of Management but opted to squander the opportunity given to them.

31. The petitioners aver that the Respondents violated **Article 43(1) (f) and 53 of the Constitution of Kenya**. It further contended that it is the responsibility of the 3rd and 4th Respondents to ensure the petitioners' right to education is not jeopardized arbitrary as the functions of the 2nd respondent include protecting human rights and promoting the best interest of the child and to ensure the development of the children's knowledge, self-confidence, free expression, spiritual and social values and to secure a physical and psycho-social setting of the children.

32. It is stated by the petitioners as a consequence of the alleged unlawful suspension and the delayed disciplinary process, the petitioners missed classes in the whole of the 3rd term and missed their respective 3rd term examinations whose results are necessary to allow the petitioners to proceed to the next grade and for transfer to another school for any of the petitioners who would want to transfer from the school.

33. **Article 53(2) of the Constitution** provides:-

"(2) A child's best interests are of paramount importance in every matter concerning the child."

Further **section 4(2) of the Children's Act, 2001** provides:-

"In all actions concerning children whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration"

Section 4(3) of the Children's Act, 2001 further provides:-

"All authority or persons in exercising their powers must treat the interest of the children as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

a) Safeguard and promote the welfare of the child

b) Conserve and promote the welfare of the child

c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

34. In considering the petitioners submissions this court is alive to the fact that the concerned school accommodates several children including the petitioners herein, and has considered the fact that in a school environment, what is of paramount importance is the welfare of all the children in the school rather than just a few children who have disciplinary issues. That does not mean the school has to ignore its responsibility in respect of a few children, who could be having some disciplinary issues, as regards their human rights and fundamental freedoms as enshrined in the constitution. Such human rights cannot be subordinated to others merely because the interest of the other children are greater. There has to be genuine and good reason to do so which must be consistent with the national values and principles of the constitution. It must be borne in mind, and as submitted by the Respondents, the disciplinary process was never completed as the 2nd Respondent is yet to determine the fate of the petitioners.

35. It is trite that the best interest of the child is of paramount importance in every matter concerning a child. The court in dealing with matters involving a student is required to weigh a balance against that of other student. In **E.S. suing through K.S vs K. School, Eldoret High Court, Pet 7 of 2015 [2015] eKLR** as cited in **O.N (A minor suing through his father and next friend, W.K) vs the Principal, K. High School & 3 others [2019] eKLR** Justice Kimondo had the following to say:-

"..In matters of this nature, the court has to weigh the interests of the applicant against those of other students and the entire school community. It is a very delicate balance."

36. In view of the foregoing and upon considering the facts of this petition, I am of the view that in dealing with matters similar to the present petition herein, the court has to weigh the interest of the petitioners against those of other students and the entire school community; that the general welfare of the hundreds of the disciplined children/student currently in the school is of paramount and supersedes the welfare of the few perceived deviant students. It should be observed also that the right to education is not absolute, but is subject to the rules and regulations governing students/education in a given institution. I find further find that none of the rights and freedoms which the petitioners allege, to have been violated is absolute as the same are enjoyable and exercisable within the limit of the law and school rules and regulations. This court is enjoined in considering this matter, to strike a balance and consider the rights of the other children at the school whose rights to property were violated when fire incident occurred, and their properties were damaged, as well as their right to life which was threatened by the unlawful act of arson alleged to have been committed by the petitioners students.

D) Whether the Replying affidavit offends the provisions of Rule 9 of the Oaths and statutory and Statutory Declarations Rule?

37. The petitioners argue that the response to the petition filed on 11/11/2019 offends the provision of Rule 9 of the Oaths and Statutory Declaration Rules, as the exhibits to the affidavit are not sealed under the seal of the commissioner and marked with serial letters of identification as provided under Rule 9 of the Oaths and Statutory Declaration Rules. In the instant petition, the Respondents served the petitioners' Advocate with what they refer to as client's copy which was not sealed, instead of the service copies which was duly marked. It should be noted that the court's copy and the copy served upon the office of Attorney General are sealed and marked. I have perused the court copy and indeed the same is sealed and marked. I note that even if the Respondent had failed to mark the annexures to the response, that would not be sufficient reasons to expunge the document from the court record as the court document is properly sealed and marked.

38. In the case of **Inamol Jesus Berakoetxea & 2 others vs Edward Buria & 2 others [2018] eKLR**, the Plaintiff filed an application supported by an affidavit which did not make reference to the annexures. The Defendant challenged the affidavit stating the documents in which the Plaintiff seeks to rely on is mere flypaper that ought not to be relied on by the Court. Lady Justice Olga Sewe in reaching at her decision stated as follows:-

"I note that Counsel for the Plaintiffs relied on George C.M. Kariithi & 2 others vs Co-operative Bank (K) Ltd 2006] eKLR for the proposition that so long as there is no confusion as to what is being relied upon, the annexure should be taken on board. However, that decision is also explicit that: - ..."there ought to be no confusion as to what is being relied upon either by a witness giving oral evidence or by a deponent of an affidavit....."

