



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**CONSTITUTION PETITION NO.30 OF 2020**

**IN THE MATTER OF: A PETITION BY M.H, M.G.J, & J.C.G(Suing on their own accord and on behalf of OAMPGA Parents and Guardians of Minor Students enrolled in Oshwah Academy, Mombasa)**

**AND**

**IN THE MATTER OF: ARTICLES 10, 19, 20, 22, 23, 27, 28, 32, 33, 43(1) (F),  
46, 47, 53, AND 258 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF : SECTIONS 4, 5, 9, 12, 13, 14, 15 AND 84 OF  
CONSUMER PROTECTION ACT, 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF : SECTIONS 3, 4, 5(2)(C) AND 7 OF THE FAIR  
ADMINISTRATION ACTIONS ACT, 2015, LAWS OF KENYA**

**AND**

**IN THE MATTER OF : BREACH AND THREATENED CONTINUED BREACH OF  
THE BILL OF RIGHTS UNDER ARTICLES 27, 28, 32, 33, 43(1)(F), 46, 47  
AND 53 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**1. M. H**

**2. M. G. J**

**3. J. C. G. (Suing of their own accord and on behalf of OAMPGA Parents and Guardians of**

**Minor Students enrolled in OSHWAL Mombasa).....PETITIONERS**

**AND**

1. NITIN PRAVINCHANDRA MALDE

2. MUKESH VELJI SAVLA

3. SAAJAN RAMESH SHAH

4. SUHAN RATILAL SHAH

5. DIPAL DHIRAJLAL SHAH

6. SHITAL SHANTILAL HARIA

7. BHARAT VELJI SHAH (All sued as OFFICE

BEARERS OF THE OSHWAL EDUCATION & RELIEF BOARD)

8. OSHWAL ACADEMY MOMBASA.....RESPONDENTS

### JUDGMENT

1. In a bid to contain the spread of **Novel Corona Virus**, the Government of Kenya just as its counterparts across the Globe, adopted a number of containment measures which included *inter alia*, the closure of all Schools in the Republic of Kenya with effect from **15<sup>th</sup> March 2020**. However, it must be appreciated that the closure was unanticipated and many parents had paid full school fees in conjecture that the terms would close smoothly as always planned.

2. Consequently, the Ministry of Education in collaboration with the Ministry of Health stepped up measures to facilitate learning during this period of closure of Schools. One of the solutions reached at and which has been received with mixed reactions, was the embracing of online learning. Some stakeholders in the education sector highly recommend the **virtual e-learning** while others vehemently oppose the same. This is the situation which among others has led to the instant Petition.

3. This **Petition** which is dated **9<sup>th</sup> May, 2020** was instituted on **11<sup>th</sup> May, 2020** by the Petitioners in their capacity as Stakeholders of the 8<sup>th</sup> Respondent's Institution by virtue of their enrollment of their children in the said Institution for purposes of provision of Educational Services.

4. The 1<sup>st</sup> to 7<sup>th</sup> Respondents are sued in their capacity as **Office Bearers** of the **Oshwal Education & Relief Board** as well as the owners and Managers of the 8<sup>th</sup> Respondent.

5. The 8<sup>th</sup> Respondent on the other hand is an Institution engaged in the provision of Educational Services within Mombasa-Kenya.

6. At this stage, there is need to draw attention to the fact that the 8<sup>th</sup> Respondent has offered education through online platforms to students enrolled to its curriculum. The Petitioners are aggrieved by some of the Respondents' decisions with regard to the **Virtual Learning** and have moved this court through the instant **Petition dated 9<sup>th</sup> May, 2020** seeking for the following reliefs:-

a) ***A DECLARATION*** that the Period between closure of the Respondent's School on **15<sup>TH</sup> March, 2020** and the normal reopening thereof as directed by the Ministry of Education is **NOT** a Normal School Term;

b) ***A DECLARATION*** that the Engagement of the Petitioners' Children by the Respondent during the period contemplated in Prayer(a) above does **NOT** amount to a Normal School Term;

c) ***A DECLARATION*** that the Petitioners' consumer rights guaranteed under **Article 46** of the Constitution of Kenya, 2010 as read together with the Consumer Protection Act, 2012, have been contravened by the Respondents;

d) ***A DECLARATION*** that the Petitioners' rights to Fair Administrative Action guaranteed under **Article 47** of the Constitution of Kenya has been contravened by the Respondents;

e) ***A DECLARATION*** that the Respondents are in contravention of the Petitioners' Rights to Equality Freedom from Discrimination, Human Dignity, Conscience, Belief, Opinion and Expression, Economic and Social Rights and their inalienable Rights of their Children as guaranteed under Articles 27, 28, 32, 33, 43(1)(f) and 53 of the Constitution of Kenya, 2012;

f) ***A DECLARATION*** that the provision of Education Services by the Respondents through the **VLE** System without consulting the Petitioners, providing them with sufficient and relevant information for decision making was an Unsolicited Service within the meaning of the Consumer Protection Act;

g) ***A DECLARATION*** that the Unilateral Decision of the Respondents on provision of Educational Services through **VLE** at the Fees **EQUAL** to those provided during Normal Learning Sessions save for a Conditional Fee Rebate as communicated through

the 8<sup>th</sup> Respondent's letter dated 21.4.2020 and/or Application of Fees paid by a number of Petitioners for the FULL SCHOOL YEAR 2019-2020 towards the Education Services provided in the VLE System was Illegal, Unconstitutional, Unreasonable and therefore Null and Void to the extent that:

