



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 456 OF 2015**

**NM (Suing through her next friend SMS).....PLAINTIFF**

**VERSUS**

**NAIROBI INTERNATIONAL SCHOOL.....DEFENDANT**

**JUDGMENT**

1. Joining a new school can be an exciting time for both child and parent. NM was admitted to (NIS) on 26<sup>th</sup> August 2011 after her mother completed the School Admission Application Form. One condition in that application is constantly discussed in this decision.

2. That important condition reads; **“I hereby agree to give ONE TERM’S notice in case of withdrawal of my child from school, failure to which I will pay a TERM’S FEE in lieu of notice”**.

3. NIS is a member of The Kenya Association of International Schools which is an association of schools offering British and American curriculum in Kenya. The British curriculum is divided into 4 key stages (KS) being:-

Stage	Years
1	1 and 2
2	3 - 6
3	7 - 9
4	10 and 11

4. After year 6, NM was desirous of moving elsewhere for her further education and so left NIS. At that point the school demanded that she pays Kshs.185,000 as fees in lieu of Notice and would not release her school leaving certificate until that was done. In the end her mother had to pay that amount so that she would obtain her school leaving certificate that was necessary for her to gain admission into her next school.

5. This aggrieves NM who alleges breach of contract and violation of her rights under Section 4 and 7 of the Children Act 2001. NM prays for judgment against the Defendant for:-

- A declaration that the Plaintiff’s rights as stipulated in the Children’s Act 2001 Section 4 and 7 have been violated.
- Kshs.185,000 plus interest thereon.
- Damages for breach of contract and violation child’s rights.
- Costs.

6. The entire claim is resisted by NIS. In a nutshell, the school contends that as NM was withdrawing from the school and was obliged to give one academic terms notice of intention to withdraw. And as the notice was not given, NIS was justified in insisting on payment of one terms fees in lieu thereof. It is the case of NIS that the notice gives the “school ample time to re-work and re adjust budgets for the next

term". A justification that is expressly stated in the school fees policy and procedure which admittedly the child's parent signed into.

7. Another defence, and this turns out to be of importance, is revealed in paragraph 6 of the Defence which reads:-

6. In further answer to paragraph 4 of the plaint the Defendant states that the contract that it entered into, with the next friend and not the Plaintiff, contained rules, regulations and conditions which had to be fulfilled but denies that the Plaintiff was to choose one academic program as alleged in particular (a) thereof otherwise the parent was to give notice of one term or fees in lieu and to pay school fees.

8. As a determination of the merit of this defence may change the course of these proceedings, the Court proposes to deal with it right away.

9. The suit is premised on two causes of action; breach of contract and infringement of the rights of a child under the provisions of Section 4 and 7 of the Children Act. Crucially the Plaintiff in this matter is NM (a minor) suing through her next friend.

10. If one starts with the action under breach of contract, then it immediately becomes clear that the claim is a cropper. From the evidence it is clear that it was the SMS as the mother of NM who entered into the contract with NIS yet there is no suit between SMS and the school. These proceedings pits NM (suing through SMS as a next friend) against NIS. Indeed NM who is a minor would not have had capacity to enter a contract with the school and she cannot maintain a cause of action based on contract.

11. The suit as presented cannot succeed on the breach of contract claim. If SMS takes a position that the same set of facts gave rise to two causes of action, one which inheres in her as a party to the contract and another on her child on account of violation of a child's right then this suit should have had two plaintiffs. SMS pressing for breach of contract as she would be privy to the contract and one by NM (Suing through SMS) for violation of her rights.

12. Next the Court considers the alleged violation of Sections 4 and 7 of the Children Act.

13. Section 4 of the Children Act provides:-

Survival and best interests of the child

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

14. While Section 7 reads:-

Right to education

(1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.

(2) Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.

15. Beginning with Section 7(1), the obligation created there is on the Government and parents. In this matter neither the Government nor a parent is sued by the child for failing to provide education. Section 7(2) is about free basic education. This suit is not about free basic education. This Court does not see any applicability of Section 7 to the circumstances of this suit.

16. Under Section 4, the provisions of Subsection (2) would have some relevance. All persons, natural or otherwise, state or private organs, must have the best interest of a child as a primary consideration when dealing in all actions concerning the child. This provision echoes the Constitutional imperative of Article 53 (2) that:-

"A child best interests are of paramount importance in every matter concerning the child".

17. There is evidence that following the tussle over the one month's fee in lieu of notice, the fees was paid on 22<sup>nd</sup> September 2015. Only then was a school leaving certificate issued in respect to the minor. On this Mr. Kingsley Makogha who testified on behalf of the school stated:-

**“School leaving certificate was issued upon payment of 1 term tuition fee in lieu of notice. This was in late September. School term had commenced. The student would not be able to join an associated school without a leaving certificate”.**

18. As a consequence of the struggle between the parent and the school, NM was late in joining the next school. Whilst making final submissions on her behalf, her lawyer says that the lateness was for two weeks. On the part of the Court it was not able to tell the exact length of lateness from the evidence presented.

