

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION NO. E005 OF 2026

IN THE MATTER ARTICLES 22, 23(1) & 3, 43(1)(f),
47(1) & (2), 53(1)(b) & (2) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 3, 4 AND 7 OF THE FAIR
ADMINISTRATIVE ACTION ACT

BETWEEN

EEW (suing thro' his father and next friend
JMG.....
PETITIONER

VERSUS

BOARD OF MANAGEMENT

KAGUMO HIGH SCHOOL.....
RESPONDENT

AND

THE ATTORNEY GENERAL.....1ST

INTERESTED PARTY

NYERI COUNTY DIRECTOR
OF EDUCATION.....2ND INTERESTED
PARTY

JUDGMENT

1. The name of the minor has been anonymized to protect the privacy of the minor. By a Petition dated 27.2.2026, the Petitioner sought the following reliefs:

- a. A declaration that the decision of the Respondent reached on 16.2.2026 to expel EEW from school was unconstitutional, unlawful, and in breach of his right to fair administrative action and basic education.
- b. An order for immediate readmission of EEW to the Respondent school to enable him attend and complete his secondary education without any hindrance whatsoever.
- c. An order for compensation to the Petitioner and his parents for the loss and damage occasioned as a result of the Respondent's actions.
- d. Costs of the petition.

2. The Petition was based on the grounds on its face and supported by the Supporting Affidavit of JMG, the father of EEW, sworn on 27.2.2026, as well as the supplementary affidavit dated 24.3.2026, as follows:

- a) On 16.2.2026, the Respondent expelled EEW Kariuki Macharia from school for alleged drug abuse, which was false and untrue.
- b) The deputy head teacher of the school summoned the Petitioner and his son to school via phone call, and upon arrival, school rules and regulations prohibiting drug abuse were read to them.

- c) The deputy principal then asked EEW to collect his books and beddings and to meet the Petitioner at the school gate.
- d) No disciplinary hearing was conducted before the expulsion of JMG.
- e) The Respondent school coerced EEW into writing a confession regarding the alleged misconduct of abusing drugs.
- f) The decision was arrived at unilaterally and communicated verbally without written reasons. The Respondent school subsequently summoned the Petitioner to school on 18.2.2026, when the Deputy Principal coerced him to sign a transfer request for his son with assurance of a positive report card on discipline if the recipient school made inquiries.
- g) The Petitioner's son has lost learning hours, unused school fees, emotional distress, psychological injury, and reputational harm. The Respondent school has not registered EEW in the KNEC despite having given them an index number, and so he will miss the KCSE Exams scheduled for November 2026.

h) The Respondent breached the student's right to fair trial, fair administrative action and education. The Petitioner appeared before the Respondent on 6.3.2026 and no evidence, including the alleged disciplinary committee minutes, CCTV, or witness, was tendered against EEW save for the alleged confession letter.

i) The Respondent ignored the evidence that the Petitioner took his son for drug test and results were negative. Therefore the hearing of 6.3.2026 was not a fair hearing as it had a predetermined judgment against EEW.

j) Dr. Mwirigi, the Chief Principal, appeared in court and blamed the deputy for the actions, but himself failed to lay down any action he took to forestall the breaches of the student's rights. The decision of 6.3.2026 was never communicated to the Petitioner, who learned of the same from the replying affidavit.

3. The Respondent filed a Replying Affidavit sworn by Dr. Silas Mwirigi, Chief Principal, on 26.3.2026 as follows:

a) A student doing drugs and aiding their purchase and distribution in school was a serious offense warranting expulsion, and such rules were laid down to all students and parents upon joining the school.

- b) EEW and others were involved in drugs and aiding their purchase and distribution in school. EEW wrote a letter dated 16.2.2026 confessing to having been involved in drugs.
- c) The Petitioner was called to school and was informed of the conduct of his son and was requested to wait for the suspension letter before going home with his son, but he became belligerent and left without waiting.
- d) On 24.2.2026, the school invited the Petitioner and his son to a disciplinary hearing scheduled for 6.3.2026, but was served with this Petition on 4.3.2026. No decision has been made to expel the student, as that is the Respondent's mandate. The disciplinary proceedings were subsequently concluded, and the student has since been registered for KCSE.
- e) The Petitioner should exhaust the appellate process under the Education Act, and the petition is premature since the final decision lies with the Ministry of Education.

