REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 158 OF 2020

OAPA (Suing as Parents and/or Guardians of

student minors currently schooling at Oshwal Academy).....PETITIONERS

VERSUS

THE OSHWAL EDUCATION RELIEF BOARD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION.....3RD RESPONDENT

JUDGEMENT

The Petition

1. Through the petition dated 11th May, 2020 supported by the affidavit of Samuel Mudimbia Afwande the petitioners, OAPA (Suing as Parents and/or Guardians of student minors currently schooling at Oshwal Academy) are challenging online classes introduced by the 1st Respondent, Oshwal Education Relief Board (hereinafter also referred to as Oshwal Academy), following the closure of Kenyan schools as a result of the declaration of the coronavirus disease as a pandemic. The Attorney General is the 2nd Respondent and the Cabinet Secretary, Ministry of Education is the 3rd Respondent.

2. It is the petitioners' contention that through an email notification on 18th March, 2020, without any consultation with them, and in breach of the enabling provisions of the laws of Kenya, the 1st Respondent proceeded to roll out a format of online classes across all year groups. They say that to facilitate the so-called e-learning programme they were required to ensure that the students have access to laptops, desktops, tablets or smartphones as well as access to WIFI connection. The petitioners additionally aver that the e-learning programme requires constant supervision by parents or guardians or a responsible adult. It is their contention that these added responsibilities are not only financially burdensome but have left many parents with no option but to relinquish their jobs so as to supervise their children. Their assertion is that the expenses are multiplied for parents with more than one child.

3. It is further the petitioners' averment that the 1st Respondent did not at any time after unilaterally implementing the e-learning programme conduct any consultations nor did they obtain the necessary concurrence of the petitioners as stakeholders. According to the petitioners, Oshwal Academy did not seek any information from them to enable them assess the suitability of the new mode of teaching especially in view of the monumental challenges affecting online classes whether on account of internet connection, power blackouts, and teaching of students especially between nursery and year 4 and those with special needs.

4. The petitioners further contend that despite the distress many families have been subjected to as a result of the Covid-19 pandemic whether by way of salary cuts or job losses, the 1st Respondent on or about 17th April, 2020 circulated an email advising them to pay the full school fees in respect of term three on or before 15th May, 2020 to be eligible for a nominal discount of Kshs. 5,000/- translating to 4.2% of the fees. This was accompanied by a threat that non-compliant students would be deregistered from the programme and by extension the school for reason of non-payment of fees. It is the petitioners' averment that they sent an email to the 1st Respondent on 21st April, 2020 seeking a reduction of the fees by at least 40% as done by schools of the same parity in curriculum and fees structure but the 1st Respondent unreasonably refused, failed or neglected to accord audience to them or to consider the request for a bigger discount.

5. The petitioners further contend that in violation of Article 46 of the Constitution, the 1st Respondent has continued to demand school fees at the rate equivalent to what is payable when the students are physically present in school. The petitioners aver that upon admission of any student to the school, parents and/or guardians enter into a binding contract with the school for provision of education and related services to the students in consideration of school fees under parameters that are conducive and beneficial to effective learning. It is their case that a contractual relationship is impliedly created by an admission form filled by parents before a student is accepted into the school.

6. The petitioners state that owing to the existence of a contractual relationship, the 1st Respondent violated the Consumer Protection Act, 2012 ('CPA') by failing to give them the information they needed in order to make informed decisions. In their view therefore, the contract is binding on both parties and any changes, such as changes in the teaching method, would need the express consent of the parents.

7. The petitioners further depose that on 23rd March, 2020, Cambridge Assessment International Examination Board cancelled all IGCSE examinations based on the British curriculum worldwide but the 1st Respondent declined to refund the fees stating that the same would be refunded once the Board refunds the fees to the school. The petitioners additionally allege that the 1st Respondent has refused and or neglected to refund transition fees already paid by some of the parents despite the fact that learning has come to a standstill.

8. The petitioners accuse the respondents of violating Section 55(3) of the Basic Education Act, 2013 (BEA) by failing to establish a parents and teachers' association.

