REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 162 OF 2020

CIS (Suing as Parents and Guardians of student minors

currently schooling at Crawford International School)….....PETITIONERS

-VERSUS-

THE DIRECTORS, CRAWFORD INTERNATIONAL SCHOOL....1ST RESPONDENT

CRAWFORD INTERNATIONAL SCHOOL.....2ND RESPONDENT

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

THE CABINET SECRETARY,

MINISTRY OF EDUCATION.....4TH RESPONDENT

JUDGEMENT

The Petition

1. The petitioners, CIS (Suing as parents and guardians of student minors currently schooling at Crawford International School), originated their case through a petition and an application under certificate both dated 12th May, 2020 supported by the affidavit of Peter Othieno. They alleged violation of their constitutional rights and those of their children through the introduction of a virtual learning program by the 1st Respondent, the Directors of Crawford International School and the 2nd Respondent, Crawford International School (hereinafter also referred to as Crawford or the School). The 3rd Respondent, the Attorney General, is the principal legal adviser of the national government whereas the 4th Respondent, the Cabinet Secretary, Ministry of Education, is responsible for education.

2. The impugned virtual learning program was introduced by the 1st and 2nd respondents following closure of schools by the Government of Kenya as a result of the reporting of the coronavirus disease in Kenya. The coronavirus disease also known as Covid-19 has been declared a pandemic by the World Health Organisation.

3. The petitioners' case was that at time of the admission of their children they entered into agreements with Crawford that their children would study the British national curriculum leading to examination in the International General Certificate of Secondary Education (IGSCE). Various subjects and activities that were non-examinable were also on offer. These subjects and activities included sports; inter-house cultural events including drama, debating and verse-speaking among others; educational visits and trips; pastoral forums; parents/teacher consultations; lunch; computers; library; and swimming pool. It was the petitioners' contention that the stated subjects and activities are not included in the online or virtual classes offered by the 1st and 2nd respondents yet they continue to levy full fees.

4. It was averred that the act of the 1st and 2nd respondents of offering the online or virtual classes at a rate almost similar to what the School charges when it is open was unfair, unconscionable and unlawful and contravened the petitioners' consumer rights protected under Article 46 of the Constitution. The petitioners further averred that under the Consumer Protection Act, 2012 ('CPA') it was unlawful for schools to mislead parents by failing to give them the information they needed to make decisions, especially if that failure caused parents to make decisions they would not have otherwise made. In their view, the 1st and 2nd respondents failed to provide the information needed by parents to make informed choices or provided the same late or in an unclear manner. Their case was that the pre-contract information supplied by the 1st and 2nd respondents to parents was binding and any changes would necessarily need their express consent and this applied to changes which took place between the disclosure of the information and the acceptance of the offer. It was their contention that the 1st and

2nd respondents failed to provide information upon switching to online learning whose cost is similar to the physical presence of their children at the School.

5. The petitioners also averred that the 1st and 2nd respondents have irredeemably failed to offer educational services with reasonable care and skill and had failed to comply with the pre-admission promises on the services to be provided to the petitioners. They further averred that as a result of the unparalleled and deleterious effects on businesses by the Covid-19 pandemic, schools of the same parity with Crawford in systems, curriculum and fees structures had considered requests by distressed parents and granted considerable fee discounts of up to 50%.

6. The petitioners pleaded with the Court to intervene and direct the Cabinet Secretary for Education 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 BEA. The Court was also asked to order the 4th Respondent 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 virtual or online learning so as to meet the basic education standards under the Constitution, international conventions and the BEA. The petitioners also sought a structural interdict directed at 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, on the regulation and control of school fees charged by private schools and schools offering international curriculum in Kenya.

7. Additionally, the petitioners sought a declaratory order that the 1st and 2nd respondents are obliged by law and Article 53(2) of the Constitution to consider the best interests of children whenever they make any policy decisions 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 new policies.

8. The 1st and 2nd respondents were also accused of violating Section 55 of the BEA by failing to establish a parents association for the School or denying the petitioners an opportunity to establish the association. The Court was therefore asked to issue an order compelling the 1st and 2nd respondents to establish a parents' association. The petitioners were clear in their petition that they do not seek costs for the proceedings.

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

9. In response to the petition the 1st and 2nd respondents filed grounds of opposition dated 13th May, 2020. They also filed a replying affidavit sworn on 28th May, 2020 by Lucy Simiyu, a counseling psychologist and organizational development practitioner with 23 years' experience. Other pleadings filed by the 1st and 2nd respondents were a replying affidavit and a supplementary affidavit sworn on 28th May, 2020 and 6th June, 2020 by Jenny Coetzee, the Managing Director of the 2nd Respondent. Finally, they filed a supplementary affidavit sworn on 6th June, 2020 by Marlene van der Wath, a teacher trainer and curriculum developer at Crawford.

