



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 143 OF 2020

BPA (suing as Parents and/or Guardians of student minors

currently schooling at Brookhouse Schools).....PETITIONERS

-VERSUS-

THE DIRECTORS, BROOKHOUSE SCHOOLS.....1ST RESPONDENT

BROOKHOUSE SCHOOLS LIMITED.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF EDUCATION.....4TH RESPONDENT

-AND-

DPGT.....PROPOSED INTERESTED PARTY

JUDGEMENT

The Petition

1. Through the petition dated 29th April, 2020 supported by the affidavit of Evelyne Achieng Agutu, the petitioners, BPA (suing as Parents and/or Guardians of student minors currently schooling at Brookhouse Schools), challenge the virtual learning program introduced by the 1st Respondent (the Directors, Brookhouse Schools) and the 2nd Respondent (Brookhouse Schools Limited- hereinafter simply referred to as Brookhouse or the School) in response to the shutting down of schools by the 4th Respondent, the Cabinet Secretary, Ministry of Education following the outbreak of the COVID-19 pandemic. The Attorney General is the 3rd Respondent. As the Court was preparing to hear the matter, another set of parents and guardians going by the initials DPGT sought to be enjoined in the matter as interested parties. They are referred to in the heading of this judgement as the Proposed Interested Parties.

2. It was the petitioners' contention that upon the closure of schools by the 4th Respondent, the 1st and 2nd respondents continued with a format of online or virtual classes for about three weeks before closing on 3rd April, 2020 and thereafter re-opened on 21st April, 2020 and continued to offer online or virtual classes and levy full fees, with a paltry or nominal discount of 10%. This, according to the petitioners, was contrary to the agreements reached between them and the 1st and 2nd respondents at the time of the admission of their children. It was the petitioners' case that in the contracts, the 1st and 2nd respondents promised to follow an adapted form of the British national curriculum leading to examination in the International General Certificate of Secondary Education (IGSCE). The petitioners averred that physical education, choir festival, illustrated creative writing competition, first aid, drama, aerobics, cultural events, educational visits and trips, pastoral forums, parent/teacher consultations, lunch, computers, library and swimming were among the courses, facilities and services which could not be provided virtually although they were in their contracts with the School.

3. It was therefore the petitioners' averment that the acts of the 1st and 2nd respondents of offering online classes or virtual classes at a rate almost similar to what the School offered when in session contravened their consumer rights and was unfair, unconscionable and unlawful

hence violated Article 46 of the Constitution. Furthermore, it was averred that under the Consumer Protection Act, 2012 ('CPA'), it is unlawful for the School to mislead parents by failing to give them the information they need to make appropriate decisions. In the petitioners' view, the 1st and 2nd respondents failed to provide the information needed for parents to make informed choices or the same was provided late or in an unclear manner. According to the petitioners, the pre-contract information provided to them by the 1st and 2nd respondents was binding and any changes made thereto would necessarily need their express consent and this applied to changes effected between the time the information was availed and when the parents accepted the offer. It was their contention that this was not done after the School made the unilateral decision to provide online classes at a cost similar to the physical presence of their children at school, with a paltry and nominal discount of 10%.

4. The petitioners further averred that the 1st and 2nd respondents irredeemably failed to offer educational services with reasonable care and skill and to comply with promises made prior to the signing of the contracts as regards the services on offer. Furthermore, they averred that the COVID-19 pandemic is having unparalleled and deleterious effects on a wide range of businesses, many of which are subject to government mandated shutdowns and other restrictions. The petitioners additionally averred that while other schools of the same parity in systems, curriculum and fees structure have considered requests by distressed parents and granted considerable fee discounts of up to 50%, the 1st and 2nd respondents have declined to do so despite their pleas.

5. The petitioners therefore pleaded with the Court to intervene and direct the 4th Respondent to immediately inquire in the terms of Section 52(1)(g) of the Basic Education Act, 2013 ('BEA') about the actions of the 1st and 2nd respondents in offering virtual learning and whether the same meets the basic education requirements under the Constitution and the Act; to immediately come up with rules, regulations and policy in terms of Section 39 of the BEA to guide the 1st and 2nd respondents and all other schools with respect to offering virtual or online learning to meet the basic education standards under the Constitution, international conventions and the BEA; and to issue a structural interdict to the 4th Respondent to immediately and without any delay and in consultation with the 3rd Respondent develop a Bill for consideration by the National Assembly to regulate and cap school fees in private schools and schools offering international curriculum in Kenya.

6. The petitioners therefore pray for orders as follows:

a) **THAT** permission be granted to the Petitioners/Applicants by the Honourable Court to use the initials "-BPA-" as the Petitioners/Applicants are parents/and or guardians of minor children and it is in the best interest of the children in terms of Article 53(2) of the Constitution that the names of the parents and their children be sealed from the public, and as also provided for under Section 76(5) of the Children's Act.

b) **THAT** pending the hearing and determination of the PETITION, a CONSERVATORY ORDER be issued staying the implementation of the payment of full fees payable to the 1st and 2nd Respondents and in lieu they be allowed to offset up to 50% of school fees pro forma for term 3 of the school year 2019-2020.

c) **THAT** a declaration be and is hereby issued that the 1st and 2nd Respondents are obliged by law and under the Constitution vide Article 53(2) to consider the best interests of the children in their Schools whenever they make any policy decisions and/or changes that would affect the children's schooling, including virtual learning and must consequently consult and obtain consent of their parents before implementing the same.

d) **THAT** an ORDER of mandamus is hereby issued directing the 1st and 2nd Respondents to immediately and without any further delay establish a Parents' Teachers Association in terms of Article 36 of the Constitution and Section 55(3) of the Basic Education Act No. 13 of 2012.

e) **THAT** a declaration be and is hereby issued that the Petitioners are entitled by virtue of Article 36 of the Constitution and Section 55 and the 3rd Schedule of the Basic Education Act No. 13 of 2012 to establish a Parents Association that is recognized and is able to engage the school.

f) **THAT** a declaration be and is hereby issued that the discount offered by the 1st and 2nd Respondents of 10% by the school in its letter of 20th April, 2020 contravenes Article 46 of the Constitution and sections 3(2), (3), (4), 4(1) and 13 of the CPA and is therefore void, unlawful and of no effect.

g) **THAT** the 1st and 2nd Respondents be ORDERED by the Honourable Court to only charge for the equivalent to the only service offered, which is the virtual class or digital class.

h) **THAT** the Honourable Court do direct that the 4th Respondent, being the Cabinet Secretary for Education to immediately inquire in terms of Section 52(1)(g) of the Basic Education Act No. 13 of 2012 about the actions of the 1st and 2nd Respondents in offering virtual or online classes and whether the same meets the basic education requirements under the Constitution and the Basic Education Act No. 13 of 2012.

i) **THAT** the Honourable Court do direct that the 4th Respondent, being the Cabinet Secretary for Education to immediately come up with rules, regulations and policy in terms of Section 39 of the Basic Education Act No. 13 of 2012 to guide the 1st and 2nd Respondents and all other schools with respect to offering virtual or online learning to meet the basic education standards under the Constitution, International Conventions and the Basic Education Act No. 13 of 2012.

j) **THAT** the Honourable Court do direct that the 4th Respondent by a structural interdict, being the Cabinet Secretary for

Education to immediately and without any delay and in consultation with the 3rd Respondent to develop a Bill for consideration by the National Assembly to regulate and control the capping of school fees in private schools and schools offering international curriculum in Kenya and report back to Court about his progress in 12 months.

k) Or such other orders as this Honourable Court shall deem just.

l) That there be no orders as to costs.

The Application for Joinder by the Proposed Interested Party

7. The proposed interested parties on their part filed an application dated 4th May, 2020 to be enjoined as interested parties. The parties in this matter all agreed that the application be determined together with the petition. The application was supported by the affidavits of Brian Mutembei, Chehar Shah and Kosgei Maswai. The application was premised on the ground that the petitioners, without the authority of the parents of students of the 2nd Respondent, express or implied, purported to file the petition primarily challenging the 2nd Respondent's virtual learning program introduced in response to the shutting down of schools by the Government of Kenya as a result of the COVID-19 pandemic. It was contended that the conservatory orders issued by this Court pursuant to the petitioners' application had the drastic effect of shutting out 313 students who are in year 4 and below from accessing the learning facilities being offered by the School. It was, however, conceded that the order suspending online classes for this category of learners had been lifted after the parties to this petition agreed to set aside the order.

8. The proposed interested parties further contended that the petitioners obtained the orders *ex-parte* and through deception and concealment of the material facts in that the petition was not filed on behalf of "Brookhouse Parents Association" or all the parents as purported. Further, that the petitioners' allegation that the quality of the online education is poor is not true. They also averred that the petitioners had failed to disclose to the Court the fact that the 2nd Respondent had already given discounts between 10%-30% on tuition fees and entirely waived boarding and transport fees for the 3rd term.

9. The proposed interested parties termed as untrue the petitioners' allegation that Brookhouse had not provided adequate information regarding online learning and support for those parents who had challenges with the virtual learning program. According to them, the School had provided alternatives for the virtual learning program and there was a fund in place to assist parents experiencing financial difficulties on a case by case basis.

10. The applicants further contended that apart from issuing regular and extensive updates, the 2nd Respondent had circulated a Virtual School Environment Guide, which is a comprehensive explanatory guide on the School's pioneering virtual learning ecosystem. It was averred that owing to this smooth mutual engagement, many parents had actively participated in ensuring that the virtual learning program is effective and enjoyable for the children and are extremely disappointed that this innovative means of teaching and learning has been cruelly disrupted. The proposed interested parties further asserted that the disruption of learning due to the COVID-19 pandemic had caused significant psychological torture to learners and the sudden stoppage of virtual learning had exacerbated an already difficult situation. The Court was therefore urged to allow the application for joinder and the other prayers sought therein as prayed.

The Petitioners' Response to the Application for Joinder

11. In opposition to the application for joinder by the proposed interested parties, the petitioners filed a replying affidavit sworn by Mr. Gabriel Roimen on 12th May, 2020. He averred that the parents formed a select committee to pursue this action and appointed him to spearhead and pursue the reliefs and remedies sought in the application and petition. It was also his averment that the petitioners are not an amorphous group as alleged and have only used the initials "BPA" to protect the privacy and rights of the children and all *bona fide* parents of the School who have an identifiable stake and legal duty to advance the interests of their children.

12. It was Mr. Roimen's evidence that the fees of the children of Mr. Kosgei Maswai who is a Kiswahili teacher at the 2nd Respondent's Karen campus are paid by the 2nd Respondent and he therefore doesn't represent the interests of other parents who pay full school fees. Furthermore, it was contended that Mr. Brian Mutembei who claimed to be a parent at the 2nd Respondent's Karen campus did not disclose how he obtained private emails from parents that were addressed or purportedly sent to the School and also shared with its advocates. The petitioners contended that the emails were therefore inadmissible, unauthenticated and of no probative value. The petitioners also challenged, through the production of a letter from the Law Society of Kenya, Mr. Mutembei's averment that he is an advocate of the High Court of Kenya. They consequently argued that his affidavit was perjured and ought to be expunged from the court record.

13. It was further averred that 1st and 2nd respondents in an advertisement in the Daily Nation of 8th May, 2020 had conceded that the petition raises serious issues of law. That notwithstanding, the petitioners averred that an association of private schools had appreciated the fact that the COVID-19 pandemic had made it impossible to deliver the approved curriculum and had advised its members that any alternative form of delivery of content to learners should be agreed upon by the parents and guardians. It was additionally averred that the Cabinet Secretary for Education had opined that private school teachers should be paid if they developed additional content to be conveyed to children online and that parents and schools should agree on payment of fees on a *pro rata* basis.

14. Mr. Roimen further averred that the petitioners were amenable to an amicable out of court settlement but Brookhouse had failed to take into consideration that no authority had recognized or accredited virtual learning. Also, that the 4th Respondent had pronounced that all schools whether private or public must remain closed.

15. It was the petitioners' deposition that although they acknowledged that children have a right to education, delivering content to children of tender years through the Zoom platform required caregivers to be present during the sessions and most of the parents who work cannot afford this extra supervision and this violates the right to education. The petitioners also averred that the pandemic had made the contract

between Brookhouse and the petitioners impossible to perform and any other arrangement must be quantified reasonably and that the virtual learning being used by the 2nd Respondent to deliver content to children in kindergarten to year 4 lacked accreditation and ought to be priced reasonably.

16. The petitioners stated that in an attempt to settle the matter they had proposed that those who opt for virtual learning for children in classes below year 4, as well as those willing to pay 100% school fees, could do so. This, in their view, would have taken into account the interests of the intended interested parties without affecting the financial position of those who did not opt in. It was their position therefore that the interests of the proposed interested parties had been taken care of and there was no need for them to be admitted into the petition.