9. Consequently the petitioners seek the following reliefs:

a) THAT a declaratory order be and is hereby issued that the 1st Respondent is obliged under the Constitution and by law to consider the best interests of the Children in the School whenever they make policy decisions and must consequently consult and obtain the consent of parents before implementing the same.

b) THAT a declaratory order be and is hereby issued that the discount offered by the 1st Respondent of Kenya Shillings Five Thousand only in its letter of 17th April 2020 contravened Article 46 of the Constitution and Sections 3(2), (3), (4) and 13 of the Consumer Protection Act and is therefore void, unlawful and of no effect.

c) THAT the 1st Respondent be and is hereby ordered to only charge proportionate fees for the only service offered which is the virtual learning.

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

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

f) THAT the Honourable Court do direct the 3rd Respondent, being the Cabinet Secretary responsible for Education, to immediately inquire in terms of Section 52(l)(g) of the Basic Education Act No. 13 of 2012 about the actions of the 1st Respondent in offering virtual learning and whether the same meets the basic education requirements under the Constitution and the Basic Education Act.

g) THAT the Honourable Court do direct the 3rd Respondent, being the Cabinet Secretary responsible for Education, to immediately inquire in terms of Article 54 of the Constitution and S. 11 of the Persons with Disabilities Act about the actions of the 1st Respondent in easing the burden of children with special needs realize their rights.

h) THAT the Honourable Court do direct the 3rd Respondent, being the Cabinet Secretary responsible for Education, to immediately come up with rules, regulations and policy in terms of S. 39 of the Basic Education Act No. 13 of 2012 to guide the 1st Respondent and all other schools with respect to offering online classes to meet the basic education standards.

i) THAT such and any further order and directions be issued in the wider interests of justice.

j) THAT there be no order as to costs.

The 1st Respondent's Response to the Petition

10. The 1st Respondent opposed the petition through grounds of opposition dated 13th May, 2020 and an affidavit sworn on 15th May, 2020 by its Education Consultant, Jyotsana Chotai. The pleadings were in respect of an application for conservatory orders and the petition and I will try to confine myself to the replies to the petition.

11. The 1st Respondent opposes the petition on the ground that the same does not meet the pleading test for constitutional petitions as set out in the cases of **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mumo Matemu v Trsuted Society of Human Rights Alliance & 5 Others [2013] eKLR.**

12. It is also the contention of the 1st Respondent that as an independent and unaided private institution it does not exercise a public function and the relationship between it and the petitioners is nothing more than contractual and the Court has no jurisdiction on matters admission, fee structure, constitution of the governing body, appointment of staff and other services provided by the 1st Respondent to the students who have voluntarily enrolled and registered with it.

13. The 1st Respondent contends that the underlying dispute concerns an alleged breach of private contracts and violation of the CPA, which is not a constitutional issue and ought to be litigated and resolved in the commercial court. Be that as it may, the 1st Respondent argues that it is registered as a non-governmental organization which runs international curriculum schools on non-profiteering basis and as a result relies exclusively on the collection of schools fees for its sustenance. Furthermore, it is stated that the principle of the best interests of the child is mutually interrelated and interdependent with other rights to form a single constitutional value system.

14. As regards the facts of the case, the 1st Respondent's evidence is that the virtual e-learning platform was introduced upon the closure of the schools by the Government in order to ensure that the students would not be disadvantaged and complete the term like students in other private international institutions of the same caliber. Mr. Chotai avers that the e-learning programme underwent testing for two weeks and was hailed as a major innovative way to continue with effective learning during the pandemic. According to Mr. Chotai, all the parents and students of the four institutions run by the 1st Respondent were informed of the requirements and the expectations that would be necessary for the successful implementation of the programme. He therefore denies the petitioners' averment that there was no consultation. Further, that the 1st Respondent only proceeded to make an investment in staff and equipment of Kshs. 50 million after the parents approved the programme.

15. Mr. Chotai deposes that the teachers, students and parents (including the petitioners) were all trained so as to ensure smooth rolling of e-learning and to also enable the children to participate fully in the online classes. Further, that a safe software system known as Microsoft Teams which is used worldwide for corporate business was deployed.

16. On the prayer by the petitioners for a reduction of the school fees, it is averred that the 1st Respondent has no control over international curriculum and the students in years 11 and 12 have to be prepared for the international examinations otherwise their future would be negatively impacted. Further, that the fixed costs of salaries, maintenance of the school and equipment continue to be met and are not capable of being adjusted in the immediate future without compromising the quality and the standards of the school. The Court is therefore urged to dismiss the petition for not raising any consumer related issue and for lacking constitutional basis.