- i. The same purported to vary the terms of the Consumer Agreement between the Petitioners and the Respondents through the provision of learning through a system which the Petitioners had not consented to;
  - ii. The same purported to induce the Petitioners to consent to the provision of learning through a newly introduced system at the same price as the one set for physical educational services during the school's normal sessions;
  - iii. The same purported to place any Parent or Minor Student who opted out of the Virtual Learning System at a disadvantage for their decision not to take up the unsolicited;
  - iv. The same is **DISCRIMINATORY** by its very nature.
- h) A DECLARATION that the subsequent Decisions of the Respondents to proceed to provide the Altered and/or Unsolicited services through VLE at an unfair price despite the Petitioners' concerns raised in that regard, was and remains a Breach of the Petitioners' Rights under Articles 27, 28, 32, 33, 43(1)(f) and 53 of the Constitution of Kenya, 2010 and went against the guiding principles for provision of Basic Education under Section 4 of the Basic Education Act, 2013;
- i) A DECLARATION that the Respondents' failure to establish a PTA and continue to operate as an institution for provision of basic education without having in place a PTA is a breach of Section 52(1)(a) as read together with Section 55(3) of the Basic Education Act, 2013;
- j) A DECLARATION that the Respondents are obliged by Law and under Constitution of Kenya, 2010 vide Article 53(2) to consider the Best Interest of the children in their Schools, whenever they make any policy decisions and/or changes that would affect the Children's School, including Virtue Learning and must consequently Consult and obtain Consent of their Parents before implementing the same;
- k) AN ORDER OF JUDICIAL REVIEW OF CERTIORARI bringing into this Court the Decision of the Respondents made on 21<sup>st</sup> April, 2020 and 27<sup>th</sup> April, 2020 and Quashing the same forthwith to the extent set out in Prayer (f) above;
- l) AN ORDER OF A PERMANENT INJUNCTION barring the Respondents from inducing the Petitioners into rendering Any Consumer Agreements for provision of Altered and/or unsolicited services and from Victimizing them or their children as a result of their refusal to partake of any such services;
- m) AN ORDER do issue DIRECTING the Respondents to immediately and without any further delay establish a Parents' Teachers' Association in terms of Article 36 of the Constitution of Kenya, 2010 and Section 55(3) of the Basic Education Act No.13 of 2012 Laws of Kenya;
- n) AN ORDER do issue DIRECTING the Respondents to engage the Petitioners directly or through the Parents' Teachers Association formed under Order (j) above and in line with the guiding Principles Under Article 10 of the Constitution of Kenya as well as Section 4 of the Basic Education Act on the matter of provision of Educational Services through virtual class or digital class, the pricing thereof and any other matters affecting the provision and management of education services at the School.
- o) AN ORDER FOR PAYMENT OF SUCH COMPENSATION for Breach of the Petitioners' Constitutional Rights as well as Damages under the Consumer Protection Act in such amount as this Honourable Court shall deem fit to determine;
- p) The costs of this Petition; and
- q) Such other or further Orders or Directions as the Court may deem fit to grant so as to meet the interests of Justice.

7. The Petition is supported by an Affidavit sworn by one N. N.(Nobin Habib) K dated 9<sup>th</sup> May, 2020 who identifies himself as swearing on behalf of the other parent. The same has 37 paragraphs and the main one is paragraph 34 which repeats the prayers sought for in the Petition. From their Affidavits, paragraph 1 of JACKLINE BWARI AMINGA'S Affidavit, the School is run by an Institution known and run by an Institution known as **OSHWAL EDUCATION AND RELIEF BOARD (OERB)** whose members are 1<sup>st</sup> to 7<sup>th</sup>

Respondents.

8. The Petition is opposed via two Affidavits sworn on 12<sup>th</sup> June, 2020 by JACKLINE BWARI AMING'A and one sworn on 22<sup>nd</sup> June, 2020 by NITIN TRAVIN CHANDRA MALDE.

9. The above being the case, they deny that **OAMPGA** place any part in the running of the School and therefore leaves **MOBIN HABIB** and **MOHAMED GACHERU JOSEPH** and **JOSEPH CHEGE GIKONYO** in their view as the Petitioners. Further information is that the relationship between parents and their children are one side and the 8<sup>th</sup> Respondent on the other side is contractual and Committee members run the School.

10. It is noteworthy to state that the **Petition** was filed simultaneously with an application **dated 9<sup>th</sup> May, 2020** in which the Applicant/Petitioner was seeking to temporarily Stay the implementation of the Respondents' decision to offer education via **VLE**.

11. The Petition as well as the application was first placed before the court on **11<sup>th</sup> May, 2020** and the court allowed the Interim Conservatory Orders for Stay. Aggrieved by the said Orders, the Respondents by an application dated **21<sup>st</sup> May, 2020** sought the court to set aside the same since, as averred therein, the Orders were besides the Petitioners, they were prejudicial to other stakeholders.

12. On **26<sup>th</sup> May, 2020** the parties submitted on how they wished to proceed with the applications and the Court appreciated the need to have the Conservatory Orders revisited. It was therefore directed that the Respondents continue delivering lessons to all the students who would be keen to log onto the online learning platform. On the other hand, the parents were directed to pay upto 50% of the term's fees. And owing to the urgency of the matter, the court further directed that parties abandon the interlocutory applications and proceed to file submissions with regard to the Petition set the highlighting of the same for **9<sup>th</sup> July, 2020**.

13. Set out hereunder are the respective pleadings and evidence by the parties.

#### **PETITIONERS' CASE**

14. The Petitioners are parents who have enrolled their children in the Respondents' Institution for purposes of provision of Educational Services. They instituted this Petition which is supported by an Affidavit sworn by **Mobin Habib**, the 1<sup>st</sup> Petitioner herein and expressed their case as follows:-

15. That in the period between **16<sup>th</sup> March, 2020** and **9<sup>th</sup> April, 2020** the Respondent by themselves or their agents offered educational services through "**virtual learning**" in a bid to ensure continuity of learning. As at **21<sup>st</sup> April, 2020**, the Respondents issued communication to the effect that save for the conditional rebate of between **Kshs.5,000/=** and **Kshs.10,000/=**, the Petitioners were required to pay school fees in full for educational services which were to be offered through Virtual Learning experience as a pre-condition to enrolment of their children in the said curriculum.

16. According to the Petitioners, the admission agreement with the Respondents does not include such terms as virtual learning experience being an exclusive mode of providing of educational services or at all, nor does it contain a future agreement or promise for the provision of educational services to the Petitioners through virtual learning without further solicitation.

17. The Petitioners contended that the offering of learning through **VLE** by the Respondents only caters for a negligible fraction of the wide threat of educational services provided at the **Oshwal Academy Mombasa** which is a material change in the Consumer Agreement between them and the Respondents. As a result of these concerns, the Petitioners aver that they wrote a "**Petition Letter**" dated **24<sup>th</sup> April, 2020** to the Respondents and expressed among other things that, the online learning during the period of **16<sup>th</sup> March, 2020** to **9<sup>th</sup> April, 2020** posed many challenges to the parents as well as the learners. That besides, there were compelling justifications for reduction of fees including the economic challenges brought about by the **Covid-19** crisis and that other Institutions were offering reasonable discounts to their consumers. Further, the Petitioners vide the letter called for consultations and dialogue or response from the Respondents within seven (7) days.