17. The petitioners were also of the view that the majority of the aggrieved parents and guardians did not derive value from the alternative arrangements being offered by the School and the School did not therefore have justifiable reason for charging full fees or offering paltry and unjustifiable discounts considering that Brookhouse had offered major discounts in its other facilities all over the world due to the negative impact of the COVID-19 pandemic. It was also the deposition of Mr. Roimen that the Inspired Group of Schools, under which the 2nd Respondent falls, had been charging higher fees in Kenya vis-à-vis the fees levied in other countries.

18. Mr Roimen additionally averred that other private schools offering British curriculum had informed parents that exams had been cancelled and had refunded fees paid for the exams but Brookhouse had not done so. He accused the 2nd Respondent of failing the test of inclusivity, participation, transparency, accountability, patriotism and integrity by not involving the petitioners in the arrangements for alternative learning or taking their views on the same.

19. In conclusion, the petitioners argued that the proposed interested parties' application lacked merit. Further, that the contract between them and the 2nd Respondent must be infused with constitutional values as the law prohibits any person from engaging in conduct that is unconscionable.

The 1st and 2nd Respondents' Application for Expungement

20. The 1st and 2nd respondents on their part filed an application dated 26th May, 2020 seeking an order directing that Paragraph 19 of Mr. Gabriel Roimen's further affidavit sworn on 12th May, 2020, together with the exhibit marked "EAA4" annexed thereto, be expunged and struck out from the court record. The application was supported by affidavits sworn on the date of the application by Eric Mulindi, John O'Connor and Sarah Wanjohi. The application was premised on grounds that Paragraph 19 of Mr. Gabriel Roimen's further affidavit sworn on 12th May, 2020 as well as the purported minutes annexed thereto and marked as "EAA4" are scandalous and factually incorrect, and refer to discussions held between the parties on a strictly without prejudice basis. Accordingly, they argued that the contested paragraph and the so-called minutes are inadmissible, immaterial and irrelevant and should not have been filed before this Court since they refer to discussions of a without prejudice virtual meeting that was hosted by Anjarwalla & Khanna LLP using the Zoom platform on Monday, 4th May, 2020 to negotiate a possible settlement in this matter.

21. The 1st and 2nd respondents further contended that it was agreed by all parties at the commencement of the meeting that the discussions were strictly being held on a without prejudice basis and there was indeed consensus that the discussions would not in any way be shared or circulated to the media or on social media sites. They stated that the proceedings of the meeting were therefore not recorded by Anjarwalla & Khanna LLP. Further, that there had been no subsequent waiver by the 1st and 2nd respondents of the applicability of the without prejudice rule to the discussions.

22. The 1st and 2nd respondents therefore urged that the said Paragraph 19 together with exhibit "EAA4", being confidential information protected and covered by the without prejudice rule were inadmissible in these proceedings and should be struck out from the record. It was further contended that despite being confidential information, the alleged minutes marked as "EAA4" were circulated widely on social media and a number of media articles in an effort to disparage the image and reputation of the 1st and 2nd respondents and this severely curtailed their right to a fair hearing. Accordingly, the 1st and 2nd respondents urged that the purported minutes be struck out and expunged from the record.

The Petitioners' Response to the Application for Expungement

23. The petitioners opposed the 1st and 2nd respondents' application for expungement through a replying affidavit sworn by Mr. Omwanza Ombati on 4th June, 2020. He deposed that he attended the virtual meeting of 4th May, 2020 through the Zoom platform for discussion of a settlement between the parents and their advocates on one side and Mr. Karim Anjarwalla and Mr. Nadim Nsouli who is the Chair and Founder of the 2nd Respondent on the other side. The meeting discussed, *inter alia*, the proposed fee reduction by the School and whether or not it was acceptable to the parents; the challenges posed by virtual learning to minors; the challenges to parents who had children in the early learning classes to year 4; and the proposal by the School to try and mitigate these obvious and apparent challenges. Also discussed was the issue whether or not virtual learning was approved in the curriculum as it was not on offer at the time the petitioners' children joined the School.

24. Mr. Ombati further averred that the discussions were written down by one Ms. Tonnie Nyanja who was one of the parents in attendance with a view of sharing the information with the larger group of parents for their feedback. Mr. Ombati averred that the discussions failed as the parents rejected the proposed settlement. It was Mr Ombati's averment that the minutes marked as "EAA4" should be viewed in that context.

25. The petitioners conceded that correspondence exchanged without prejudice cannot be used to the prejudice of a party's case or to the prejudice of any legal right if the protection is properly invoked. They nevertheless stated that the privilege had been waived since the 2nd Respondent had discussed the proceedings of the aforesaid meeting in detail through an undated letter sent to all parents. It was pointed out

that the said letter which was authored by one Mr. Rabih Saab was annexed to the impugned minutes marked "EAA4".

26. Mr. Ombati further deposed that considering that these proceedings are in respect of children, the best interests of children override any privilege and the Court should promote and protect the interests of the child as provided for in the Constitution, the Children Act and the BEA. He therefore asked the Court to dismiss the 1st and 2nd respondents' application for expungement.

The 1st and 2nd Respondents' Reply to the Petition

27. In response to the petition, the 1st and 2nd respondents filed a replying affidavit sworn on 8th May, 2020 by John O'Connor, who is a Board Member of the School as well as Brookhouse's Managing Director for East Africa. He deposed that the petitioners are guilty of non-disclosure of material facts. He stated none of the petitioners' constitutional rights and fundamental freedoms were infringed or threatened with infringement by the 1st and 2nd respondents as alleged since this matter revolves around a contractual dispute.

28. It was further his averment that following the commencement of this suit, the 1st and 2nd respondents had in good faith continued to engage with the petitioners and the other parents so as to find the best possible means of ensuring the continuation of the children's education and this had culminated in additional significant discounts being introduced by the School in order to further cushion the families. In his view, the new measures introduced by the 1st and 2nd respondents had put Brookhouse ahead of other international schools of the same caliber in terms of the measures being implemented in recognition of the difficult economic times. This, he deposed, illustrated the 1st Respondent's continued support for the parents as well as the paramount acknowledgment of the best interests of the children and their right to education.

29. Furthermore, Mr. O'Connor averred that the agreements entered into between the School and the parents at the point of their children's enrollment were private contracts and the parties were bound by their terms unless they proved that they were procured through fraud, misrepresentation or undue influence. He was therefore of the view that the School, supported by the fundamental principle of party autonomy underlying negotiation of private contracts, enjoys the right and prerogative to set its fees as it deems fit.

30. It was also his averment that in a public show of support for the virtual learning programs implemented by learning institutions, including the School, the 4th Respondent while addressing Members of the Parliamentary Education Committee on 7th May, 2020 had praised the innovative efforts by private schools to provide alternative learning methods during the pandemic and urged that such efforts should continue unimpeded even if only a fraction of the students are able to use such facilities. Further, that the 4th Respondent had at the same time assured the country that the Government would not put any measures in place to stop virtual learning. Consequently, this Court was urged to adopt the Cabinet Secretary's approach and dismiss this petition.

31. In further response to the petition, the 1st and 2nd respondents filed grounds of opposition dated 11th May, 2020 through which they opposed the petition on the ground that the petitioners lacked the authority and permission to represent all the parents and guardians of the children enrolled with the 2nd Respondent. They also contested the petitioners' identities and averred that withholding the identities of the petitioners grossly violated the 1st and 2nd respondents' right to fair hearing. In their view, the petitioners' complaint was commercial in nature, raising contractual disputes and did not disclose any violation or threatened infringement of constitutional rights.

32. It was also the 1st and 2nd respondents' case that the petitioners had approached this Court with unclean hands and as such should not enjoy the benefits of *ex-parte* orders obtained through misrepresentation and non-disclosure of material facts. They asserted that the application and the petition should fail on this basis. Further, that the orders sought for suspension of learning for children at kindergarten to year 4 infringed their constitutional right to education under Articles 43(1)(f) and 53(1)(b) of the Constitution. It was therefore urged that the petition was an abuse of the Court's process.

33. The 1st and 2nd respondents in further opposition to the petition filed replying affidavits sworn on 8th May, 2020 and 11th May, 2020 by Mr. Eric Mulindi who is the head teacher of the 2nd Respondent's Secondary School located in Karen. He averred that the petition is laced with misrepresentations made in an effort to mislead this Court into granting the orders sought and that the petitioners were guilty of non-disclosure of material facts. He also deposed that BPA is an amorphous group which does not represent the interests of all the parents of the 2nd Respondent. His averment was that the group was formed, without the consent or knowledge of other parents, with the sole intention of bringing these proceedings so as to disrupt the virtual learning program and also raise unnecessary and unsubstantiated uproar regarding the discounted fees being implemented in term 3 of the 2019/2020 academic year.

34. Mr. Mulindi stated that by signing the agreements during the enrolment of their children, the petitioners voluntarily agreed to be bound by Brookhouse's policies, rules and regulations. In his view therefore, the petition is an underhand attempt to circumvent the agreement between the petitioners and the School without any reasonable cause.

35. Mr. Mulindi categorically denied the petitioners' allegation that the School had stood in the way of formation of a parents' association stating that Brookhouse was engaged in discussions with the community of parents to formally establish the association and the discussions were being finalized before these proceedings were instituted.

36. In respect to the School's virtual learning program, Mr. Mulindi averred that the program was introduced as the next best alternative to physical lessons which had been stopped by the Government in response to the COVID-19 pandemic. It was further his deposition that the School is part of a uniform conglomerate of global schools under the umbrella of Inspired Education, which operates over 50 schools in more than 20 countries, educating over 45,000 students and the virtual learning program had been implemented with great success across most of these institutions.

37. Mr. Mulindi deposed that the School uses the British National Curriculum leads to examination in the International General Certificate of

Secondary Education which is a well-organized and respected means by which to measure students' achievement at the end of Year 11. He further averred that in implementing this international system of education, the School follows the Cambridge International Examinations (CIE) Board syllabuses offered by the University of Cambridge Local Examinations Syndicate (UCLES) which is one of the world's largest authorities on educational assessment, with examination centers in more than a hundred different countries.

38. According to Mr. Mulindi, the School is held to an international standard of assessment and granting the petitioners' prayers would be chaotic and extremely disruptive on the School's ability to comply with the international assessment requirements. He deposed that the impact would be more harmful to the youngest learners whose classes had been stopped as they would face difficulties in assessments in terms of time. He stated that the School's calendar would need to be drastically reshuffled in order to ensure the learners' continued progression. It was also his averment that the orders sought by the petitioners were extremely discriminatory as they sought to stop studies for children in kindergarten to year 4 while the rest of the students continued with their studies.

39. Mr. Mulindi deposed that this Court has no power to arbitrarily cap school fees for a private institution or suspend learning for its students, as urged by the petitioners. Further, that the subject matter of this suit, although disguised as a constitutional petition, is purely a contractual dispute falling within the jurisdiction of the Commercial Division of the High Court. He therefore urged the Court to dismiss the petition for lack of merit and for being an abuse of this Court's process.

The Attorney General's Response to the Petition

40. The 3rd Respondent filed grounds of opposition dated 22nd May, 2020 in opposition of the petition. The Attorney General's case was that the petition does not disclose any constitutional questions for the determination of this Court neither does it meet the principles on pleadings in constitutional petitions as enunciated in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** and augmented in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**.

41. It was also the assertion of the 3rd Respondent that the issues raised in the petition arose from contractual obligations between private parties and should have been litigated in an ordinary civil suit. Further, that the petition grossly offends the doctrine of separation of powers as this Court does not have the jurisdiction to grant the prayers sought against the 3rd and 4th respondents. Accordingly, the Attorney General asked for the dismissal of the petition asserting that the same is misconceived, unmerited and an abuse of this Court's process.

The 4th Respondent's Replying Affidavit

42. The 4th Respondent filed a replying affidavit sworn on 27th May, 2020 by Dr. Richard Belio Kipsang who is the Principal Secretary, Ministry of Education, State Department for Early Learning and Basic Education. Dr. Belio deposed that the mandate of the 4th Respondent is derived from Articles 43(f), 53, 54, 55, 56 and 57 of the Constitution. He stated that under Section 43 of the BEA, basic education institutions are categorized into public schools which are schools established, owned or operated by the Government and includes sponsored school, while private schools are those established, owned or operated by private individuals, entrepreneurs and institutions.

43. Dr. Belio concurred with the petitioners that they are indeed entitled to establish a parents and teachers' association for the purposes of promoting the welfare of all pupils and child protection as provided by Section 55(3) of the BEA.

44. As for the role played by the 4th Respondent in regard to private schools, the Principal Secretary averred that the 4th Respondent undertakes the vetting of teachers and approves the curriculum offered to learners as per Section 4(b) of the Kenya Institute of Curriculum Development Act, 2013 in order to ensure that learning is in line with both national and international basic education standards. Moreover, all private teachers are also required to be registered with the Teachers Service Commission.