The 2nd Respondent's Grounds of Opposition

17. The 2nd Respondent filed grounds of opposition dated 22nd May, 2020 in opposition of the petition. The Attorney General's case is that the petition does not disclose any constitutional questions for the determination of this Court neither does it meet the principles on pleadings in constitutional petitions as enunciated in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154**, and augmented in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**.

18. It is also the assertion of the 2nd Respondent that the issues raised in the petition arise from contractual obligations between private parties and form a subject matter for litigation in an ordinary civil suit. Further, that the petition grossly offends the doctrine of separation of powers as this Court does not have the jurisdiction to grant the prayers sought against the 2nd and 3rd respondents. Accordingly, the Attorney General asserts that the petition is misconceived, unmerited and an abuse of this Court's process.

The 3rd Respondent's Replying Affidavit

19. The 3rd 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 deposes that the mandate of the 3rd Respondent is derived from Articles 43(f), 53, 54, 55, 56 and 57 of the Constitution. He states that under Section 43 of the BEA basic education institutions are categorized into public schools which are schools established, owned or operated by the Government and includes sponsored school, while private schools are those established, owned or operated by private individuals, entrepreneurs and institutions.

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

21. As for the role played by the 3rd Respondent in regard to private schools, the Principal Secretary avers that the 3rd Respondent undertakes the vetting of teachers and approves the curriculum offered to learners as per Section 4(b) of the Kenya Institute of Curriculum Development Act, 2013 to ensure that learning is in line with both national and international basic education standards. Moreover, all private teachers are also required to be registered with the Teachers Service Commission.

22. Dr. Belio deposes that the 3rd Respondent has not suspended the academic calendar of private schools such as the 1st Respondent who operates under international curriculum. Further, that the 3rd Respondent has no objection to online delivery of teaching as it is in line with the embracing by the Government of technology in all spheres, including the education sector. He also states that adequate constitutional and legal safeguards have been put in place in order to ring fence the delivery of quality basic education in both public and private institutions.

23. According to Dr. Belio, the 3rd Respondent is not vested with the power to prescribe the rates payable as fees in private schools since these are matters within the realm of private service contracts and by virtue of the principle of privity of contract, the 3rd Respondent cannot meddle in the issue.

24. Dr. Belio is also of the view that the petition offends the doctrine of separation of powers as the role of the courts is simply to ensure that policies enacted by the Executive meet constitutional standards and nothing more. He additionally avers that the petition does not disclose any constitutional dispute capable of being resolved by this Court since the claim can be competently determined in an ordinary suit. In conclusion he terms the petition unmerited and prays for its dismissal.

The Petitioners' Submissions

25. The petitioners' submissions dated 2nd June, 2020 were filed in respect of the application for conservatory orders. During the hearing of the petition, Mr. Kamau for the petitioners indicated that he would be relying on the same submissions in support of the petition. It is fair for completeness of record to reproduce those submissions although they were clearly meant for the application for conservatory orders.

26. In addressing the law on granting of an interlocutory injunction, counsel cited the famous case of **Giella v Cassman Brown [1973] EA 358** and reiterated the principles set therein. On whether the petitioners had made out a *prima facie* case with a probability of success, counsel cited the case of **Mrao v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where it was stated that a *prima facie* case is not confined to a **"genuine and arguable case"** but extends to a situation where **"a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

27. Counsel submitted that the petitioners are critical stakeholders and shareholders on whose behalf the 1st Respondent manages the school. However, the decision to roll out online classes was made unilaterally and without reference to them thereby contravening Articles 10 and 46 of the Constitution. To buttress his argument, counsel cited the case of **Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others** (citation not provided) where the essence of public participation was enunciated.

28. Counsel for the petitioners also relied on the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** and argued that in the absence of any demonstration by the 1st Respondent as to how it complied with the constitutional requirements of public participation before making a far-reaching decision affecting the petitioners and their children, it followed that there was a violation of an important constitutional step. Counsel also relied on the case of **Republic v The Attorney General & another Ex Parte Hon. Francis Chachu Ganya Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012** to firm up the argument.