4. The interested parties did not file any documents in response to the petition. In any case their position is now settled by the supreme court in **Methodist Church in Kenya v Fugicha & 3 others (Petition 16 of 2016)**

[2019] KESC 59 (KLR), where the Supreme Court held as follows:

What should we make of a cross-petition fashioned as such? Yet this court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the court. We did remark, in *Francis Kariuki Muruatetu & another v Republic & 5 other s*, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us. Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested

party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court” [emphasis supplied].

54. In like terms we thus observed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others , Civil Appeal No 290 of 2012 (paragraph 24):

A suit in court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

5. The matter proceeded by way of written submissions. However, I had to call for the attendance of the School Principal in one of the sessions. I got a definite impression that he was at sea on what transpired, or feigned ignorance. I directed him to ensure that the minor was registered. He assured me that the registration had occurred. The Principal appears ignorant of the processes and his ultimate role. He kept shifting responsibility to the Deputy Principal even in matters where the buck stops at his desk.

Submissions

6. The Petitioner filed submissions dated 24.3.2026. It was submitted that the Petitioner's son was thrown out of school with beddings and all belongings on 16.2.2026 without a hearing on the alleged involvement in drugs. Further, there was no evidence of a disciplinary committee hearing or investigation before the expulsion, and the purported hearing on 16.3.2026 was an attempt to sanitize the infringement of the student's rights and fundamental freedoms. Reliance was placed on Section 4 of the Fair Administrative Action Act, which requires written reasons and a notice of right to review to justify an administrative action.
7. On the doctrine of exhaustion, it was submitted that the Respondent took unreasonably long to safeguard the rights of the student, and it was necessary that only the court would be an appropriate mechanism for justice. Reliance was placed on **Geoffrey Muthinja & 4 others v Samuel Muguna Henry & 2 others [2022] KEHC 2085 (KLR)**.
8. It was also submitted that there were exceptions to the exhaustion doctrine that applied to this case and reliance was placed *inter alia* on **Fleur Investments Limited v held that: - Commissioner of Domestic Taxes & another (2018) eKLR**.
9. On compensation, it was submitted that Ksh. 300,000/= would be adequate and supported by **E K & 5 others v Registered Trustees of S H S [2015] KEHC 2692(KLR)**.

10. On the part of the Respondent, submissions dated 1.4.2026 were filed. It was submitted that the student's registration had already been completed, and such prayers in the Petition were overtaken by events.
11. It was as such submitted that the Petition was filed without having exhausted the elaborate procedure for disciplinary action against the student and is premature.
12. The Respondent submitted that the right to education was not absolute, and where a student was involved in prohibited drugs, the Respondent had the responsibility to protect the welfare of other students in the school from being affected negatively.
13. The Respondent, however, cited no authorities.

Analysis

14. In this Petition, the issue that presents to me for determination is whether the Respondent acted in breach of the constitutional rights of the student under Articles 47 and 53 of the Constitution as to entitle the Petitioner to the reliefs sought. The Petitioner maintained that the rights and fundamental freedoms of the student were threatened and infringed when the student was thrown out of school without any hearing on the alleged drug abuse contrary to Article 25 and 47 of the Constitution. Therefore the petition raises four issues, that is:

- a. Whether the petitioner's right to fair hearing was breached
- b. Whether the minor's right to education was breached
- c. Remedies and reliefs available
- d. Doctrine of exhaustion

15. The Constitution imposes an obligation on all courts to promote the spirit, purport, and objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* **(2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883**, the Constitutional Court observed as follows:

"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law". In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.

16. This obligation bestowed on this Court resounds the special role of the judiciary in our system with respect to constitutional interpretation. In *Marbury vs. Madison*, **5 U.S. 137 (1803)**, it was observed that the courts, as well as other departments, are bound by the Constitution and must interpret it when a dispute so requires.