45. Dr. Belio deposed that the 4th Respondent has not suspended the academic calendar of private schools such as the 1st Respondent who operate under international curriculum. Further, that the 4th Respondent had no objection to online delivery of teaching as it is in line with the Government's embracement of technology in all spheres, including the education sector. He also stated that adequate constitutional and legal safeguards have been put in place in order to ring fence the delivery of quality basic education in both public and private institutions.

46. According to Dr. Belio, the 4th Respondent is not vested with the power to prescribe the rates payable as school fees in private schools since these are matters within the realm of private service contracts and by virtue of the principle of privity of contract, the 4th Respondent cannot meddle in the issue. He was also of the view that the petition offends the doctrine of separation of powers as the role of the courts is simply to ensure that policies enacted by the Executive meet constitutional standards and nothing more. He additionally averred that the petition does not disclose any constitutional dispute capable of being resolved by this Court since the claim can be competently determined in an ordinary suit. In conclusion he termed the petition unmerited and prayed for its dismissal.

The Proposed Interested Parties' Reply to the Petition

47. Although the application for joinder by the proposed interested parties is yet to be determined, the proposed interested parties were allowed to respond to the petition for the Court's consideration should their application for joinder be successful. In that regard the proposed interested parties filed grounds dated 12th May, 2020 opposing the petition. It was the view of the proposed interested parties that the petition as pleaded does not meet the standard of a constitutional petition established in the cases of **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. They stated that the petitioners had failed to plead with precision the alleged constitutional violations, set out the provisions of the Constitution said to have been infringed and show the manner in which the provisions of the Constitution were allegedly infringed.

48. The proposed interested parties were also of the view that this Court lacks jurisdiction to set school fees and micromanage the manner

and nature of education services provided by the 1st and 2nd respondents to the students who have voluntarily enrolled and registered with the 2nd Respondent.

49. The proposed interested parties stated that while the petition is couched as a constitutional reference, the matter actually concerns alleged breach of private contracts and violation of the CPA and the case therefore offends the principle which states that not every violation of the law should be raised before this Court as a constitutional issue. They therefore urged the Court to adopt the principle of avoidance and decline the petitioners' invitation to wade into a commercial dispute since their grievances ought to be litigated and resolved in the commercial court.

50. Furthermore, the proposed interested parties opposed the petition on the grounds that the orders sought are blanket in nature and cannot be made in favor of unnamed petitioners and the Court ought not to make an order that affects persons not before it and any order made ought to be restricted to the only identified petitioner being Evelyne Achieng Agutu. They also stated that making orders stopping online learning amounts to the Court unilaterally denying the students basic education which violates Article 53 of the Constitution. Further, that there was no evidence that any of the persons appearing in the list of petitioners attached to the affidavit sworn in support of the petition as exhibit EAA1 have consented to the institution of these proceedings. That in any case, this matter is not a representative suit.

The Petitioners' Reply to the Responses to the Petition

51. In their rebuttal, the petitioners filed a replying affidavit sworn by Gabriel Roimen on 12th May, 2020. Mr. Roimen deposed that in the case of private schools, prospectuses, advertising and promotion on the school websites and media publicity constitutes 'engaging in conduct in trade or commerce' that is covered by the provisions of the CPA. He averred that the petitioners have a right to quality education and urged the Court to find that virtual learning cannot be equated to normal schooling. Further, that the pricing in any event offended the constitutional dictates and the rights of consumers guaranteed by the Constitution.

52. It was further averred that safety and quality of education are central to the right to free and compulsory education which virtual learning fails to achieve. Also that the costing of virtual learning offends the rule against profiteering and capitation in the provision of basic education. Mr. Roimen was also of the view that while the School enjoys some autonomy, as an institution registered under the BEA, the Government and indeed the 3rd and 4th respondents have a legal mandate to promote and protect the rights of children to free and compulsory education and are enjoined by the law to provide and ensure quality basic education in conformity with the set standards and norms and should also establish structures to ensure access to education and training. Furthermore, he averred that the 4th Respondent has a duty to enquire into the conduct of any private school and ensure that the same is being run in accordance with the relevant and applicable law and the school promotes access to education.

53. Mr. Roimen was also of the view that the 4th Respondent has a positive role to ensure the quality and accessibility of basic education. He averred that commercialization of education defeats accessibility and does not promote the right to free basic education and all actors must be enjoined to protect and promote this right, the same being a constitutional imperative. It was also his assertion that the 3rd Respondent as the defender of the public interest is enjoined to defend the right to education and the social interest in education, to preserve education as a public good and resist any attempt by the private players to make education inaccessible and a commercial venture through profiteering and capitation. Accordingly, he deposed that the courts ought to pronounce themselves and issue effective remedies, not limited to structural interdicts, directing relevant players to take remedial measures.

54. It was further averred by Mr. Roimen that although the importance of embracing technology cannot be undermined, the method of delivery of education to learners must be safe and meet the prescribed quality and international norms and should be priced reasonably. Consequently, he stated that the petitioners have pleaded with particularity the violation of the constitutional right to education and consumer laws which rights are justiciable both under domestic laws and various international conventions and therefore this Court's jurisdiction was properly invoked and the petition should be allowed.

The Petitioners' Submissions

55. Mr. Issa Mansur who led the legal team for the petitioners filed written submission dated 5th May, 2020 and further submissions dated 12th May, 2020. He summarized the petitioners' case by stating that the conduct of the 1st and 2nd respondents entailed a violation of the constitutional duty under Article 53(1) & (2) of the Constitution; the right to education under international law that obligates the 3rd and 4th respondents and conversely the 1st and 2nd respondents to ensure that private schools meet minimum education standards as set or approved by the State under Article 13(4) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"); and the petitioners' consumer rights as guaranteed by Article 46 of the Constitution and the CPA. It was further submitted that the common features that this petition deals with are *inter alia*, little or no ability to negotiate terms of the contracts or adhesive contracts that are oppressive and purportedly binding to parents; inadequate and unclear disclosure of important terms of the contract, particularly those which are weighed against the weaker party being the parents.

56. Counsel for the petitioners cited the decision of the Supreme Court of India in **Mohini Jain v State of Karnataka, (1992 AIR 1858)** for the statement that the '*right to education*' is the concomitant of fundamental rights enshrined under Part III of the Constitution, and that '*every citizen has a right to education under the Constitution.*' It was submitted that the Court also held that the '*right*' to education '*flowed from the enforceable right to life and personal liberty*' guaranteed by Article 21 of the Constitution, since there could be no '*dignified enjoyment of life,*' or the realization of other rights, without adequate education.

57. Another case that was cited by the petitioners is **Avinash Mehrotra v Union of India & Others, Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398** where the Supreme Court of India decided that there is a fundamental right to receive education in secure and safe environment, and the right to education incorporates the provision of safe schools pursuant to Articles 21 and 21A of the Constitution.

58. Counsel for the petitioners also referred to the case of **Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR** where Lenaola, J (as he then was) relying on a South African commentary held that education is both a human right in itself and an indispensable means of realizing other human rights and as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

59. The advocate for the petitioners proceeded to submit that the government has an obligation to ensure that children are provided opportunities to develop in a healthy manner and private schools, like public schools, can be regulated to promote constitutional objectives through regulations directed at ensuring provision of adequate infrastructure, facilities for the health and safety of children, equality of access, particularly to promote educational interests of disadvantaged groups, and ensuring that teaching and non-teaching staff are treated in a humane and non-exploitative manner.

60. It was further submitted for the petitioners that the courts of India who are pacesetters in this area of jurisprudence held in the case of **The Proprietary High School Trust, Ahmedabad v State of Gujarat, AIR 1985 Guj 146** that the obligation to provide education is not discharged by merely establishing schools or funding them, but by enacting regulations to ensure that the schools cater to the needs of the people, particularly the weaker segments, and promote educational excellence. Additionally, this Court was told that the Indian landmark judgment of **T.M.A. Pai Foundation v State of Karnataka, AIR 2003 SC 355** established that while private schools had the broad autonomy to fix their admission policy and fee structure, profiteering was disallowed and private schools could only make a 'reasonable surplus'.

61. Counsel cited Article 2(6) of the Constitution which provides that treaties or conventions ratified by Kenya shall form part of the law of Kenya and submitted that there is an obligation under international law to ensure that, even private schools meet minimum education standards as set or approved by the State and codified in Article 13(4) of the ICESCR which enjoins State Parties to recognize the fundamental right to education of all people, directing State Parties towards the full development of the human personality and dignity, and strengthening respect for human rights and freedoms. Further, that Articles 13 and 14 of the ICESCR enjoins States to provide free and compulsory primary education, and progressively introduce free secondary education. It was also submitted that paragraphs 3 and 4 of Article 13 of the ICESCR recognizes the right of parents to send their children to schools, other than those run by the State and affirms the liberty of individuals and bodies of individuals to run their own educational institutions. They nevertheless contended that this liberty is subject to the State's obligation to realize the right to education, and the requirement that the education in the private institutions must conform to the minimum standards established by the State.

62. Counsel further submitted that the content of the right to education, as well as the duties of the State in realizing it, is elaborated in General Comment No. 13 of the Committee on Economic, Social and Cultural Rights where the right to education is explained under four components, popularly known as the 4As: availability, accessibility, acceptability and adaptability. While the General Comment reiterates the liberty of individuals and bodies to run their own schools, it also states that the State has an obligation to ensure that this liberty 'does not lead to extreme disparities of educational opportunity for some groups in society'.

63. Counsel placed reliance on the Jomtein Declaration and the Dakar Framework for Action for the submission that basic education must shift its focus from mere enrolment to the quality of learning.

64. The decision in the case of **Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR** was relied on in support of the proposition that private persons are liable for violating fundamental rights, particularly socio-economic rights.

65. Counsel for the petitioners also cited various provisions of the law including Section 76(5) of the Children Act, sections 51 and 53 of the BEA, as well as the CPA, and submitted that the freedom to contract is not a right that is totally unfettered as it exists within a set of social and legal obligations. Further, that Parliament also has a responsibility to define and protect the right to contract through legislation.

66. The petitioners identified the responsibility of a plaintiff in a claim such as theirs by citing the case of **Blomley v Ryan [1956] HCA 81**, where Mason, J observed that a plaintiff who seeks relief in respect of a standard form of contract dictated by a party whose bargaining power is greatly superior should establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstance.

67. It was the petitioners' counsel's view that as the power and significance of the private school sector continues to grow, so does the need for constitutional protection and it is in this regard that Article 46 of the Constitution and its enabling law, the CPA, are lauded as landmark achievements in the area of consumer protection. It is pointed out that Part II of the CPA particularly gives consumers a wide range of rights including the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of goods or services to the consumer. This right, it was contended, cannot be ousted by any agreement between the parties. It was submitted that the legislation also prohibits 'unfair practices', 'unconscionable conduct' and 'unconscionable bargains' and proceeds to provide for radical sanctions against a supplier who engages in those acts.

68. Counsel cited the Court of Appeal case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR** as providing the grounds upon which courts can interfere with a contract. Firstly, the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court; secondly, the victim must have been suffering from certain types of bargaining weakness; and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that the behavior of the stronger party is morally reprehensible.

69. As to the applicability of constitutional principles to private contracts, counsel cited the case of **Barkhuizen v Napier (2007) 5 SA 323 (CC)** where the majority of the Constitutional Court of South Africa, considered the application of the Constitution of the Republic of South Africa to private contractual relationships. It was pointed out that although Ngcobo, J eschewed a direct application of the Bill of Rights to contractual provisions, he nevertheless indirectly applied constitutional principles through the law of contract concept of public policy. It was stated that the learned Judge considered the meaning of this form of public policy in the light of the Constitution, determined the manner in

which the Section 34 right as an expression of public policy applied to the contract and related this to broader principle of contractual fairness.

70. Lord Denning was quoted as holding in **Lloyds Bank Ltd. v Bundy [1975] QB 326** that the doctrines of duress and undue influence were not independent doctrines but rested on a single thread of inequality of bargaining power and that the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him for the benefit of the other. Similarly cited was the case of **Commercial Bank of Australia v Amadio [1983] 151 CLR 447 HC**, where Mason, J stated that, relief on the ground of “*unconscionable conduct*” is usually taken to refer to the class of cases in which a party makes an unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage.

71. Relying on the cited authorities, counsel submitted that the 1st and 2nd respondents operate a business in which they enter into contracts with parents to provide a service and parents agree to pay fees for that service and the contract is the fundamental source of the obligations that the School owes to the parents and the parents to the School. Consequently, it was urged that it is vital to ensure that the contract is only entered into when a school has decided that it has the resources to provide its educational offering to the student, and that the parents have the resources to pay for that service and the contract includes all appropriate terms. **Plimer v Roberts [1997] FCA 1361 (5 December 1997)** was quoted for the proposition that while the actual activity of teaching students is not considered to be a trade or commerce, the conduct of the business of the school is. It was therefore submitted that schools must be mindful of these provisions when drafting their prospectuses or other marketing brochures.