29. It was further submitted that without an established parents and teachers' association as required by Section 55(3) of the BEA, the decision to demand full school fees for virtual classes at the rate equivalent to normal school sessions is unconscionable, unfair and a violation of Article 19 of the Constitution. It was therefore urged that the petitioners have demonstrated a *prima facie* case.

30. On the issue as to whether the petitioners would suffer irreparable harm, counsel cited the case of **J.M. Gichanga v Co-operative Bank of Kenya Ltd [2005] eKLR** where it was held that damages are not a suitable remedy where a petitioner has established a clear legal or equitable right. Counsel therefore urged the Court to take judicial notice of the widely reported distress that many families have been subjected to as a result of the Covid-19 pandemic and find that it would not be equitable in the circumstances to order parents to pay full school fees on account of the argument that the 1st Respondent can easily issue credits to parents should the petition succeed.

31. On the question as to in whose favour the balance of convenience tilts, counsel cited the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** where the Court in dealing with the issue of balance of convenience held that the Court will seek to maintain the *status quo* in determining where the balance of convenience lies and in this case, counsel urged that the balance of convenience tilted in favour of the petitioners as a result of the pandemic.

32. In conclusion, counsel cited the case of **Associated Provisional Picture Houses Ltd v Wednesbury 1KB 223,** and urged that the Court has power to intervene because the decision of the 1st Respondent is unreasonable in view of the pandemic. The decision of **Law Society of Kenya v Hilary Mutyambai & 6 others [2020] eKLR** is cited as holding that Covid-19 calls on everybody to understand and appreciate the unprecedented dilemmas facing the international community as a result of the disease. The Court was urged to allow the petition.

The 1st Respondent's Submissions

33. Mr. Mwangi, who led the team of lawyers for the 1st Respondent, filed written submissions dated 3rd June, 2020. On the issue whether there were any constitutional issues raised, counsel submitted that none had been raised and cited the case of **Lawrence Nduttu & 600 others v Kenya Breweries Ltd & another [2012] eKLR** in which the Supreme Court held that when parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if, in its opinion, this will distract its judicious determination of the main cause. Counsel also cited the case of **Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another [2017] eKLR** where Mativo, J held that when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful but whether the argument forces the court to consider constitutional rights or values. Counsel also relied on the cases of **James Kuria v Attorney General & 3 others [2018] eKLR** and **Bernard Murage v Fineserve Africa Ltd & 3 others [2015] eKLR** for the same proposition.

34. On the issue whether the Court can interfere in a commercial dispute, counsel cited the case of **JMOO v Board of Governors of St. M's School, Nairobi [2015] eKLR; High Court Petition No. 542 of 2014** where Mumbi Ngugi, J noted that the school must be allowed to govern its student body on the basis of the provisions of its code of conduct and the education laws so that the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it.

35. Counsel for the 1st Respondent cited the Indian case of **Naresh Kumar v Director of Education & another W. P. (C) 2993/2020** where it was held that no direction can be issued to unaided private schools not to charge tuition fess during the period of lockdown consequent on

the Covid-19 pandemic. Additionally, counsel referred to the cases of **Kenya Deposit Insurance Corporation v Richardson & David Limited & another [2017] eKLR** and **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** as upholding the principle that the courts should not interfere with the operations of private bodies.

36. On whether the petitioners' rights have been violated, counsel argued that, as appreciated in the case of **Naresh Kumar (supra),** provision of online teaching requires even greater input by teachers. Further, that it was not pleaded with the necessary precision that the petitioners' consumer rights were breached in any way.

37. Another argument made by counsel, based on the decisions of the Supreme Court of India in the cases of **Maharshi Dayanand University v Surjeet Kaur [2010] SCC 159** and **P. T. Kashy & others v Ellen Charitable Trust & others [2012] SCC,** was that education is not a commodity which falls under consumer protection laws. Furthermore, counsel argued that the Supreme Court of India in **Christian Medical College Vellore & others v Union of India & others** upheld the right of a private medical college to administer education without undue interference from the State or the courts.

38. On the issue whether the orders sought are warranted, counsel argued that if the orders sought herein are granted, they would disrupt the financial running of the 1st Respondent's education. It was contended that any orders issued against online education would negate the principle of the best interests of the child and the right to education as enacted by the Constitution, the BEA and various international instruments.

