IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.8 OF 2014

IN THE MATTER OF ARTICLES 2, 3, 5(1), 19, 20, 21, 22, 23, 24, 27, 43, 47, 48, 53(1)(B) AND 2, 159(1)(2)(A)(B) AND (E), 165(3)(A) AND (B) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 4(2) AND (3), 5, 7 AND 22 OF THE CHILDREN'S ACT NO.8 OF 2001

AND

IN THE MATTER OF ARTICLE 2(1) AND (2), ARTICLE 3(1) AND (2), 4, ARTICLE 27(1) AND (2), ARTICLE 28(1), (2) AND (3) OF THE UNITED CONVENTION ON THE RIGHTS OF THE CHILD

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION, CHILDREN'S ACT AND THE UNITED CONVENTION ON THE RIGHTS OF THE CHILD

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO EDUCATION AND TO FREE AND COMPULSORY BASIC EDUCATION, HUMAN DIGNITY, FAIR ADMINISTRATION AND PROTECTION FROM DISCRIMINATION

AND

IN THE MATTER OF ABUSE OF OFFICE BY THE 1ST AND 2ND RESPONDENTS

BETWEEN

J L (SUING AS NEXT FRIEND OF M L, A MINOR).....PETITIONER

AND

S L , SECRETARY, SCHOOL MANAGEMENT COMMITTEE,

M P SCHOOL.....1ST RESPONDENT

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

S L.....3RD RESPONDNET

JUDGMENT

1. The petition herein is dated 18th February, 2014 and is supported by an affidavit sworn by the Pettioner on his own behalf. The Petitioner stated that he is the father of one **M L**, a minor who was denied and discriminated against when she joined [particulars withheld] School. The 1st Respondent, is the Head Teacher and the secretary to the School Management Committee of [particulars withheld] School.
2. The Petition is founded under **Article 22** and **23** of the **Constitution** and alleges contravention of fundamental rights and freedom under **Article 27** of the Constitution in respect of access to free and compulsory education.
3. The Petitioner prays for:

a) A declaration that the actions of the respondents were unconstitutional for violating the rights of the Petitioner under Articles 27, 28, 43 (1)(f), 53(1)(b) and (2) of the Constitution.

b) An Order that the child be returned to School

c) An Order that the child be treated equally with others and be given a conducive environment to enjoy the right to education.

d) General and exemplary damages

e) A declaration that S L, who occupies public office contravened Articles 27, 28, 43 (1) (f), 53 (1) (b) and 2 of the Constitution of Kenya hence unfit to hold any public office in Kenya.

f) The Petitioner to be paid costs of this Petition.

4. Together with the Petition, the Petitioner took out a Notice of Motion under Certificate of Urgency for an Order that the Honourable Court grant an order to reinstate the Petitioner to school pending the hearing and determination of the Petition; and that the child be registered in the school, treated equally and be given a conducive environment to enjoy the right to education.
5. The application was certified urgent and fixed for inter parties hearing on 4th March, 2014. The court further ordered the Respondents to reinstate the Petitioner to School pending the hearing and determination of the Petition.
6. On 4th March, 2014 the matter was placed before this court for hearing of the Petition. Mr. Ouma, learned counsel for the Petitioner was present. Despite due service of the Petition, there was no appearance from the Respondents.
7. The brief facts before me are that M L, a minor, was living with her grandmother and schooling at a nearby school to the home. She was however diagnosed with a heart ailment which forced her to seek specialized treatment at a local hospital. Consequently, she moved from her grandmother's house and started living with her father, the Petitioner herein.
8. The Petitioner then sought to enroll her at M P School. She was set to join Standard five. However, the 1st Respondent, initially denied her admisson to the school on the basis that she had not attained the requisite mark to be enrolled in Standard five. Upon being prevailed by the area chief, the 1st Respondent admitted the child to the school as a Standard four pupil.
9. The Petitioner further avers that the 1st Respondent instructed teachers not to record the child's attendance in the school registered or mark her school work. According to the petitioner, these actions are discriminating and denied the child an opportunity to fully enjoy the right to a free and compulsory education. Moreover the child was expelled from the school without reasonable explanation and the 1st Respondent did not take into consideration her best interest.
10. Mr. Ouma, Counsel for the Petitioner submitted that **Article 53(1)(b)** of the Constitution gives every child a right to basic Education. The actions of the 1st Respondent contravene this right. Further the 1st Respondent did not consider the child's best interest despite being aware of the child's health condition.

