REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 3 OF 2016

IN THE MATTER OF AN APPLICATION BY MUSAU NDUNDA, GENARD NYAGA & RACHAEL ODUOR (AS NATIONAL OFFICIALS OF THE KENYA NATIONAL PARENTS ASSOCIATION) FOR JUDICIAL REVIEW

AND

IN THE MATTER OF PROVISIONS OF THE CIVIL PROCEDURE ACT CAP 21 AND RULES AND THE PROVISIONS OF THE HIGH COURT VACATION RULES

AND

IN THE MATTER OF PROVISIONS OF ARTICLE 10, 43(I)(f) AND 53 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF PROVISIONS SECTIONS 53 AND THE 3RD SCHEDULE OF THE BASIC EDUCATION ACT NO. 14 OF 2013

AND

IN THE MATTE OF PROVISIONS REGULATION 12, 15, 44 AND 45 OF THE BASIC EDUCATION REGULATIONS UNDER LEGAL NOTICE NO. 39 OF 2015 AND IN THE MATTER OF KENYA GAZETTE NOTICE NO 1555 OF 10TH MARCH 2015

AND

IN THE MATTER OF FAILURE TO ENFORCE THE KENYA GAZETTE NOTICE NUMBER 1555 OF 10TH MARCH 2015, REGULATION 46 OF THE BASIC EDUCATION REGULATION 2015 AND SECTION 92 OF THE BASIC EDUCATION ACT NO. 14 OF 2013 AND ALLOWING PUBLIC SCHOOLS TO ARBITRARY ISSUE PARALLEL FEE STRUCTURES AND ALLOWING ALTERATION OF PRESCRIBED SECONDARY SCHOOL FEES FOR THE YEAR 2016 AND INTRODUCTION OF LEVIES IN PUBIC PRIMARY AND SECONDARY SCHOOLS AND FORCING PARENTS TO BUY SCHOOL UNIFORM FROM SPECIFIC SHOPS CONTRARY TO THE BASIC EDUCATION REGULATION 2015

REPUBLIC OF KENYA……………………………..…………APPLICANT

VERSUS

CABINET SECRETARY-MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY……….…….……..….RESPONDENT

KENYA SECONDARY SCHOOL

HEADS ASSOCIATION………….……………1ST INTERESTED PARTY

KENYA PRIMARY SCHOOL

HEADS ASSOCIATION………….………...2ND INTERESTED PARTY

EX PARTE: MUSAU NDUNDA

GERALD NYAGA

RACHEAL ODUOR Suing as National Officials of the

KENYA NATIONAL PARENTS ASSOCIATION

JUDGEMENT

Introduction

1. **Nyaga** and **Rachael Oduor**, who instituted these proceedings in their capacity as the national officials of the **Kenya National Parents Association** seek the following orders:

i. That orders of prohibition do issue directed to the respondent and agencies entrusted by the respondent to manage education included therein Principals, Head Teachers and members of the Boards of Management from howsoever increasing or altering school fees for the year 2016 from the gazette fee of Kshs 53,554/= per year for National Schools i.e 1st Term Kshs 26,780/=, 2nd Term Kshs 16,070/= and 3rd Term Kshs 10,704/=. Kshs 38,969/- per year for County and Extra County Schools i.e. 1st Term, Kshs 19,485/= 2nd term Kshs 12,990/= and 3rd Term Kshs 6,494/= and Kshs 9,374/= per year for Day Schools i.e. 1st Term 4,687/=, 2nd Kshs 2,812/= and 3rd Term 1,875/= and further prohibiting the Respondent his agents Principals, Head Teachers and members of the Board of Management from sending away learners from school because of their parents inability to pay term fees and further imposing directly or indirectly an extra levy on pupils, students, parents and guardians including activity fee, County Education Board levy, admission fee, motivation fees, weekly/monthly examination fee, holiday coaching fee among many other levies and further prohibiting form 1 selections.