10. The 1st and 2nd respondents' case was that the petition was incompetent, legally and factually unfounded, hopelessly misconceived, without merit, *mala fides* and ought to be dismissed with costs. The petitioners were accused of failing to disclose their identity to the Court hence not demonstrating the nexus between themselves and the 1st and 2nd respondents. It was further asserted that the petitioners did not identify any provisions of the Constitution violated by the 1st and 2nd respondents or demonstrate in any manner whatsoever how their constitutional rights were violated. Additionally, the 1st and 2nd respondents asserted that the petitioners had not demonstrated that their individual contracts with the 2nd Respondent were entered into through coercion, fraud or misrepresentation by the 2nd Respondent.

11. It was also the 1st and 2nd respondents' assertion that the petitioners' claim was premised on alleged breach of contract and they had failed to demonstrate that there existed a constitutional issue over and above the contractual issue. According to the respondents, the petition raised no issues touching on the enforcement of fundamental rights or interpretation of the Constitution. On the petitioners' prayer for a 50% discount of fees, the 1st and 2nd respondents contended that the same was completely unjustifiable as the petitioners failed to explain how they arrived at the said figure.

12. In response to the petitioners' claim that the 1st and 2nd respondents did not engage the petitioners before introducing the new mode of teaching, it was averred that the 2nd Respondent has continuously engaged the parents. It was deposed that as early as mid-March the School conducted a survey to ascertain whether online learning would be a viable option in light of the directive issued on 16th March, 2020 by the Government of Kenya to close schools. According to the 1st and 2nd respondents, the survey confirmed that 87% of the parents, including the petitioners, had access to computers and internet, and it was on the basis of this survey that the 2nd Respondent rolled out its online teaching program in the last few days of the second trimester. The 1st and 2nd respondents additionally averred that their teachers attended rigorous training workshops, conducted by the ADvTECH Group of which the 2nd Respondent is a member. The training focused on testing and strengthening virtual teaching capacity on the Microsoft Teams platform.

13. The 1st and 2nd respondents testified that through a letter dated 16th April, 2020, they apprised the parents of the training workshops. The teachers were also retained in School during the holidays to ensure all students had access to the Microsoft Teams platform and the parents were even trained on how to log into the system. Further, that the teachers also posted information and guidelines pertaining to digital learning and syllabus coverage in the virtual classrooms before the School reopened for third trimester. This, they asserted, was done with the sole aim of enabling students to get the full benefit from all learning activities. They also stated that the parents were furnished with six-week overviews and lesson plans for each subject were published at two weeks intervals to assist parents in understanding the pathway to be followed in lessons. Be that as it may, the 1st and 2nd respondents deposed that the parents who included the petitioners had on 19th April, 2020 commended Crawford's initiative to put in place a usable online learning platform save for one Mr. Sunil Shah who expressed dissatisfaction with the school fees rebate and the absence of a parents' body.

14. The 1st and 2nd respondents added that the School promotes a culture of consumer awareness by constantly involving the parents in digital literacy and engaging them with a view to offering the highest attainable standard of education during the Covid-19 containment period. According to the 1st and 2nd respondents, the need to change overviews and/or learning guides is, in any case, best identified by the individual subject teacher and effected in the best interests of the students. They consequently asserted that the input or approval of parents was therefore not necessary and neither did the changes visit any harm upon the petitioners or the children.

15. The 1st and 2nd respondents warded off the allegation that e-learning was inferior and asserted that the Microsoft Teams platform adopted by the School was in line with the School's recognition of use of technology for communication, teaching, learning and assessment, as expressed in its Digital Citizenship Guidelines. They averred that the world over, corporates, governments and individuals had opted for the Microsoft Teams platform to carry our mission-critical work and this was informed by its security and privacy features. The 1st and 2nd respondents stated that these were the two main considerations the School took into account when determining the best interests of the students who are all minors. Further, that the 2nd Respondent, a Microsoft Showcase School, was part of a global community of schools engaged in digital transformation to improve teaching, learning and assessment of students.

16. The 1st and 2nd respondents also stated that online learning was especially beneficial for students with a history of mental health challenges. According to the 1st and 2nd respondents, virtual schooling was helpful as it allowed the students to maintain a positive mindset during the Covid-19 pandemic by enabling them to interact with their schoolmates and teachers.

17. The 1st and 2nd respondents rejected the allegation that online education had made parents to incur additional expenses. They averred that there was no additional expenditure since students posted their work online hence making scanning or printing unnecessary. Also that the students could call and chat with their teachers through the Microsoft Teams platform. Further, that the platform had a feature that allowed students to raise their hands hence giving them an opportunity to ask questions like they would in a physical class. It was additionally averred that the features of the application allowed teachers to maintain control and order during the lessons and the students still received personal attention during lessons as well as one-on-one support lessons outside of the regular class lessons. Consequently, the petitioners' allegation that the 1st and 2nd respondents had failed to offer educational services with reasonable care and skill was dismissed as unfounded.

18. The 1st and 2nd respondents stated that they had acceded and continued to accede to requests by parents for individual fees payment plans. It was deposed that in any case the parties to the contract had the option to cancel the contract by way of a three months' notice, and the School had offered to waive the notice period should parents elect to leave for more affordable alternatives or should they opt out of the e-learning program.