39. In the instant petition, the 1st and 2nd Respondents made clear reference to the annexures in the affidavit in response to the petition filed on 11/11/2019. The annexures in their affidavit in response are clearly referred to, sealed under the seal of the commissioner for oaths. The client's copy which was not sealed by commissioner and served upon the Petitioners Advocate would not cause any confusion as to what the Respondents relied upon as the annexures in the copy in question are marked with serial letters of identification such as **MO-1 to MO-9**.

E) Whether the petition was filed prematurely?

40. The Respondents submit that at the time of admission of the petitioners to the school, the petitioners and their parents/guardians they undertook, in writing to comply with the school rules and regulations. The school rules and regulations are annexed to the Respondents' response to the petition filed on 11/11/2019. The school Rules and Regulations has an internal disciplinary process. The student upon executing an admission document to the school is duly bound to obey and abide by the disciplinary school rules and regulations to the letter and once breached, unless it is demonstrated the same are unreasonable and conflicts with the welfare of the children, such as academic, social and mental growth, the same have to be complied with.

41. It has been demonstrated by the Respondents that after the occurrence of fire incident, the school formed a disciplinary committee to investigate the incident; which committee interrogated the students and found the petitioners students were said to be involved. The school issued the students with suspension letters which also invited the students and their parents/guardian to a hearing before the Discipline, Ethics and Integrity Committee of the school on 26/9/2019 which was in accordance with the rules. The committee found that the case warranted to be forwarded to the Full Board of Management. That inspite of the petitioners and their parents being invited to attend hearing before the Full Board of Management as recommended by the Discipline, Ethics and Integrity committee of the school twice, the petitioners choose not to attend, but opted file the present petition. The full Board of Management, the 2nd Respondent herein, should be noted is the body that is, mandated to make final decision as regards the petitioners case and could not do so the petitioners having declined to appear before it.

42. I have considered the submissions and the position taken by the petitioners herein not to attend the hearing before the Full Board of Management, and I am of the view that the petitioners should have appeared before the 2nd Respondent for hearing of their disciplinary cases before opting to file the present petition. The final decision on the fate of the petitioners was to be arrived at by the 2nd Respondent upon hearing the disciplinary proceedings before it. The petitioners declined to appear before the 2nd Respondent. It was incumbent upon the petitioners to appear before the 2nd Respondent for final determination of their case. The petitioners contention that the Respondent infringed Rule 39(5) of the Basic Education Act Regulations by failing to communicate to the County Director of Education before the 28th September 2019, results of the meeting that took place on 26/9/2019 is not correct as no meeting was held on the same day before the full Board of Management but before the Discipline, Ethics and Integrity Committee of the school. There was nothing that the full Board could communicate as alleged by the petitioners.

F) Whether the 1st and 2nd Respondents defied the court order issued on 23/10/2019?

43. On 23rd October 2019 the court ordered that the 6th petitioner be allowed to access the school as a day scholar to sit the examination of form IV starting on 24/10/2019 and further directed the 6th petitioner during the said period be subjected to the school rules and regulations. The Respondent asserts that they complied with the court's order and it is the 6th Respondent who defied the court's order. The Respondent avers that they allowed the petitioner access the school and that she sat the examination according to this court's order. It is contended during the examination period the student exhibited acts of rudeness and defying of authority contrary to the school rules and regulations and courts order. As regards this issue I find no sufficient material from the affidavits duly filed. The issue was raised by the petitioners who have to discharge the burden of proof. In absence of evidence to demonstrate the Respondents defied the court's order I will find that there is no proof the court's order was defied by the Respondents.

44. The upshot is that I find the petition has no merits and that the petition was filed prematurely. I direct that the Petitioners in accordance with the Rules and Regulation of the Respondents school should present themselves on a date to be set by the 2nd Respondent for the Full Board of Management to defend themselves; within a minimum period of 21 days from the date of this judgment, in default of appearance upon notification, the Full Board of Management shall be at liberty to reach a decision and communicate the same to the Petitioners and 3rd and 4th Respondents.

45. In view of the nature of the petition and considering that this matter involves petitioners who are students of the 1st Respondent school, and whose case is yet to be fully determined by the 2nd Respondent. I direct each party do bear its own costs.

Dated, signed and delivered at Nairobi this 7th day of February, 2020.

.....

J .A. MAKAU

JUDGE