ii. An order of Mandamus do issue directed to an compelling respondent to lodge a complaint with the director of public prosecution in respect to any adverse report or evidence to invoke section 92 of the Basic Education against any principal, head teacher or any member of the Board of Management of contravention of Regulations 12, 44 and 45 of the Basic Education Regulation 2015 published under legal notice number 39 of 2015.

iii. An order of Certiorari do issue directed to the respondents including all principals and head teachers of public schools in the county to move the court and to quash all fees structures, newsletters, demand notes and circulars done by the respondents agents including

all principals and head teachers of public schools in the country.

iv. An order to the officers commanding police stations (OCS) in all the sub-counties where public schools are situated within the Republic of Kenya to investigate and report to the Director of Public Prosecutions any servants or agents of the Respondent included therein Principals, Head Teachers, Board of Management Members or Education Officers in contravention of the provisions of Basic Education Act 2015 or who sends away a learner from school due to non-payment of extra levy or any term fees balance or in contraventions of Regulation 12, 15, 44, 45 and 67(c) of the Basic Education Regulation 2015 published as Legal Notice No. 39 of 2015. For the Director of Public Prosecution's action.

v. The honourable court be pleased to make further or other orders within its inherent jurisdiction.

vi. Costs occasioned hereby be awarded to the applicant.

***Ex Parte* Applicants' Case**

2. The application was based on the following grounds:

i. That the Cabinet Secretary for the Ministry of Education, Science and Technology is by provisions of section 53 of Basic Education Act No. 14 of 2013 has the overall public authority responsible for governance and management of basic education and training which power he may delegate to any agency, body, organ or institution as appropriate (Section 53 (2) Basic Education Act)

ii. That the Cabinet Secretary acting within his powers appointed an 18 member taskforce on 22nd February 2014 to advice the government on realistic school fees to be charged in public secondary schools and the said taskforce was headed by Dr. Kilemi Mwiria

iii. That the Cabinet Secretary on behalf of the Government of Kenya increased the government funding by 30% towards free primary and secondary education and subsequently a circular was issued by the Director General of Education outlining the said increase.

iv. That the Cabinet Secretary acting within his powers of regulating the fees charged in public schools published the Basic Education Regulations 2015 under Legal Notice No. 39 of 8th April 2015 and further gazetted the fees structures under gazette notice number 1555 of 10th March 2015.

v. That section 28 and 39(1) of the Basic Education Act 2013 mandates the government through the cabinet secretary in charges of education, science and technology to offer free and compulsory basic education and ensure that any school going child goes to school.

vi. That Regulation 12 of the Basic Education Regulations 2015 outlaws any person or body from imposing any activity levy on any pupil, parent or guardian in any public school. The said regulation makes it a criminal offence under regulation 15 as read together with section 92 of the basic education act 2013 for any person to send away a learner from school for non-payment of activity levy.

vii. That Regulations 44 and 45 of the Basic Education Regulations 2015 outlaws any person or a Board of Management of school from issuing an alternative fee structure other than the one issued by the Cabinet Secretary in charge of Education, the sane regulation goes further and outlaws any person or a Board of Management of any public education institution from altering the fees set by the government. Regulation 46 of the basic education regulation 2015 makes it a criminal offence for any person to contravene regulation 44 and 45

and punishable under section 92 of the Basic education Act 2013.

viii. That Regulation 62 of the Basic Education Regulation 2015 outlaws any person or a Board of Management of a public school from forcing parents to buy uniform from a specific shop or outlet.

ix. That the Respondents principals and head teachers of public schools with vested interests have frustrated government effort of providing free education to every Kenyan child by disregarding totally the relevant provisions of the Basic Education Act 2013, The Basic Education Regulation 2015, The Gazette Notice No. 1555 of 10th March 2015, the Director General of Education circular letter ref no. MO/DEB/6/2/3 of 25th September 2014 and the Dr. Kilemi Mwiria taskforce report of 31st October 2014, thus making the realization of free basic education in Kenya a sham and a mockery of due process and of the Rule of Law.