19. In response to the petitioners' comparison of Crawford with other schools, the 1st and 2nd respondents contended that it was impossible to compare one business to another as every business operated within its own specific environment and had its own peculiar clientele, size and maturity. They stated that Crawford, unlike other schools, was a newly established institution with only 425 students across 14 grades and was charging substantially lower fees by up to 50% compared to what other school were charging before the outbreak of the coronavirus disease. It was further their testimony that Crawford operated on a completely different business model as it was a fixed-cost business and over 70% of its revenue utilized to pay staff salaries with services like maintenance, security, cleaning, transport and other equipment being outsourced. Additionally, the 1st and 2nd respondents asserted that the 2nd Respondent offered a completely parallel curriculum which included leadership, STEAM education, cryptocurrency education, philosophy for children, Mandarin, design and technology, drama, music and arts. Lastly, that were the 2nd Respondent to discount its fees to the proposed percentage, it would not be in a position to offer the same quality of services it has been offering. Based on the stated averments, the 1st and 2nd respondents asserted that other schools could not be said to be similar to the Crawford in systems, curriculum or fees structures as claimed by the petitioners.

20. The 1st and 2nd respondents deposed that there was general consensus among the parents and the students that the online classes were of substantial benefit to the students and that the quality of education so delivered by the 2nd Respondent met the standards promised to the parents at the point of admission. They averred that the petition was disruptive to the rest of the parents, the ongoing learning process and most importantly the students who were eager to proceed with the learning and assessment under the tutelage of their very capable and skilled teachers.

21. In closing, the 1st and 2nd respondents through annexure "JC 17" indicated a willingness to support the parents' initiative to form a parents' association.

22. The 1st and 2nd respondents exited the stage by asserting that the petitioners' case fell short of the threshold of a constitutional petition as it did not raise issues concerning enforcement of fundamental rights or interpretation of the Constitution. The 1st and 2nd respondents stressed that the petitioners had not disclosed any infringement of their rights. They therefore prayed for the dismissal of the petition in its entirety and asked for costs to be awarded to them.

The 3rd Respondent's Grounds of Opposition

23. 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 did not disclose any constitutional questions for the determination by this Court neither did it meet the principles on pleadings in constitutional petitions as enunciated in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** and augmented in **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**.

24. It was also the assertion of the 3rd Respondent that the issues raised in the petition arose from contractual obligations between private parties and formed a subject matter for litigation in an ordinary civil suit. Further, that the petition grossly offended 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 was misconceived, unmerited and an abuse of the Court's

process.

The 4th Respondent's Replying Affidavit

25. 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 were categorized into public schools which are schools established, owned or operated by the Government and included sponsored school, while private schools were those established, owned or operated by private individuals, entrepreneurs and institutions.

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

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

28. Dr. Belio deposed that the 4th Respondent had not suspended the academic calendar of private schools, which operate under international curriculum, such as the 1st Respondent. Further, that the 4th Respondent had no objection to online delivery of teaching as it was 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 had been put in place in order to ring fence the delivery of quality basic education in both public and private institutions.

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

The Petitioners' Rebuttal

30. In rebuttal, the petitioners filed a replying affidavit sworn on 4th June, 2020 by Mr. Peter Othieno. In response to Lucy Simiyu's affidavit, he deposed that Ms. Simiyu had not tendered any evidence in support of her averment that she was a counseling psychologist. Further, that her averments demonstrated a gross violation of the confidentiality of the minors.

31. In response to Dr. Belio's affidavit, Mr. Othieno deposed that whereas the Principal Secretary acknowledged the mandate of overseeing the establishment of a parents-teachers association under Section 55(3) of the BEA, this had not been undertaken by the 2nd Respondent hence an admission of abdication of statutory duty. Further, that the 4th Respondent had not undertaken the mandate under Section 52(1)(g) of the BEA neither was it shown that the teachers of the 2nd Respondent had been vetted. He additionally deposed that among the duties bestowed upon the Ministry of Education was the licensing and regulation of schools and therefore the relationship between the 2nd Respondent and parents ought not to be left to the parties.

32. In response to Jenny Coetzee's affidavit, Mr. Othieno deposed that this Court had jurisdiction to hear and determine their case. He further averred that a consumer may under Section 4(1) of the CPA commence proceedings on behalf of a class of persons or may become a member of such class of persons in proceedings in respect of a dispute arising out of a consumer agreement. He also deposed that Section 13 of the CPA provided the factors that may be taken into account in determining whether a representation is unconscionable.

33. Mr. Othieno averred that a survey conducted by the 2nd Respondent for the purpose of ascertaining the effectiveness of online learning and its implementation found that 75.8% of the respondents were not involved in the implementation process; that 60.4% of the respondents indicated the learners were getting distracted by non-related matters shared on the platform; and that 75.8% of the respondents confirmed that the School was not covering all the subjects like in normal learning sessions.

34. Mr. Othieno further averred that the increased role delegated to the parents in the online classes had not been compensated by way of fee rebate. Additionally, that the 2nd Respondent had failed to acknowledge the violation of privacy and the security concerns brought about by the online platform.