72. In order to demonstrate that the petitioners had met the conditions set out in the cited cases, counsel relied on the letter dated 1st May 2020, which was sent out to all parents following the filing of this petition and grant of interim reliefs. In the petitioners’ view, the letter shows that the 1st and 2nd respondents were using their superior position or bargaining power to the detriment of the parents who were placed in some special situation of disadvantage.

73. It was submitted that in **LTI Kisii Safari Inns Ltd & 2 others (supra)** the Court dealt with the issue of undue influence and stated that duress occurs where consent is induced by illegitimate pressure, the practical effect of which is compulsion or absence of choice, rendering the consent to be treated in law as reversible. The doctrine of economic duress, counsel asserted, focuses on the lack of a practicable alternative as the source of inequality which arises when there is a threat to a party’s economic interests so that there is no practicable alternative but to submit. He stated that for a claim of economic duress to succeed, it must be demonstrated that the pressure was illegitimate, significant and compulsive resulting in lack of practical choice or realistic alternative for the innocent party. Counsel submitted that once this is established, then the innocent party is entitled to avoid the resulting contract so long as it has not subsequently been affirmed.

74. Counsel submitted that Section 3(4)(a) of the CPA provides the purposes of the Act and Section 4(1) allows a consumer to commence proceedings on behalf of a class of persons or become a member of such a class of persons in proceedings in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of such proceedings. Section 13 of the CPA was cited as providing the factors that may be taken into account in determining whether a representation is unconscionable.

75. The petitioners contended that offering online or virtual classes at a rate almost similar to that of a regular session is unfair, unconscionable and unlawful thus violating their consumer rights protected by Article 46 of the Constitution. They accused the 1st and 2nd respondents of violating the CPA by failing to give them the correct information to enable them make the appropriate decisions.

76. It was further the petitioners’ submission that the pre-contract information supplied by the 1st and 2nd respondents to parents was binding, and any changes made would necessarily need their express consent. This, they stated, applied to any changes that occur between the time the information is availed and the acceptance of the offer by the parents. This requirement, in their view, was contravened when the School made a unilateral decision to provide online classes, at a cost similar to the physical school despite the additional roles played by parents in virtual school.

77. Counsel for the petitioners went ahead to submit that the 1st and 2nd respondents have irredeemably failed to offer educational services with reasonable care and skill and have failed to comply with promises made in pre-contract information about the available services. It was submitted that all terms in the contracts entered by the parents are subject to a test of fairness to determine, if, contrary to the requirements of good faith, they cause a significant imbalance in the parties’ rights and obligations under the contracts to the detriment of the parents. Counsel supported his argument by citing the case of **First National Bank [2002] 1 AC 481** where Lord Bingham equated good faith to ‘*good standards of commercial morality and practice*’, whereby appropriate prominence should be given to terms which might operate disadvantageously to the customer. It was therefore urged that the concept of ‘*fair and open dealing*’ proposed by Lord Bingham appears to express a concern with ensuring voluntary consent by consumers entering into standard form contracts.

78. According to the petitioners, the COVID-19 pandemic has resulted in parents raising issues such as the quality of learning compared to percentage of the fee reduction; the reason for fees being payable for examination year groups when exams will not be taking place; junior/nursery provision where this is more limited than senior provision; boarding fees where there is no boarding; and, whether the situation is a *force majeure* event. They submitted that if a term is unfair, then the court ought to intervene. The petitioners cited examples of unfair terms as including price variation, variation of entire agreement clauses, terms imposing disproportionate financial sanctions, and in the instant case a paltry and nominal discount of 10%. It was the petitioners’ assertion that other schools of the same parity in systems, curriculum and fee structure, have considered requests by distressed parents and have granted considerable fee discounts of up to 50%.

79. On the need to regulate school fees for private schools, counsel relied on the Gujarat Self-Financed Schools (Regulation of Fees) Act of India which prescribes fees to be charged by private schools and requires approval for any charges above the prescribed amount. It was pointed out that an attempt to challenge the constitutionality of the law failed after the High Court upheld its constitutionality. Based on the position in India, counsel therefore urged this Court to direct the 3rd and 4th respondents to prepare and submit to the National Assembly a

Bill to cap fees levied by private schools in Kenya.

80. On the availability of the orders sought, counsel submitted that Kenyan courts have granted structural interdicts in cases touching on the right to education. He cited the case of **MMM v Permanent Secretary, Ministry of Education & 2 others [2013] eKLR** where the Court ordered some of the respondents to file within thirty days a report indicating the measures they had taken in regard to the petitioner's application for bursary for his son. The order also required the petitioner to file a report within the same period of time indicating any assistance advanced to him by the Constituency Development Fund towards the payment of his son's school fees. Also cited as confirming the Court's power in that regard are the decisions in the cases of **Erick Githua Kiarie v Attorney General & 2 others [2016] eKLR** and **Githunguri Residents Association v Cabinet Secretary-Ministry of Education, Attorney General & 5 others [2015] eKLR**.

81. On whether consumer rights are constitutional rights that ought to be protected, counsel cited Article 46 of the Constitution as protecting consumer rights. It was further submitted that at the international level, eight fundamental consumer rights were first declared in the 1985 UN Guidelines for Consumer Protection (as expanded in 1999). These rights are the right to safety, to choice, to redress, to consumer education, and to a healthy and sustainable environment, along with the right to satisfaction of basic needs, the right to be informed, and the right to be heard. Further, that in 1999, the above-mentioned UN guidelines were supplemented by a new principle being the right to sustainable consumption.

82. Counsel referred to Paragraph 5 of Mr. Mulindi's affidavit sworn on 8th May, 2020 and Paragraph 7 of the affidavit sworn on 8th May, 2020 by Mr. O'Connor to support the petitioners' contention that written contracts were signed between the parents and the School for provision of teaching and other services. It was consequently submitted that consumer law is applicable to this matter.

83. Still on the issue as to whether the contracts between the School and parents falls under the purview of the CPA, it was submitted that the term consumer is defined in Section 2(a) & (d) of the CPA and includes within its ambit every end user of goods or services, where such use is consequent to the payment of consideration, which may be paid in any form or medium, either directly or indirectly. To buttress the petitioners' argument, counsel cited the case of **Central Academy Educational Society v Gorav Kumar (1996) 3 CPJ 230** where it was held that teaching is not capable of marketization as opposed to the sale of books or provision of accommodation which is marketable and can be considered as service as per the Consumer Protection Act of 1986.

84. Counsel for the petitioners also cited **Jai Kumar Mittal v. Brilliant Tutorials (2005) 4 CPJ 156 (NC): (2006) 1 UC 43**, where it was held that supply of defective study materials by an institute can sustain a valid claim against it for deficiency of service. Counsel submitted that in **Bhupesh Khurana v Vishwa Budha Parishad (2001) 2 CPJ 74 (NC)** it was held that the institute was liable to refund the fees having lured students to enroll in it through deceitful tactics.

85. According to counsel, in **Sonal Matapurkar v S. Niglingappa Institute 1997 (2) CPJ 5 (NC)** admissions were made by the respondent dental institute over and above the sanctioned seats as a result of which the students were not allowed to appear in the examination by the university. Since the students had paid huge donations and had also made an investment of time and energy, it was held that there was deficiency in service and the complainants were entitled to refund of the donation and compensation with interest and cost of the proceedings.

86. Counsel for the petitioners relied on the cited decisions and urged that the provisions of the CPA are applicable to educational activities or services rendered by educational institutions. He urged that students are direct consumers or beneficiaries of the services or facilities provided by schools and although not all kinds of activities performed by schools may be classified as marketable services because of the nature of those particular services, such an argument does not support the complete exclusion of schools from the scope of consumer protection laws. Consequently, the Court was urged to allow the petition as the orders sought are deserved. **The 1st & 2nd Respondents' Submissions**

87. Mr. Taib who led the team appearing for the 1st and 2nd respondents filed written submissions dated 11th May, 2020 and 5th June, 2020. Counsel identified four issues for the determination of the Court. On the nature and effect of the orders sought, counsel cited Article 21(1) of the Constitution for the statement that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

88. On the extent of the right to education as provided by international conventions, counsel stated that the obligation to respect the right to education requires State Parties to avoid measures that hinder or prevent the enjoyment of the right; while the obligation to protect the right to education requires State Parties to take measures that prevent third parties from interfering with the enjoyment of the right; and the obligation to fulfill or facilitate the right to education requires State Parties to take positive measures that enable and assist individuals and communities to enjoy the right. Accordingly, counsel contended that the orders sought, if granted, would perpetuate denial of the right to education. Counsel relied on the case of **University Academic Staff Union (UASU) v Attorney General and Chief of Staff & another [2018] eKLR** where the Court held that a person who seeks to limit fundamental rights and freedoms in the Bill of Rights has a constitutional duty to reasonably justify the limitation.

89. Counsel for the 1st and 2nd respondents stated that the virtual learning program was introduced to ensure children continued with their education following the Government's closure of schools and other institutions as a result of the COVID-19 pandemic. Counsel further submitted in order to ensure that the students would continue with their education unhindered, a lot of information was shared by the School and both staff and parents were trained on virtual learning.

90. It was contended by counsel that the virtual learning system, introduced by Inspired Education, the School's parent organization, had been applied to great effect in over 50 schools in 20 countries educating over 45,000 students and therefore the School had a head start on other local international schools of similar stature. Counsel submitted that in the circumstances the 1st and 2nd respondents took reasonable steps to ensure the continued education of the pupils and there are no justifiable reasons advanced by the petitioners to warrant suspension of virtual learning.

91. Counsel also referred to the rights protected by Article 27 of the Constitution and asserted that granting the orders sought would result in unequal treatment and discrimination of the concerned pupils as their peers in other international schools continue learning using Zoom or other online platforms. This, counsel contended, would effectively limit access to education of children at Brookhouse. It was also submitted that there is no report, scientific or otherwise, to support the petitioners' assertion that pupils in kindergarten to year 4 classes do not benefit from virtual learning.

92. Counsel for the 1st and 2nd respondents submitted that while investigating the merit or otherwise of the petitioners' claims and unraveling the factual allegations raised, the Court should bear in mind that the petitioners hinge their prayers on alleged infringement and threatened violation of constitutional provisions and it must investigate whether there are any real constitutional rights and freedoms that will otherwise be infringed or threatened. It was further urged that by seeking orders that this Court reduces school fees by 50%, the petitioners are asking the Court to rewrite the terms of the contracts between the individual parents or guardians and the 2nd Respondent which goes against the sanctity of the principle of party autonomy in contractual negotiations and any transgression into private arrangements should be avoided by the Court.

93. It was further submitted that, as held by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, courts will not dictate the terms of a valid contract. On that basis, counsel submitted that it would therefore be improper for this Court to make any declaration, as it is being invited to do, that the 2nd Respondent's discounts and subsidies are unconstitutional. In counsel's view, the issue is purely commercial in nature and it would be a travesty of the law of contract if the orders sought are issued.

94. On whether the matter meets the parameters of a constitutional petition, counsel cited the decision of **Anarita Karimi Njeru v Republic [1979] eKLR** as re-emphasized by the Supreme Court in **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** in support of the proposition that a petition should disclose the rights infringed, the constitutional provisions violated and the manner of their violation.

95. In pursuit of a related point, counsel cited the case of **Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another [2017] eKLR** where the Court pointed out that not every dispute ought to be filed in the Constitutional Division of the High Court unless it raises constitutional issues and that a constitutional question is an issue whose resolution requires the interpretation of the Constitution rather than that of a statute. It was counsel's firm view that the petitioners herein have sought to disguise a matter, which is evidently commercial in nature, as raising constitutional issues.

96. It was counsel's submission that there is no specificity as to the manner in which the petitioners' rights under Article 46(1) of the Constitution were allegedly violated. Moreover, it was submitted that the 1st and 2nd respondents, prior to implementing the discounts, which the petitioners have termed "*unfair practices*", conducted extensive surveys among international schools of similar standing and it was evident that the measures that were introduced by the 1st and 2nd respondents were not only in line with market standards, but far more reasonable than those of other institutions. On that basis, counsel argued that the petition raises no issues for the determination of the Court and ought to be dismissed.

97. To buttress his argument, counsel quoted the case of **Wilber Khasilwa Otichilo v Speaker, County Assembly of Vihiga & 2 others [2020] eKLR** as holding that a party who alleges a legal violation must present the facts that provide the background to that violation since it is the facts that bring out or demonstrate the alleged violation. Counsel argued that there is no specificity as to the manner in which the petitioners' rights under Article 46(1) of the Constitution were allegedly violated. Further, that by seeking cessation of the children's learning through their application and succeeding albeit *ex parte*, the petitioners have caused a gross violation of the rights they seek to enforce in respect of 313 pupils.