3. According to the Applicants, Kenya National Parents Association (hereinafter referred to as "the Association") is a registered society and whose main mission is to protect the rights of the parents and children in the education sector. The association, it was averred monitors and receives reports regularly from parents association on management and governance of public school from all corners of the country and supports, defends and educates school parents association on their roles and functions on matters of transparency, accountability, governance and management of public schools throughout the country.

4. It was averred further that in the course of the month January 2013, section 96 of the ***Basic Education Act 2013*** No. 14 of January 2013 (hereinafter referred to as "the Ac") repealed the former ***Education Act Cap 211*** and on 8th April 2015 the respondent through Legal Notice No. 39 of 2015 by virtue of provisions of the Act published ***Basic Education Regulations 2015*** (hereinafter referred to as "the Regulations") operationalising the provisions of the Act. By regulations 44 and 45 it was made an offence for any person or a member of the Board of Management (hereinafter referred to as "the Board") to alter or increase fees without a written authority of the respondent. The Act, according to the applicants, has opened up space to the parents association in the governance and management of basic education in public schools through elective representation on the Boards of their institutions.

5. According to the applicants, on 10th March 2015 the respondent gazetted the fees structures of all public schools under gazette notice number 1555 and on the same note issued the free primary education funding circular letter no. MOE/DBE/6/2/3 of 25th September 20414. However, while he was or ought to have been aware that many schools have issued fees structures that were contrary to prescribed fees, the respondent deliberately failed to invoke the law by the prosecution of school principals, head teachers and the Boards of Management of schools that had violated regulation 44 and 45 of the Regulations. Based on legal advice, the applicants believed that section 92 of the Act and Regulation 46 of the Regulations give the respondent a room to lodge a complaint against any person contravening the relevant provisions of the Act.

6. In the applicants' view, the plurality of fees structures each issued by different public schools exceeding by huge margins optimum recommended by experts commissioned by the government will render public schools the preserve of the wealthy families beyond the reach of the poor marginalized or vulnerable unless the Court stays all parallel fees structures unlawfully crafted by the respondent's agents.

7. It was submitted on behalf of the applicants by **Mr F N Wamalwa**, their learned counsel that this application is based on sections 28 and 29 of the Act which deals with the charging of tuition fees. According to learned counsel, Article 53(1)(d) of the Constitution provides the right to education as one of the fundamental rights. Under section 95 of the Act, the respondent is empowered to recommend school fees structures which the respondent had done. However, a look at the fee structures for various schools show that fees re being charged in excess of the recommended rates by the respondent.

8. It was submitted that section 48 of the Act mandates the respondent to implement free and compulsory basic education. It was contended that the arbitrary increase in fees would negate the constitutional

provision relating to free and compulsory basic education which is an obligation on the part of the government while the parents are under a duty to ensure that the education is compulsory.

9. It was submitted that the said increase in fees would not occur if the respondent regularly checked on the principals who are his agents. It was further contended that the issues raised herein are issues of public concern hence it cannot be said that t applicants have no locus standi in light of the provisions of Article 22(a) of the Constitution. It was asserted that the Association is a body registered and recognised under the ***Societies Act***.

10. Learned counsel submitted that the factual averments were not controverted hence the prayers sought ought to be granted.

Respondent's Case

11. In response to the application, the Respondent filed the following grounds of opposition:

> **1. That the Ex-parte Applicants have no locus standi to bring this application before this Honourable Court. The association by the Ex-parte applicants is illegal under section 55 and the third schedule of the Basic Education Act 2013; which provides for the establishment of parents association at the National County and sub county level.**
>
> **2. That the applicants association is registered under the Societies Act which is contrary to section 55 and the Third Schedule of the Basic Education Act; under section 2 of the Societies Act a society shall not include an organization under a different law of which the applicants association is registered under the societies act.**
>
> **3. That the matter is not within the purview of Judicial Review court neither does it meet the basic tenets of judicial review application.**
>
> **4. That the application has not demonstrated sufficient cause for grounds upon which the court can grant the orders sought against the Respondents.**
>
> **5. That the application is an abuse of court process and lacks merit.**
>
> **6. That in the circumstances and based on the foregoing reasons the notice of motion is therefore baseless, misconceived and devoid of any merit and orders sought should not be granted.**

12. It was submitted on behalf of the Respondent by his learned counsel **Miss Odhiambo** that the applicants were not clear on what they were seeking. It was submitted that a part from tuition fees, any other charges can be levied as long as the same is approved. In this case, it was contended that the fees being charged have been approved as there was no evidence to the contrary.