35. Mr. Othieno also deposed that the virtual learning which was introduced without consultation had resulted in higher costs for parents despite their increased roles in the new system of learning. He deposed that despite the changes in circumstances leading to a completely different contract between the parties, the 1st and 2nd respondents had continued to levy disproportionately high fees, retained exam fees for cancelled exams, and offered un-regulated and patched up online lessons without acknowledging the role of parents. He accordingly reiterated that the petition was merited and sought that it be allowed as prayed.

The Petitioners' Submissions

36. The advocate appearing for the petitioners filed written submission dated 6th June, 2020. Counsel urged 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.

37. It additionally submitted on behalf of the petitioners that the common features that this petition deals with includes little or no ability to negotiate terms of the contracts or adhesive contracts that are oppressive and purportedly binding to parents; and inadequate and unclear disclosure of important terms of the contract, particularly those which are weighed against the weaker party being the parents.

38. Counsel for the petitioners cited 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 decision 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.

39. Another authority cited in support of the petitioners' case 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 a secure and safe environment, and the right to education incorporates the provision of safe schools pursuant to Articles 21 and 21A of the Constitution. Counsel also referred to the case of **Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR** where Justice Lenaola (as he then was) 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.

40. Counsel 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.

41. It was further submitted for the petitioners that the Republic of India as a pacesetter 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'.

42. Citing Article 2(6) of the Constitution which provides that treaties or conventions ratified by Kenya shall form part of the law of Kenya, counsel 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.

43. It was also submitted on behalf of the petitioners 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. The petitioners, 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 set by the State.

44. It was 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 provides 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'.

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

46. Counsel for the petitioners further 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. Counsel similarly cited **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.

47. It was 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 was pointed out that Part II of the CPA particularly give 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 provide for radical sanctions against a supplier who engages in those acts.

48. Counsel cited the Court of Appeal case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('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.

49. Counsel also 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 the broader principle of contractual fairness.

50. 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.

51. Counsel accordingly 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.

52. 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.

53. 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.

54. Counsel submitted that whereas Section 3(4)(a) of the CPA provides the purposes of the Act, 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.

55. 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. Counsel accused the 1st and 2nd respondents of violating the CPA by failing to give the petitioners the correct information to enable them make the appropriate decisions.

56. It was further the petitioners' submission that the pre-contract information supplied by the 1st and 2nd respondents to the parents was binding, and any changes made would necessarily need their express consent. This, they stated, applied to any changes that occurred between the time the information was 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 the virtual school.

57. 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 the 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.

58. On the need to regulate school fees for private schools, counsel relied on the Indian Gujarat Self-Financed Schools (Regulation of Fees)

Act 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.

59. On the availability of the orders sought, counsel submitted that Kenyan courts have granted structural interdicts in cases touching on the right to education. Accordingly, 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, within thirty days, file 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.**

60. 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.

61. On the issue whether the contract between the School and parents fall 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 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.

62. Counsel for the petitioners similarly cited **Jai Kumar Mittal v. Brilliant Tutorials (2005) 4 CPJ 156 (NC): (2006) 1 UC 43,** for the holding that the 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. 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. A claim against the respondent was upheld on the ground that since the students had paid huge donations and also made an investment of time and energy there was deficiency in service and the complainants were entitled to refund of the donation and compensation with interest and cost of the proceedings.

63. 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 the educational institutions. According to counsel, 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 well deserved.

The 1st & 2nd Respondents' Submissions

64. Counsel appearing for the 1st and 2nd respondents filed written submission dated 7th June, 2020. Counsel submitted that there are three issues for the determination of the Court. On the issue whether the Court has jurisdiction to hear the matter, counsel cited the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where it was held that jurisdiction is everything and a court without jurisdiction has no power to make one more step but down its tools. Counsel submitted that this Court has no jurisdiction to hear the matter since the petitioners have averred in their pleadings that their relationship with the School is contractual and the petition is premised on an alleged breach of contract as pleaded at paragraph (g) of the application for conservatory orders. It was counsel's submission that the petitioners are merely seeking determination of private contractual rights, and this can only be achieved through a formal law suit and not a constitutional petition.

65. Counsel for the 1st and 2nd respondents further stated that since the petition is primarily premised on Article 46 of the Constitution, Section 84(1) of the CPA provides that a **"consumer may commence the action in the appropriate court."** According to counsel this is not the "appropriate court" referred to in Section 84(1) of the CPA. On this point, reliance was placed on the South African case of **Artwell Francis Mlawuli v St. Francis' College (Marianhill Secondary Independent School) [2016] ZAKZDHC 17 (20 April 2016),** where a challenge against a decision excluding a child from a school was dismissed with the Court holding that the relationship between the school and its learners is contractual and the school is not obliged to accept anyone. The cases of **KAPI Ltd & another v Pyrethrum Board of Kenya [2013] eKLR** and **J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School [2018] eKLR** were also cited in support of the argument that a constitutional petition is not an appropriate tool for determining contractual disputes.

