



In re DN & DKK (Minors) (Family Miscellaneous Application E004 of 2025) [2025] KEHC 5178 (KLR) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E004 OF 2025**

G MUTAI, J

APRIL 28, 2025

IN THE MATTER OF THE CHILDREN'S ACT

(ACT NO 29 OF 2022)

AND

IN THE MATTER OF DN AND DKK (MINORS)

AND

IN THE MATTER OF AN APPLICATION BY DN AND DKK

(MINORS SUING THROUGH LMM, THEIR MOTHER AND NEXT FRIEND)

BETWEEN

LMM APPLICANT

AND

[PARTICULARS WITHHELD] SCHOOL RESPONDENT

JUDGMENT

1. Through an Originating Motion dated 30th January 2025, the Applicant seeks the following: -

1. That permanent injunction restraining the Respondent herein from removing the children DN and DKK from its learning institution until such a time that the Applicant will willingly transfer to another school;
2. That the Respondent be restrained from discrimination on the children herein in any way whatsoever while attending school therein;
3. That this honourable court may make any other or such orders as may be just and expedient concerning the matter herein;



4. That a power of arrest be attached to the orders herein; and
5. The costs of this application be provided for.
2. Together with the Originating Summons, the Applicant also filed a Notice of Motion application dated 30th January 2025, vide which she sought interim orders preventing the Respondent from removing her children from the school.
3. The basis upon which the application was brought was that the children, DN and DKK, are pupils at [Particulars withheld] School, having been admitted in 2016 and 2019, respectively, and are in Grade 7 and 4. The children had been removed from school due to a disagreement between the parents and the school. The Applicant urged that the children had no role in the disagreement and that she had been identified by the Chairlady of the school, VM, for discrimination for being vocal about the school's affairs.
4. The Applicant averred that she had complied with the school's requirement and that she had paid all the requisite fees and was ready to cooperate and allow the smooth running of the school's programs.
5. She blamed the dispute on the fact that she had raised issues about the school and that the school chose to pick on her and her children.
6. The Respondent opposed the Originating Summons and the application. In an affidavit sworn by Ms. VM on 20th February 2025, the said deponent averred that the Applicant was a perpetual fee defaulter who, when she filed this cause, owed the school a considerable amount of money. She accused her of creating strife in the school by encouraging parents to take their children elsewhere. She also accused her of not allowing her children to take school-cooked meals and of frequently visiting the school to harass the administration.
7. Ms. VM averred that contrary to what was alleged in the affidavit of the Applicant her children had previously been transferred to [Particulars withheld] School and that they only returned when there was a change of management at the [Particulars withheld] School, by taking advantage of the fact that the new management were not aware of her previous conduct.
8. She stated that the Respondent was free to take her children to another school.
9. As both the application and the Originating Summons seek the same prayers, the two were canvassed together by way of written submissions.
10. The submissions of the Applicant are dated 4th April 2025. The counsel for the Applicant, Oduor Siminyu & Co., identified issues for determination as being: -
 - i. Whether the Respondent's action to expel the minors followed due process;
 - ii. Whether the Respondent's action violated the minors' right to education;
 - iii. Whether the Respondent's action of interpreting its policies is discriminatory of the minor; and
 - iv. Costs.
11. It was submitted that the Respondent's action was discriminatory as it failed to provide a list of all parents with fee arrears and what action had been taken against them. It was urged that the lack of payment of fees was a pretext and not the real reason for expulsion.



12. It was urged that the Applicant was subjected to an unfair process, was not heard and unreasonable demands were made of her, including pulling down the WhatsApp group, quitting her role as the parents' representative.
13. Counsel relied on the case of Geothermal Development Co Ltd v the Attorney General & 3 Other [2013] eKLR and Nyongesa & Others v Egerton University (1990) KLR 692.
14. Counsel therefore urged the Court to allow the Originating Summons as prayed.
15. The submissions of the Respondent is dated 25th March 2025. The Respondents identified the issues coming up for determination as being:-
 1. Whether the Respondent's actions violate the minor's right to education;
 2. Whether the Respondent's application and interpretation of its policies is discriminatory to the minors; and
 3. Who is entitled to costs?
16. On the first issue, it was urged that the Respondent was a private institution with its own policies. Counsel for the Respondent submitted that the Respondent, as a private institution, had no obligation to provide for the right to education. Reliance was placed on the decision of the Court in JK (suing on behalf of CK v Board of Directors of R School & another [2014]eKLR and Joseph Njuguna & others v George Gitau t/a Emmau School & another [2016]eKLR.
17. Counsel submitted that the Applicant failed to meet her obligation as a parent by paying school fees on time. She urged that without finances the Respondent could not run its programs. She relied on the case of BPA v Directors, Brookhouse Schools & 3 others DPGT (Proposed Interested Party) [2020]eKLR where the Court stated as follows:-

