REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

PETITION NO. 11 OF 2016

IN THE MATTER OF ARTITCLES 3(1), 22, 23(3), 43(f), 53(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4(2), 7(1) OF THE CHILDREN'S ACT 2001

AND

IN THE MATTER OF SECTIONS 28 & 35 OF THE BASIC EDUCATION ACT 2013

P.P. (A minor suing through his father and next friend)

F W…….....….....…PETITION

-VERSUS-

BOARD OF MANAGEMENT, [Particulars Withheld]

HIGH SCHOOL.....RESPONDENT

R U L I N G

1. By his Notice of Motion filed contemporaneously with the Petition on 20/9/2016, the Petitioner identified as P.P. sought the following orders:-

> **"1. THAT service of the application herein be dispensed with in the first instance and the matter be certified urgent and heard ex-parte.**
>
> **2. THAT pending the hearing and determination of this application interpartes, this Honourable Court be pleased to grant orders of mandatory injunction compelling the Respondent to re- admit the Petitioner to the school forthwith for normal and uninterrupted studies and all examinations.**
>
> **3. THAT pending the hearing and final determination of the application interpartes, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent from either suspending and/or expelling the Petitioner from the school."**

2. Prayer 1 and 2 are spent. Despite the erroneous wording, I am prepared to believe the 3rd prayer was intended to refer to the "final determination" of the Petition, rather than the determination of the instant

application. Otherwise, in light of the framing of the prayers, the entire application would stand spent. The grounds in support of the Notice of Motion are *interalia* that the Petitioner, a form four student and Kenya Certificate of Secondary Education (K.C.S.E.) candidate at **[Particulars Withheld] High School** had been expelled by the Respondent in July, 2016.

3. The affidavit in support of the Motion was sworn by the father and next friend of the Petitioner, **F M**. The gist of the affidavit is that the Petitioner a registered K.C.S.E. candidate in 2016 was expelled by the Respondent in July 2016, following a suspension for alleged defiance of a teacher and prefect. He complains that the expulsion decision was made after an appearance by the Petitioner and deponent before the Respondent board, where they were "taken through an opaque process".

4. He further deposes that the expulsion decision was communicated orally and that efforts to confirm whether the candidate would be allowed to sit K.C.S.E. exams were ignored by the Respondent. It is stated that the Respondent also denied the Petitioner access to the school therefore the Applicant stood to suffer irreparably.

5. In response, the Respondent filed a Replying affidavit through **Peter Maina Kuria**, the Deputy Principal, **[Particulars Withheld] High School**. He deposes that the Petitioner has been involved in several breaches of the School Rules and Regulations, and that the cases were reported to the parents and school's Board of Management. That internal interventions and corrective measures had failed.

6. That following a meeting of the Board of Management (BoM) held on 27th July 2016, a decision was made to exclude the Petitioner who had been suspended on three previous occasions, thus qualifying for expulsion under the rules. The expulsion was allegedly communicated by a letter dated 28th July, 2016 and that the Petitioner had a right to appeal to the County Education Board.

7. Parties agreed to dispose of the Motion by way of written submissions. The Petitioner's submission are hinged on Article 53(1)(b) of the Constitution and Section 35 of the Basic Education Act. He argued that whereas suspension or expulsion may be allowed under the Act, the action should not constitute a breach of a pupil's right to education or be inconsistent with his best interest. That due process must be followed in arriving at the decision to expel a student.

8. In this case, it is stated that no damages may compensate the Petitioner adequately if he missed a chance to prepare for and sit his exams. That the Respondent's concern for discipline cannot override the student's right to education and his best interest. That under the Basic Education Act, expulsion is a step of last resort, taken after all internal corrective measures have failed, and after due process, not demonstrated in this case by the Respondent.

9. In submissions, the Respondent argued that the right to education is not absolute and may be limited under Article 24(1) d) of the Constitution and Section 35(3) of the Basic Education Act. That the Petitioner's rights must be weighed against the corresponding rights of the entire school population and its administration.