39. Counsel for the 1st Respondent further submitted that no evidence was adduced to demonstrate that the 1st Respondent violated any rights of the petitioners neither was violation of the law proved. It was additionally urged that the petitioners did not establish failure by the 2nd and 3rd respondents to discharge their duties to warrant issuance of orders by the Court. Accordingly, the Court was urged to dismiss the petition with costs to the respondents.

The 2nd and 3rd Respondents' Submissions

40. Ms. Mutindi appearing for the 2nd and 3rd respondents filed written submission dated 26th May, 2020. Counsel identified three issues for the determination of the Court. On the issue whether the petition raises any constitutional issues, counsel cited the South African case of **S v Boesak (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912** at paragraphs 13 & 14 where the Court considered the question as to what constitutes a constitutional matter and held that the answer must be gleaned from a reading of the Constitution and includes disputes as to whether any law or conduct is inconsistent with the Constitution as well as issues concerning the status, powers and functions of a State organ. She also cited the case of **Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others [2018] eKLR** where it was held that constitutional issues include the constitutionality of the provisions of an Act of Parliament, the interpretation of a legislation and the application of the legislation.

41. 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 1st 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 Oshwal Academy, is governed by the Law of Contract Act, the CPA and other statutory provisions. She therefore urged the Court to dismiss the petition on the ground that it is not fit for resolution through a constitutional petition.

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

43. On the issue whether the petitioners are entitled to the reliefs sought, counsel submitted that the prayers sought against the 3rd Respondent are incompetent, bad in law and offensive to the fundamental doctrine of separation of powers. In support of the assertion, counsel cited the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where it was held that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice.

44. Counsel for the 2nd and 3rd 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**.

Analysis and Determination

45. Having considered the pleadings and the submissions of the parties in this case, two issues emerge for the determination of this Court

namely whether the petition raises a constitutional dispute, and if so, whether the petitioners have established a case for the grant of the orders sought.

Whether the Petition Raises a Constitutional Dispute

46. 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 for constitutional petitions as laid down in **Anarita Karimi Njeru (supra)** and **Mumo Matemu (supra).** The second ground upon which the Court is asked to dismiss the matter is that the petition concerns alleged breach of the contracts between the petitioners and Oshwal Academy and has nothing to do with violation of the Constitution and the rights and freedoms enshrined therein.

47. In **Anarita Njeru** the standard for drafting constitutional pleadings was set as follows:

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

48. The Court of Appeal affirmed the test outlined in **Anarita Karimi Njeru** in **Mumo Matemu (supra).** On its part the Supreme Court confirmed the importance of complying with the stated principle by stating 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."**

49. The principle in support of the second ground upon which the respondents seek to upset the petition was outlined by Lenaola, J (as he then was) in the case of **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR** thus:

> **"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."**

50. The said doctrine 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."**

51. The constitutional avoidance principle was upheld by the Supreme Court in **Lawrence Nduttu & 600 others v Kenya Breweries Ltd & another [2012] eKLR** where it was held that:

> **"(25) What then is a case involving the interpretation or application of the Constitution? Does the mere allegation by an intending appellant that a question of constitutional interpretation or application is involved automatically, without more,**

bring an appeal within the ambit of Article 163 (4) (a) of the Constitution? A two judge bench of this Court had occasion to deal with this issue in the case of *Erad Suppliers &General Contractors Limited Versus National Cereals & Produce Board SC Petition No. 5 of 2012.*In disposing of this issue among others, the Court opined as follows and we quote:

> ***"In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court"."***

52. The first question therefore is whether the petitioners have disclosed a violation of the Constitution, the constitutional provisions violated and the manner in which the provisions were violated. In their pleadings, the petitioners allege violation of the rights and principles enunciated and protected by Articles 43, 46 and 53 of the Constitution. They claim that the 1st Respondent's failure to reduce school fees upon the change of the mode of teaching violated those rights. Their case is that the actions of the respondents have affected their consumer rights and the rights of their children to basic education. They have also specified the orders they seek against the 2nd and 3rd respondents which they have tied to the statutory and constitutional mandates of the two offices. The petitioners cannot be said to have failed the drafting test. Whether their pleadings disclose a constitutional dispute is another issue altogether. This is the question which I now proceed to answer.