17. The Court of Appeal in **Attorney General v Law Society of Kenya & another** [2017] KECA 176 (KLR), applied the case of (*Marbury vs. Madison*) where they stated as follows:

What Chief Justice John Marshall observed in 1803 on the supremacy of the American Constitution in *Marbury V. Madison*, 5 U.S. (1 Cranch) 137 (1803), appear to have informed the enactment of the above section 3. Those words, which we reproduce below, apply to date in many jurisdictions, including ours. He said;

“The Constitution is the fundamental and paramount law of the nation, and that it cannot be altered by an ordinary act of the legislature. Therefore, an act of the Legislature repugnant to the Constitution is void...It would be an absurdity to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution: It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the

operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.....”

18. The above decision was affirmed in Law Society of Kenya v Attorney General & another [2019] KESC 16 (KLR) by the Supreme Court.

19. This court is thus the ultimate guardian of the Constitution and its values. The constitutional court of South Africa in My Vote Counts NPC vs Speaker of the National Assembly and Others (CCT121/14) [2015] ZACC 31 (30 September 2015) stated thus:

"We are mindful that it is this Court that is the final arbiter on adherence to the Constitution and its values. On this, in Doctors for Life, Ngcobo J says:-

"...This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its

constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

20. The power of the court is set out in extension under Article 22 of the Constitution as follows in regard to the enforcement of fundamental rights and freedoms:

(1) 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.

(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.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

21. Article 23 of the constitution provides for the authority of courts to uphold and enforce the Bill of Rights. The court granted the primacy on the enforcement of these rights is the High Court under Article 165(3)(b) of the Constitution as follows:

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

20. Article 23 (1) of the constitution provides as follows:

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

22. The power is buttressed in Article 23(3) of the Constitution, which gives a gamut of remedies that the High Court may give. The sub Article provides as follows:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

23. The manifestation of contravention or infringement of the constitutional rights is a matter that should be clearly spelt out by the grievant Petitioner. The apex court has discussed the prerequisites for a proper Constitutional Petition. In **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others** [2014] eKLR the court stated as follows:

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the

provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

24. Therefore, the Petitioner herein should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. The foregoing was fittingly captured in in Miscellaneous Criminal Application 4 of 1979, **Anarita Karimi Njeru v Republic [1979] KLR** where the court observed as follows:

If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...

25. The requirement of precision is thus crucial to serve to derive the actual dispute for the determination by the court and goes to the root of the Petition as a pleading. In Constitutional Petition No E265 of 2021, **Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another** [2021] eKLR, the court

discussed the need for precision in approval to the precedent in Anarita Karimi decision and observed as follows: -

The foregoing finding (Anarita Karimi Njeru) received endorsement from the Court of Appeal in Nairobi Civil Appeal No 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance[2013] eKLR as follows-

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

26. The Petition herein meets the threshold for constitutional petitions but the issue is whether the violations are proved. The jurisdiction of this court is

circumscribed under Article 165(3) of the Constitution of Kenya, which posits as follows: -

(3) Subject to clause (5), the High Court shall have-

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

27. It is noteworthy that there is no necessity that all constitutional petitions that come before this court must win. The condition was that the Petitioner raises constitutional questions as anticipated in the *locus classicus* of *Anarita Karimi vs Republic*, and once the court was satisfied that there was a justiciable case, based on a real and substantial controversy which unequivocally calls for adjudication of the rights asserted, that was enough. In **Patrick Ouma Onyango & 12 Others v The Attorney General & 2 Others, Misc Appl No. 677 of 2005**, the court endorsed the doctrine of justiciability, as stated by Lawrence H. Tribe in his book *American Constitutional Law*, 2nd Edition, p. 92 that;

'In order for a claim to be justiciable as an article III, it must present a real and substantial controversy which unequivocally calls for

adjudication of the rights asserted. In part, the extent to which there is a 'real and substantial controversy' is determined under the doctrine of 'standing' by an examination of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also a part of the controversy itself-an aspect of the appropriateness of the issues for judicial decision....and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

28. I have perused the minutes of the Board and they appear choreographed to meet a specific end in mind. The student in this matter and the related matter were registered since the court had directed so. However, a third student who

had not gone to court was expelled since he had not gone to court. This meant that the decision was made with the court case in mind.