98. Counsel submitted that the ICESCR recognizes the right of privately owned institutions to develop their own systems and structures, including fees structures as well as curricular, without external interference from the government. He stated that over the last forty years of its existence the School has strived to develop an institution that offers the highest quality education for its students and this has certainly been achieved and the School has earned its rightful place as a leading educational provider, not only in Kenya, but in the continent and globally. Accordingly, counsel asserted that the level of intrusion and control proposed by the petitioners in the affairs of Brookhouse is completely unlawful and ought to be dismissed by the Court. Counsel contended that in any event, no evidence has been tendered by the petitioners to warrant any interference in the contractual relationship between the 2nd Respondent and the large number of parents who have no qualms with the virtual learning program or proposed discounts.

99. It was further submitted that in a claim for constitutional infringement, much like in any matter brought for adjudication before courts, the abiding principle of '*he who alleges must prove*' applies as was held in the case of **Hakizimana Abdoul Abdulkarim (supra)**, and as stipulated by sections 107 and 109 of the Evidence Act, Cap. 80. Therefore, counsel urged that the petitioners' failure to discharge this evidentiary burden should weigh heavily against them in these proceedings and the Court should dismiss the petition for want of proof.

100. On the issue whether the petitioners have achieved the threshold for issuance of the orders sought, it was submitted that the suspension of learning for more than 313 children in kindergarten to year 4, as proposed by the petitioners, not only undermines the proper assessment for their advancement to the next level of education but also violates their constitutional right to education as their continued learning through online classes has been suspended.

101. It was also contended for the 1st and 2nd respondents that the suggested 50% reduction of fees across the board will have serious adverse effects on the financial stability of the 2nd Respondent to continue to maintain its two campuses and more importantly to continue to keep all the staff and pay full salaries. It was further argued that the orders sought have the potential to wreak havoc on the 2nd Respondent's financial sustainability as well as jeopardizing the livelihoods of its staff. Counsel therefore urged that the negative effects of the orders sought by the petitioners on the children combined with the adverse economic effects on the 2nd Respondent and its staff will be far greater than any alleged harm on the petitioners.

102. Regarding their application for expungement, the 1st and 2nd respondents submitted that it is trite law that negotiations held on a without prejudice basis, and especially those that do not lead to a settlement, are inadmissible in court and are generally privileged. It was stated that this rule is established by Section 23 of the Evidence Act, Cap. 80. Counsel further submitted that developments in jurisprudence regarding the without prejudice communication principle stipulate that it is not necessary that the communication expressly indicates that it is made ‘without prejudice’ and the court can infer from the circumstances in which such communication was made that the parties intended that the said communication would not be adduced as evidence in the trial of the suit. This statement was backed by reference to the decision in **IATA v Connect Travel Limited [2019] eKLR**.

103. It was also submitted that the without prejudice rule is founded on the public policy principle that encourages parties to negotiate possible settlements in good faith. It was asserted that it would therefore beat the purpose of good faith negotiations if parties would reveal all aspects of negotiations, especially if such discussions are not fruitful. This statement was supported by the decision of **Rush and Tompkins Ltd v Greater London Council [1989] AC 1280**, as relied on domestically in **Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR**.

104. Counsel therefore urged that it is manifestly clear that communication that is made without prejudice is not admissible in court, especially when such communication pertains to good faith negotiations that did not ultimately lead to an amicable settlement. According to the 1st and 2nd respondents, these are the precise circumstances in the present case and the petitioners should not be allowed to rely on the purported minutes. The Court was therefore urged to allow the 1st and 2nd respondents’ application for expungement.

105. In conclusion, it was submitted that the petitioners have approached this Court with unclean hands and have deliberately withheld material facts in an attempt to hoodwink the Court into granting the orders sought. Reliance was placed on the decision in **Hilal Masoud v Director Kenya Wildlife Service & 2 others [2019] eKLR** for the proposition that a party cannot benefit from any equitable remedies on the basis of their misrepresentations. For the stated reason, counsel submitted that the petition must fail. Further, that issuance of the orders sought would infringe the constitutional rights of the children as well as the 1st and 2nd respondents. It was therefore the 1st and 2nd respondents’ prayer that the petition be dismissed and costs awarded to them.

The 3rd & 4th Respondents’ Submissions

106. Ms. Mutindi appearing for the 3rd and 4th respondents filed written submission dated 26th May, 2020. Counsel identified three issues for the determination of the Court. On the issue whether the petition raises any constitutional issues, counsel cited the South African case of **S v Boesak (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912** at paragraphs 13 & 14 where the Court considered the question as to what constitutes a constitutional matter and held that the answer must be gleaned from a reading of the Constitution and includes disputes as to whether any law or conduct is inconsistent with the Constitution as well as issues concerning the status, powers and functions of a State organ. She also cited the case of **Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others [2018] eKLR** where it was held that constitutional issues include the constitutionality of the provisions of an Act of Parliament, the interpretation of a legislation and the application of the legislation.

107. It was counsel’s view therefore that due to the existence of contractual relationships for provision of education and related services between the petitioners and the 2nd Respondent, the issues falls within the realm of private service contracts capable of being determined under the alternative existing mechanism for redress in civil law.

108. Counsel relied on the case of **Speaker of the National Assembly v Karume [2008] 1 KLR (E.P.) 425** in support of the proposition that where there is a clear procedure prescribed by the Constitution or an Act of Parliament for the redress of any particular grievance, that procedure should be strictly followed. She also cited the case of **Gabriel Mutava & 2 others v Managing Director Kenya Parts Authority & another [2016] eKLR** where a similar view was expressed. She asserted that a contractual relationship, like the one between the petitioners and the School, is governed by the Law of Contract Act, the CPA and other statutory provisions. She therefore urged the Court to dismiss the petition on the ground that it is not fit for resolution through a constitutional petition.

109. On whether the rights of the petitioners have been violated, counsel submitted that the fundamental principles established in **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272** require that constitutional petitions must be pleaded with reasonable precision. She observed that the Supreme Court in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** emphasized the principles set out in the **Anarita Karimi Njeru** case. It was counsel’s submission that the petitioners have neither provided particulars of the alleged violations or the manner of the alleged infringement.

110. On the issue whether the petitioners are entitled to the reliefs sought, counsel submitted that the prayers sought against the 4th Respondent are incompetent, bad in law and offensive to the fundamental doctrine of separation of powers. In support of the assertion, counsel cited the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where it was held that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice.

111. Counsel for the 3rd and 4th respondents further submitted that the reliefs sought herein are untenable because this Court cannot direct the Executive on which rules, regulations and policies to enact or the manner in which to undertake its policy-making mandate as sought by the petitioners. She contended that were the Court to do as urged by the petitioners, it would be usurping the policy-making role of the Executive. Counsel supported her argument by citing the case of **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary, Ministry of Health & 4 others [2016] eKLR** where the Court in declining a prayer for similar orders held that it could not direct the Executive on which policies to enact and or the manner in which it is to undertake its policy-making mandate.

112. It was further submitted that in ensuring checks and balances under the doctrine of separation of powers, the role of the courts is restricted to ensuring that policies enacted by the Executive or laws enacted by the Legislature are constitutionally sound as was enunciated in the case of **Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 7 others (2012) eKLR**.

113. On the prayer by the petitioners for an order directing the 3rd and 4th respondents to prepare and submit to the National Assembly a Bill for capping school fees in private schools and schools offering international curriculum in Kenya, counsel submitted that the mandate of the 4th Respondent with regard to basic education does not extend to the regulation of school fees in private schools and by virtue of Section 29(2) of the BEA, regulation of school fees by the 4th Respondent only applies to public schools. Counsel was also of the view that private schools are established, owned and operated by private individuals, entrepreneurs and institutions and capping school fees in a relationship arising out of private contractual relationships would contravene the long standing principle of privity of contract.

114. Counsel observed that the orders sought against the 3rd Respondent essentially seek to compel the 4th Respondent to take particular actions. She, however, submitted that although the 3rd Respondent is the principal legal advisor to the National Government, the 4th Respondent is not bound by the 3rd Respondent's advice. To buttress her argument, Ms. Mutindi cited the case of **Apollo Mboya v Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR** where the Court held that to compel the Attorney General to advise the President of the Republic of Kenya in a particular manner would amount to the Court arrogating itself the function of the Attorney General. In conclusion therefore, counsel stressed that this Court has no jurisdiction to direct the Executive on how to discharge its mandate. She therefore prayed that the petition be dismissed with costs to the respondents.

The Submissions of the Proposed Interested Parties

115. Mr. Kiragu Kimani appearing for the proposed interested parties filed written submissions dated 12th May, 2020. On the issue as to whether the petition meets the threshold of a constitutional petition, counsel cited the case of **Anarita Karimi Njeru (supra)**, as re-emphasized by **Mumo Matemu (supra)**, and submitted that the petition does not meet the legal threshold for a constitutional reference as the petitioners have not shown the constitutional provisions violated by the respondents' actions, the rights infringed and the manner in which the rights were allegedly infringed. Counsel further submitted that although the petitioners have cited Article 46 of the Constitution as the basis for their petition, the mere fact that the Constitution is cited does not elevate the commercial dispute between the petitioners and the 2nd Respondent to a constitutional petition. Reliance was placed on the decision of the Supreme Court in **Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another [2012] eKLR** in support of the statement.

116. It was also submitted that a constitutional question is an issue whose resolution requires interpretation of the Constitution rather than that of a statute as was held in **Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another [2017] eKLR**. Further, that as held in **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR**, not each and every violation of the law should be raised before this court as a constitutional issue. Also cited in support of the argument were the decisions in **James Kuria v Attorney General & 3 others [2018] eKLR** and **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**.

117. With respect to the claim that the petitioners' consumer rights were infringed, counsel submitted that this is an allegation bereft of proof. It was stated that the petitioners ought to have availed evidence to support the allegation that the costs of running a virtual learning program are lower than the cost of operating a physical school. Counsel additionally submitted that the petitioners have also not produced any expert evidence to support their claim that the quality of education delivered through virtual learning is poor. Consequently, counsel submitted that the claim of violation of consumer rights therefore falls flat.

118. Turning to the prayers in the petition, counsel asserted that the petitioners are inviting the Court to interfere with and micro-manage the internal operations of a private learning institution. He urged the Court to decline this invitation. Counsel relied on the cases of **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** and **Kenya Deposit Insurance Corporation v Richardson & David Limited & another [2017] eKLR** for the proposition that courts should not micro-manage the internal operations of private institutions. The proposed interested parties therefore urged the Court to dismiss the petitioners' petition. The proposed interested parties prayed for costs.

Analysis and Determination

119. I have carefully considered the substance of the petition, the parties' rival affidavits and submissions and I identify the issues for the determination of this Court as follows:

- a) Whether the application for joinder by the proposed interested parties should be allowed;
- b) Whether Paragraph 19 of Mr. Gabriel Roimen's further affidavit sworn on 12th May, 2020, together with the exhibit marked "EAA4" annexed thereto, should be expunged and struck out of the Court record; and
- c) Whether the petition raises any constitutional issues, if so, whether the petition should be allowed, and the appropriate orders to be granted, if any.

Some Preliminary Issues

120. There was an attempt by the petitioners to torpedo the proposed interested parties' application for joinder by seeking to strike out one of the affidavits sworn in support of the application. Specific reference was made to the averment by Mr. Brian Mutembei that he is an advocate of the High Court of Kenya. According to the petitioners, Mr. Mutembei's affidavit was perjured because his claim that he is an advocate was rejected by the Law Society of Kenya.

121. The prayer by the petitioners for the expungement of Mr. Mutembei's affidavit from the Court record was not given attention by the parties in their submissions. I will therefore simply observe that a false averment should not lead to the striking out of an affidavit but should only affect the weight to be attached to the deponent's evidence. Indeed, Order 19 Rule 6 of the Civil Procedure Rules, 2010 provides that the "court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive." Firstly, the

provision does not say that the entire affidavit should be struck out if it contains scandalous, irrelevant or oppressive matter. Secondly, a false statement is not one of the grounds for striking out part of an affidavit. There is therefore no merit in the petitioners' prayer to strike out the entire affidavit of Mr. Mutembei or the portion that is said to be false.

122. On their part, the 1st and 2nd respondents in their oral submissions made heavy weather of the issue of the alleged concealment of the petitioners' identities. This matter, however, fizzled out when the petitioners pointed out that they had provided a list containing their names to this Court and the other parties.

123. For purposes of record it is observed that the petitioners' statement is indeed correct as can be attested to by reference to Paragraph 1 of the affidavit sworn on 29th April, 2020 in support of the petition by Evelyne Achieng Agutu wherein she averred that a list of the parents who support the petition is annexed as "EAA-1". All they requested was that the list only be availed to the parties. This being a matter touching on children, the petitioners' request to use the initials "BPA", which was allowed by this Court, was indeed legitimate and merited. Thankfully, counsel for the 1st and 2nd respondents graciously abandoned the issue after the petitioners made the clarification. In that regard, nothing more needs to be said on this peripheral argument.

The Proposed Interested Parties' Application for Joinder

124. The proposed interested parties sought to be enjoined to these proceedings as interested parties. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** pronounced the law on joinder of an interested party as follows:

"[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

[23] Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

"(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

[24] We ask ourselves the following questions: (a) what is the intended interested party's stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?"