66. Counsel for the 1st and 2nd respondents proceeded to submit that the petitioners herein entered into private service contracts with the 2nd Respondent and if there is any breach as alleged, it should be litigated in a substantive civil suit where the parties will get a chance to cross-examine each other. In his view, this Court cannot determine this dispute without hearing witnesses and having them questioned on the very many documents annexed to the bulky affidavits filed in the petition. According to counsel, important questions such as whether the School is providing all the services promised to the parents; the effectiveness of online classes; the actual costs the School is incurring in providing online learning; and whether the fees currently being charged are commensurate to the services being provided can only be determined after an oral hearing.

67. It was further submitted that the CPA at Section 84 envisages the civil court as the appropriate court and this Court should be hesitant to

handle this petition because the petitioners did not clearly demonstrate that the civil court was inadequate for resolution of their grievances. Reliance was placed on the decisions of the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR** and **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** as stating the principle that where there exists another sufficient and adequate avenue to resolve a dispute, a party should resort to that avenue instead of filing a constitutional petition. Counsel therefore urged this Court to embrace the constitutional avoidance doctrine which was also pronounced in the cited Court of Appeal decisions.

68. On the issue as to whether the petitioners have met the threshold of a constitutional petition, counsel submitted that even if the Court were to find that it has the requisite jurisdiction to entertain this petition, the petitioners have not met the threshold of a constitutional petition. Counsel agreed that every court case, regardless of its nature, does indeed have a constitutional underpinning. It was, however, urged that as was stated by J. M. Mativo, J in **Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Another [2017] eKLR,** not every dispute ought to be filed in the Constitutional Division of the High Court unless it raises constitutional issues.

69. The decision of J. M. Mativo, J in **James Kuria v Attorney General & 3 others [2018] eKLR** was referred to as defining a constitutional question as an issue whose resolution requires the interpretation of a constitution rather than that of a statute. In that case, the learned judge cited with approval the holding in the South African case of **Fredericks & Others v MEC for Education and Training, Eastern Cape & Others [2002] 23 ILJ 81 (CC)** that a constitutional matter must be gleaned from a reading of the Constitution itself and can include the constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. According to counsel for the 1st and 2nd respondents, the instant petition does not raise constitutional issues since Articles 36 and 46 upon which the petitioners premised their grievances have been given effect by Section 55(3) of the BEA and the CPA respectively. These statutes according to counsel were more than capable of addressing the petitioners' grievances.

70. It was further submitted that it is trite law that in every case where a statute enacts or prohibits a thing for the benefit of a person, the person shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law as was espoused best by Sir John Comyns in **A Digest of the Law of England (5th ed, 1822) 442.** Also relied on was the case of **Groves v Lord Wimborne [1898] 2 QB 402**, cited with approval in **James Kuria (supra)** for the proposition that where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

71. According to counsel for the 1st and 2nd respondents, in **Hakizimana Abdoul Abdulkarim (supra)** which was a constitutional petition founded on Article 46 of the Constitution, the Court held that the petition did not disclose constitutional issues as it alleged breach of the duty of care or a breach of an implied term in a contract and the claim needed to be proved by way of evidence and facts, and therefore the petitioner's redress lay in a tort or breach of contract claim in a civil court. This Court was thus urged to reject the petition on the ground that petitioners failed to utilize the dispute resolution mechanisms provided under the CPA and the BEA.

72. Counsel for the 1st and 2nd respondents further submitted that even if the petitioners' allegation that the 2nd Respondent had committed an unfair trade practice is correct, the petitioners would still not find remedy in this Court. Reliance was placed on the case of **Consumer Federation of Kenya (COFEK) Suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v Commercial Bank of Africa & 2 others [2018] eKLR,** where Fred Ochieng', J held that if the petitioner had proved the assertions of false representation or unfair business practice, the same would not amount to a violation of the Constitution as the matters complained of by the petitioner did not meet the threshold of a constitutional petition.

73. On the issue as to whether the rights of the petitioners have been violated, counsel submitted that the petitioners have not established that their rights were violated. The decision of **Anarita Karimi Njeru v Republic [1979] eKLR** was cited as setting the threshold to be satisfied by an applicant who seeks to move the Court to determine whether or not his rights have been violated or are likely to be infringed. According to counsel, the petitioners had not specified or particularized the alleged infringement nor did they adduce evidence to show that how the 1st and 2nd respondents frustrated the formation of a parents' association. It was counsel's submission that on the contrary, the School is on record supporting the formation of a parents' association and had committed to do so within a set timeframe.

74. Turning to the alleged violation of Article 46 of the Constitution and the CPA, counsel observed that the School was accused of unfair business conduct and practices and that the petitioners were given *'take it or leave it'* or adhesive contracts. It was counsel's firm contention that the allegations have not been substantiated in the petition or the affidavits filed by the petitioners. Be that as it may, counsel submitted that the School is a private school, otherwise known as an 'independent school' in South Africa and the principle of informed choice is applicable. Counsel stated that this principle was best espoused in the South African case of **St. Charles College v. Henry Louis Andre Du Hecquet De Rauville – In the High Court of South Africa Kwazulu-Natal Division, Pietermaritzburg**, where the Judge stated that the respondents had the choice, if they so wished, to enroll their sons at a public school and thus would have avoided their predicament. It was submitted that it was further held in the said case that the respondents could exercise the choice of sending their sons to an independent school because they enjoyed a higher economic status than the majority of parents who chose to send their children to public schools.