18. It was argued that the Respondents in demonstration of arrogance and in total lack of concern of the matters raised in the Petition Letter proceeded to launch the **VLE** and sent an unintelligible, unreasonable, shocking and strange response through the Principal of the 8<sup>th</sup> Respondent to the effect that the 1<sup>st</sup> to 7<sup>th</sup> Respondents would not address the petitioners' concern because the petition was not physically signed by the persons whose names appeared thereon.

19. The Petitioners further contended that the **VLE** has consistently experienced failures at multiple levels with the Petitioners being subjected to constant changes on the Platforms on which the Respondents' services are being offered. As such, it is averred that the Respondents are acting in total disregard or ignorance of the effects that **Covid-19** pandemic is having. That vide a demand letter dated **2<sup>nd</sup> May, 2020**, the Respondents sought to enforce the unilateral decision to provide educational services through Virtual Learning Educational (**VLE**) platforms and charge the Petitioners full school term fees as a pre-condition to their children accessing the platform.

20. In response to the said letter, the Petitioners further presented their demands which included inter alia, that the Respondents do terminate the provisions of education services through the **VLE** Platform pending the resolution of impasse subject thereof or in the alternative, the Respondent undertakes to provide remedial classes to the students at their own cost once the restrictions on physical attendance at school are lifted. The petitioners further suggested that the pricing of educational services on the **VLE** Platform be at reasonable cost in consultation with all stakeholders but its demands were never responded to.

21. The second aspect of the Petitioners' grievances against the Respondents offering education via **VLE** is that various schools offering similar curricula have considered requests by distressed parents and have granted considerable fee discounts of up to 50% but the Respondents have chosen to act in an arbitrary, high-handed and dis-respectful manner. As averred by the Petitioners, the Kenya Schools Association, (**KPSA**) to which the 8<sup>th</sup> Respondent is affiliated vide a letter dated **4<sup>th</sup> May, 2020** made it clear on a myriad of issues by stating that:-

**a) The period between closure of schools and when the normal reopening of schools occurs, has not been defined in law and is being treated as a health crisis break.**

**b) The Local Basic Education Curriculum is neither in 1<sup>st</sup> Term nor in 2<sup>nd</sup> Term, but on a HEALTH CRISIS BREAK and Continuous Engagement of Learners in learning Activities through Online Platforms is highly encouraged using AGE APPROPRIATE and Prescribed Content.**

c) *Any Learning Activity engaged in during the HEALTH CRISIS BREAK be treated as a SEPARATE PROGRAM/*

*CONTRACT from the Normal School Terms Programs/ Contracts, and be made OPTIONAL.*

22. As a result of the foregoing, the Petitioners contended that their constitutional rights have been breached in the manner described below:

a) *That the acts and/or omissions of the Respondents violate the provisions of the Consumer protection and by extension Article 46 of the Constitution for being unfair, unconscionable and unlawful. It is averred that section 9 of the Consumer Protection Act is contravened by providing material that materially alters the services contracted for without express consent. That, sections 5 and 12 are contravened by offering the said VLE at school fees that are exact amount payable when the school is in physical session and further by continuing to offer services which the 8<sup>th</sup> Respondent know are poor and unmerchtable. Finally that the Respondents have contravened Article 46 of the Constitution by refusing to address the concerns of the Petitioners and thereby denying the Petitioners the information they needed to make decisions with regard to VLE.*

b) *Since some of the parents had paid fees in full, it is the Petitioners' contention that the Respondents' actions of applying fees paid in advance in advance was contrary to the Petitioners' reasonable expectations and in absolute disregard for the minors' best interest and wholesome general development.*

c) *The actions of the Respondents violated section 4 of the Fair Administrative Action Act as well as Article 47 of the Constitution which guarantees everyone of the right to an administrative action which is procedurally fair and reasonable. By ignoring the Petitioners' concerns expressed in writing and by failing to accord the Petitioners an opportunity to be heard, the Respondents were in contravention of the said Section 4 and Article 47.*

d) *That the actions/Omissions by the Respondents violated the Petitioners' rights under the bill of rights and especially rights under guaranteed under Articles 27, 28, 32, 33, 43(1)(f) and 53.*

e) *As a consequent of the foregoing breaches, the Respondents' omissions violates the provisions of Section 4 of the Basic Education Act by lacking in transparency by declining to engage the parents who are primary stakeholders, discriminating against the Petitioners' Children because of their inability to attend the VLE or because their Parents are raising concerns.*

f) *That the Respondents' actions and/or omissions fail to promote good governance, participation and inclusive of parents and other stakeholder against Section 52 and 55 (3) of the Basic Education Act which requires the Respondents to establish a parents teachers Association. It is contended that the Respondents are taking advantage of the absence of the said association to manage the school in a manner that breaches the petitioners' right and departs from the national values and principles of governance under Article 10 of the Constitution.*

23. In his submissions, **Mr. Ngonze** counsel for the Petitioners extensively submitted on the issues canvassed in the petition and in a quick summary pointed out the concerns of the Petitioners on page 12 of his submissions which I have considered. Nonetheless, **Mr. Ngonze** first submitted on whether or not this court has jurisdiction to determine the matter. He submitted that the Petitioners are entitled to file a claim under Article 22 before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by Article 23 of the Constitution. The learned Counsel cited the finding in the Petition of **Satrose Ayuma & 11 Others...Vs...Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others, Petition No.65 of 2010 [2013]eKLR.**

24. He added that the Petitioners' consumer rights guaranteed under Article 46 of the Constitution are enforceable as constitutional rights, Counsel submitted that it cannot be denied that the contract between the parties is not subject to the Consumer Protection Act since the Respondent market themselves to attract students to their school and they charge tuition fees and other fees, so that failure to pay the said fees entitles them to refuse a child access to the classroom.

25. The learned Counsel for the Petitioners expressed the view that the varying of the terms of the consumer agreement by the Respondents is meant to disadvantage the parents/minors who opted out of the virtual learning system.