10. The Respondent emphasised the documented incidents of indiscipline in breach of the School Rules, by the Petitioner. It contended that the Petitioner was accorded a right to be heard before a final decision was made by the Board and communicated in writing. This decision, it is submitted, was taken after previous corrective measures had failed. The Respondent takes issue with the procedure adopted by the Petitioner in pursuing redress, stating that Judicial Review or an appeal to the County Education Board were more appropriate in this case. The Respondent supported their submission by citing the case of **R.C.K. (a minor suing through mother and next friend K.R.C.) -Vs- KSI [2014] eKLR; Petition No. 84 of 2014.**

11. The basic facts surrounding the case are not disputed. These include the fact that the Petitioner was a Form IV student at **[Particulars Withheld] High School**, and registered for the Kenya Certificate of Secondary Examination in 2016 and that on 27/6/2016; that he was served with a suspension order via a letter by the school principal for the following alleged conduct:-

"- Defying the teacher

- **Defying the prefect."**

He was advised to return to school on 16/07/2016, accompanied by his parent/guardian. That subsequently, upon reporting on 16/7/2016, the Petitioner and his father were asked to appear before the Board (panel) on 18th July 2016, which they did. Eventually, the decision was made to expel the Petitioner.

12. What the Petitioner is now seeking is a conservatory order in terms of Article 23(1) c) of the Constitution. The principles governing the grant of such an order are well settled. In **Centre for Human Rights Education and Awareness (CREAW) & 7 Others -Vs- Attorney General Petition No. 16 of 2011; [2011] eKLR**, **Musinga J** stated that:-

> **"It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order……**
>
> **"At this stage, a party seeking orders only requires to demonstrate that he has a prima facie case with a likelihood of success, and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation."**

13. For its part, the Supreme Court emphasized in **Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others SCK [2013] eKLR** that the court considering the grant of conservatory orders must bear in mind the element of public interest. The Court stated:-

> **[86] *"Conservatory orders"* bear a more decided *public-law* connotation: …… Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes.***
>
> **[63] Thus where a conservatory order is sought against a public agency like a legislature assembly that is mandated to carry out certain fictitious in the normal cause of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislature body should take into account the need to allow for their ordered function in public interest."**

14. Thus the question in this case is whether the Petitioner has demonstrated a *prima facie* case with a likelihood of success, and that there is a real danger that he will suffer prejudice from the violation or threatened violation, if the orders sought are denied. Finally, the court will consider the question of public interest.

15. So far as I can discern from the Petitioner's pleadings, affidavits and submissions, three complaints emerge. They touch on the procedure and substance of the impugned decision by the Respondent. Regarding the former, the Petitioner's first complaint is captured at paragraph 7 and 8 of the Supporting affidavit, namely:

> **"7. THAT on 16th July, 2016 the Petitioner and I were told to appear before the board on 18th July, 2016.**
>
> **8. THAT on 18th July, 2016 the Petitioner and I appeared before the board where we were taken through an opaque process. The teacher claimed to have been defied by the Petitioner never appeared before the board neither did the prefect."**

16. The second complaint on the process was that no formal (written) communication was made in respect of the Board's decision even as the Petitioner was excluded from the school. In this regard

reliance is placed on Section 35 of the Basic Education Act which provides that before expulsion, a learner must be accorded a hearing.

17. If I understood the Petitioner well, his challenge or complaint regarding the substance of the impugned decision was that it violated his rights under Articles 53 (1) b) and 53 (2) of the Constitution which guarantee the right to basic education and secure the best interests of a child in **"every matter concerning the child"**, respectively.

18. With regard to the complaints on the procedural aspects of the impugned decision, it is not disputed that the Petitioner and his father were invited to and attended the Board (panel) meeting on 18th July, 2016, prior to the Board meeting of 27/7/2016, where the relevant report was produced and deliberated upon by the Board of Management. Paragraph 8 of the supporting affidavit refers to the hearing on 18th July 2016 as "opaque" apparently because the teacher and prefect "claimed to have been defied" did not attend.