75. Counsel additionally submitted that the options available to the petitioners notwithstanding, the School had put in place measures to ensure that the parents were still able to secure their children's access education at the School by allowing them to make fee payment plans. Counsel, however, stressed that the petitioners made informed choices of enrolling their children at the School fully aware of the financial implications and were not coerced into signing their contracts with the School nor were they forced into the ongoing e-learning program. Furthermore, it was asserted that the 1st and 2nd respondents acknowledge, protect and give effect to the students' right to education and the very act of moving learning to the Microsoft Teams platform was informed by the need to keep providing education to the children even when the circumstances under which that service was formerly provided had drastically changed. The School, in counsel's view, undoubtedly showed its adaptability to the prevailing circumstances such that it was able to continue providing learning for 98% of its students in an easily accessible manner.

76. Counsel for the 1st and 2nd respondents appreciated the holding in the South African case of **NFM v John Wesley School & Darren**

Tarr, Case No. 4594/2016 that independent schools must act in a manner that minimizes any harm on the leaner's right to basic education. However, it was submitted that the petitioners' grievance about additional roles in the education of their children goes against the prevailing notion which requires parents to be more involved in their children's learning.

77. It was further submitted by counsel for the 1st and 2nd respondents that global agencies like UNICEF are leading initiatives geared towards sensitizing and supporting parents with a view to optimizing children's learning. It was also submitted that it is becoming increasingly clear, as can be seen from the Competency Based Curriculum rolled out in Kenya, that learning is not the sole responsibility of the teacher. The 1st and 2nd respondents stated that there is an urgent need for partnership between parents and teachers to ensure the students derive as much benefit from education as they can. The Court was accordingly urged to dismiss the petition. Counsel urged that costs be awarded to the respondents since the petition did not raise issues of public interest.

The 3rd & 4th Respondents' Submissions

78. 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 that constitutional issues include 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.

79. 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 fall within the realm of private service contracts capable of being determined under the alternative existing mechanism for redress in civil law. 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 statutes such as the Law of Contract, 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.

80. On whether the rights of the petitioners were violated, counsel submitted that the fundamental principles established in **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272** requires constitutional petitions to 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 did not provide particulars of the alleged violations or state the manner of the alleged infringements by the State.

81. On the issue whether the petitioners were entitled to the reliefs sought, counsel submitted that the prayers sought against the 4th Respondent were 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.

82. 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. Furthermore, it was 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**.

83. 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 contract would contravene the long standing principle of privity of contract.

84. 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.

Analysis and Determination

85. I have carefully considered the pleadings and submissions and in my view, the Court is called upon to determine the following issues:

a) Whether this Court has jurisdiction to entertain the petition; and

b) Whether the petitioners' constitutional rights were violated or threatened with violation, and if so, what are the appropriate remedies?

86. By citing the decision in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1,** the 1st and 2nd respondents appeared to suggest that this Court has no jurisdiction to touch this matter at all at all. This was, however, quickly followed by a climb down to the position that the dispute is not one requiring the interpretation and or the application of the Constitution and the matter should therefore be dealt with as a commercial dispute. This latter argument does indeed raise an issue that needs to be determined by this Court.

87. The question therefore is whether the petition raises constitutional issues. The respondents 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 nor are the injuries allegedly suffered clearly outlined. The principle of law established in **Anarita Karimi Njeru (supra)** and stressed in **Mumo Matemu (supra)** provides 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.

88. The importance of complying with the rule established in the cases cited above was outlined 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."**

89. Does the instant petition comply with the stated principle? The answer is in the affirmative. The petitioners allege 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 accuse 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 disputes. The objection by the respondents to the petition on this ground therefore fails for lack of merit.

90. 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 rights and freedoms enshrined in the Constitution. Litigants are indeed discouraged from using constitutional petitions to prosecute matters which can be pursued through other statutory procedures and there is no shortage of decided cases on this principle of the law.

91. 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."**

92. 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 rights….**
>
> **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."

93. In the already cited case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** the Supreme Court did indeed affirm the legal principle that forbids the engagement of the Constitution in all manner of litigations. The Constitution should only be resorted to when it is necessary to do so. Otherwise disputes should be decided within the boundaries of the procedures provided by the statutes applicable to those disputes.

94. A perusal of the pleadings and submissions made before this Court disclose that the respondents are indeed correct that at the core of this matter is the claim by the petitioners that the 1st and 2nd respondents breached the contracts entered between the School and petitioners for provision of education services. Nevertheless, the matter will not be fully resolved by the determination of the contractual dispute. It is noted that the petitioners have also alleged violation of their consumer rights by the 1st and 2nd respondents. 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 the Court arose from contractual relationships, they also call for the interpretation of the Constitution.

95. 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 a constitutional petition.

96. 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. It is my view therefore that this case attracts the application of the principle enunciated by Lenaola, J (as he then was) 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."