In summary the factual basis of the Petition is that the Petitioners were not consulted when the Respondents decided to expand the Virtual Learning to protect the children from **Covid-19** infections while at the same time keep them in class so as not to be disadvantaged against other International Students who had already adopted the Virtual Learning system.

26. The Petitioners were aggrieved because they felt that the Respondents had ignored their views and forged ahead with their agenda, and in particular attached a cost to the system. In their view, they believed the Respondents were offering low quality education and it would not be possible for them to offer extra-curriculae activities through Virtual Learning.

#### The Respondents case

27. The Respondents in opposing the Petition, filed three **Replying Affidavits** sworn on diverse dates but all filed on the **21<sup>st</sup> July, 2020.**

28. The first **Replying Affidavit** is sworn on **12<sup>th</sup> June, 2020** by **Jackline Bwari Aming'a**, the head of school of the 8<sup>th</sup> Respondent. She deponed that the parents association known as **OAMPGA** was unknown to her and the same does not represent the majority of the school parents with the 8<sup>th</sup> Respondent. She averred that in the process of admitting students, the 8<sup>th</sup> Respondent entered into a contractual agreement with the parents including the petitioners wherein the rights and obligations between them were clearly set. One of the said terms

is the clear set policy on the fees payable. Fees are payable by the first day of the term and reminders are sent to the parents as at the set deadlines to the effect that non-payment of fees will lead to the affected child not being permitted to class.

29. **M/s Jackline** also deponed that as at the time the government directive for closure of schools was issued, the 8<sup>th</sup> Respondent had three and half (3<sup>1/2</sup>) weeks to run to complete term two and therefore there was need to innovate so as not to bring term 2 to waste. Consequently, the 7<sup>th</sup> Respondent then kick-started a series of meeting and to ensure that the students of the 8<sup>th</sup> Respondent were not disadvantaged, it was unanimously agreed that the 8<sup>th</sup> Respondent should proceed to offer educational services to all students via Virtual E-Learning Platform (**VLE**) which has widely been adopted by the Kenyan Government in various sectors including the Judiciary. That the **VLE** went through a testing period in the three and a half weeks between **16<sup>th</sup> March, 2020** and **9<sup>th</sup> April, 2020** after which the board decided to roll out the Virtual Learning experience fully in the third term, to ensure that learning did not stop.

30. It is averred that the 8<sup>th</sup> Respondent then sent a series of communication to all the parents and students detailing the requirements and expectations that would be necessary to implement the **VLE**. The 8<sup>th</sup> Respondent then employed the Microsoft Teams and Module Learning platforms which in-turn required substantial infrastructural investment. It is the deponent's assertion that as a result, the 8<sup>th</sup> Respondent had to purchase additional 28 laptops and other IT equipment including but not limited to subscription for online books which was acquired on an agent basis for the sum of **Kshs.2,637,330/=**. Evidence of the expenditure on ICT was annexed as "**JBA 3**".

31. **M/s Jackline** further deponed that the 8<sup>th</sup> Respondent undertook urgent training of teachers and provision of information and support to students and parents including the Petitioners to enable smooth rolling out of the **VLE** for the students to fully participate in the online classes. Since the 7<sup>th</sup> Respondent as well as the 8<sup>th</sup> Respondent are non-governmental organizations, the only source of funds for running the school is mainly fees collection from the parents and the investment undertaken was reasonable in the circumstances.

32. However, according to the Deponent, the Petitioners moved this court and obtained ex-parte orders on **12<sup>th</sup> May, 2020** which the Respondents duly complied with resulting to all learning activities in the school being suspended despite the fact that online learning was currently progressing in the Respondent's sister schools at Nairobi.

33. It is said that it is untrue that the Respondents insisted for full payment of the school fees since it granted the parents rebates between the sum of **Kshs.5,000/=** to **Kshs.10,000/=** and contrary to assertions of the Petitioners, the **VLE** system has been largely lauded by a large number of parents. That more than 394 students (which is more than 65% of the total students) were already participating in the online **VLE** with more than 230 students having paid the full school fees and more than 120 students having paid the 50% school fees as directed by this court on **26<sup>th</sup> May, 2020**. In the Respondents' view, the declaration that the periods between **15<sup>th</sup> March, 2020** and when the Government of Kenya formally re-opens public schools does not amount to a normal school term would extremely prejudice the parents and unfair to all its stakeholder.

33. It was Jackline's averments that the fees schedule of the 8<sup>th</sup> Respondent is not exorbitant, and contrary to the contentions of the Petitioners that the services rendered since the virtual learning timetable commences classes from the morning to the late evening and more so the class size have been amended to suit online learning to the benefit of the parties. It would therefore be unfair according to the Respondents, that the Petitioners' actions do not represent the majority of the parents would stop the education calendar which has been embraced by majority of the stakeholders in the 8<sup>th</sup> Respondent.

34. According to the Respondents, the parents including the Petitioners formed a conscious decision by enrolling their children with the 8<sup>th</sup> Respondent when they had a choice of taking them to government operated schools where a tuition fee is not chargeable. By so doing, the parents were aware that they would incur costs of tuition fees as prescribed by the school. Therefore the orders of this court for payment of 50% school fees has had the result of crippling the 8<sup>th</sup> Respondents activities and in any case if granted the orders sought in the Petition would result in rendering all of the Respondents staff redundant.

35. Further, the Respondents further contended that the 8<sup>th</sup> Respondent is not a member of the **Kenya Private schools Association** since it operates an international curriculum while the Association embraces the **8-4-4 curricula**. Accordingly, the directives of Kenya Private Schools Association are of no consequence to the 8<sup>th</sup>

Respondent.

36. Lastly, it is contended that the Petitioners have no *locus standi* to challenge the fees chargeable by the Respondent since whatever fees does not affect the fundamental rights of the children. Also, the Respondents appreciate that the best interest of the child is always paramount in matters concerning the child and by obtaining orders from this court to stop the **VLE**, the Petitioners have acted against the best interests of the children. In any event, the Respondents aver that education is not a good or services and it cannot be said that the students are consumers or the Education Boards be service providers within the meaning of Consumer Protection Act.