53. The respondents' argument that parties should be discouraged from using constitutional petitions to litigate matters which can be prosecuted through other statutory processes is indeed correct. This message was powerfully conveyed by the Court of Appeal in the already quoted case of **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR.** The question therefore is whether this is a matter suitable for resolution through a constitutional petition.

54. I find myself in agreement with the respondents that the core issue in this petition is the alleged breach of the contracts entered between the 1st Respondent and the petitioners for the provision of education services at a fee. In my view, however, the matter will not be resolved without considering the issues raised by the petitioners about the alleged violation of their rights as consumers and the rights of their children to basic education.

55. The petitioners also allege that the impugned decision of the 1st Respondent negates the declaration by the Constitution that a child's best interests are of paramount importance in every matter concerning the child. I am therefore in agreement with the petitioners that constitutional issues raised in their petition take a higher pedestal as the Court is called upon to apply and interpret the Constitution. Redress through other litigation processes may not provide an adequate remedy, if any, to the petitioners. The objection by the respondents to the petition on the grounds that it does not meet the standards for constitutional pleadings and that it does not raise constitutional issues therefore fails.

Whether the petitioners have established a case for the grant of the orders sought

56. 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 paramountcy of the best interests of a child in every matter concerning the child as promulgated in Article 53(2).

57. The rights of consumers find firm root in Article 46 of the Constitution in the following words:

> **"46. (1) Consumers have the right—**
>
> **(a) to goods and services of reasonable quality;**
>
> **(b) to the information necessary for them to gain full benefit from goods and services;**
>
> **(c) to the protection of their health, safety, and economic interests; and**
>
> **(d) to compensation for loss or injury arising from defects in goods or services.**
>
> **(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.**
>
> **(3) This Article applies to goods and services offered by public entities or private persons."**

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

58. 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."** The lawmaker actually provided interpretive principles at Section 3(1) and (2) of the Act as follows:

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

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

a) appropriate foreign and international law; and

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

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

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

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

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

c) promoting fair and ethical business practices;

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

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

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

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

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

60. The CPA is therefore the law that seeks to implement the rights created by Article 46 of the CPA and the legislature provided the manner of interpreting the law. Section 2 clearly defines who a consumer is. Although the 1st Respondent attempted to argue that consumer law is not applicable to provision of education services, the pleadings and submissions in this case points to the existence of contracts between the parents and the 1st Respondent. It is therefore my finding that Article 46 and the CPA applies to the dispute before this Court.

61. The petitioners hold the view that the contracts should be viewed from the prism of the Constitution. The respondents are of the firm view that this petition revolves around a contractual dispute which must be addressed using the legal tools for resolving contractual disputes without resorting to the Constitution. In that regard, they cite the decision of the Court of Appeal in the case of the **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."

62. 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."

63. 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 legislation 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.

64. 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]

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

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

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

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

66. 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 stated 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."

67. The respondents appear to question the constitutionality and legality of online learning when they seek orders directing the 3rd Respondent to immediately inquire in terms of Section 52(l)(g) of the BEA about the actions of the 1st Respondent in offering virtual learning and whether the same meet the basic education requirements under the Constitution and the BEA. They also seem to suggest that online teaching violates Article 54 of the Constitution and the Persons with Disabilities Act in respect of the rights of children with special needs.

68. The petitioners, however, did not explain how online delivery of the curriculum by the 1st Respondent violated or infringed the stated rights. By seeking that the 3rd Respondent be directed to investigate whether online teaching meets the basic education requirements under the Constitution and the BEA, the petitioners are actually fishing for evidence to use in demonstrating that virtually education does not meet the standards of face-to-face learning. They have actually not stated why they hold the view that online education does not meet the requirements of the Constitution and the BEA. They simply want an inquiry without establishing a basis for such an investigation.

69. It is noted that the BEA does indeed provide for online learning when at Section 2 it provides the following definition:

"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"

70. The only change introduced by online education is the mode of the delivery of the curriculum. The petitioners have not claimed that the manner of teaching has negatively impacted on the content of the learning material. They have therefore not made out a case for the commissioning of an inquiry in respect of the use of online platforms to deliver the curriculum. In order to make headway on this particular point, they ought to have availed expert evidence. They did not do so. This particular prayer therefore fails.