13. According to learned counsel before the fee structures are released, the Parents Teachers Associations are involved and the same are approved by the Boards.

14. It was contended that the Association had no locus to institute these proceedings as it had been rendered irrelevant and struck out. To learned Counsel, the applicants had not any illegality or irrationality and that they had suffered as a result of the fee structures.

15. It was submitted that in exercising his discretion to determine the fees chargeable the respondent takes into account several factors apart from tuition in order to enable schools run smoothly and efficiently such as the payment of non-teaching staff.

16. On the order of mandamus, it was submitted that it is not the duty of the respondent to lodge a complaint with the Director of Public Prosecutions. With respect to the fee structures, it was submitted

that the same have been overtaken by events since the same were issued during the first term. It was therefore submitted that the application was unmerited and ought to be dismissed.

1st Interested Party's Case

17. The application was opposed by the 1st interested party herein, Kenya Secondary School Heads Association, vide grounds of opposition dated 23rd February, 2016 in which it stated that:

> **1. The applicant lacks *locus standi* to institute or maintain its suit.**
>
> **2. The Respondent and interested parties are well within the law and have the discretion and authority under the Basic Education Act to increase and alter school fees.**
>
> **3. The Kenya National Parents Association has failed to give adequate grounds to support their application for the said orders.**

Determinations

18. I have considered the issues raised in this application.

19. The first issue for determination is whether the applicants herein through the association have *locus standi* to institute these proceedings. In my view, by the enactment of the current Constitution in particular Article 23 thereof, the demarcation between judicial review and constitution petitions has been blurred so much so that in granting remedies in judicial review applications, constitutional principles clearly play a crucial part therein. Judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context.

20. On this issue, I wish to quote the holding in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

> **"over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has**

recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi.* Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"

21. The Court continued:

"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

22. In **<u>Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others</u>** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical,

abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

23. Article 258 of the Constitution which provides as follows:

> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> > ***(a) a person acting on behalf of another person who cannot act in their own name;***
> >
> > ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
> >
> > ***(c) a person acting in the public interest; or***
> >
> > ***(d) an association acting in the interest of one or more of its members.***

24. Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

> **"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."**

25. The issue of standing was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

> **"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce**

the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others……"

26. The Court proceeded to hold that:

Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them……..The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

27. Under our Constitution the issue of locus has been expanded and under Article 258(1)(b) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and such proceedings can be brought *inter alia* by a person acting as a member of, or in the interest of, a group or class of persons. Similarly under Article

22(2)(b) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

28. The applicants herein describe themselves as officials of a registered society under the ***Societies Act***. No affidavit was sworn in opposition to the factual averments by the Applicants. In my view, under the aforesaid provisions of the Constitution, the applicants have *locus* to institute these judicial review proceedings if as it is claimed, the Respondent's inactions have contributed to inability to have the constitutional rights relating to education realised.

29. As was held in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,**

> **"Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them."**

30. Therefore based both on authority and the Constitution, the Applicants clearly have standing to agitate the prayers sought in these proceedings.

31. Article 53(1)(b) of the Constitution provides that every child has the right to free and compulsory basic education. The right to free and compulsory basic education in my view is one of the ways in which the right to inherent dignity and the right to have that dignity respected and protected under Article 28 can be realistically achieved. It is my view that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. See ***Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.*** Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated.