37. The **2<sup>nd</sup> Replying Affidavit** was sworn on the **22th June, 2020** by the 1<sup>st</sup> Respondent, **Nitin Pravinchandra Malde** who is the **Chairman** of the **Board of Oshwal Education & Relief Board**. He deponed that a private actor in his view has the right to apply for registration of private and international schools and the Government's role in such institution is only limited to registration and if need be, deregistration of the institution for failing to meet the laws and regulations in place. Once registered, the **Basic Education Act** broadly bestows upon the institution obligations which are not public in nature and include:-

- a) **To admit students of their choice subject to objective and rational selection procedure and the compliance conditions;**
- b) **To set up a reasonable fee structure taking into consideration the need to generate funds to be utilized for the betterment of**

*education in that institution and to provide facilities necessary for the benefit of the students;*

*c) To constitute a governing body;*

*d) To appoint staff (both teaching and non-teaching staff); and*

*e) To take action in case of dereliction of duty on the part of either the students and/or student's duty admitted into the school.*

38. Pursuant to the above obligations, the 1<sup>st</sup> Respondent avers that they operate an international school on the basis of Contracts entered between the parents and the students on one part and the school on the other hand. That the rules and regulations contained in the contracts include the obligation of payment of fees payable upon admission of the student and on demand by the school and the parents consent to those conditions upon signing of the Contracts thus implicitly agree to the fees payable.

39. With respect to the issue of the **Parents Teachers Association (PTA)**, it is deponed that the Respondents do not object to the establishment of the **PTA** save that it should undertake only limited duties set out in the **Third Schedule** of the **Basic Education Act**. This is so because, as the 1<sup>st</sup> Respondent asserts that the **Oshwal Academy** (8<sup>th</sup> Respondent) was established in **1968** by **Oshwal Religious Community (Oshwals)** and there is a competent Management Board put in place to operate the institution and determine the education calendar. In the same vein, it is averred that the Respondents have subscribed to International Curriculum with examinations being set by **Cambridge** and **IGCSE** and therefore the fees paid is not consideration for services but the charge paid for the privilege of participation in the learning processes offered by the Respondents which are fashioned upon international standards.

40. According to the deponent, the Petitioners' children have no constitutional right to attend the Respondents' schools and they are only members of the school pursuant to Contracts signed between them and the School. As such rolling the **VLE**, charging reasonable fees and deregistration of students who have not paid school fees is not a public function and asking the court to dictate on what reasonable fees should be charged would be akin to asking the court to rewrite the contract between the parties which is not tenable in law.

41. The **third Replying affidavit** was sworn on **12<sup>th</sup> June, 2020** by **Shaahid Parvez Sheikh** who states to be a parent in the 8<sup>th</sup> Respondent school with 3 children in the institution. He deponed that owing to the closure of schools, the 8<sup>th</sup> Respondent on **16<sup>th</sup> March, 2020** communicated of the innovation of the **VLE** which has since then received positive feedback from a majority of parents including himself. He avers that the orders sought in the Petition will completely throw many parents into confusion and anguish since the school is unable to proceed with studies and bring the third term to an end and it is only in the best interest of the children that their studies should not be brought to a standstill.

42. In both written and oral submissions made by **Mr. Kaula** on behalf of the Respondents, the following issues for determination have been pointed out:-

*a) Whether there are any constitutional issues raised;*

*b) Whether the dispute is contractual in nature.*

*c) Whether the Respondents violated Article 47 of the Constitution and the Fair Administration Act;*

*d) Whether the Court can interfere with the commercial/ contractual dispute;*

*e) Whether there are any consumer protection issues that arise from the petition;*

*f) Whether the Respondents have engaged in violation of children rights;*

*g) Whether the Respondent s have engaged in discriminatory practices; and*

*h) Whether the orders sought should be granted.*

43. On whether there are any constitutional issues raised in the Petition, it was **Mr. Kaula's** submission that in his view there are no Constitutional issues raised by the Petitioners. This is because the Petitioners have been unable to identify any specific right that has been violated and indeed the Petitioners have not shown how the 8<sup>th</sup> Respondent violated their rights by implementing Online learning. The Counsel asserted that the Constitutional provisions referred to by the Petitioners were only pointers to the relevant rights and not a matter of construction of the Constitution. Further that an omnibus reference to Articles of the Constitution does not in any way imply that the court is being called upon to interpret the application of the Constitution. To buttress this line of argument, the Counsel relied on the cases of **Lawrence Nduttu & 600 Others...Vs...Kenya Breweries Ltd & Another [2012]eKLR** and **Hakizimana Abdoul Abdulkarim...Vs...Arrow Motors (EA) Ltd & Another [2017]eKLR**.

44. On whether the Dispute herein is contractual in the nature, **Mr. Kaula** submitted that it is not disputed that the Petitioners and the Respondents' entered into a Contractual Agreement thereby setting the rights and obligations of the respective parties. He reiterated that the Petitioners voluntarily enrolled their children at the 8<sup>th</sup> Respondent School based on the Contracts and accepted to be bound by the terms thereof including the payment of fees. He then narrows down to the conclusion that the issue of dissemination of education via **VLE** is squarely a contractual dispute and this court should decline the invitations by the Petitioners to find that the dispute herein raises constitutional issues. The Counsel relied on the case of **James Kuria...Vs...Attorney General & 3 Others [2018]eKLR** where the High Court observed that;

**“...Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute...”**

45. And in the case of **Bernard Murage...Vs...Fineserve Africa Limited & 3 Others (2015) eKLR**, where the court observed 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 statutory remedy should be pursued first...”**

46. On whether the Respondents violated **Article 47** and the **Fair Administrative Action Act**, the Respondents' case is that whereas the **Constitution** and the **Basic Education Act** guarantees the right to basic education for everyone, this is an obligation on the State and not one imposed on private institutions. It therefore cannot be used to impose a duty on a private independent school, as the 8<sup>th</sup> Respondent, to grant a hearing before undertaking certain decision with respect to the students enrolled in the school. Therefore, there are no grounds for importing a duty to act fairly or reasonably into the decision to roll out **VLE** and charge tuition fees because reasonableness is not a ground to impugn the terms of a Contract. On the foregoing, the Counsel relied on the cases of **Khan-vs-Ansur NO and Others 2009(3) SA 258 (D)** and **Klein-vs- Dainfern College and Another 2006(3) SA.**