29. Thirdly, the decision of the board should be by way of recommendation to the second interested party. However, in this case it was final. The original expulsion done by the Deputy Principal was not nullified by the board. The minor was already expelled by the time the board considered the expulsion. There can be no re-expulsion. The respondent could not validate an ultra vires action by the Deputy Principal.

30. Once service of the petition was effected, the board was convened on the same day as the hearing in court. After the court parties purported to hear the applicant and communicated the decision. There is no indication of what the minor said or any request to answer the charges. There is no record of the student having time to interrogate the deputy principal. There are no proceedings on what transpired. The board was not considering the report of the disciplinary committee. I do not understand how the board expects the minor to follow the appellate rules when there was no primary decision.

31. It is important to note that the board's decision was to re-expel the minor who had already been expelled by the Deputy Principal, who appeared to be under the impression that he had those powers. He had no such powers. He is not

even a member of the board of management. It is surprising that though the Respondent appears to suggest that the parents were present and the student, there is no record indicating that they, like the two deputy principals and the sub-county director of education were in attendance at any time.

32. Petitioner's case was also argued that the petitioner was not given written reasons before the carrying out of the administrative action. Indeed, he was literally thrown out of school and given his luggage to go home. At that point the student was expelled. The respondent purported that there are rules to be used.

33. One of the fundamental rights that cannot be limited under Article 25(a) of the Constitution is freedom from torture and cruel, inhuman, or degrading treatment or punishment. This will be crucial shortly in turning of the case as pleaded. What I gather was that the minor was picked by the Deputy Principal of the respondent and asked to write a confession. His father was called and told to collect the son, who then moved to court for the reversal of the expulsion.

34. Once service of the petition was effected, the board was convened on the same day as the hearing in court. After the court, parties purported to hear the Petitioner and communicated the decision. There is no indication of what the minor said or any request to answer the charges. He was promptly re-expressed. He had already been expelled

by the Deputy Principal, who appeared to labor under the impression that he had those powers. The petitioner maintained that there was no such powers.

35. Petitioner's case was also argued that the petitioner was not given written reasons before the carrying out of the administrative action. Indeed, he was literally thrown out of school and given his luggage to go home. At that point the student was expelled. The respondent purported that there are rules to be used. I have perused the rules.

36. The Basic Education Act, 2013, is 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. The Act provides in section 13 as follows:

35. (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 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: Provided that such a pupil shall be admitted to an institution that focuses on correction in the context of education.

37. Section 54 of the Basic Education Act, 2013 provides as follows:

(7) The County Director of Education shall, subject to the authority of the Cabinet Secretary and in consultation with the County Government, perform the following functions.

38. Section 59 (f) of the Basic Education Act, 2013, provides as follows:

The functions of the Board of Management of a basic education institution shall be to:

(f) Determine cases of pupils' discipline and make reports to the County Education Board;

39. The representative is therefore required to determine discipline and make reports to the County Education Board. In this case, the Deputy Principal determined the wrongs, took the alleged confessions, expelled the students, and even determined the manner of leaving the school, which was with immediate effect, with all books and beddings. The

respondent then worked backward to validate the Deputy Principal's decision.

40. There are elaborate mechanisms for redress for the school. There is, however, no provision for verbal expulsion. The deputy principal exceeded his mandate by being the complainant, the confessor, the jury, the prosecutor, and the executioner and jailer. The kind of action by the school must be frowned upon. The right to fair administrative action must be proportionate and have regard to the nature of the right. It must also have age-appropriate measures to safeguard the minors' rights.

41. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as follows:

(1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

42. Is the act of terminating education for form four students at the tail end of the 8-4-4 system reasonable? The action meets the perfect test of irrational action.

43. The Basic Education Act enjoins the Respondent to first exhaust other mechanisms for correction before the option of expulsion is considered. There was absolutely no correction, or other record referred to or attempt to review any corrective measure. Such conduct is high handed and does not meet the requirements of rationality. It is not that the allegations were not serious. However, in the right to be heard before action is taken, the procedure is sacrosanct. John M. Mativo J, as he then was, in the case of **Republic v Kenyatta University Ex parte Martha Waihuini Ndungu [2019] KEHC 11128 (KLR)**, addressed the question of irrationality as follows:

53. In *Council of Civil Service Unions v. Minister for the Civil Service*. Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality. What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it to "unreasonableness" in

Wednesbury Case. By “Procedural Impropriety” His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

54. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others* where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

55. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.

