



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 152 OF 2018**

KAYCIA JINNAH.....PETITIONER

VERSUS

AGA KHAN EDUCATION SERVICES, KENYA.....RESPONDENT

**JUDGMENT**

**PETITION**

1. The Petitioner filed her Petition and Supporting Affidavit on 20<sup>th</sup> April 2018 seeking the following orders:

- a) A Declaration that the Respondent's decision to withholding the Petitioner's Leaving Certificate and her Grade 10 and 11 Transcripts is inconsistent and in conflict with the Constitution and thus null and void.*
- b) A Declaration that the Respondent's decision to withholding the Petitioner's Leaving Certificate and her Grade 10 and 11 Transcript denies, contravenes, violates, infringes and threatens the Petitioner's constitutionality protected rights to equality and freedom from Discrimination, Right to Education as enshrined under Article 27 and 43 (f) of the Constitution.*
- c) A Mandatory injunction to compel the Respondent to release the Petitioner's Leaving Certificate and her Grade 10 and 11 Transcripts.*
- d) Costs of the Petition.*

**PETITIONER'S CASE**

2. The Petition is premised on the grounds that the Respondent has allegedly refused to release the Petitioner's School Leaving Certificate and her transcripts for Grade 10 and 11 so as to allow her to apply for admission in higher learning institutions to pursue her further education. The Petitioner opines that the Respondent's refusal is due to the ongoing case between her parents and the school before the Chief Magistrate's Court in **Nairobi No. 1002 of 2017 Aga Khan Education Services Kenya v Nazir Jinnah**.

3. The Petitioner argues that the decision of the Respondent to decline to release fundamental school documents infringes upon **Article 43 (f) of the Constitution of Kenya 2010**, and limits her universal right to education without meeting the mandatory qualifications for limiting of the enjoyment of fundamental rights under Article 24 of the Constitution.

4. The Petitioner further avers that she was not given an opportunity to demonstrate that the impugned decision adversely affected her, thus resulting in a violation of **Article 47 (1) of the Constitution**. Moreover, the Petitioner asserts that she has a legitimate expectation, that the Respondent would follow due process, and any decision by the Respondent which would directly affect her rights and interests would be fairly arrived at yet this was not done.

**RESPONDENT'S RESPONSE**

5. The Respondent filed a Replying Affidavit sworn by Apollo Gabazira on 2<sup>nd</sup> July, 2018 in which the Deponent asserts that the Petitioner has failed to disclose the existence of **Petition 48 of 2017, Nazir Jinnah v Aga Khan Education Service, Kenya & 6 others** concerning the failure to pay school fees of the Petitioner's brother. Furthermore, the case of **CMCC No. 1002 of 2017 Aga Khan Education Services**

**Kenya v Nazir Jinnah** concerned the recovery of the sum of Kshs 3,915,266.30 due from the Petitioner's father in respect of his three children including the Petitioner, which he failed to pay over the course of 5 years. The Respondent avers that the Petitioner's documents were withheld due to school fees arrears.

6. The Respondent opposes the Petition on grounds that the right to education enshrined at **Article 43 of the Constitution** Is fulfilled by the State and there is no obligation placed on private entities to provide or protect the right to education. The Respondent further argues that if the orders sought herein are granted it would dispose of Petition 48 of 2017 in its entirety and render it nugatory thereby prejudicing the Respondent's position.

#### **ANALYSIS AND DETERMINATION**

7. I have very carefully considered the Petitioner's Petition; the Respondents response, parties rival submissions and from the same the following issues arises for considerations:

- a) *Whether the Petitioner's right to education has been infringed?*
- b) *Whether Petitioner had legitimate expectation?*
- c) *Whether Petitioner is entitled to the orders sought?*

#### **A. WHETHER THE PETITIONER'S RIGHT TO EDUCATION HAS BEEN INFRINGED?**

8. The Petitioner aver that **Article 43(1)(f) of the Constitution** guarantees that every person has the unqualified right to education. The Petitioner urge the Respondent's decision to refuse to release fundamental school documents on the ground of non-payment of school fees limits her universal right to education without meeting the mandatory qualifications for limiting of the enjoyment of fundamental rights under **Article 24 of the Constitution**. The Petitioner further contend the Respondent's decline to release her fundamental school documents effectively limits her enjoyment of her fundamental rights to education under **Article 43(1)(f) of the Constitution**.