32. In my view, it is therefore upon the State to ensure that it puts into place measures which would ensure that human rights and fundamental freedoms enshrined under the Constitution are protected and achieved. It is therefore my view that any law or policy must as of necessity have as its core objective the upholding of human dignity, a test to which any law and policy must be subjected. As was aptly put by this Court in **Federation of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] EKLR (HCK)**:

> **"One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture.….The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination.."**

33. In my view, the Court must not to fail to appreciate the circumstances of our society in which a majority are not privileged to afford fees paid in high cost schools whether public or private. According to this Court, the primary obligation of ensuring that the provisions of the Bill of Rights are safeguarded, protected and achieved rests squarely on the State.

34. Therefore, it is the constitutional obligation of the State to put into place the necessary policies that ensure that the children not only access free and compulsory education but that that education is of a quality that will achieve the purpose for which it is intended. Education should not just be for the sake of it but must be geared towards achieving a purpose.

35. To achieve this objective Parliament enacted section 39 of the Act which provides that:

It shall be the duty of the Cabinet Secretary to—

> ***a. provide free and compulsory basic education to every child;***
>
> ***b. ensure compulsory admission and attendance of children of compulsory school age at school or an institution offering basic education;***
>
> ***c. ensure that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education;***
>
> ***d. provide human resource including adequate teaching and nonteaching staff according to the prescribed staffing norms;***
>
> ***e. provide infrastructure including schools, learning and teaching equipment and appropriate financial resources;***
>
> ***f. ensure quality basic education conforming to the set standards and norms;***
>
> ***g. provide special education and training facilities for talented and gifted pupils and pupils with disabilities;***
>
> ***h. ensure compulsory admission, attendance and completion of basic education by every pupil;***
>
> ***i. monitor functioning of schools; and***
>
> ***j. advise the national government on financing of infrastructure development for basic education.***

36. This obligation is underpinned in Article 21 of the Constitution which provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. That obligation, it is my view, cannot be shifted by the Government to any other person. To do so would amount to the Government shirking its constitutional responsibility to ensure that every person enjoys the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom as provided under Article 20(2) of the Constitution. In my view this is the purpose of section 53 of the Act which provides that:

> ***(1) The Cabinet Secretary shall be responsible for the overall governance and management of basic education.***
>
> ***(2) Subject to the provisions of this Act, the Cabinet Secretary shall by regulation entrust the governance or management of any aspect of basic education and training to any agency, body, organ or institution as may be appropriate for the purposes of this Act.***

37. It follows that the Cabinet Secretary is responsible for the management and governance of basic education though he is empowered to delegate the same to the Boards which Boards must operate in accordance with the instructions and powers conferred upon them by the Cabinet Secretary. In order for the Cabinet Secretary to properly carry out his mandate, section 95 of the Act empowers him to make Regulations and pursuant to this power the Cabinet Secretary promulgated ***Basic Education Regulations,***

2015.Regulation 12 thereof bars institutions from causing parents or guardians to contribute any funds for co-curricular activities without written approval from the Cabinet Secretary upon the advice of the respective County Director of Education. Regulation 44 on the other hand bars public institutions from issuing alternative fee structures other than approved by the Cabinet Secretary while regulations 45 and 46 thereof bars any person or Board in a public institution of basic education and training from altering or increasing fees without written authority of the Cabinet Secretary on the pain of facing criminal prosecution. Regulation 67(3) on the other hand bars institutions from prescribing specific suppliers of school uniforms or any other materials for parents or guardians.

38. These Regulations in my view are meant to ensure children access education facilities without being unduly disadvantaged by arbitrary decisions by the management of public institutions offering basic education.

39. The Bill of rights impose upon the State both positive and negative obligations. Negative obligations in the sense that the State ought not to unnecessarily intrude into the affairs of the citizens. In effect Kenyans ought to be given the freedom to exercise their inalienable rights without undue interference. However, the State is also under an obligation to make provisions towards ensuring that the Bill of Rights is realised and attained. That constitutes a positive obligation on the part of the State. These rights are provided under Article 43 of the Constitution and to this end Article 20(5)(a) provides that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the principle that it is the responsibility of the State to show that the resources are not available. To achieve the right to free and compulsory basic education, it is not enough for the State to simply ensure that public educational institutions are available but to regulate the same and ensure that the same are accessible to those the Constitution intends them so that the letter and spirit of Article 53 does not remain a mirage. It is in this respect that the Legislature enacted the Act and particularly section 28 thereof which places a duty on the Cabinet Secretary concerned to implement the right of every child to free and compulsory basic education.