125. In ***Shirvling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others [2018] eKLR***, the Court stated the test for joinder as follows:

"The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit."

126. Similarly, in ***Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR*** the Supreme Court held that:

"[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a

replication of what the other parties will be making before the Court.

....

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

127. The proposed interested parties are described as parents and guardians plus teachers who double up as parents of the minors in the School. However, unlike the petitioners, they oppose the petition on the ground that the petitioners do not represent the views of all the parents of the minors in the School. It is further their contention that as a direct result of the petitioners’ misrepresentation, all other concerned parents were denied the opportunity to be heard on the matters in issue before the interim orders that were binding upon them were issued.

128. In my view, the petition primarily challenges the 2nd Respondent’s virtual learning program introduced in response to the closure of schools by the Government of Kenya as one of the containment measures for the COVID-19 pandemic. Particularly, the petitioners are challenging the virtual learning program for pupils in kindergarten to year 4, the failure to consult the parents before its introduction, the tuition fees payable, and the lack of a parents and teachers’ association. The proposed interested parties by virtue of being parents or guardians at Brookhouse have demonstrated their personal stake in the proceedings and the prejudice to be suffered in case of non-joinder. They have also clearly highlighted the submissions they wish to make before the Court and the relevance of those submissions. Accordingly, I find that the proposed interested parties have a legitimate stake or interest in the matter and will suffer prejudice should the joinder not be allowed.

129. The petitioners appear to suggest that they speak for all the parents with children in the School. Such a claim would have been persuasive if the parents had a formal association through which a meeting could have been held and a decision made as to whether to file the petition or not. In the matter at hand there is a set of parents under the initials “BPA” and another set of parents under the initials “DPGT”. No one set of parents represents the interests of the other set of parents. No parent is superior to any other parent. Each parent is therefore entitled to be heard. All parties concede that the 2nd Respondent has no association for parents and teachers. The “BPA” is not a registered or recognized association. The petitioners disclose that they have only used the acronym to conceal the identities of their children. This cannot therefore be a situation where all the parents are bound by the “corporate” decision of “BPA”. Parents opposed to the position taken by the other parents are entitled to be heard. As such the application for joinder is truly merited and is allowed as prayed. The proposed interested parties will henceforth be referred to as interested parties.

The 1st and 2nd Respondents’ Application for Expungement

130. The 1st and 2nd respondents filed an application seeking to expunge Paragraph 19 of Gabriel Roimen’s further affidavit sworn on 12th May, 2020 together with the annexed exhibit marked “EAA4” on the ground that the so-called minutes refer to a without prejudice virtual meeting hosted by the law firm of Anjarwalla & Khanna LLP, using the Zoom platform on 4th May, 2020 to negotiate a possible settlement of this matter. It was indeed submitted by the applicants, and the submission was not opposed by the petitioners, that there was consensus that the discussions would not in any way be shared or circulated to the media or on social media sites and the host of the meeting did not record the proceedings of the meeting. The 1st and 2nd respondents contended that there has been no subsequent waiver of the applicability of the without prejudice rule to the discussions. The petitioners did not dispute these averments.

131. In Kenya, the without prejudice rule is derived from the provisions of Section 23(1) of the Evidence Act, Cap. 80 which states that:

“23. Admissions made without prejudice in civil cases

(1) In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.”

132. Njoki Mwangi, J extensively dealt with the “without prejudice” rule in the case of **Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR** as follows:

“10. To cite from the case of Oceanbulk Shipping and Trading SA V TMT Asia Limited and 3 others [2010] UKSC 44, on the legal principles of the "without prejudice" rule, in a majority decision of the Supreme Court of the United Kingdom, the Judges stated-

"The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute".

11. In the case of Walker V Wilsher (1889) 23 QBD 335 at 337 Lindley LJ asked what the meaning of the words "without prejudice" was in a letter written "without prejudice" and answered the question this way -

"I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

12. The appellants in their grounds of opposition filed on 16th October, 2015, referred to the case of Rush and Tompkins Ltd V Greater London Council [1989] AC 1280, a copy of the said authority was not availed by the appellants' counsel. This court has read the said decision that was determined a century after the Walker V Wilsher case (supra). In the Rush and Tompkins case (supra), Robert Walker LJ at page 1299 held as follows:-

"The "without prejudice" rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts V Head [1984] Ch 290 at 306;

"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course failure to respond to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co V Drayton Paper Works Ltd (1927) 44 RPC 151 at 156 be encouraged fully and frankly to put their cards on the tableThe public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

13. However, in the case of Rush & Tompkins (supra) at page 1300, Lord Griffiths said:-

"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase "without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the "without prejudice' material for a variety of reasons when the justice of the case requires it....(emphasis mine).

....

18. The cases cited in this ruling have shown that the rule of "without prejudice" is not absolute, it has exceptions. I find that since the respondent accepted the appellants' offer, the letter from the appellants written on a "without prejudice" basis was excluded from the operation of the provisions of section 23 (1) of the Evidence Act, thus rendering it admissible in evidence.

19. The treatise Halsbury's Laws of England Vol. 17 at paragraph 213 states-

"The contents of a communication made "without prejudice" are admissible when there has been a binding agreement (emphasis mine) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible."

The above commentary solidifies the decision taken by this court that the letter in issue in this case, is admissible."

133. I have quoted Njoki Mwangi, J at length because she clearly expresses the import and purport of the without prejudice legal doctrine. I therefore need not restate the law since I fully agree with her analysis.

134. The parties before this Court are agreed that the meeting of 4th May, 2020 was held in an attempt to reach a settlement of the dispute that gave rise to the institution of these proceedings. The petitioners did not dispute the averment by the 1st and 2nd respondents that there was an upfront agreement that the discussions of the meeting were on a without prejudice basis. Indeed, the petitioners conceded that the purported minutes were only being recorded for the sole purpose of sharing with the larger body of parents who were not part of the meeting so that they could decide whether they were agreeable with any proposed settlement. In the circumstances the 1st and 2nd respondents' complaint that the sharing of the contents of the discussions in the media and social media was not done in good faith is well-founded.

135. The petitioners nevertheless argued against the application for expungement and submitted that the privilege had been waived as the 2nd Respondent, had, through an undated letter from Mr. Rabih Saab addressed to all parents discussed the proceedings of the meeting in detail.

It was also submitted that since these proceedings are between the parents and the School, the best interests of the child override any privilege and the Court should best promote and protect the interests of the child as provided for in the Constitution, the Children Act and the BEA. The Court was therefore urged to dismiss the application for expungement.

136. A perusal of the pleadings and submissions of the parties clearly shows that the without prejudice rule covers the circumstances of this case. The parties met to discuss a possible settlement and expressly agreed that the discussions were not to be shared with anybody else. One party, however, went ahead to place before the Court the alleged proceedings of the meeting. This action clearly goes against the public policy that encourages parties to cases to reach out of court settlements. The claim that the proceedings of the meeting were conveyed to all the parents through a letter from the 2nd Respondent does not cure the petitioners' indiscretion. It does not explain why they never relied on the letter instead of exhibiting the alleged minutes of the meeting.

137. It is also my view that the petitioners cannot be allowed to hide behind the constitutionally formulated principle of the best interests of the child in order to subvert the rules of evidence. Litigation involving constitutional matters is never done outside the rules governing resolution of disputes by the courts. There are established rules of evidence and procedure which should be adhered to. If there is need for an authority to back this statement then one can see the holding by Asike-Makhandia, J (as he then was) in **Peter Ochara Anam & 3 others v The Constituencies Development Fund Board & 4 others [2011] eKLR** that:

“In as much as the Constitutional Petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure for handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored or witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That would be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the Petitioners that the petition being neither a criminal nor civil proceedings it must be conducted in vacuum.”

138. In short, I find the 1st and 2nd respondents' application for expungement merited and I allow it as prayed so that Paragraph 19 of the further affidavit sworn on 12th May, 2020 by Gabriel Roimen, together with the attached document marked “EAA4”, are expunged from the Court record.

Whether the Petition Raises Constitutional Issues

139. The respondents and interested parties urged this Court not to entertain the petition on two grounds. The first ground is that the petition does not meet the pleading test in that the rights allegedly violated are not clearly specified, the constitutional provisions said to be violated are not identified and the harm allegedly suffered is not clearly stated. The opponents of the petition have indeed correctly captured the law as stated in **Anarita Karimi Njeru (supra)**, and reiterated in **Mumo Matemu (supra)**, that whoever seeks constitutional redress should set out with a reasonable degree of precision the complaint, the constitutional provisions said to be infringed, and the manner in which they are said to be infringed.

140. The importance of complying with the rule established in the cited case of **Anarita Karimi Njeru** was stated by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** as follows:

“[349] ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

141. Does the instant petition comply with the stated principle? Yes, it does. The petitioners alleged violation of the rights protected by Articles 36, 43, 46 and 53 of the Constitution by the 1st and 2nd respondents' act of introducing virtual or online classes without consulting them. They also accused the 3rd and 4th respondents of abdicating their constitutional mandates by failing to ensure compliance with the BEA. They have therefore established grievances and disclosed alleged injuries which have been linked to particular provisions of the Constitution. They have explained the manner in which their rights have been violated. The petitioners therefore have a solid claim that needs to be interrogated using the tools for determining constitutional questions. The objection by the respondents and the interested parties to the petition on this ground is therefore found to be without merit and dismissed.

142. The second ground upon which the Court is asked to dismiss the petition is that the case before this Court concerns alleged breach of contracts between the petitioners and the School and has nothing to do with the violation of the Constitution and the rights and freedoms enshrined therein. Parties are indeed discouraged from using constitutional petitions to litigate matters which can be prosecuted through ordinary statutes and there is no shortage of decided cases on this principle of law.

143. In **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR**, Lenaola, J (as he then was) cautioned that:

“55. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute....

56. I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy

through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

144. The same message was stressed by the Court of Appeal in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** thus:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

... this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional right....

Of course violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

145. The constitutional avoidance principle was also upheld by the Supreme Court in the already cited case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**.

146. Is this a matter suitable for resolution through a constitutional petition? The respondents and interested parties have a point when they claim that at the center of this dispute is the alleged breach of the contracts signed between the 1st and 2nd respondents on the one hand and the petitioners on the other hand. Nevertheless, the matter does not terminate at the contractual dispute. The issue of violation of consumer rights is one that can attract both statutory and constitutional remedies. There is alleged violation of the right to education and the principle of the best interests of the child. Through the prayers in the petition, the petitioners have opted for constitutional remedies. In my view, although the issues placed before Court arose from contractual relationships, they also call for the interpretation of the Constitution.

147. There is also the matter of the 4th Respondent’s alleged failure to discharge constitutional and statutory responsibilities. Additionally, the petitioners pray that the 3rd and 4th respondents be directed to draft and present to the National Assembly a Bill to cap the fees charged by private educational institutions. The orders sought against the 3rd and 4th respondents are best pursued through constitutional petitions.

148. In my view, this is one of those cases in which this Court is required to handle the matter as a constitutional petition since the other available remedies may not be adequate. This case attracts the application of the principle enunciated in **Bernard Murage (supra)** that:

“57. I am also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004 that where there is a means of redress that is inadequate, the Court should not exercise restraint.”

149. It will also be demonstrated during my discussions on the merits of the petition why this is a matter that invites the interpretation of the Constitution. In the circumstances, I find that this Court cannot run away from the petitioners’ case and I must proceed to tackle it head on. That is to say that the argument by the respondents and interested parties that the petitioners’ case should be dismissed for lacking the hue of a constitutional dispute is found to be without merit and rejected. I will now turn to the merits of the petition.

The Merits of the Petition

150. The petition is premised mainly on Article 46 of the Constitution. The alleged infringement of the petitioners’ rights as consumers under the said provision is then tied to alleged violation of other constitutional rights being the right to education under Article 43(1)(f), the right of a child to free and compulsory basic education under Article 53(1)(b), and the principle of the best interests of a child in every matter concerning the child as promulgated in Article 53(2).

151. The rights of consumers finds firm root in Article 46 of the Constitution in the following words:

“46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.”

152. It is important to appreciate from the outset that Article 46(3) of the Constitution stipulates that the provisions of that Article applies to goods and services offered by public entities or private persons.

153. The preamble of the CPA, which is the Act of Parliament contemplated under Article 46(2) of the Constitution, provides that the enactment is an **“Act of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.”**

154. The lawmaker actually proceeded to provide interpretive principles at Section 3(1) and (2) of the CPA as follows:

“(1) This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).

(2) When interpreting or applying this Act, a person, court or the Advisory Committee may consider—

a) appropriate foreign and international law; and

b) appropriate international conventions, declarations or protocols relating to consumer protection

155. Sub-section **(4)** of the Section 3 proceeds to provides the purposes of the Act thus:

“The purposes of this Act are to promote and advance the social and economic welfare of consumers in Kenya by-

a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;

c) promoting fair and ethical business practices;

d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;

e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;

f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.”