9. The Petitioner urge that the right to education is a fundamental economic and social right guaranteed in the Constitution. The Petitioner further argue the Respondent's refusal to release fundamental school documents can only be justifiable upon meeting the threshold of **Article 24(1) of the Constitution**.

10. **Article 24(1) of the Constitution** provides that a right or fundamental freedom in the bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; taking into account all relevant facts including...

**"24. Limitation of rights and fundamental freedoms**

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

11. The Petitioner submit the specific rights or fundamental freedoms which by legislation may be limited are those relating to persons serving in the Kenya Defence Force or the National Police Service; under **Article 24(5) of the Constitution**. It is urged the Respondent has not demonstrated the conditions as required in law to justify limitation of the rights of the Petitioner's to Education.

12. The Petitioner further state the draconian and arbitrary enforcement of the limitation against her over fundamental school documents is direct violation of **Article 43(f) of the Constitution of Kenya**. It is further urged the Petitioner was not accorded an opportunity to demonstrate to the Respondent that indeed the impugned decision adversely affected the Petitioner and as a result she was treated unfairly in violation of **Article 47(1) of the Constitution**.

13. The Petitioner sought reliance in the case of *exparte Juliet Wanjiru Njoroge & 5 Others Msagha vs. Chief Justice & 7 Others, Nairobi HCMA No.1062 of 2004 [2006] eKLR 553* where it was held as follows:

**"...the court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deep rooted in the English common law and have been transplanted by reason colonialization of the globe during the heydays of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the view of the person who will be affected by the decisions. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence**

***of the departure from essential principles of justice. The decision must be declared to be no decision..” (Emphasis added)***

14. The Respondent counters the Petitioner’s submission urging, that the Petitioner has not proved her allegations of breach of the Constitution on the part of the Respondents.

15. The Respondent refers to the Office of the High Commissioner for Human Rights General Comment No. 13: The Right to Education (Art.13) where it is clearly stated as follows:-

**“47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant”. [Emphasis added]**

16. It is true that it is the State which is burdened with the duty to ensure that the right to education is fulfilled and enjoyed by all persons in Kenya. However, States duties under international human rights are threefold: the duty to protect, respect and fulfil (provide). It can be argued that although the State must ensure that it takes positive measures to provide education for all and respect the right to education for all; the State must also step in to protect the right to education where third parties are interfering with the right. This Court must intervene where it believes that a fundamental right or freedom has been threatened or infringed, and the right to education is not an exception to this rule.

17. The crux of the Petition herein is the right to education under **Article 43(1)(f) of the Constitution**. The Constitution of Kenya clearly provides for the right to education, however the right is not absolute and may not apply to all institutions of learning; and more specifically to a private institution.

18. In the case of ***I.K. & Another v. Principal M Academy & another (2015) eKLR*** the Court addressed itself as follows:-

**“The right to education is not absolute when a parent takes his child to learn in a private school which is managed through the school fees paid for the students. Such an institution cannot run effectively and efficiently if parents do not meet their parental obligations of paying school fees for their children.”**

19. Similarly in ***J. K. (suing on behalf of CK) v Board of Directors of R School & another [2014] eKLR***, the Court held;

**“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 realisation 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.”**

20. The Petitioner herein has not demonstrated to this Court to what extent **Article 43(1)(f) of the Constitution** extends its force to private institutions; where students and pupils parents enters into contract with the school management as regards payment of school fees and clearly setting the obligation of the institution and that of the parent of the pupil or students. The private institutions operate quite differently from state managed education institutions and/or schools. The constitution obligation under **Article 43 of the Constitution** is placed on the state; it is all the same not absolute and it is not on a private institution, as the present institution herein.

21. The parent who chooses to have his/her children study in a private institution or school; executes contract between himself/herself with the private institution at the time of enrolling his/her child in a private institution or school is contractually bound by the terms and conditions of enrolment, he/she cannot act contrary to the contract as regard his/her dealings with a private institution.

22. The Respondent aver that the Petitioner is guilty of material non-disclosure of existence of various other pending suits. It is averred that there is existence of **Petition No. 48 of 2017 Nazir, Jinnah vs. Aga Khan Education Services, Kenya & 6 Others** which is of fundamental importance to this case.

23. In **Petition 48 of 2017 Nair Jinnah (Supra)** brought under the provision of **Article 43 of the Constitution** on the right of education, so as not to meet part of the contract it was stated that nor can a child by pass such contract to urge that his/her constitutional rights to education is being violated by a private institution or school. I find **Article 43 of the Constitution** is not absolute and do not apply where parties have valid contract as the learned Judge in the above case reiterated the sound legal position that a private institution does not owe a Constitutional right to education. I find that the position is that such right is owed and fulfilled by the state via public schools under the Basic Education Act and not by private institutions.