19. In the Petition, at Paragraph 10 it is stated that: -

> **"In the (suspension) letter the parent was asked to accompany his child to the school on 16th July, 2016 when they were to appear before the board, they did not receive a fair hearing. Instead they were taken through "an opaque process which was merely a one sided discourse on the subject of discipline."**

20. With respect, the fact that the complainant teacher and student did not attend the panel on 18th July 2016 cannot be the basis for concluding that the process was unfair. Similarly the allegation that the process was "**opaque or a one sided discourse on discipline**," without more, is vague. How exactly was the process opaque or one sided, thus unfair? Does it mean that the Petitioner did not get a chance to state his case? It is not clear from the Petitioner's material.

21. The Petitioner relies on the provisions of Section 35 of the Basic Education Act which provides that:-

> **"(1) Pupils shall be given appropriate incentives to learn and complete basic education.**
>
> **(2) No pupil admitted in a school, subject to subsection (3) shall be held back in any class or expelled from school.**
>
> **(3) Subject to subsection (1) the Cabinet Secretary may make regulations to <u>prescribe expulsion or the discipline of a delinquent pupil for whom all other corrective measures have been exhausted and only after such child and parent or guardian have been afforded an opportunity of being heard:</u>**
>
> **Provided that such a pupil shall be admitted to an institution that focuses on correction in the context of education."** (emphasis added)

22. The Basic Education Regulations of 2015 define indiscipline at Regulation 32. The procedure for handling disciplinary cases is set out at Regulations 37 to 39. In the case of a learner who has been suspended under Regulation 38, and reported to the Board of Management, the procedure prescribed at Regulation 39 is as follows:-

> **"(1) The particulars of the complaint preferred against the learner shall be read out to the parent or guardian and the learner at the meeting with the Board of Management under regulation 38, and the learner shall be asked to defend himself or herself.**
>
> **(2) Where the parent or guardian fails to appear, the business of the Board shall be adjourned, and the matter shall be deferred and a new date set and communicated for the parties to appear.**

(3) Where the parent or guardian fails to attend on the rescheduled date, the case shall be heard and determined such absence notwithstanding.

(4) In all disciplinary proceedings affecting a learner the attendance of the Sub-county Education Officer shall be mandatory.

(5) The recommendations of the Board of Management shall within two days be communicated to the County Director or Education."

23. There is no requirement under Regulation 39 (1) for the aggrieved person to appear in person before the board, but the Regulations provide for the learner to be given a chance to defend himself after the particulars of the complaint have been read out to the learner in the presence of his guardian/parent.

24. As regards the decision taken by the Board of Management on 27/7/2016, a copy of the letter communicating the decision, attached to the Replying affidavit as annexture **PMK4** appears to put to doubt the Petitioner's assertion that no official communication, further to the oral decision at the end of the Board of Management, was received in respect of the Respondent's decision of 27/7/2016. On the face of it the said decision was also communicated to the County Director of education as required under Regulation 39 (5).

25. It is not the role of this court to prescribe or impose a different procedure or approach in disciplinary hearings from that prescribed in the Regulations. The Petitioner has in my view not demonstrated how the procedure adopted at the Board of Management hearing violated regulation 39 of the Basic Education Rules.

26. Regarding the merits or substance of the impugned decision, the Petitioner has stressed upon the provisions of Section 35 of the Basic Education Act, Article 53 (2) and 53 (1)(b) of the Constitution. The School Rules and Regulations in force in the material period are not disputed, and are attached as annexture **PMK 1** to the Replying affidavit. While there can be no question regarding the Petitioners stated constitutional rights and the requirement for discipline in learning institutions, I do not accept, the Petitioner's bland argument that:

"the Respondent's concern on the uncorrectable manners of the student……..cannot override the paramountcy of the student's right to education and his best interest……" (sic)

27. The constitution must be read as a whole and no single provision taken and applied in isolation. Article 24 (1) provides:

"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 factors, including:-

(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."