47. Whether the court can interfere in a commercial and/or Contractual Dispute, **Mr. Kaula** submitted that there is unchallenged evidence to the effect that the 8<sup>th</sup> Respondent embarked on urgent investment on IT equipment and training at a cost of **Kshs.5.5 million** and that notwithstanding, there is no empirical evidence tendered to show that the 8<sup>th</sup> Respondent changed its fees in any way. As such the court should not descend into the arena and interfere with the contractual rights and obligations subsisting between the parties or purport to run the affairs of the private schools nor can the court take the role of a school auditor or Inspector. In support of this line of argument reliance was placed on the cases of **Judicial Service Commission ...Vs...Gladys Boss Shollei & Another [2014]eKLR** and **Kenya Deposit Insurance Corporation...Vs...Richardson & David Limited & Another [2017]eKLR.**

48. **Mr. Kaula** further relied on persuasive Indian cases of **Bihar School Examination Board...Vs...Suresh Prasad Singh MANU/SC/1605/2009** and **Maharshi Dayanand University..**

**Vs..Surjeet Kaur (2010)** to canvass the argument that the education does not amount to a service and the school board does not amount to a supplier within the meaning of the **Consumer Protection Act, 2012**. Accordingly, matters of the fees chargeable and dissemination of education via **VLE** cannot be brought under the purview of the **Consumer Protection Act, 2012**.

49. **Mr. Kaula**, Counsel for the Respondents further submitted that the decision to roll out **VLE** and charging tuition fee does not violate the Petitioners' Constitutional rights since the Petitioners do not have any Constitutional right in the Respondents' School and the decision to continue with education at the subsistence of **Covid-19** does not impair the rights of a child. According to the Counsel, the Petitioners cannot allege that the decision by the Respondents is discriminatory because tuition fee has been charged uniformly. In his conclusion, the Counsel submitted that there is no compelling ground granted by the Respondents to warrant the grant of the prayers sought.

#### **Analysis and Determination**

50. I have considered the pleadings of the parties as well as their detailed respective submissions and authorities, and find the above facts have raised fundamental questions regarding how the School is run and the role of parents in its administration. On the other hand, whether education is a service subject to the Consumer Protection Act. The answers to these questions would resolve the dispute. From these, the following substantive issues arise for determination:

- a) Whether the period between the closure of the respondents' school on 15<sup>th</sup> March, 2020 and the normal reopening thereof as directed by the ministry of education is a normal school term;**
- b) Whether there was violation to the Petitioners' Constitutional rights and fundamental freedoms;**
- c) If the finding in (b) above is in the affirmative, what redress is available to the petitioners;**
- d) Whether this court can order Respondents to adjust the tuition fees to discounts suggested by the petitioners owing to corona pandemic;**
- e) Who should bear the costs of the Petition.**

51. To begin with, it is the finding of this court that the issue of Jurisdiction submitted on by **Mr. Ngonze** is not disputed by the Respondents and it is therefore not an issue in dispute as whether or not this court is clothed with requisite jurisdiction to determine the matter. Consequently, this court will not delve into the issue and will further take judicial notice of the provisions of **Article 165** of the **Constitution of Kenya, 2010** wherein it is provided that the High Court has unlimited original jurisdiction in Criminal and Civil matters.

52. With regard to the first issue framed for determination, it is common ground that in response to the first reported case of the **Coronavirus (COVID-19) Pandemic** in the Republic of Kenya, the closure of all educational institutions within the Republic with effect from **10<sup>th</sup> March, 2020** upto and including **3<sup>rd</sup> May, 2020** was communicated vide a **Press Statement** made on **9<sup>th</sup> March, 2020**. And vide a Directive issued on **3<sup>rd</sup> May, 2020**, the Ministry of Education extended the closure of said Educational Institutions up to and including **4<sup>th</sup> June, 2020**. Subsequently, beyond the said date, and the Directive has now been extended to **January, 2021** when it is expected that schools shall reopen. Therefore, the **2020 school calendar** year is considered lost due to the **COVID-19** pandemic. This answers the first issue for determination in the affirmative. From the foregoing, I find that prayers **(a)** and **(b)** of the Petition are not and cannot be disputed

because private/community schools offering education curriculum at the Respondents' were not exempted. Therefore, the prayers **(a)** and **(b)** are hereby granted.

53. The second and the third issues are related and therefore the same will be determined jointly. However, the determination on whether there was a violation to the Petitioners' Constitutional rights as well as their fundamental freedom, will inform the finding on the third issue for determination, which is what reliefs are available for the Petitioners.

54. On whether there was a violation to the Petitioners' Constitutional rights and their fundamental freedom, **Mr. Ngonze** for the Petitioners argued that the Respondents declined to engage the Petitioners in rolling in a new mode for provision of education via Virtual e-learning experience and further that the Respondents have employed a discriminative approach in undertaking the **VLE** in that, payment of tuition fees would be a precondition to accessing the **VLE** so that the students who will not have paid the fees will be deregistered from the 8<sup>th</sup> Respondent school. He added that these steps undertaken by the Respondents were an infringement of the Petitioners' fair administrative actions rights as well as a contravention of their consumer rights.

55. In response, **Mr. Kaula** for the Respondents' argued that the provision of Virtual learning is not an administrative action within the meaning of '**administrative action**' as defined in the **Fair Administrative Actions Act** nor is it to be interpreted that students are consumers or schools '**service providers**', as defined under the **Consumer Protection Act**, so as to fit in the Petitioners' assertions that their consumers rights were contravened.

56. **Mr. Kaula** further argued that the dispute between the parties is a contractual one and not a constitutional dispute contrary to the Petitioners' view. Therefore the real issue is that of contractual and commercial negotiation meaning that the Respondents owe absolutely no obligation to engage the Petitioners in the new virtual learning experience.