156. The CPA is therefore a law that seeks to implement the rights created by Article 46 of the Constitution and the lawmaker provided the manner of interpreting the law. Section 2 clearly defines who a consumer is. It is my observation that all the parties in this case do not dispute the fact that there was a contract for provision of a service between the individual parents and the School. Indeed, the petitioners correctly pointed out that Mr. Mulindi at Paragraph 5 of his affidavit of 8th May, 2020 and Mr. O’Connor at Paragraph 7 of the affidavit sworn on 8th May, 2020 support their contention that written contracts were signed between the parents and the School for provision of teaching and other services. The petitioners’ position is further affirmed by the fact that the 3rd and 4th respondents consistently asserted that they cannot wade into the issue of fees charged by private schools as the same falls within the realm of private service contracts. In the circumstances, Article 46 of the Constitution and the CPA are therefore applicable to the dispute before this Court.

157. The petitioners hold the view that the contracts should be viewed from the prism of the Constitution. The respondents are of the firm view that this is a contractual dispute which must be addressed using the tools for resolving contractual disputes without resorting to the Constitution. In that regard, the respondents cited the decision of the Court of Appeal in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** that:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

158. However, the same Court of Appeal appreciated in the case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & others [2011] eKLR** that there are certain situations where the Court may interfere with a bargain between parties. The majority, through the judgement of Tunoi, JA (as he then was), clearly expressed the current legal position by stating that:

“The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. In VANZANT V COATES. [1969] 14 D.L.O.R. 256 it was held that the transaction would, in the foregoing circumstances be rescinded.

The traditional view that *“if people with their eyes open wilfully and knowingly enter into unconscionable bargains, the law has not right to protect them”*- as held in *FRY V LANE 1888 40 Ch. D 312* – has long been altered. Also I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of *“overriding objective”* which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.

The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.R. in *LLOYDS BANK LTD VS BUNDY [1975] Q.B. 326 AND SCHROEDER MUSIC PUBLISHING CO VS MACANLAY [1974] 1 W.L.R. 1308*, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

159. It is therefore clear that the powerful statement of the Court of Appeal in the earlier case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, must be tempered by the current thinking that a sense of fairness should be infused into transactions between private parties. The strong party in a contractual relationship should not be allowed to steamroll over the weaker party. This is in line with the prevailing jurisprudential trajectory that requires constitutional values to be infused into contracts. If this was not so, the Kenyan people would not have found it necessary to include Article 46 in the Constitution and follow it with the enactment of the CPA to specifically protect the rights of consumers. The Court of Appeal in the just cited case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & others [2011] eKLR** did indeed appreciate that the arrival of the 2010 Constitution had shifted the ground on this particular issue.

160. In the very recent case of **AB and Another v Pridwin Preparatory School and Others [2020] ZACC 12**, the Constitutional Court of South Africa reaffirmed the importance of applying public policy to contractual relationships by stating (as per Nicholls AJ) that:

“All contractual agreements between private parties are governed by the principle of *pacta sunt servanda*, unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in the Constitution, including notions of fairness, justice and reasonableness. The Parent Contract, in particular clause 9.3, must stand up to scrutiny, based on the test set out in *Barkhuizen*, where this Court authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of *ubuntu*. What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (*pacta sunt servanda*), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them.”

[Footnotes omitted]

161. Relevant to this case is the holding by the Court that:

“However, this finding fails to account for the peculiar nature of contracts that seek to impinge upon or regulate the fundamental educational rights of children under the Constitution. These cannot be equated with standard commercial contracts such as a lease. Contracts specifically dealing with the education of children are of a different species in that there are markedly different considerations at stake. While there is nothing offensive about the clause itself (*per se*), the enforceability of clause 9.3 and similar clauses may impact directly upon the educational and other constitutional rights of children....

The crucial issue is then whether independent schools, by providing education to children, assume constitutional duties and obligations that inhibit the free exercise of contractual rights. In this matter, these are the best interests of the child as entrenched in section 28(2) of the Constitution and the right to basic education as protected in section 29(1)(a) of the Constitution. If independent schools do not have this duty, the children will have no independent right to expect their constitutional educational rights to be enforced through inhibiting free exercise of contractual rights. That the best interests of the child are paramount is accepted and embraced by the School. But, if a constitutional duty to provide basic education protects also those children who attend an independent school, may the School evade these obligations by attempting to contract out of it?”

The Court went ahead and held that an independent school could not terminate a contract between it and a parent without giving a hearing to the child.

162. This position was earlier pronounced by Masipa, J of the South African High Court in *NFM v John Wesley School & another*, Case No. 4594/2016 when he held that:

“[67] The Basic Education Hand Rights Book-Education Rights in South Africa, chapter 20: Education Rights in Independent Schools discusses the provisions of s 29 of the Constitution. Amongst other considerations, it adopts the principles set out in *Juma Masjid Primary School*, the court found that s 28(2) of the Constitution imposes the horizontal application of the right to education on independent schools since it extends the application of the Bill of Rights to bind a natural or a juristic person to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. The court went further to set out that the purpose of s 28(2) was not to obstruct private autonomy or to impose on a private party the duties of the State, but rather to require private parties not to interfere with or diminish the enjoyment of a right. It found that there was a negative constitutional obligation not to impair the learners’ right to a basic education.

[68] In *Juma Masjid Primary School, The Trust*, as the owner of the property, was entitled to seek eviction in view of its extensive but fruitless efforts to engage the MEC to alleviate the position of learners affected by the proposed eviction. That did not imply, however, that it was entitled to an eviction order. The Trust’s constitutional obligation, once it had allowed the school to operate on its property, was to minimise the potential impairment of the learners’ right to a basic education. This required consideration and compliance with guaranteed rights in ss 29(1) and 28(2) of the Constitution.

[69] Since the Constitution require private parties or bodies not to interfere with or diminish the right to basic education, independent schools must act in a manner that minimises any harm on the learner’s right to basic education....

[77] I agree with the applicant that while the first respondent may be entitled to invoke its authority to exclude learners, a fair procedure must be followed. The exclusion must also be for a fair reason taking into account what is in the best interest of the child. In this regard, it should not matter whether the school is an independent school or a public school. This must apply regardless of whether such exclusion relates to the child’s conduct or any breaches by its guardians or parents.

[78] A consideration of the best interest of the child goes beyond looking at other rights protected by the Constitution. Mr Shapiro’s reference to an infringement of the right to equality and dignity seeks to limit the best interest of the child to such rights and cannot be correct. The concept is much broader than that. Any conduct, contractual or otherwise, which is contrary to the best interest of the child conflicts with s 28 the Constitution. Section 39 of the Constitution always calls for courts and other decision makers to take into account the provisions of the Bill of Rights when deciding on matters.

[79] Mr Shapiro’s argument that the Constitutional Court reserved the right for it to consider matters which can be said to be moot to it cannot be correct. This is because *Pillay*¹⁷ made reference to the court and did not limit such powers to it. Where the interest of justice requires, any court with the requisite jurisdiction may hear the issues before it.

[80] While it is accepted that independent schools are autonomous, this does not exclude them from the operations of the Act and the Constitution. A finding in that suspending a learner from class due to non-payment of school fees was contrary to the provisions of s 28 (2) of the Constitution would apply similarly to independent schools.”

163. The respondents and the interested parties made lengthy submissions in support of their argument that virtual or online classes are legal and constitutional. I, nevertheless, did not hear the petitioners assert that virtual or online classes violate constitutional principles, rights and freedoms. It would have indeed been absurd for the petitioners to attempt to stand on the path of the unstoppable march of technology, more so during the unprecedented times we are living in. It is clear that the deployment of ICT in teaching is legalised by Section 2 of the BEA which states that:

“ICT Integration and Education” means the seamless incorporation of information communication technologies to support and enhance the attainment of curriculum objectives, to enhance the appropriate competencies including skills, knowledge, attitudes and values and to manage education effectively and efficiently at all levels”

164. My understanding of the petitioners’ complaint is that online teaching was introduced without consultation and they also question the pricing of the “*product or service*” offered by the School. At the periphery is their claim that the School is not licensed as required by the BEA to offer virtual education. These in my view are the issues at the core of this petition.

165. I will start with the question of pricing. The petitioners decried what they termed a paltry discount of 10% offered by the 1st and 2nd respondents following the shift from face-to-face instruction to virtual teaching. Their case is that the introduction of virtual classes is contrary to the agreement reached between them and the 1st and 2nd respondents at the time of the admission of their children. They stated that among the courses, activities, facilities and services that were not offered online and which they contracted for are physical education, choir festival, writing competition, first aid, drama, aerobics, cultural events, pastoral forums, meals, consultations between parents and teachers, library, and swimming.

166. The petitioners therefore assert that virtual offering of the reduced package at a rate almost similar to the full package offered when the School was in full session contravened their consumer rights, was unfair, unconscionable and unlawful hence violated Article 46 of the Constitution. Further, that the School misled them by failing to give them the information needed to make appropriate decisions. The petitioners claim that any changes made by the 1st and 2nd respondents required their consent.

167. Another reason that was given in support of the assertion that the discount offered by the School was unreasonable was that other schools of the same parity in systems, curriculum and fee structures had considered requests by distressed parents and granted considerable

fee discounts of up to 50%. There was also the assertion that the 2nd Respondent had no justifiable reason for charging full fees or offering paltry and unjustifiable discounts when the other schools which fall under the Inspired Education Group of Schools had offered major discounts worldwide due to the negative impact of the coronavirus pandemic on economies. It was additionally alleged that Brookhouse has been charging higher fees in Kenya compared to its schools in other countries.

168. There was also the allegation by the petitioners that virtual learning comes with extra costs for parents especially those with children in kindergarten to year 4 who were required to assist the children with school work. It was their case that the School and teachers have shifted their responsibilities to the parents. They also berated the quality of virtual education stating that virtual learning cannot be equated to normal schooling.

169. The 1st and 2nd respondents and the interested parties rebuffed all the petitioners' averments. They entered the stage with the averment that the petitioners' case is coloured with some falsehoods and hobbled by material non-disclosure. They pointed out that although the petitioners harped on about an alleged paltry discount of 10%, Brookhouse had indeed offered discounts of between 20% and 30% across the board. Further, that the petitioners had failed to disclose the establishment of a fund by the School to help parents in distress. The petitioners were also accused of failing to disclose that the boarding and transport expenses had been excluded from the new fees structure.

170. Interestingly, the petitioners did not rebut any of the 1st and 2nd respondents' averments and I will therefore hold them to be true. That is not to say that the petitioners are a bunch of liars. Far from it. A perusal of the pleadings filed in this matter will show that the petitioners have focused their case on the discount in respect of the tuition fees. They, however, fail to appreciate the fact that some of the facilities and services they claim their children are missing are not tied to the tuition fees. An example is something like the swimming pool which needs regular maintenance at high cost. I also observe that the petitioners complained about payment of fees for exams that were not going to be sat. I, nevertheless, note that somewhere among the many documents filed in this petition is communication from the School calling upon the parents to go and collect unutilized exam fees. Once again, the petitioners cannot be blamed for making this particular complaint since the communication came after this petition had been filed. This gives the impression that Brookhouse was reacting to the petition by asking the parents to go and collect the unused exam fees.

171. A perusal of the pleadings and submissions confirm the 1st and 2nd respondents' assertion that this petition is a reaction to the downturn in the economy as a result of the outbreak of the coronavirus disease. Prior to the arrival of the COVID-19 pandemic on our shores, the petitioners were comfortable with the terms of their contracts with Brookhouse. This is not to say that the petitioners are not entitled to move the Court at any time alleging that their contracts with the School violate constitutional rights. However, the petitioners are, in my view, not challenging the original contracts. Their argument is that the introduction of online classes waters down the original contracts. They claim that the shift to online schooling changed the terms of the contracts and infringe on their rights as consumers of the service offered by Brookhouse. It is, nevertheless, noted that the petitioners, even after wondering whether the COVID-19 pandemic is a *force majeure* event, have not sought the termination of their contracts with the School. They only seek declarations relevant to online classes. Their timidity therefore narrows down the task of this Court to the issue of pricing and whether the decision of the School to adopt online teaching violates the consumer rights of the petitioners and by extension the right of their children to free and basic education. Another issue is whether the action of Brookhouse negates the paramountcy of the principle of the best interests of the child. The prayers sought against the 3rd and 4th respondents will also be addressed.

172. Even though the petitioners lampooned the quality of online education, their opponents and especially the interested parties correctly pointed out that they did not avail any evidence to demonstrate its inferiority to face-to-face teaching. Their case against the respondents cannot therefore succeed on the issue of the quality of the "product."

173. The petitioners are the ones who made the allegation of violation of rights by the 1st and 2nd respondents. The law therefore required them to establish their allegations. The matters to be taken into account by the courts in determining whether there has been an infringement of the rights of a consumer by way of unfair practices are enumerated in sections 12 and 13 of the CPA.