44. The actions of the Respondent jeopardized the rights of the student. The Respondent could not purport to register the student but deny him presence in school for learning as this meant preparing the student for failure. The second aspect is the right to education. The petitioner is in the transitional phase of the 8-4-4 education system. There are only two classes remaining: forms three and four. The petitioner is in the examination class. The respondent, in a very cavalier manner, told the court that registration is too late. This was a disproportionate action. The expulsion addressed both the alleged misbehavior for which the minor was not heard, and the examination. The minor was not involved in the examination irregularities. There is no reason not to register him for classes.

45. Further, the right to education was threatened and infringed as the student would remain out of school, thus losing learning hours. On the other hand, the Respondent maintained that the school had not expelled the student as the process leading to such a decision was not in the mandate of the school and was being undertaken by the relevant authorities. As such, according to the Respondent, the Petition was premature.

46. It is not a disputed matter that the student is at home. The minutes of 6.3.2026 recommended that he remains home as he was a threat and bad influence to other students. However, the school registered the student for the

KCSE Exams, anticipated in November 2026, and the Petitioner has not disputed this fact.

47. In addition, the Respondent impliedly ratified the student to continue learning when the school registered him for national examination for November 2026. The anticipated alleged action of the ministry, whether expulsion, suspension, or any such decision to vindicate the student will have no effect, as the student shall have already suffered the consequences of the Respondent's actions.

48. The court is also alive to the fact that the Respondent has the responsibility to take care of the welfare and best interest of the student, at all times when he was in school. The decision to keep the student out of school was drastic and final, without going through the proper procedure. There was no prior warning or allegation of prior engagement in drugs abuse and as the student had been in the Respondent school since form one and was now in form four, it was clearly in error for the Respondent to arrive at such a decision without evidence of proper investigations and hearing. Section 4 (3) and (5) of the Fair Administrative Action Act sets the following as the tenets of a fair hearing:

- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:
 - a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;

- c. Notice of the right to a review or internal appeal against an administrative decision, where applicable;
 - d. A statement of reasons pursuant to Section 6;
 - e. Notice of the right to legal representation where applicable.
 - f. Notice of the right to cross-examine or where applicable;
 - g. Information, materials and evidence to be relied on in making the decision or taking the administrative action;
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to:
- a. Attend proceedings, in person or in the company of an expert of this choice;
 - b. Be heard;
 - c. Cross-examine persons who give adverse evidence against him; and
 - d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this Section shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

49. I have perused the minutes of 6.3.2026 and do not see any submissions from the student or the Petitioner. The decision by the Respondent disregarded the humongous effect on the right to free and compulsory basic education of the student under Article 53 (b) and the right to education under article 43 (1) (f) of the constitution. The rights of children are provided for under article 53(1) of the constitution. The said article provides as follows:

- (1) Every child has the right-

- (a) to a name and nationality from birth;
- (b) to free and compulsory basic education;
- (c) to basic nutrition, shelter and health care;
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
- (f) not to be detained, except as a measure of last resort, and when detained, to be held-
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.

50. The rights have another addition under Article 53(2) as follows:

(2) A child's best interests are of paramount importance in every matter concerning the child.

51. It does not appear that the matter at hand was considered in light of article 53(2) of the Constitution. There appears to be an overemphasis on the rights of the other 2,500 other students in the school. It does not appear that the respondent gave any thought to the rights of the petitioner. It is true that rights of one person must end where another starts. However, the fundamental rights are inherent to the person and not granted by the state. This means that the right to fair hearing is enjoyed by them in or

notwithstanding the rights of others. It is not a community right but a right to an individual as a human person.

52. The Constitutional imperative under article 53 is buttressed under Section 8 of the Children Act 2022 Act No 29 of 2022 which provides as follows:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children.

2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and

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

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.