57. **Article 47** of the **Constitution of Kenya, 2010** which is pertinent to the forgoing discussion provides as follows;

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

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

*(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

*a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*

*b) Promote efficient administration.*

58. In actualization of the said Article, Parliament enacted the **Fair Administrative Action Act, No. 4 of 2015. Laws of Kenya. Section 3** of this Act provides as follows;

**3. (1) This Act applies to all state and non-state Application agencies, including any person;**

*a) exercising administrative authority;*

*b) performing a judicial or quasi-judicial function under the Constitution or any written law; or*

*c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.*

59. While **Section 4** provides as follows;

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

**2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

*a) prior and adequate notice of the nature and reasons for the proposed administrative action;*

*b) an opportunity to be heard and to make representations in that regard;*

*c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*

*d) a statement of reasons pursuant to Section 6;*

- e) *notice of the right to legal representation, where applicable;*
  - f) *notice of the right to cross-examine or where applicable; or*
  - g) *information, materials and evidence to be relied upon in making the decision or taking the administrative action.*
- 4) *The administrator shall accord the person against whom administrative action is taken an opportunity to-*
- a) *attend proceedings, in person or in the company of an expert of his choice;*
  - b) *be heard;*
  - c) *cross-examine persons who give adverse evidence against him;*
  - d) *...*
- 5) *Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*

60. By a **letter** dated **21<sup>st</sup> April, 2020** authored by the 8<sup>th</sup> Respondent and addressed to the parents, the 8<sup>th</sup> Respondent contended that it would continue using Teams and the **VLE** to ensure that learning continues effectively. The calendar and fees payable for the terms were attached in the letter. The Petitioner in a letter addressed to the Principal and dated **27<sup>th</sup> April, 2020**, highlighted two issues namely

*i. the implementation of Virtual Learning.*

*ii. reduction of fees.*

61. Subsequently, the Petitioners vide a letter dated **2<sup>nd</sup> May, 2020** sought to have the issues raised with regard to **VLE** deliberated upon and a parent meeting called upon for that purpose. The Respondents answered vide a letter dated **5<sup>th</sup> May, 2020** and informed the Petitioners' that they had a right of choice in joining the 8<sup>th</sup> Respondent school and no Constitutional rights have been contravened whatsoever by rolling the **VLE**. It is not contested that the Respondents still hold the position that they had no obligation to consult the Petitioners with regard to rolling up to the **VLE** system. It is also not disputed that no meeting was held as requested by the Petitioners to deliberate concerns raised.

62. The interpretation of this court is that the 8<sup>th</sup> Respondent School is not an exception to non-state agencies as envisaged under Section 3 of the Fair Administrative Actions Act. It is a private entity that exercises administrative authority over the parents and students enrolled to the institution including the Petitioners. It cannot go without saying that the Respondents' actions and decisions affects the legal rights and interest of the said parents and students flowing from the contract executed when enrolling the students to the 8<sup>th</sup> Respondent institution. It is therefore an implied term of the contract between the parties that the administrative decisions by the respondents would be reasonable and fair depending on the circumstances of the case and that the parents as well as the student by dint of the Contracts reserved a right of representation in any administrative action undertaken by the Respondents. So as a result thereof, the Respondents had a duty to address the concerns raised by the Petitioners and if need be offer reasons for any administrative action at the request of the Petitioners. It would be an arbitrary move to hold that the Respondents had no obligation to address the concerns raised by the Petitioners. Albeit the Respondents argued that the Petitioners consciously signed the Contract to enrol into the 8<sup>th</sup> Respondent school and agreed to the terms thereof. What the Respondents failed to appreciate is that as an implied term of the law, they had an obligation to offer reasons for any administrative action that affected the rights of the parents as well as the students when such a concern was raised. I therefore find that the Respondents failed to discharge this duty.

63. This Court will now consider the second percept of the foregoing issue under determination. That is, whether the Petitioners' Consumer rights have been violated. **Article 46** of the **Kenyan Constitution, 2010** outlines the rights of consumers of any goods or services, in the following terms:

#### **46. Consumer rights**

*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.*

64. In the instant case, **Mr. Ngonze** argued that the Respondents by material alteration of services contracted for in the existing consumer Agreement without the consent of the consumers infringed upon the Petitioners' consumer rights. Further, the Petitioner's Counsel argued that by refusing to address the Petitioners concerns relating the services offered through **VLE**, the Respondents limited the Petitioners' consumer rights under **Article 46** of the **Constitution**.

65. **Mr. Kaula** on the other hand, held the view that education is not a service and consequently the School could not be a service provider whatsoever. The Counsel further argued that the students are not Consumers within the meaning of the **Consumer Protection Act** hence no consumer rights arose at all. He added that the contracts signed between the parties were private and had no aspects of publicity to warrant any protection.

66. In addressing the forgoing issue, this Court borrows slightly from the decision in the case of **SPG (Suing as parents and guardians of students minors currently schooling at Sabis® International School – Runda)...Vs...Directors, Sabis® International School - Runda & 3 Others [2020] eKLR**, where the Court considered the extent to which education has been considered a consumer right. The court expressed itself as follows:

*“...that on the International level, eight (8) fundamental consumer rights were first declared in the 1985 UN Guidelines for consumer protection. These rights include 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. In 1999; the aforesaid UN guidelines were supplemented by a new principle the right to sustainable consumption”*

67. The point of departure therefore is that at International Level, Education has been pointed out as a consumer right as declared in the **1985 UN Guidelines for Consumer Protection. Consumer Protection Act No. 46 of 2012** which is a normative derivative of **Article 47** of **Constitution of Kenya, 2010** defines a ‘**consumer**’ as among other things, “*a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act.*” The Act further defines a ‘**consumer agreement**’ as ‘*an agreement between a supplier and a consumer in which the supplier agrees to supply goods on service for payment*’. While a ‘**consumer transaction**’ is defined by the Act as “*any act or instance of conducting business at other dealings with a consumer; including a consumer agreement*”.

68. To determine whether the Contract between the School and the parent falls under the purview of the **Consumer Protection Act**, the Court is guided by the **1985 UN Guidelines for Consumer Protection** and by the definition of a consumer as established above and in the court’s finding that students are direct consumers or beneficiaries of the service or facility provided by the 8<sup>th</sup> Respondent school. Although all kinds of activities performed by the schools may not be classified as marketable service because of the nature of those particular services but it does not support the complete exclusion of the school from the scope of consumer protection laws. However, this court agrees that reading is not capable of marketization, the court is alive to the fact that the school further offers other services, secondary and ancillary, such as library, laboratory, transport and Internet services.

