



Ragen (Suing on his own Capacity, in the Public Interest and on behalf of Mwaani Boys Secondary School Parents) v Board of Management of Mwaani Boys Secondary School & 4 others (Constitutional Petition E010 of 2024) [2025] KEHC 12440 (KLR) (29 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION E010 OF 2024**

TM MATHEKA, J

AUGUST 29, 2025

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 43(1)(F), 47.48, 53(1)(B)(2), 55(A) & 56(B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10,73, 74, 75, 201 & 232 THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE CHILDRENS ACT

AND

IN THE MATTER OF ARTICLE 28 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

AND

IN THE MATTER OF BOARD OF MANAGEMENT OF MWAANI BOYS SECONDARY SCHOOL FORCING EACH LEARNER TO PAY KSHS 5000 WITHOUT CONSULTATION WITH PARENTS AND WITHOUT RELEVANT DOCUMENTATIONS OF PROOF OF INTENDED USE OF THE MONEY

BETWEEN

AINEA RAGEN PETITIONER

SUING ON HIS OWN CAPACITY, IN THE PUBLIC INTEREST AND ON BEHALF OF MWAANI BOYS SECONDARY SCHOOL PARENTS

AND

BOARD OF MANAGEMENT OF MWAANI BOYS SECONDARY SCHOOL 1ST RESPONDENT



PRINCIPAL OF MWAANI BOYS SECONDARY SCHOOL 2ND RESPONDENT
PRINCIPAL SECRETARY STATE DEPARTMENT OF BASIC
EDUCATION 3RD RESPONDENT
COUNTY DIRECTOR OF EDUCATION MAKUENI COUNTY 4TH
RESPONDENT
ATTORNEY GENERAL OF THE REPUBLIC OF KENYA 5TH RESPONDENT

RULING

Introduction

1. The Petition herein was provoked birthed by the decision of Mwaani Boys Secondary School management to send all the students home following a fire incident in the school on 20/09/2024. The students were required to report back to School between 01/10/2024 and 07/10/2024. There was imposed on each one of them a mandatory penalty of kshs 5,000/= ostensibly for purposes of repairing the damages caused by the fire. It is the Petitioner's contention that the decision amounted to a blanket condemnation of all students without tabling evidence of proof of their involvement and culpability, an action that is in contravention of fair administrative action and the doctrine of presumption of innocence.
2. Together with the Petition, the Petitioner filed an Application dated 01/10/2024 seeking conservatory orders and on 07/11/2024, this court issued the following orders;
 - a. The Notice of Motion is allowed in terms of prayers 6,7 and 9 on its face-with the cost of the Notice of Motion.
 - b. Submissions of the Petitioner be filed and served within 14 days.
 - c. Respondents will have 14 days to Respond.
 - d. Mention on 9/12/2024 before the Deputy Registrar for compliance.
 - e. Petitioner to serve.
3. Aggrieved by the said orders, the Respondents filed an Application dated 28/11/2024 under certificate of urgency seeking the following orders;
 - a. That pending the hearing and determination of this Application inter partes, this honorable court be pleased to set aside the orders issued on 07/11/2024.
 - b. That this honorable court be pleased to set-aside, vary or discharge the ex-parte orders issued on 07/11/2024.
4. The Application is supported by the grounds on its face and the affidavit of Ms. Robi Mwise Debora – Senior State Counsel in the Attorney General's Chamber - sworn on the same day. She deponed that the conservatory orders issued ex-parte at an interlocutory stage are akin to a final judgment and have rendered the hearing of the main petition otiose.
5. She deponed that her first appearance in this matter was on 14/10/2024 for a mention of the said Application where the court issued directions on compliance and gave a further mention of 28/10/2024. That, on 27/10/2024, she received instructions from the 3rd Respondent to inform the



court of the intention to have the matter settled out of court. That, on 28/10/2024, the court was not sitting as the judge was indisposed and they were instructed to take dates at the Registry. A notice is exhibited as RMD1.