24. The judge added that,

**“A parent who enrolls his child in a private institution does so on his own free will and desire and is taken to have understood as well as undertaken to abide by the terms and conditions of enrolment governing operations in such an institution (emphasis added) . He must not expect free services including education to his child. Where the terms under which the child was admitted were based on the parent’s ability to pay school fees, they remain so unless varied in favour of the parent by the private education provider.**

25. It is of great importance to point out that the Respondent is responsible for among other things, to ensuring that the parents of children admitted to its school adhere to the terms and conditions of admission, including and not limited to payment of school fees. Private institutions are not charitable entities but are on business like any other business person and have to be paid for their services.

26. It is stated by the Respondent that at the time of admission of the Petitioner she was a minor. That it is her parents who signed all the requisite admission forms among them a declaration (at pages 36 to 37) of the Replying Affidavit sworn by Appollo Gabazira. The declaration provides among other things that the Petitioner's parents are aware of and accept the regulation regarding payment of school fees.

27. In the case of *Joseph Njuguna & 28 others v George Gitau T/A Emmaus School & Another [2016] eKLR*, Hon. Justice Onguto held;

***“The services offered by a private entity are akin to a contract (emphasis added) where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and 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.”***

28. There is no dispute that the Petitioner's entry to Respondent's institution was formalized through a contract, between Petitioner's father and the institution. The Petitioner's father was contractually bound to pay school fees to the respondent, failure to which, the Respondent is legally entitled to take measures such as suspension from school and even withholding academic documents. It has not been demonstrated to this court, that the Respondent is hindering the Petitioner from furthering her studies. The Petitioner's parents are the one to blame for failing to fulfil their contractual obligation, thus to pay the Petitioner's outstanding school fees or making arrangements on settlement of the same with the Respondent.

29. It has been submitted that the contractual dispute; which the Petitioner has not controverted, is the subject of *CMCC No. 1072 of 2017; Aga Khan Education services, Kenya vs. Nazir Jinnah* where the Respondent herein seeks to recover a sum of Kshs.3,916,266.30/= due from the Petitioners' father in respect of his 3 children including the Petitioner.

30. The Respondent further urge that before academic certificate are issued to any former student, the student is required to first clear with all the departments of the school; including finance. This it is contended the Petitioner has not complied with such requirements. I find that it is after appearance before the relevant departments and the decision making authority of the school that one can say his documents are being withheld unfairly and/or illegally. The compliance with school requirements is in my view a must.

31. The Respondent urge that the Petitioner cleared school in 2015 and did not until 19<sup>th</sup> March 2018 write an email to the Respondent stating;

***“I would like to come into school this week to collect my leaving certificate and transcript for grades 10 and 11 please.”***

32. The Petitioner through her email declared an intention to go to the school and collect the certificates but she never went to school. It should be noted that the relationship between a student and the school is of personal nature and it is wrong for the court to supervise the internal machinery and practice of the Respondent without any justification to show, that it acted illegally and/or unlawfully. I find that it is the duty of the Petitioner herein as a former student to formally request her documents from the school and undergo the procedure laid down by the Respondent for the release and discharge of her documents.

33. The Petitioner has not demonstrated to this court that she visited the Respondent's school, and cleared with the departments as per the school policy. The allegations that the Respondent is unjustifiably holding on to the certificate and transcripts is a mere allegation which the Petitioner has not proved. The Petitioner further allege that her application to the universities were rejected on grounds that she failed to meet the application criteria due to missing school leaving certificate and transcripts. However it is clear that the Petitioner other than alleging, she has not produced any evidence in which her applications were denied due to missing school leaving certificate and transcripts.

34. The Respondent urge further that in 2014, due to school fees arrears, the Respondent withheld the Petitioner's elder brother's IGCSE Certificate and were only released at the request of chairman of the Respondent's Board of Directors, Mr. Moez Jamal. The request was made following a representation by the Petitioner's father that he would clear the arrears which promise he has failed to keep 5 years later.

35. Further it is contended that Petition No. 48 of 2017 *Nazir Jinnah vs. Aga Khan Education Services, Kenya & 6 Others*, was filed on behalf of the Petitioner's younger brother wherein it sought conservatory orders prohibiting the Respondent from suspending/removing JNK from attending classes and school activities.