69. On perusal of the **Consumer Protection Act, No.14 of 2012**, it is clear that it provides for situations when Courts can intervene to obviate contracts that are undoubtedly unconscionable, oppressive and unfair. As long as the Respondents submit that the Petitioners made a decision to be bound to pay school fees in full upon demand, it is not in doubt that the 8<sup>th</sup> Respondent school is unable to meet its part of the bargain due to conditions arising out of the **COVID-19** pandemic. This would be purely against clear provisions of the Consumer rights as provided under the **Consumer Protection Act, 46 of 2012**, which was enacted to meet Constitutional objectives set out under **Article 46** of the **Constitution of Kenya 2010**.

70. However, the circumstances of this case seem to be different. The Respondents deponed to the extent that there are rebates granted by the Respondents’ Board depending on the student’s year of study. Further that the lunch and transport expenses had since been waived. I find the same reasonable and the assertions by the Petitioners’ that the fees charged for the **VLE** is the same as that chargeable on physical attendance to schools. In so far as the tuition fee is concerned, the charging of the same would be justified in view of the fact that almost all schools are conducting online classes and teachers are discharging their functions by imparting course work via Online platforms, checking project work online, correcting papers wherein students have already been given examinations, preparing questions and lessons taught and supervising students to complete the work given etc. There is also a burden on the schools to pay their staff during these months and this court is reluctant to order a 70% discount on fees charged as suggested. The foregoing also determines the fourth issue identified for determination by this court.

71. The third percept is on whether the Respondent has violated the Petitioners’ rights as guaranteed under **Article 27, 43(1)(f)** and **53** of the **Constitution**. On this issue, the Petitioners argue that the continued provision of educational services through the **VLE** without addressing their concerns is placing the Petitioners at a disadvantage in relation to those who have agreed to the unconscionable terms, and the same is also discriminatory in that it denies the Petitioners’ children the basic right to education as it places financial interests above the best interests of the child. However, the concern here seems to be more anchored on the fees chargeable at the **VLE**.

72. The Respondents on the other hand argue that the Petitioners have a choice of whether to continue in the Respondents’ school or to subscribe in a government operated institution where tuition is offered at the expense of the government. It is further argued that private schools have no obligations to offer basic education since the same is vested entirely upon the state.

73. **Article 43(1)(f)** of the **Constitution** provides that every person has the right to education while **Article 53** therefore provides for a wide array of rights of the children including the right to free and compulsory education. And further, that a child’s best interests are of paramount importance in every matter concerning the child. **Article 53(1)(b)** stipulates that “*Every child has the right to free and compulsory basic education.*”

74. More relevant cases are, the case of **Joseph Njuguna & 28 Others v...Vs... George Gitau T/A Emmaus School & Another [2016] eKLR**, where the Court stated as follows:-

*“the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school, where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary.”*

75. In the case of **J.K (Suing on Behalf of CK)...Vs...Board of Directors of R School & Another [2014]eKLR**, the Court observed that:

*“It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article 43. However, there is no obligation placed on a private entity such as the respondent school to provide such right”*

76. hence, this Court’s view is that the Petitioners are obliged to pay school fees for the roll-out to the VLE and as such they have not shown how their rights under **Articles 27, 43(1)(f) and 53** of the **Constitution** have been infringed. In short, they have not shown the manner of infringement and the nature and extent of that infringement.

77. That having been said, and for the benefits of all the parties in the instant Petition, this court is of the view that the loop holes identified in the issues framed above can reasonably be remedied by negotiations through a validly registered **Parents Teachers Association (P.T.A)** whose existence is a requirement of the law pursuant to **Section 55** and the **4<sup>th</sup> Schedule** of the **Basic Education Act No. 14 of 2013, Laws of Kenya**. All other issues remain at the pleasure of the school, which retains the right to set the curriculum. It must be appreciated that Private, and even Public Schools, have got particular and specific standards to maintain. These standards give those learning institutions specific identity and character, which distinguishes them from other institutions. This gives the learning institutions including the respondents herein, the right to safeguard their domain character or standards.

78. In so far as this court cannot dictate content of the Respondents curriculum, similarly it cannot dictate on the fees chargeable by the Respondents and payable by the Petitioners for the curricula unless the same is irrational on a basic scrutiny. This would include circumstances where the Respondents are shown to be charging for services and events which are not offered in the circumstance.

79. I agree with the Petitioners’ submissions that the best interest of the child should be at the forefront of appreciating the fact that it has been difficult times for parents brought about by the sinking economy owing to the **Corona (Covid-10) Pandemic**. However, these rights have to be balanced with the Respondents’ relatively important right to maintain its character as an International Private School. As far as I have pointed out infringement of some of the Petitioners’ rights, the same should not be enforced in a manner that would dwindle the Respondents’ operation. These issues can be adequately addressed by a **Parents’ Teachers Association** since they are indoor management matters.

80. **Section 55** of the **Basic Education Act** reads as follows;

**55. Board of management**

1) .....

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

3) **Every private school shall establish a Parents’ Teachers Association.**

81. The **Parents Teachers Association** is therefore a mandatory requirement and is a legal instrument in the management of schools. There is no evidence that there is a **PTA** in the 8<sup>th</sup> Respondent school. And because it is a requirement of the law to have a **PTA**, this court hereby directs that the same be formed for the school herein and be in place within 60 days from the date hereto. The **PTA** will be a part of the board member and will therefore canvas any concerns from the parents.

**Disposition**

82. In light of the findings above, this Court hereby grant, the following

orders:

a) **The Petition is hereby allowed in terms prayers (a), (b), (c), (d), (f), (i) and (m) as framed under paragraph 6 of this Judgment.**

a) **That the Respondents to facilitate the formation of the Parents’ Teachers Association within 60 days pursuant to Section 55 of the Basic Education Act No.14 of 2013, Laws of Kenya.**

*b) The Respondent shall engage the Parents' Teachers Association in matters of provision of Educational Services through Virtual class or Digital class and deliberation on the tuition fees payable.*

*c) In the meantime, the Respondent shall continue providing educational services through Virtual class and the parents who wish to enroll their children to the Virtual classes shall as well pay the full tuition fees.*

*d) Each party shall bear its own costs.*

It is hereby so ordered.

*Judgment is Delivered, Dated and Signed at Mombasa this 2<sup>nd</sup> day of September, 2020.*

**D. CHEPKWONY**

**JUDGE**

**2/9/2020**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all Judgments and Rulings be pronounced in open Court.

**D. CHEPKWONY**

**JUDGE**

**2/9/2020**