71. The other complaint by the petitioners is that online teaching was introduced without consultation. They allude to Article 10 of the Constitution as establishing the requirement for consultation. The petitioners did not however elaborate on the issue through submissions and I do not understand how the Article 10 national values and principles of governance applicable to State organs, State officers and all persons whenever executing the responsibilities therein can be applied to a private contract. Be that as it may, the 1st Respondent tabled evidence, which was not rebutted by the petitioners, showing that they consulted the parents and the students and even trained them. On the evidence on record, the petitioners have therefore failed to establish violation of any constitutional provision as a result of the alleged failure to consult them.

72. Another ground upon which the petition is premised is the failure by the 1st Respondent to substantively reduce the fees upon the change of the mode of the delivery of the curriculum. According to the petitioners, they deserved a reduction of fees by up to 40%. They asserted that offering online classes at a rate almost similar to that of face-to-face learning was unconscionable and unfair. Further, that Oshwal Academy failed to give them information necessary for them to make decisions. To the petitioners, all these violated their consumer rights under Article 46 of the Constitution.

73. In order to justify their claim for a reduction of fees, the petitioners stated that online learning had resulted in substantial savings by the 1st Respondent on fuel, printing, stationary, electricity and water costs. Further, that online education had made the petitioners incur additional expenses. The petitioners also contended that other schools of the same parity in systems, curriculum and fees structure have on their own motion issued generous tuition fees concessions in the region of 30% to 50%.

74. In response to the petitioners' arguments on the issue of pricing, the 1st Respondent stated that it is a community-supported school with no Government support and fees form a major part of its funding. The 1st Respondent asserted that it had invested Kshs. 50 million on online education. Further, that the petitioners have not placed any material before the Court to support their claim for greater discounts. According to the 1st Respondent, the schools the respondents claim are of the same status with it actually charge ten times the fees charged by the 1st

Respondent. It was further the 1st Respondent's case that even during the Covid-19 situation the petitioners and all parents are obligated to pay tuition fees.

75. I have considered the arguments on the issue of fee discount. The 1st Respondent is correct that the issue as to the amount of fees payable to schools by parents does not ordinarily fall within the remit of courts. In that regard I agree with the decision of Mumbi Ngugi, J in **JMOO v Board of Governors of St. M's School Nairobi [2015] eKLR** that the **"school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with the decisions are placed before it."**

76. It is also noted that the petitioners have not placed any evidence before this Court to show that Oshwal Academy has made savings on its recurrent costs upon closure of schools. They have not given evidence of the parameters of parity in respect of other schools in terms of fees and facilities. Their claim that other schools of the same parity have offered higher discounts is therefore unsupported. In any case not one school can be equated to another school in terms of teaching, facilities and services. The petitioners have therefore not made out a case to warrant a dictation by this Court on the fees to be charged by the respondents.

77. In the Indian case of **Naresh Kumar v Director of Education & another, W. P. (C) 2993/2020** the importance of fees for unfunded private schools was appreciated thus:

> **"21. No direction, therefore, in our view, can be issued, to unaided/private schools, not to charge tuition fees during the period of the lockdown, consequent on the COVID pandemic, and to source the funds, for meeting expenses relatable to salaries of their staff, maintenance of their establishment, and providing of online education, from the monies available with their parent trusts/societies. This submission, of Dr. Sharma, too, therefore, does not commend acceptance."**

78. The petitioners have not pointed to any law that would allow this Court to determine the fees payable to the 1st Respondent. It is appreciated that the petitioners have alleged violation of their rights as consumers. However, they did not provide any evidence to support their claims that the decision by the 1st Respondent to give a discount of Kshs. 5,000/- is unconscionable and unfair. The requirement to adduce evidence in support of such allegations was confirmed by the Court of Appeal (J.W. Onyango Otieno, JA) in **LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR** as follows:

> **" In the cases of *Royal Bank of Scotland Plc vs. Etridge (No.2), Barclays Bank Plc vs. Hanis and another, Midlan Bank Plc vs. Wallace and another, National Westminister Bank Plc vs. Gill and another*, UCB *Home Loans Corporation Ltd vs. Moore and another* (Conjoined Appeals); *Barclays Plc vs. Coleman and another, Bank of Scotland vs. Bennet and another and Kenyon Brown vs. Desmond Banks & Co*, all reported as heard together and reported as *Royal Banks of Scotland vs. Etridge (No.2) 2 AC 773*, to which we were referred by all parties, it was stated as regards the proof required to demonstrate undue influence as follows:-**
>
> **"*Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence vests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.***
>
> ***Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient; failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of those two facts is prima facie evidence that the defendant abused the influence 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.""***

79. Sections 12 and 13 of the CPA provides the parameters to be taken into account in determining allegations of false representation and unconscionable representation respectively. A contract can therefore be invalidated on those grounds. For instance, Section 13(2)(b) of the CPA provides that one of the factors to be taken into account in determining whether a representation is unconscionable is if **"the price grossly exceeds the price at which similar goods or services are readily available to like consumers."** The petitioners could have indeed succeeded in invalidating the contracts they have signed with Oshwal Academy if they had provided evidence to show that the fees charged grossly exceeds the fees charged by other schools offering the same standard of education and facilities. As already stated, they have failed to do so. Their allegation that their consumer rights were violated by the 1st Respondent therefore remains unsubstantiated.

80. Since the petitioners have failed to establish that their rights as consumers were violated by the 1st Respondent, it follows that the right to free and basic education and the principle of the paramountcy of the best interests of the child in matters concerning the child have not been infringed. It is only if the petitioners had established violation of Article 46 of the Constitution that the Court could have proceeded to consider the issue of the alleged violation of the other rights. I only need to mention that the petitioners have not adduced any evidence or even explained why they think that online education negatively impacts on children with special needs.

81. There was the issue of lack of a parents' association for the 1st Respondent's schools. It was not disputed by any of the parties that the law (Section 55(2) & (3) of the BEA) stipulates that a private school should establish a parents and teachers' association to carry out the functions outlined in the Third Schedule of the BEA. The petitioners' allegation that the 1st Respondent has not established parents' associations in its schools was not disputed by the 1st Respondent. It has therefore been proved that the law has not been complied with in

that particular respect. An appropriate order shall therefore issue accordingly.

82. The petitioners specifically asked for a declaratory that the 1st Respondent is obliged under the Constitution and by law to consider the best interests of the children whenever any policy decisions are made and that the parents must be consulted and their consent obtained before the policies are implemented. This is simply a restatement of the law and ties up with the role of the parents' association. The petitioners are therefore deserving of such a declaration, if only for the purpose of reaffirming the law.

83. As the petitioners have not established violation of their rights under Article 46 of the Constitution, there is no basis for the Court to order a reduction, increment or alteration of the levies imposed by the 1st Respondent. The prayers for issuance of orders against the 3rd Respondent fail in that the petitioners have not proved that they have asked the Cabinet Secretary to act and he has refused to do so. Furthermore, no evidence was adduced to demonstrate serious breaches of the law to warrant the issuance of mandatory orders. It is also observed that issuance of any orders that would lead to the suspension of online learning will actually violate instead of enhancing the right of the petitioners' children to basic education.

84. I only need to add that 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 statement 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."**

85. As regards the issue of costs, I note that the petitioners have clearly indicated in their petition that no party should be awarded costs. That is the way to go in a delicate relationship like that between the petitioners and the 1st Respondent. I endorse the petitioners' attitude. Although they have not obtained the majority of the prayers they sought, they remain the victors. The size of the prize does not matter. 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.

86. In conclusion, I find that the petition partially succeeds to the extent already stated in this judgement. Orders will therefore issue as follows:

a) A declaration is hereby issued that the 1st Respondent is obliged under the Constitution and by law to consider the best interests of the child whenever they make policy decisions and must consequently consult and obtain the consent of parents before implementing such decisions;

b) An order of mandamus be and is hereby issued directing the 1st Respondent to immediately and without further delay, and in any case not later 120 days from the date of this judgement, establish a parents and teachers' association in terms of Section 55(3) of the Basic Education Act, 2013;

c) A declaration be and is hereby issued that the petitioners are entitled by virtue of 55(2) and the Third Schedule of the Basic Education,2013 to establish a parents' association that is recognized and is able to engage the 1st Respondent; and

d) Each party shall bear own costs of the proceedings.

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

W. Korir,

Judge of the High Court