36. The present Petition is for release of certificates despite the undisputed fact that the Petitioner has not cleared with the Respondent to allow release of the documents.

37. Considering the Petition and facts of the case, it is clear that the Petitioner owes the Respondent school, fees, and what turns out is that this petition is nothing but a scheme that has been hatched as urged by the Respondent, by the household of the Petitioner's father, in order to evade and/or avoid paying school fees for the children who have already received education through the Respondent school. The Petitioner's parents have since 2014 been aware that the school policy requires clearance with the Finance Department and all other departments before certificates can be issued. I find the Petitioner's parents and the Petitioner have not demonstrated the delay in settlement and clearance with the school was hampered by good cause. I find that this petition has not been brought in good faith and by allowing it will amount to perpetrating an illegality and breach of parties valid contract. I find indeed the Respondent was kind and gracious enough to allow the Petitioner to complete her education even with outstanding fees arrears. The Petitioner is under an obligation to clear with the school department after which the certificate and transcripts will be released.

## **B. WHETHER PETITIONER HAD LEGITIMATE EXPECTATION?**

38. The Petitioner urge that she has a legitimate expectation that any decision by the Respondent whose effect directly affects her rights and interest will be fairly arrived at after due consideration of all facts surrounding the resolutions yet this was not done in respect of the impugned decision to withhold her fundamental school documents. It is further urged due process was not followed by the Respondent.

39. In the **Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR**; it was held as follows:-

***“18. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in National Director of Public Prosecutions v Philips. These include: - (i) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification”, (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator’s actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.”***

40. In the case of ***Royal Media Services Limited vs. Attorney General & 8 others Nairobi CA No. 4 of 2014 (2014) eKLR*** it was held that;

***“for a legitimate expectation to arise, the decisions of the administrative authority must affects the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance form the decision maker that they will not be withdrawn without giving him first an opportunity to advancing reasons for contending that the should not be withdrawn.”***

41. In the instant petition the Petitioner has not demonstrated facts to establish that she has met the requirements for existence of such expectations as set out in the case of ***Republic vs. Principle Secretary (supra)***. The Petitioner has not shown that there was a representation which was clear, unambiguous and devoid of relevant qualifications; that the expectation is reasonable in the sense, that that a reasonable person would act upon it; that the expectation must have been induced by the decision marker and that it must have been lawful for the decision – marker to make such representation. In the instant petition the petitioner has not demonstrate existence of any representation from the Respondent nor has she shown existence of a clear and unambiguous representation, nor any inducement from the Respondent. It is not clear how she met the requirements for existence of such an expectation. I therefore from the above find that the Petitioner has not established existence of such expectation for which the Respondent should be expected to respect. I find that no legitimate expectation ever existed nor has it been shown to have existed.

42. The Petitioner asserts that it had a legitimate expectation that the Respondent would follow due process and that the Petitioner would be accorded the opportunity to be heard. However, no evidence has been tendered in court to prove that this opportunity was pursued and denied. Furthermore, the Petitioner has not proved that there was any representation made by the Respondent to the effect that she would be given her certificates without clearing with the finance office and following the laid down due process by the Respondent.

### ***C. WHETHER PETITIONER IS ENTITLED TO THE ORDERS SOUGHT?***

43. The Petitioner in her Petition has failed to demonstrate what constitutional rights and fundamental freedoms the Respondents has violated; how and in what manner. The issues raised in the petition revolve around a contract entered into between the petitioner’s parents and the school, which contract is still in force. It is clear that the academic certificates sought in this petition are issued to any former student, after the former student first clears with all departments of the school, including finance. The Petitioner like any other former student should clear with the school departments after which she is at liberty to collect her Certificate and transcripts. I find, if this court were to allow the Petitioner and any other former student to fail to carry out its obligation as per parties contractual agreement, that will be tantamount to exposing the Respondent’s school to unscrupulous parents who are unwilling to pay school fees and/or meet their contractual obligations with the Respondent school.

44. ***The upshot is that the Petition lacks merit and I proceed to dismiss the same.***

45. ***This is a Constitutional Petition and the award of costs is at the discretion of the Court. I have considered the nature of the Petition and note any person has the right to access court to determine their rights and fundamental freedoms and awarding costs may deny parties access to justice. I therefore order each party to bear its own costs.***

Dated, Signed and Delivered at Nairobi on this 1<sup>st</sup> day of October, 2020.

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J. A. MAKAU

JUDGE