“private schools are not funded by the state and must change fees in order to provide services”.
18. Counsel for the Respondent denied that the policies of the Respondent were not discriminatory. she urged that the requirement that the applicant's children leave school wasn't based on prohibited grounds but rather the non-adherence with the school rules and non-payment of the school fees.
19. I have considered the Originating Summons, the affidavit in support, the annexures thereto and also the replying affidavit sworn by Ms VM and its annexures. I have also considered the submissions of the parties' advocates. I must now determine if the Originating Summons has merits and if I should allow it.
20. To do this I need to set out the constitutional and statutory provisions that undergird the rights the subject of these proceedings.
21. Article 43(1) of *the Constitution* states that: -
 - “(1) Every person has the right: -
 - ...
 - (f) to education.”



22. The foregoing provision is emphasized in Article 53(1) of *the Constitution* of the state which provides that:-

- “(1) Every child has the right:-
- (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
- ...”

23. Section 13 of the *Children Act*, 2022 states that:-

- “(1) Every child has the right to free and compulsory basic education in accordance with Article 53(1)(b) of *the Constitution*.
- (2) It shall be the responsibility of every parent or guardian to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution.
- (3) The Cabinet Secretary shall, in consultation with the Cabinet Secretary for the time being responsible for education develop and implement policies for the realization by every child of the constitutional right to basic education.”

24. My reading of the above provisions is that the duty to provide education lies with the state and the parents. It is not a duty that lies on a private educational establishment.

25. In making the foregoing observation I am guided by the decision of Mumbi Ngugi J. (as she then was), who while addressing the right to education and the place of private schools in the case of JK (Suing on behalf of CK) v Board of Directors of Rusinga School & another [2014] KEHC 7490 (KLR), held that:-

“It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article 43. However, there is no obligation placed on a private entity such as the respondent school to provide such right.”

26. I am further guided by the decision of Onguto, J, Joseph Njuguna & 28 others v George Gitau T/A Emmaus School & another [2016] KEHC 6612 (KLR) where the learned Judge held as follows:-

“I further wish to state that, the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school, where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary.”

27. In this case, it is evident that the Applicant has had challenges paying school fees and that despite having opportunities to remedy the same, she has not cleared the arrears. The inability could be cured by the Applicant transferring her children to a different school, either public, where she wouldn't have to pay fees, or a private school whose fees structure is within her means.



28. It must be noted that private schools have the right to set their own policies. As has often been said, the Courts should be most reluctant to micromanage private institutions unless their conduct is unconstitutional. Mumbi Ngugi, J (as she then was), pithily stated as follows in the case of JK (Suing on behalf of CK) v Board of Directors of Rusinga School & another [2014] KEHC 7490 (KLR)

“24. Before considering these issues, it is important to acknowledge the right of educational institutions to set rules of conduct for their students. Courts will not ordinarily interfere with those rules and regulations except in very exceptional circumstances. The court recognises that it is those charged with the responsibility of educating children and nurturing them into adults who respect the rule of law and the rights of others who are best placed to make regulations for students, and enforce them. Only if it is demonstrated that such rules or the enforcement thereof violate the rights of those subject to them, or *the Constitution*, will the court intervene. As the court observed at paragraph 28 of its decision in Fredrick Majimbo & another v Principal, Kianda School, Secondary Section High Court Petition No 281 of 2012...”

29. It is a common ground that the Respondent is a private school. A private school run its programs with funds obtained from school fees paid by parents. Without payment of school fees, schools would grind to a halt. In my view, requiring payment of school fees and having sanctions when there is default isn't unreasonable or unconstitutional. The Applicant still has the option of taking her children to another school, as she has done in the past.

30. I note that the Respondent's contention in the Replying Affidavit that the Applicant was a disruptive influence in the school was controverted as she did not file an affidavit in response thereto. Running a food establishment near the school and encouraging parents to take their children elsewhere could be considered hostile activities. Given the conduct of the Applicant, the Respondent was within its rights to ask her to take the two pupils to a different school.

31. Has there been discrimination? I must state at the outset that it was the Applicant's duty to prove her case. Section 107 of the *Evidence Act* placed the burden of proof on her to buttress her allegation of discrimination.

32. Based on the available evidence, I find and hold that the Applicant did not prove that there was discrimination.

33. The upshot of the foregoing is that I am not persuaded that the application has merit. Consequently, the Originating Summons dated 30th January 2025 is hereby dismissed. I discharge the orders currently subsisting.

34. Given the nature of the matter, each party shall bear its own costs.

35. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 28TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH THE CTS PLATFORM.

GREGORY MUTAI

JUDGE