40. Ours is a transformative Constitution, hence the State may subject to availability of resources even be compelled to step in and regulate the education system for the benefit of its children. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLR** where it expressed itself as follows:

> **"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."* The scholar states the object of this South African choice: *"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social***

institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." **The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

41. As this Court appreciated in **Republic vs. Commission for Higher Education Ex-Parte Peter Soita Shitanda [2013]eKLR** Article 43(1)(f) of the Constitution provides that every person has the right to education. In my view, the right to education would make no sense if the public institutions which provide education are not regulated so as to make them accessible to those who would otherwise be left out therefrom. It is in this respect that section 29 of the Act provides that:

1. No public school shall charge or cause any parent or, guardian to pay tuition fees for or on behalf of any pupil in the school.

2. Notwithstanding subsection (1) –

a. ***tuition fee may be payable by persons who are not Kenyan citizens;***
b. ***other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the county education Board provided that no child shall be refused to attend school because of failure to pay such charges;***
c. ***no person shall collect levies without issuing an official receipt.***

42. It is therefore my view that the State must ensure that the subsidy it grants to schools must be sufficient to ensure quality education is imparted to those who are admitted to such institutions.

43. In this case, it is contended that contrary to ministerial guidelines some public educational institutions offering basic education are not adhering to the guidelines issued by the Cabinet Secretary. The Cabinet Secretary has not bothered to controvert this damaging accusation. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...."

44. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** **Goudie, J** eloquently, in my view, expressed himself, *inter alia*, as follows:

> **"*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment."**

45. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**, it was held that *mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. It therefore my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, mandamus may go forth.

46. In this case, the Respondent is under both a constitutional and statutory obligation to ensure that the letter and the spirit of Article 53 of the Constitution which decrees to the children free and compulsory basic education is achieved. To omit to carry out the said mandate calls for the grant of an order of *mandamus* compelling him to do so.

47. It is not in doubt that the manner of regulating the provision of free and compulsory basic education is an exercise of discretion on the part of the Respondent. In such circumstances the Court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

48. However when it comes to orders of *mandamus*, on the authority of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.

49. With respect to prayer (i) this Court cannot grant the same in the manner sought since the Board of Management accused of violating the guidelines by the Respondent are not parties to these proceedings as required by section 1(a) of the Fourth Schedule to the Act. To grant orders against them would therefore violate the rules of natural justice. It is on the same basis that prayer (iv) is also incapable of being granted.

50. With respect to prayers (ii) and (iii), this Court cannot grant the same in the manner sought as to do so would amount to compelling the Respondent to act in a particular manner yet the Respondents has several options of ensuring that his guidelines are adhered to.

51. This Court however cannot overlook or turn a blind eye to the alleged omissions or inactions of the Respondent.

Finding

52. Based on the material placed before me, I find that the contention by the applicants that the Respondent has not carried out the mandate placed upon him by the Constitution and the legislation, has not been displaced.

Order

53. In the premises the order which commend itself to me and which I hereby grant is that the Respondent, the Cabinet Secretary, Ministry of Education, Science and Technology is hereby compelled to ensure that his guidelines issued towards the attainment of the rights to free and compulsory education under Article 53 of the Constitution are adhered to.

54. Applicants have not succeeded in most of their prayers, they will have half the costs of these proceedings to be borne by the Respondent.

55. Orders accordingly.

Dated at Nairobi this 11th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr F N Wamalwa for the applicant

Miss Odhiambo for the Respondent and holding brief for Mr Wasuna for the 1st interested party

Cc Mwangi