174. In order to succeed in their claim, the petitioners needed to provide evidence of false and or unconscionable representation on the part of the 1st and 2nd respondents. In my view they needed to particularize in their pleadings the elements of the misleading representation made to them by the two respondents. Some of the grounds would need an averment by an individual parent in support of the claim. An example is where the parent alleges that that he or she could not protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of the agreement or similar facts. Such attributes cannot apply to all the parents and a claim based on such grounds should be individualized. In such a situation, each claimant needs to particularize his or her claim and adduce evidence in support of the averment. This is made even more necessary by the fact that each parent has an individual contract with the School.

175. That there was need for the petitioners to adduce evidence in support of the alleged violation of their rights as consumers was confirmed by the Court of Appeal (J.W. Onyango Otieno, JA) in *LTI Kisii Safari Inns Ltd & 2 others (supra)* when he held that:

" In the cases of *Royal Bank of Scotland Plc vs. Etridge (No.2)*, *Barclays Bank Plc vs. Hanis and another*, *Midlan Bank Plc vs. Wallace and another*, *National Westminster Bank Plc vs. Gill and another*, *UCB Home Loans Corporation Ltd vs. Moore and another* (Conjoined Appeals); *Barclays Plc vs. Coleman and another*, *Bank of Scotland vs. Bennet and another* and *Kenyon Brown vs. Desmond Banks & Co*, all reported as heard together and reported as *Royal Banks of Scotland vs. Etridge (No.2)* 2 AC 773, to which we were referred by all parties, it was stated as regards the proof required to demonstrate undue influence as follows:-

"Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence vests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship,

and all the circumstances of the case.

Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient; failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of those two facts is prima facie evidence that the defendant abused the influence he acquired in the parties relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”

176. For instance, a contract can be invalidated on the ground of unconscionable representation where, as per Section 13(2)(b) of the CPA, **“the price grossly exceeds the price at which similar goods or services are readily available to like consumers.”** As already stated, one of the grounds upon which the petitioners hinged their claim is that Brookhouse levies fees higher than those of other private schools of similar status. It is also claimed that even though the School is a member of Inspired Group of Schools, it is more expensive than schools of the group in other countries.

177. In the first instance, it must be observed that the petitioners did not support their averments with evidence. Secondly, it must be appreciated that the decision as to the amount of fees to be levied is a complex one. Even where schools are said to be of the same status, the facilities and the caliber of the teaching staff may be different. Sometimes the price comes with the brand name. It is indeed correct that one private school may provide the same quality of education with another private school but that does not mean the two schools should impose uniform fees. Each school has its own budgets and traditions and that may explain why a parent will select one private school over another private school with similar facilities and output. It suffices to state that the pricing of a product is a complex process.

178. This takes me to the prayer for an order directing the School to reduce its fees. This prayer fails for two reasons. In the first place, the petitioners have not established a violation of their consumer rights by the 1st and 2nd respondents. Secondly, even if the petitioners had established a violation of their rights, they have not shown that this Court has the authority of the law to determine the terms of a contract for parties to the contract. The appropriate remedy the Court can provide once it is established that a contract is unconstitutional is to make a declaration to that effect so as to allow the parties to re-engage afresh if they so desire. I am not persuaded that the Court can fix the price without prejudicing the provider of the product or service.

179. The Court cannot determine the prices of goods and services in the market. In any case, the Court is ill-equipped to find that a reduction of schools fees by a particular percentage is appropriate and fair to all the parties. The School actually explained that the price of land in Kenya is exorbitant and this is one of the reasons its levies are higher than that of its sister schools in other countries. Were the Court to take on the responsibility of determining the discount that should have been offered by Brookhouse, it would be required to conduct extensive research outside the evidence placed before the Court by the parties. The Court has no such authority neither is that its mandate.

180. The product or service in the market belongs to the 1st and 2nd respondents and since it has not been proved that they made false and or unconscionable representations to any of the parents, they are at liberty to charge whatever fees they desire to charge. The market dictates the cost of a product or service and the consumer purchases the product he or she can afford. It would be unjust for parents who willingly and voluntarily enroll their children in private schools to demand a reduction of school fees on the ground that the fees charged violates the constitutional right to free and basic education. I appreciate that the constitutional rights of children should be given special attention by this Court. This, however, should be balanced with the rights of those who invest in provision of private education. As was submitted by the 3rd and 4th respondents, there is need for private investors to assist the State in the fulfillment of its constitutional obligation to provide free and basic education. Although basic education is supposed to be free for all children, parents who opt to enroll their children in private schools are expected to meet the cost.

181. Another ground upon which the petitioners based their allegation that Article 46 of the Constitution was violated is that they were not consulted by the 1st and 2nd respondents prior to the introduction of online learning. The petitioners are indeed correct that such a major shift in the delivery of education needed their input. They do not pay peanuts in school fees and I would think the right to basic education being a constitutional right should be accompanied by constitutional values. However, it must be appreciated that the closure of schools was abrupt and there was no time for meaningful engagement as the 1st and 2nd respondents were required to deliver their part of the bargain despite the changed circumstances. The 1st and 2nd respondents, nevertheless, averred that they immediately brought the parents on board. This testimony was not rebutted. In the circumstances I find that the consultation that took place at the time of the introduction of the new mode of learning was adequate. It is noted that the studies offered by the School are pegged on an international system of education which had not been suspended at the time the Kenyan schools were closed. The School had a contractual obligation to prepare the children for the examinations.

182. Since the petitioners have failed to establish that their rights as consumers were violated by the 1st and 2nd respondents, it follows that the right to free and basic education and the principle of the paramountcy of the best interests of the child have not been infringed. It is therefore not necessary for this Court to consider the alleged violation of these other rights.

183. On the issue of licensing, I must state that once a school is licensed, it offers education in accordance with the provisions of the BEA. I am not persuaded that the permission of the 4th Respondent should be sought when a school decides to switch to online learning from face-to-face teaching. The petitioners did not point to any particular statutory provision that would require re-licensing in such circumstances. The 4th Respondent who is the regulator of the education sector in the country in the response filed in Court clearly supported virtual learning. It is therefore my finding that the petitioners have not made out a case for faulting the 1st and 2nd respondents for not seeking licencing from the 4th Respondent before offering virtual classes. Consequently, this particular ground in support of the petition fails.

184. It is important to note that the coronavirus disease has disrupted economies and frustrated the delivery of services. The 1st and 2nd respondents' efforts in ensuring that they delivered their part of the bargain must be appreciated. They sought a solution immediately the

Government ordered the closure of schools. In the Indian case of **Naresh Kumar v Director of Education & another W. P. (C) 2993/2020**, the Court appreciated the decision by schools to offer online learning by stating that:

“10. Significantly, the impugned Order, dated 17th April, 2020, notes the effort, on the part of certain private schools, to disseminate education online, as a welcome step, aimed at ensuring that students do not suffer, in their curricular activities during the 2020-2021 academic session. We wholeheartedly endorse this sentiment. Judicial notice may be taken, of the painstaking efforts, made by schools and teachers, in providing education, and holding classes, through online platforms. The effort in physically teaching students, in a regular classroom, cannot even remotely be compared with the effort that the teacher has to expend, in providing online education. It is a matter of common knowledge that, in doing so, the effort required to be put in, by the teacher, and the strain to which the teacher subjects herself, or himself, is tremendous, and the efforts of teachers - referred to, often, as the noblest among all noble professions - require to be commended in the highest terms. We unhesitatingly place, on record, our wholehearted appreciation, of the efforts of teachers, and schools, towards this end.”

185. The Court was urged, based on Indian jurisprudence, to order the 3rd and 4th respondents to prepare and submit a Bill to the National Assembly to cap fees levied by private schools. Although free and basic education is indeed an important constitutional right, the responsibility of discharging that mandate rests on the State and not private entities. Private schools are not funded by the State and they must charge fees in order to provide services. The onus of determining whether fees for private schools should be capped is an issue for the Executive and Parliament. Those who want levies payable in private schools to be capped should lobby Parliament to pass the necessary law. It is, however, observed that the implications of such a law are enormous and it is up to the people of Kenya and not a Judge to decide whether it is time to have such a law. Although I do not agree, as suggested by the 3rd and 4th respondents, that this Court has no authority to direct the Executive on policy formulation, I find that in this particular case, the petitioners have not convinced this Court that it should issue an order directing the 3rd and 4th respondents to formulate such a Bill.

186. This applies to the prayer for formulation of regulations on online learning. It may indeed be necessary to have regulations to guide the delivery of the curriculum through online platforms. However, that is a conversation to be had by all Kenyans and in particular the stakeholders in the education sector. It is not the business of the courts to micromanage other State organs by telling them what to do and when to do it. My decision finds support in the holding of Lenaola, J (as he then was) in **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR** that:

“109. In Prayers (e) (f), (g) and (h) the Petitioners have asked the Court to direct the Respondents to undertake certain measures set out therein. As attractive as the Prayers may sound, they cannot be issued as framed because the principle of separation of powers prohibits this Court from getting into the arena of the policy making power of the Executive. The Court cannot particularly direct the Executive on which policies to enact and or the manner in which it is to undertake that policy-making mandate. In addition, I have addressed the issue of guidelines under Section 20 of the Act and I need not repeat my finding thereto. It follows that those Prayers cannot be granted.

187. It is important to add that the petitioners have not indicated that they had knocked on the doors of the 3rd and 4th respondents seeking promulgation and enactment of the policies and laws they desire and they were not attended. The compulsive orders the petitioners seek are in the nature of orders of mandamus. For the petitioners to succeed, they needed to establish that they had asked the two respondents to execute identifiable statutory responsibilities and they failed to do so hence the need for the Court to step in.

188. Still on the prayers sought against the 4th Respondent, I find that the petitioners have not demonstrated that they have reported to the Ministry of Education that the School is offering substandard curriculum. That being so, the Cabinet Secretary cannot be said to have failed in his duties thereby requiring some nudging through a court order. In any case, the petitioners have, as already established, failed to demonstrate the inferiority of virtual learning. It is therefore my finding that the respondents have failed to make a case against the 3rd and 4th respondents and their claim against these two respondents fail in its entirety.

189. There is, however, merit in the prayer by the petitioners for the establishment of a parents and teachers' association. Section 55(3) of the BEA does indeed provide for the establishment of a parents and teachers' association for every private school. The law (Section 55(2) of the BEA) actually provides for the constitution of a parents' association for every school. Rule 1 of the Third Schedule of the BEA specifies that there shall be a parents' association for every public or private secondary school. Among the functions of the association according to Rule 2(6)(e) is the discussion and recommendation of charges to be levied on pupils and parents.

190. The petitioners alleged that Brookhouse had frustrated their attempts to form an association of parents. The School claimed that it was in the process of forming an association of parents when the petitioners filed this petition. None of them produced any evidence to support their assertions. There is no need to assign blame for this omission on any of the parties. The BEA became operational on 25th January, 2013. No reason was given by either side as to why it took over seven years before the formation of a parents' association became an issue. The petitioners cannot claim that they were frustrated by Brookhouse for over seven years and did nothing about it. On the other hand, the School has not shown why it has not complied with this statutory imperative. Be that as it may, it is now time for the School and the parents to establish a parents' association as required by the law.

191. Although I have found that the 1st and 2nd respondents did not fail to consult the parents prior to the introduction of online education, I agree with the petitioners that in order to attain the Article 53(1)(b) right of children to free and compulsory basic education and in order to comply with the provision of Article 53(2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child, constant consultation between the School and the parents is very necessary. It is therefore important to restate this requirement through the issuance of a declaratory order as prayed by the petitioners.

192. In conclusion, I find that this petition partially succeeds and a declaration be and is hereby issued that the petitioners are by virtue of Section 55(2) & (3) and the Third Schedule of the Basic Education Act, 2013 entitled to be members of an association of the parents of

Brookhouse. The establishment of a parents and teachers' association as per Section 55(3) of the BEA is the responsibility of the school. In the circumstances, an order is issued compelling the 1st and 2nd respondents to forthwith, and not later than 120 days from the date of this judgement, establish a parents' association which meets the requirements of the provisions of the Third Schedule of the Basic Education Act, 2013.

193. Additionally, a declaration be and is hereby issued that the 1st and 2nd respondents are obliged by law and the Constitution to consider the best interests of the children in their schools whenever they make any policy decisions or changes that would affect the children's schooling, and must consequently consult and obtain consent of their parents before implementing the policies or changes.

194. In their pleadings the petitioners clearly indicated that they are not asking for the costs for these proceedings. That is the way to go in a delicate relationship like that between parents and a school. I therefore endorse the petitioners' attitude. Although they have not obtained the majority of their prayers, they remain the victors. The size of the prize does not matter. Ideally they were entitled to the costs of the proceedings. Since they have declined an award of costs, the appropriate order in the circumstances is to ask the parties to meet their own costs of the proceedings. It is so ordered.

Dated, signed and delivered at Nairobi through email/virtually this 3rd day of September, 2020

W. Korir,

Judge of the High Court