28. Except for rights listed in Article 25 of the Constitution, any other right can be limited by law. The

preamble to the Basic Education Act states:

> **"An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes."**

29. Thus Section 35 of the law, and related provisions must be seen as effecting Article 53 of the Constitution. Section 35 (3) therein does envisage the expulsion of a student for incorrigible indiscipline. It also provides that the affected learner is entitled to be heard before such decision is made. I have not heard any argument that the provision is unconstitutional. The Section provides that a **"delinquent pupil for whom all other corrective measures have been exhausted"** may be expelled through the procedure prescribed in the Basic Education Regulations, 2015, (see also Section 95 of the Act).

30. As stated, Regulation 32 of the Regulation defines indiscipline as follows:

> **"A learner shall be deemed to be individually indisciplined if involved in-**
>
> **(a) physical fights;**
>
> **(b) bullying of other learners;**
>
> **(c) stealing;**
>
> **(d) playing truancy;**
>
> **(e) cheating in examinations;**
>
> **(f) abusing teachers or other persons in authority;**
>
> **(g) defiance of lawful instructions;**
>
> **(h) drug trafficking or substance abuse; or**
>
> **(i) any other conduct categorized as indiscipline by the Board of Management."**

31. Some of the conduct above is included in Rule 3 and 4 (b) of the Respondent's Rules the latter which states that:-

> **"Taking of drugs, bullying, stealing, drunkenness, disobedience, vandalism, deceits are prohibited and punishable."**

32. Has the Petitioner demonstrated *prima facie*, that the Respondent's decision was inconsistent with the provisions of Section 35 of the Basic Education Act, and thus violated the Petitioners rights under Article 53? Annexture **"P.P.1"** to the Petitioner's affidavit indicates the reason for the suspension of the Petitioner, which the institution principal was empowered to issue under Regulation 38 which states:

> **"If the head of the institution is of the opinion that-**
>
> **(a) the acts of indiscipline have persisted in spite of the warnings or corrective measures taken under these regulations; and**
>
> **(b) if the act of indiscipline is likely to threaten the safety of the other learners in the institution, the head of the institution shall issue the learner, with a suspension letter**

addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of Management of the institution."

33. In his material, the Petitioner did not mention that this was not his first run-in with the school concerning discipline, and that he has previously been suspended as a result. These uncontroverted matters emerged in the Replying affidavit at paragraph 8 to wit:-

"8. THAT the Petitioner has been involved in a series of indiscipline cases. All these indiscipline cases have been reported to the parent as well as Board of Management of the school. The Petitioner has in these numerous occasions been warned and has even written apology notes (*Annexed hereto is a bundle copy of the suspension letters and apology notes marked PMK2*)."

34. According to annexure **PMK 2** in May and October 2015 the Petitioner had been suspended *interalia* for rudeness to a teacher, refusing punishment and having a mobile phone at school. Some of the alleged offensive conduct is admitted by the Petitioner in his letters dated 23/10/2015, 26/10/2015 **(PMK2).** Equally his letters dated 16/06/2015, 3/3/2015 6/6/2015 to the school management **(PMK 2)** appear to support the Board of Management's minutes of the meeting on 27/07/2016 **(PMK 3),** regarding the Petitioner's discipline record, all of them apparent forms of breach of the school rules by the Petitioner.

35. The term, "corrective measures" is not defined in the Regulations but evidently, warnings, and punishment including suspension, subject to Section 36 of the Act are part of corrective measures (Implied in regulation 37, 38 and 42). However under Regulation 42 no Board or authority can withdraw a learner's examination candidature as a form of punishment. The minutes of the Board of Management **"PKM 3"** and the bundle "**PKM 2"** (suspension letters and Petitioner's letters) appear to demonstrate the corrective measures taken in respect of instances of breach cited therein.

36. Thus, while I do not see any legal basis for the Respondent's claim that the third suspension should lead to an automatic expulsion, it is my view, without determining the question with finality at this stage, that the Petitioner's recorded antecedents do not seem to aid his case.

37. In the circumstances, I am unable to see how the Petitioner's right to education has been violated. Granted, the paramountcy of his welfare is guaranteed in Article 53 (2). However, his rights must be weighed against those of others, and in particular the public interest elements captured in the Basic Education Act, which include the maintenance of discipline in schools to facilitate a conducive learning environment in schools.