97. I understand the learned Judge to be saying that the Court should not sheath the constitutional sword if the other available remedies are inadequate. In other words, a litigant should not be cast into the wilderness and left bereft of remedy in the enforcement of the principles enunciated in **Gabriel Mutava & 2 others (supra).** I am of the view that in the quest to do substantive justice as commanded by the Constitution, courts should not unnecessarily deny litigants the constitutional route to the garden of justice. To deny a party who has outlined constitutional issues an opportunity to ventilate those issues will defeat the spirit of justice and fairness envisaged by the Constitution. In the circumstances, I find that no basis has been established to warrant the abandonment of this petition by the Court. That is to say that the argument by the respondents that the petitioners' case should be dismissed for lacking the hue of a constitutional dispute is found to be without merit and rejected.

98. I will now turn to the merits of the petition. 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).

99. The rights of consumers find firm root in Article 46 of the Constitution as follows:-

"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."

100. It is important to appreciate from the outset that Article 46(3) of the Constitution stipulates that the provisions of the Article applies to goods and services offered by public entities or private persons. The Constitution therefore directly applies the obligations created therein to dealings between private persons.

101. 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."**

102. The lawmaker actually proceeds to provide interpretive principles at Section 3(1) and (2) of the CPA thus:

> *"(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*

103. Section 3(4) goes ahead to provide the purposes of the Act as follows:-

> **"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."*

104. The CPA is therefore a law that seeks to implement the rights created by Article 46 of the Constitution and the lawmaker ensured that the manner of interpreting the law was provided. The term 'consumer' is clearly defined in Section 2. 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. The 1st and 2nd respondents' attempt to deflect the application of consumer rights to the dealings between them and the petitioners finds no support in the evidence that was adduced before the Court. The 1st and 2nd respondents repeatedly stressed the existence of contracts between them and the petitioners. On their part the 3rd and 4th respondents consistently asserted that they cannot wade into the issue of fees charged by private schools as the same falls into 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.

105. The petitioners hold the view that the contracts should be viewed from the prism of the Constitution. The respondents are all 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. They proceed to urge the Court not to interfere in contractual disputes and 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."**

106. However, the same Court of Appeal appreciated in the case of **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('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.LO.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."

107. 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 persons. 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 Enwicklungsgellschaft ('Deg') & others [2011] eKLR** did indeed appreciate that the arrival of the 2010 Constitution had shifted the ground on this particular issue.

108. That courts have authority to infuse fairness in unconscionable contracts was also affirmed by the Court of Appeal in **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR** when it was stated that:-

"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, *commercially unreasonable, and grossly unfair given the existing circumstances of the case…"*

109. 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]

110. Relevant to this case was 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.

111. 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 Musjid 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 Musjid 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."**

112. A perusal of the pleadings and submissions made in this petition confirm that there is no dispute about the constitutionality of online education. It would indeed have been absurd for the petitioners to attempt to stand on the path of the unstoppable march of technology especially during this period of history when the Covid-19 pandemic has completely changed how human beings interact. It is also noted 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"**

113. In my view, the petitioners complain that online learning was introduced without consultation. They also believe it is cheaper for the School and expensive to them compared to face-to-face teaching and they ought to have been given substantive discounts when the new mode of learning was introduced. Of course there is the issue of the absence of a parents' association in the School.

114. It is important to appreciate from the outset that since the petitioners are the ones who alleged violation of the Constitution by the respondents, they had a duty to prove their allegations. This requirement was confirmed in the already cited case of **LTI Kisii Safari Inns Ltd & 2 others (supra)** when the Court of Appeal (per J.W. Onyango Otieno, JA) held that:-

> **"In the cases of Royal Bank of Scotland Plc vs. Etridge (No.2), <u>Barclays Bank Plc vs. Hanis and another, Midlan Bank Plc vs. Wallace and another,</u> <u>National Westminister Bank Plc vs. Gill and another</u>, UCB <u>Home Loans Corporation Ltd vs. Moore and another</u> (Conjoined Appeals); <u>Barclays Plc vs. Coleman and another, Bank of Scotland vs. Bennet and another and Kenyon Brown vs. Desmond Banks & Co,</u> all reported as heard together and reported as <u>Royal Banks of Scotland vs. Etridge</u> (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 be 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.""

115. The petitioners objected to the discount extended to them by the 1st and 2nd respondents on the grounds that the School had made savings subsequent to the alteration of the mode of teaching and that the teachers' responsibilities had been shifted to parents forcing them to incur more expenses. According to the petitioners, the School had violated their rights as consumers by offering online classes at almost the same cost to what was being charged when the School was in full session. The petitioners contended that the 1st and 2nd respondents also violated Article 46 of the Constitution by failing to provide them with the necessary information that would have enabled them make the appropriate decisions.

116. 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%. The petitioners also questioned the quality of virtual learning hence their prayer that the 3rd and 4th respondents should be asked to find out whether online learning meets the constitutional and statutory requirements for basic education.