11. Counsel also submitted that failing to register the child and mark her school work was contrary to **Article 27** which guarantees a person equal treatment and enjoyment of all rights and fundamental freedoms. According to counsel the 1st Respondent is a public officer who is required to uphold the national values envisaged under **Article 10(1)** of the **Constitution.** However, the 1st Respondent did not take into account the principles in making the decision.
12. The Respondents did not file any reply nor did they make any appearance in these proceedings despite due service. The court did not therefore have the benefit of hearing its side of the story. The court will nevertheless proceed to discharge its mandate of rendering substantive justice.

ISSUES FOR DETERMINATION

a) Whether the Respondents actions violated the Petitioners right to education?

b) Whether an award for general and exemplary damages is merited?

c) Who shall bear the costs?

ANALYSIS

13. **Article 53** of the **Kenyan Constitution** provides that every child has the right to free and compulsory basic educatio1n and also adopts the principle that a child's best interest is of paramount importance in every matter concerning a child.
14. In the instant Petition it is noted that none of the Respondents entered appearance nor filed any responses to justify and explain why such actions were taken as against the Petitioner. The evidence of the Petitioner on the actions taken by the 1st and 3rd Respondents therefore remains unchallenged and uncontroverted.
15. The Respondents actions of failing to register the Petitioners attendance meant that she was guilty of absenteeism. Absenteeism can be defined as the habitual and frequent absence from school without good reason. The action taken by the Respondents cannot be said to be in the Petitioner's best interest as absenteeism without good reason is an indicator of delinquency and poor performance and all these go onto the Petitioner's Report Card and records and lends credence to stigmatization and low self esteem.
16. Education entails learning to read and write and to acquire a variety of knowledge and it also includes a grading process. The grading process through marking of homework and school work evaluates a child's performance, achievements, progress and summarizes a student's accomplishments. This information arouses the child's interest and competitiveness and leads to building of a child's self confidence.
17. By failing to mark the Petitioner's work the Respondent's actions I reiterate, cannot be said to be in the best interest of the Petitioner as it denied her information or evidence on evaluation of her progress and accomplishments so as to enable her to move to the next level or next class thus denying the Petitioner the benefit of a quality education.
18. This court is alive to the fact that it should not interfere in the administration and running of institutions but will intervene especially where decisions are made that are not fair and just. An institution like the Respondents must guarantee all children equal rights to develop their capabilities and talents.
19. The Petitioner lives in a rural area and also has a heart condition but this notwithstanding she has a right to a basic education regardless of where she lives and regardless of her disability.
20. The Petitioner's prayer is for general and exemplary damages but no submissions were tendered to establish the extent of damage suffered and the award to be made. The Respondents are found to have violated the Petitioners right to a basic right to education and the Petitioner is entitled to relief in the form of damages for the indignity suffered. This court will therefore make a minimum award of Kshs.50,000/=.

FINDINGS AND DETERMINATION

For the reasons stated above this court makes the following Orders;

1. The Petition is found to have merit and is hereby allowed.
2. This court declares that the conduct of the 3rd Respondent was discriminatory and that Petitioner's rights under **Articles 53** and **27** of the **Constitution 2010** were violated.

i) The 3rd Respondent shall officially reinstate and register the Petitioner in the school and the Petitioner shall remain enrolled until she completes her basic education.

ii) The 3rd Respondent shall treat the Petitioner equally to the other learners thereat and provide a conducive learning environment for the Petitioner to enjoy her right to a basic education.

3. This court finds the 1st and 3rd Respondents guilty of violating the Petitioners right and awards the sum of Kshs. 50,000/- as damages to be paid to the Petitioner jointly or severally by the 1st and 3rd Respondent.
4. The Petitioner shall be at liberty to apply for further orders.
5. The Petitioner shall have costs of the Petition.

Dated, Signed and Delivered at Nakuru this 15th day of September, 2014.

A. MSHILA

JUDGE

Coram:

Hon. A. Mshila, Judge

Mwangi, court clerk

Miss Khatambi for A.G.

N/A by Ouma

Petition allowed with costs