53. The child was not given an opportunity to express himself in the presence of a guardian and or the children's officer. Therefore, the respondent erred in consigning the petitioner to a lifetime of illiteracy without giving him an opportunity for correction, hearing or even establishing the truth. In the case of **KKPM v SWW [2019] KEHC 10362 (KLR)**, Ongeru J, posited as follows:

In the circumstances of this case, which involves minor children of the parties, there is additional consideration imposed by Article 53 (2) of the Constitution which requires that **"a child's best interests are of paramount importance in every matter concerning the child."** The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its broadest sense. The orders sought would result in depriving the minor of the maintenance amount which in my view would militate against the best interest of the child.

54. The welfare and best interest of the child is of fundamental importance that the Principal should not treat the children the same way as hard-core adult criminals. There are mechanisms of dealing with the complaint that allow the interest of the minor and other minors in the school to be taken care of without violating the rights of the majority children.

55. The right to be heard is sacrosanct and cannot be treated in the cavalier manner the school did. Indeed, if the

school wished to deal with the minor and have him record a statement in the absence of a parent or guardian, the law requires them to have a Children's Officer present. This was not done. **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004** (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice.

The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all

administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

56. The Respondent attempted to sanitize a decision made in breach of natural justice, that is failure to comply with two fundamental principles that is *audi alterum partem* and the principle of *Nemo iudex in causa sua*, which fundamentally provides that no one should be a judge in his own cause. The minor was entitled to be heard by the disciplinary committee but the Deputy Principal torpedoed this and effected an illegal expulsion. The respondent attempted to validate the same *ex post facto*. Indeed it is irrelevant that the same decision would have been arrived at if the minor was heard first.

57. An attempt to sanitize the already made decision is in all fours with the decision dealt with by Odunga J, as he then was in *Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh* [2018] KEHC 8967 (KLR).

30. Whereas the authority concerned may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural

impropriety the same cannot stand. It was therefore held in *Onyango Oloo vs. Attorney General* [1986-1989] EA 456:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in

carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

58. The court in the case of **Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [supra]** continued as follows:

31. This was a restatement of Lord Wright's decision in *General Medical Council vs. Spackman* [1943] 2 All ER 337 cited with approval in *R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007* that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

33. I associate myself with the position in *Board of Education vs. Rice*; [1911] AC 179 in which Lord Loreburn LC stated that:

"A decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything.'"

59. The minor was entitled to be heard in all the initial procedures in the Basic Education Act and Regulations. Without having been heard by the first committee and thereafter the Respondent, the proceedings became null and void. In **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

60. There was no decision to take to the Respondent’s Board for hearing and subsequently for recommendation to the County Education Board. The decision to expel the minor was thus null and void.

61. This then brings the court on the question of exhaustion. This doctrine was discussed in the case of **Mutiso v Commissioner of Domestic Taxes [2023] KEHC 22421 (KLR)**, by AC Mrima, J as follows:

This Court has on a number of occasions discussed the exhaustion doctrine. In an expanded Bench of the High Court in Mombasa High Court Constitutional *Petition No. 159 of 2018* consolidated with Constitutional Petition No. 201 of 2019 **Ramogi & 3 others v Attorney General**

& 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2021] KEHC 3392 (KLR)

William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR, the Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 *Constitution*. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that: It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

45. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion in Republic v Independent Electoral and Boundaries Commission (IEBC); Al Ghurair Printing and Publishing LLC & 5 others (Interested Parties);

The National Super Alliance (NASA) Kenya (Ex parte Applicant) [2017] KEHC 4663 (KLR), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

62. Further in *Republic v Independent Electoral and Boundaries Commission (IEBC); Al Ghurair Printing and Publishing LLC & 5 others (Interested Parties); The National Super Alliance (NASA) Kenya (Ex parte Applicant) [2017] KEHC 4663 (KLR)*, the court held as follows:

57. The first one - is an obvious one and a necessary corollary to the concept of the Rule of Law: that all

decisions including those by judges are subject to the rule of law and judges must, in their interpretive role, subject themselves to a conception of adjudication which filters out their “personal” and “subjective” views and their own personal visions of freedom in place for a constrained approach which is grounded in reasoned argument and structured by the Constitutional text. Probably the best description of this kind of judicial function is the one cited by Mr. Ahmednassir: Prof. Karl Klare in his magnificent piece on Transformative Constitutions: Legal Culture and Transformative Constitutionalism. Prof. Klare says as follows:

This essay focuses on adjudication as one branch of the law-making processes of democratic societies. I take for granted the perhaps controversial assumption that because adjudicators can never be totally constrained by their legal sources, because no one has yet devised or likely to devise a system of total constraint consistent with democratic values-adjudication is, inevitably, a site of law making activity....Among types of law making, adjudication is, or is supposed to be the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule and principle....But judges still, and will always confront the conflicting pulls and tensions (what we used to call the “dialectics” of freedom and constrain. On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society. Yet, on the other, just about everyone

takes for granted that adjudication is not and cannot be infinitely plastic and open-ended, that judges and lawyers are not completely at large to say and do as they please by the lights of whatever personal vision of freedom they hold....[W]e balk at the idea of transformative adjudication because this suggests an invitation to judges, as distinct from legislators to attempt in their work to accomplish political projects. To the contrary the rule of law ideal enjoins judges to check their politics at the courthouse door. Judges are appointed neutrally to enforce the laws set down by others, not to make politics. They are supposed to provide legal interpretation of texts, which means filtering out, as best as they can, their “personal” or “subjective views”, or, what is taken to be the same thing as their “political values” and ideological preconception....

58. Here, what Prof. Karl Klare is railing against, is, in fact, a form of Lochnersism: a form of judicial activism in which court decisions are made based upon presumed rights not specifically addressed by existing (Constitutional) law, especially when influenced by political or personal beliefs. The term is culled from the (in) famous US Supreme Court decision in *Lochner vs. New York*,⁶ which declared unconstitutional a law that limited bakers to a maximum 10-hour work day and 60-hour work week based on a transcendental concept of “liberty of contract”. Indeed, what Prof. Klare was concerned about in his article was the possibility that a largely counter-majoritarian class of judges would use their sense of class morality to torpedo the majoritarian Constitutional values embedded in the South African Transformative Constitution. In short, Prof. Klare is voicing the opinion that

Judges should not constitutionalize their moral views in the guise of Constitutional interpretation. 6198 U.S. 45 (1905)

59. The second meaning of “Judicial Restraint” seems to be more contested one: that judges must, in exercising their judicial authority, practice judicial deference: treat the decisions of other Constitutional organs with deference due to the legitimacy, autonomy and expertise of these other organs. It is not clear what outer limits Mr. Ahmednasir would suggest for this “Judicial Deference” but Prof. Githu Muigai suggested the familiar and accepted definition of Judicial Review as the appropriate approach. That approach is epitomized by the following paragraph in *Susan Mungai vs. The Council of Legal Education & 2 Others*:

“[A] Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of *Associated Provincial Picture Houses Ltd. -v- Wednesbury Corporation*[I]t would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body ... for the court to substitute its own view from that of the [public body] to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts

quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision by issuing a mandamus to compel [a particular action by a public body].... it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."

63. We have a hastily done decision by a body not entitled to make the decision. The decision tumbles upon three constitutional imperatives, that is: the right to fair hearing, the right to fair administrative action, and the imperative under article 53 (2) of the Constitution. There is no process provided for appeal from the decision of the Deputy Principle that is arrived at *in vacuo*. Second and more fundamentally, the process of following up will create an ineffective remedy since once examinations are out of reach and teaching is not done, any victim in that system is pyric.

64. The right to fair hearing was addressed in the case of **National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others [2017] KECA 342 (KLR)**, where the court held as follows:

[35] On our part, we would entirely agree with the trial judges that although the pleadings were slovenly drawn, an appeal or a pleading cannot easily be struck off because a right to a hearing is a fundamental one under our Constitution. This Court differently constituted observed in **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others**, C.A. No. 18 of 2013, Nyeri, as thus;-

“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

65. The matter relates to a candidate who must register and sit for examinations barely 6 months from today. There is no forum to be heard in time of the examinations to be registered, studied for and taken. The system in place is ineffective, where the proceedings start with expulsion before the hearing.