117. The 1st and 2nd respondents answered each and every allegation made by the petitioners. They asserted that the petitioners had not demonstrated that their individual contracts with the 2nd Respondent were entered into through coercion, fraud or misrepresentation by the 2nd Respondent.

118. As for the allegation by the petitioners that there was no consultation prior to the introduction of online learning, the 1st and 2nd respondents testified that engagements commenced in mid-March 2020 when the School conducted a survey to ascertain whether online learning would be a viable option in light of the directive issued on 16th March, 2020 by the Government of Kenya to close schools. The findings of the research were disclosed to the Court. The 1st and 2nd respondents also stated that the teachers, parents and students were all trained on online learning. Evidence of training was supported by the production of a letter dated 16th April, 2020.

119. The 1st and 2nd respondents explained at length why they opted to use the Microsoft Teams platform to deliver the lessons. The 1st and 2nd respondents added that the School promotes a culture of consumer awareness by constantly involving the parents in digital literacy and engaging them with a view to offering the highest attainable standard of education during the Covid-19 containment period.

120. The overwhelming evidence placed before the Court by the 1st and 2nd respondents was not challenged by the petitioners. The only conclusion this Court can reach is that there was adequate consultation and dissemination of information before and during the implementation of the virtual learning program. It is appreciated that the schools were shut down abruptly and the 1st and 2nd respondents had an obligation to meet their part of the bargain in the changed circumstances considering that they were offering international curriculum which was not affected by what was happening in Kenya.

121. The petitioners did not adduce any evidence in support of their claim that e-learning is inferior to face-to-face teaching. It was not sufficient for them to simply aver that online learning is inferior without backing the assertion with evidence. The School's position that introduction of online teaching was in line with its recognition of use of technology for communication, teaching, learning and assessment, as expressed in its Digital Citizenship Guidelines was not disputed by the petitioners. The averment by the 2nd Respondent that it is part of a global community of schools engaged in digital transformation to improve teaching, learning and assessment of students was not challenged by the petitioners. It can therefore be inferred that Crawford has expertise in delivery of teaching through digital platforms. The petitioners' claim that virtual education is of poor quality cannot therefore be accepted considering that it is not the content of the curriculum that changed but the mode of its delivery. This is in addition to the 1st and 2nd respondents' undisputed deposition that there was general consensus among the parents and the students that online classes were of substantial benefit to the students and that the quality of education delivered by the 2nd Respondent met the standards promised to the parents at the point of admission.

122. The 1st and 2nd respondents disputed the petitioners' assertion that parents were incurring additional expenses under the new mode of teaching. They averred that there was no additional expenditure since students posted their work online hence making scanning or printing unnecessary. The 1st and 2nd respondents also stated that they had acceded and continued to accede to requests by parents for individual fees payment plans.

123. According to the 1st and 2nd respondents it is impossible to compare one business to another as every business operates within its own specific environment and had its own peculiar clientele, size and maturity. They stated that Crawford, unlike other schools, was a newly established institution with only 425 students across 14 grades and was charging substantially lower fees by up to 50% compared to what other school were charging before the outbreak of the coronavirus disease.

124. The submissions by the 1st and 2nd respondents explain why it is difficult for the Court to determine that the discount extended to the petitioners by the School is inadequate. First and foremost, the petitioners did not adduce any evidence in support of their claim that the

discount offered was unreasonable. Second, 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 must 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 results.

125. This takes me to the prayer for an order directing the School to reduce its fees. This prayer should fail on two grounds. 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 a 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.

126. 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 1st and 2nd respondents' averment that their fees were 50% less than that charged by other schools of the same parity before the pandemic was not disputed by the petitioners. The petitioners have therefore failed to convince this Court that it can fix the fees chargeable by the 1st and 2nd respondents.

127. 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 to make profits from their investments. 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.

128. 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 weaknesses cannot be applicable 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.

129. It is a correct statement of the law that 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, the petitioners did not establish that the fees they pay are grossly excessive compared to fees levied by schools offering similar standard of education. All the other factors provided by sections 12 and 13 of the CPA that the Court should take into account in determining whether a contract is poisoned by false representation and unconscionable representation have not been established by the petitioners.

130. 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 interest of a child have not been infringed. It is therefore not necessary for this Court to consider the alleged violation of these other rights.

131. 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 of 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."**

132. The Court was urged, based on Indian jurisprudence, to order the 3rd and 4th respondents to prepare and submit to the National Assembly a Bill 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 with the suggestion 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.

133. 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.**

134. 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 received no response. The compulsive orders the petitioners seek are in the nature of orders of mandamus. For the petitioners to succeed, they therefore needed to establish that they have asked the two respondents to execute identifiable mandates and they have failed to do so hence the need for the Court to step in.

135. 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.

136. 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. The 1st and 2nd respondents have indicated their willingness to establish a parents' association as per the law. There is no need to say more.

137. 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.

138. 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 parents of the 2nd Respondent. 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.

139. 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 policies or changes.

140. In their pleadings the petitioners clearly indicated that are not asking for costs for these proceedings. That is the way to go in a delicate relationship like that between the petitioners on the one hand and the 1st and 2nd respondents on the other hand. I 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 are entitled to costs. 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