19. Regardless of the length of delay, the school would be in breach of the child's right if it was in breach of the contract it had entered between it and the parent. Put differently the school would be guilty of infraction if its insistence that one terms fees in lieu of notice be paid was without a legal or contractual basis.

20. Inevitably this Court must discuss that contract and who between the parent and the school was in breach. The answer turns on the interpretation to be given to the phrase “withdraw from school” found in the Admission Application Form and the school fees policy and procedure which constitutes the contract between the parties herein.

21. The key departure between the Plaintiff and the Defendant is whether or not a student leaving school after completing an academic programme for which the child enrolled amounts to withdrawal from school. NM's contention is that she had enrolled for junior school which she completed in year 6. That as evidence of completion she was awarded a Certificate of Graduation.

22. The school, on the other hand, asserts that the issuance of a certificate is an internal recognition of a student for achieving a milestone. It being equated to a sports day certificate. Makogha emphasized that there is no separation of the curriculum between years 6 and 7.

23. It has been stated on countless occasion that it is not the business of the Court to rewrite a contract made by parties. Short of coercion, fraud or undue influence which is pleaded and proved, a court is under obligation to give effect to the contract as drawn.

24. An old rule of contract interpretation is to read a contract as a whole so as to understand its main or overall purpose (Glynn v Margetson [1893] A.C. 351).

25. Secondly, save where a term or provision to a contract is made subject to another, the provisions and terms should not be construed so as to render any provision or term superfluous or meaningless. The rationale being that by including a term and provision into a contract, the parties must have intended it to bear a meaning.

26. These cannons of interpretation will guide this Court.

27. In the application form, the applicant is asked to choose the academic programme he/she wishes to enroll. There are four programmes from which the applicant is to choose from; junior school, middle school, IGCSE and A Levels. The following is the instruction to applicant;

**“I wish to enroll for the following academic programme (one choice only)”**

28. This is a clear instruction that of the four programmes, the applicant has to apply for one programme only. It has to be remembered that this application, once accepted by the school, constitutes the contract between the parent and the school. Of course because of the statement which comes towards the end of the form, the form incorporates the Handbook, Rules of the school and the payment terms and conditions into the contract. It would therefore seem that once the parent, on behalf of the child, applies for admission for one programme and the school accepts the application, then the period of the contract terminates at the end of the programme. This is how the parent to NM understood the contract and it does not seem to be an unreasonable construction of the contract.

29. On the other end, however, is the unequivocal condition (which is repeated in the school fees policy and procedure perhaps for emphasis!) that a parent who wishes to withdraw a child from the school and does not give one term's notice must pay a term's fees in lieu of notice. On this there is no ambiguity as to what a term is. A term is not the same thing as an academic programme and the stance taken by the school may pass when looked at from this standpoint.

30. While a contract or a term thereof is not ambiguous merely because parties are not able to agree as to its construction or propose competing interpretation, it is ambiguous if it is reasonably open or fairly susceptible to more than one interpretation when read by an objective reader in the position of the parties.

31. This Court has not found any reason to relegate the “programme” clause to the “term” clause as both of them do not seem to be needless or without meaning. Depending on where the parties stand, their construction of the contract is justified. To the parent because that is the only programme for which she signed her child to. Fair to the school because the “term” clause gives the school ample time to re-work or re-adjust budgets for the following term. For this reason, and from an objective standpoint of the parties, the contract is reasonably open to at least two interpretations and is therefore ambiguous.

32. This apparent difficulty was not unlocked by the oral evidence of the parties. Indeed, the rival evidence entrenched the competing interpretations. For that reason, and so as to resolve the dispute, the Court is inclined to construct the ambiguity as against the drafter. This is

the *contra proferentem* Rule which is defined as:-

“The doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorable to the drafter”.

(Black’s Law Dictionary Tenth Edition)

33. The inevitable conclusion is that the school acted against the contract in insisting on payment of a terms fees in lieu of notice and is liable for the inconvenience caused to the Child. Whilst NM cannot obtain any damages for breach of contract because of reasons rendered earlier, she is entitled to redress for the failure of the school to act in her best interest.

34. My last task is the assessment of damages. I find it strange that neither the Plaintiff’s nor Defendant’s lawyer proposed any figure in this respect. That does not help the Court. Further, the evidence on this limb is in the dearth and wanting. There is no evidence on the exact time the Child was out of school as a result of the Defendant’s conduct or the trauma or such other suffering this caused her. In these circumstances the Court can only make a token award. The Plaintiff is awarded a sum of ksh 20,000.00. Both sides have lost and won in equal measure, each party shall bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> Day of October 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Walela for Malonzo for Plaintiff**

**Muiruri for Kasira for Defendant**

**Court Assistant: Nixon**