66. It is my finding therefore that the doctrine of exhaustion did not apply to this case as internal mechanisms were flouted as the student was expelled by the Deputy Principal who had no right to do so. No amount of pontification could sanitize what had fallen by the wayside. Secondly possession or dealing with drugs is criminal in nature. There is no report whatsoever on the whereabouts of the drugs. The school Deputy Principal acted as a prosecutor, jury and executor.

67. The student was out of school where he could remain even after having registered him for KCSE exams and it was not clear when a decision would be made. Even if a decision would be made eventually to vindicate him, he would have lost valuable learning time and even if the decision were to

expel him, he would still have to sit examinations without learning. In **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR**, the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

68. There exists exceptions to the doctrine of exhaustion. In *R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA) (supra)*, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest

involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

69. Therefore, this court will in exceptional circumstances consider, and determine whether the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. This places the burden upon this Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

70. Moreover, the jurisdiction of this Court to consider disputes on administrative action as a right also emanates where parties may lack adequate audience before a forum created by a statute, or the quality of audience before the forum is in doubt, must not be ousted from the seat of this Court. Therefore, statutory provisions ousting Court's jurisdiction are not cast in stone and must be construed

restrictively, on case to case basis. This was extensively elaborated by Mativo J in **Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR** as doth:

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

71. The alleged violations met the threshold to be redressed through constitutional remedies stipulated under Article 23 (3) of the Constitution. It is my finding that the action of the respondent violates the fundamental rights in the bill of rights, that is, the right to fair hearing, the children’s rights and the right to fair administrative actions.

72. The Petitioner also prayed for compensation for breach of constitutional rights. It was averred that the Petitioner’s son has lost learning hours, unused school fees, emotional distress, psychological injury and reputational harm. On compensation in constitutional petitions, I am fortified by the dictum of the Court of Appeal in **Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR)** as follows:

The US Supreme Court in *Carey vs Piphus*, 435 U.S. 247 (1978) ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory damages in this regard are general damages that are recoverable without proof of actual loss.

15. The relevant principles applicable to award of damages for constitutional violations under the Constitution were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004*. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows: "When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a

constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

73. From the pleadings there is paucity of materials to find on breach of rights. Secondly, the question of the original sin was not addressed. The minor, from the decision above, will remain with the school until examinations are done. I don't find it necessary to award damages as they were not demonstrated. Further, the other remedies are sufficient.

74. The remedies granted serve to ensure that the student receives education in the Respondent school and not elsewhere. There is need for comity between the parties. Further, the learning period lost is not unreasonable and the Petitioner has no basis for allegations of psychological and reputational harm.

75. Before departing, I note that the parent and the school are supposed to be partners in raising this new generation. The quashing of the decision does not make the minor a saint ready for canonization. It is a victory arising from a fundamental flaw in procedure and nothing more. The parents may need to do more to provide the minor with psycho-social support, if they are to reap well in the future. Counseling and behavioural adjustment programmes need to be introduced for correction, in the circumstances of matters complained of.

76. On costs, an award of costs in this court are governed by Section 27 of the Civil Procedure Act. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases.

77. Being a constitutional petition and noting the relationship between the parties is continuing, it is directed that each party to bear own costs.

Determination

78. The upshot is that I make the following orders:

a) The Petition is merited and is allowed in the following terms:

- (i) A Declaration is hereby issued that the decision of the Respondent reached on 16.2.2026 to expel EEW was unconstitutional, unlawful and in breach of his right to fair administrative action, fair hearing and basic education.
- (ii) An Order is hereby issued for immediate readmission of EEW to the Respondent school, registration for KCSE examinations 2026, if not yet registered, to enable him attend and complete his secondary education in the Respondent school without any hindrance.
- (iii) An Order be and is hereby issued quashing any ongoing or prospective action, hearing or decision by the Respondent or any other person or entity in respect of the allegations of drug abuse against EEW raised by the Respondent on 16.2.2026.
- (iv) An order for compensation to the Petitioner and his parents for alleged loss and damage is declined.

b) Each party will bear its own costs.

DELIVERED, DATED and SIGNED at NYERI on this 23rd day of April, 2026. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

Muchiri Wa Gathoni for Petitioner present

Ms. Wanzia for Mr. Gisemba for the Respondent

Mr. Nganga for Mr. Karweru

Petitioner present

Court Assistant - Michael