38. The need for discipline in learning institutions is echoed in the decision of **RCK** which the Respondent relied on. It is also echoed in the Petitioner's bundle of authorities attached to the Petition, though not expressly referred to in submissions, namely **G.N. -Vs- Chumani Secondary School Board of Management [2014] eKLR and E.K. & 5 Others -Vs- The Registered Trustees of S.H.S. [2015] eKLR**. The above decisions appear to have been made prior to the commnencement of the Basic Education Regulations of 2015, which in my view, have *interalia* given flesh to Section 35 (3) of the Basic Education Act.

39. **Muriithi J** had this to say in the **G.N. Case**:-

"There cannot be any contest that a school is entitled to ensure the discipline of school students and for that purpose to take punishment decisions that may include the expulsion of students from the school. However, consistently with the constitutional right to basic education, the decision of the school to expel must be exercised in accordance with the due process established by the law and the school's regulations. Section 35 of the Act has made provision for the discipline of students in a manner that accords to the right to basic education of the students. Suspension or expulsion of a student minor may not breach his right to education and to paramount regard of best interest of the child if it is done in

accordance with due process established by the provisions of the Basic Education Act or other law, unless such law can be shown to be unconstitutional."

40. I associate myself with the above position. Besides, under the 2015 Regulations, expulsion from a given school of a student referred to as the "exclusion of a learner" does not necessarily mean that his education is over. As stated earlier, the excluded student's registration as a candidate for national exams cannot be withdrawn. This means, for the purpose of this case that the Petitioner was entitled to be allowed into the school for purposes of sitting his K.C.S.E. papers.

41. Moreover, under Regulation 40, a duty is placed upon the County Director of Education, upon receiving the Board of Management's recommendation for exclusion of the learner, to adopt the following course of action:

"Where the County Director of Education receives the recommendation of the Board of Management then he or she shall seek the advice of the County Education Board as to whether to-

(a) order for conditional or unconditional re-admission of the learner;

(b) transfer the learner to an alternative institution; or

(c) transfer the learner to a corrective center in the context of education."

42. In this case it is not clear whether the Petitioner herein has benefitted from the various options in Regulation 40, or whether he was allowed to sit the K.C.S.E. examination at **[Particulars Withheld] High School**. It is unfortunate that, despite the exclusion decision by the Board of Management having been communicated, even if orally, to the Petitioner, at the end of July, 2016, he did not approach the court until the eve of the commencement of K.C.S.E. exams.

43. Therefore it is likely that certain aspects of his case may well have been overtaken by events due to the delay. Equally, the framing of his prayers is wanting as all the prayers seemed to anticipate the hearing of the application and not the Petition. That notwithstanding had the Petitioner come to court timeously and been able to make a case, the court would not have been limited by the prayers; appropriate orders could have been crafted.

44. In the case of **Martin Nyaga Wambora -Vs- Speaker of the Country Assembly of Embu & 3 Others – Petition No. 7 of 2014** emphasized that a successful Applicant to conservatory orders must demonstrate "real danger" of prejudice stating:

"[60] To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious so much so that it deserves immediate remedial attention or redress by the court. Thus, an alleged threatened violation that is remote and unlikely will not attract the court's attention.

[62] The second principle which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory."

45. The prejudice must flow from the violation or threatened violation of the constitutional right. Thus, the demonstration of a prima facie case (in this case violation of rights and/or threat thereof) goes hand in hand with the demonstration of related prejudice. Thus if there is no *prima facie* case of violation of right or threat thereof shown, it would be difficult to make a case of the danger of real prejudice. In my view the Petitioner's Motion fails both tests.

46. Equally, and consequently, the Motion, in so far as it appears unsuccessfully to canvass a tenuous grievance in respect of what appears on the face of it, to be the procedural and lawful enforcement of school discipline, fails the public interest test. The Motion has no merit and is dismissed with costs.

Delivered and signed at Naivasha, this 12th day of May 2017.

In the presence of:-

No Appearance for the Petitioner

No Appearance for the Respondent

Court Assistant – Barasa

C. MEOLI

JUDGE