6. She deponed that they were not served with any invitation by the Petitioner to set the new date at the registry and upon perusal of the file on 18/11/2024, they established that the matter was mentioned on 07/11/2024 and ex-parte orders issued. That, the Attorney General (AG) was never served with a notice to appear on the said date and was therefore unaware of the date of 7th November 2024.
7. She deponed that they should be granted an opportunity to be heard on the Petitioner's Application in the interests of justice or set aside the orders and have the parties proceed to hearing of the main petition. That, the orders issued are final in nature and tantamount to pre-emptying the petition which goes against the principles, purpose and intention of an Application for conservatory orders.
8. The Application is opposed by the Petitioner through a Replying Affidavit sworn on 21/03/2025. He deponed that, prayers No. i and ii of his application dated 01/10/2024 were allowed by the court ex-parte on 03/10/2024 and the Respondents did not raise any issue when their counsel appeared in court on 14/10/2024. That the matter was set for mention on 28/10/2024 but it took another 30 days for the Respondents to file the current Application.
9. He deponed that on 04/11/2024, the ODPP charged 6 students of Mwaani Boys High School in Makueni Magistrate Criminal Case No E616 of 2024 with arson, and destroying school property worth kshs 5,302, 950/=. That they were also accused of burning School crops yet the School does not have a farm with crops. That from the charge sheet the Respondents had evidence against the 6 students and had quantified the damage but they have never availed evidence linking the entire student body which they had burdened with a mandatory payment for of Ksh 5000 each for the same damage.
10. He deponed that the Application by the Respondents is an irony by all standards because it is directly seeking this courts blessing to allow the 1st and 2nd Respondents to collect kshs 5,000/= from parents of each student in the school yet they have not availed any proof in form of an audit report from a reputable entity to show how they arrived at kshs 5,000/= per student. That the Respondents have not shown how the entire student body was involved in light of the existing criminal case alleging that only 6 students were involved.
11. He deponed that the Respondents have not demonstrated how the impugned orders have prejudiced them as they have continued to collect normal school fees unhindered including sending back home the students who had not cleared their school fees. That they have not demonstrated the substantial loss which they will incur if the court fails to grant orders for stay.
12. He deponed that the parents who are struggling, to the point of selling property like land, will suffer substantial loss if the court grants the orders. That, granting the orders is akin to chaos as it will empower the Respondents to aggressively collect kshs 5,000/= from parents including sending back home the students who will not have paid the same.
13. He deponed that the Respondents have not approached this court with clean hands as the school computer system automatically added kshs 5,000/= to the normal School fees in violation of the orders of this court. That, some parents have already paid the amount and others have been billed and are expected to pay. That the principal, Mr. Kimongo, was not sincere when he appeared before the court on 17/03/2025 and claimed that the addition of kshs 5,000/= into the computer billing system was done before he was transferred to the school. He deponed that he had raised the issue with the principal on several occasions both privately and publicly on Parents' Day yet the school still billed the parents the said amount.



14. He deponed that it has become a trend in Makueni County Schools to charge each student a pre-determined amount of kshs 5,000/= whenever a fire incident occurs in any School. That, in the period of June to October 2024, there were fire incidents in public Schools in Makueni County and the school managements of those schools unilaterally forced parents to pay kshs 5,000/= for damages. That, the outcome of this case will set precedent that no school management within the Republic of Kenya will unilaterally and without proof, bill parents for damages incurred in the event of an incident of the nature that causes damage in schools. That, this one of the grounds upon which the Parents of the students in Mwaani did not buy into the idea of an out of court settlement proposed by Counsel for the Respondents.
15. He deponed that the right to a fair hearing is a fundamental right which applies to all. That, the same way the Respondents have invoked Article 50 of *the Constitution* in seeking the stay orders is the same way the parents/students have a right to fair hearing in knowing why the school is billing them kshs 5,000/= without evidence of their sons' involvement.
16. The parties elected to canvass the Application through written submissions and appropriate directions were given. Consequently, the parties complied and filed their respective submissions.

Submissions by the Applicants

17. For the Applicants the issue for determination is whether the conservatory orders granted on 07/11/2024 should be set aside.
18. Reliance was placed on Rules 16(2) and 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedure Rule 2013 (Mutunga Rules) as well as Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules for the submission that this court can set-aside, vary or discharge an order upon such terms as may be just.
19. Reliance was placed on *Esther Wamaitha Njihia & two others v Safaricom Ltd [2014] eKLR* where the court held inter alia that;

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so, should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali.*) It also goes without saying that the reason for failure to attend should be considered.”
20. It was submitted that there is no dispute that the Petitioner did not serve the respondent. That, no evidence adduced by the Petitioner by way of an Affidavit of Service as proof of service of the mention notice to the Respondents. That, it is trite law that a party should never be condemned unheard as it is against the rules and principles of natural justice and a violation of a person's constitutional right. That, in making the Orders of 07/11/2024, this Honourable Court was misled into condemning the Respondents/Applicants unheard thereby compromising their constitutional right to a fair trial as well as its right to natural justice.
21. It was submitted that the Counsel for Applicants had taken note of the court directions to comply by filing a response but contended that she could not have acted without the clients' instructions.



That, the instructions were only given on 27/10/ 2024 and they were to the effect that an out of court settlement should be pursued. That, this necessitated informing the court of the intentions of the Respondents before engaging the Petitioner and that if an out of court settlement was being pursued, there would be no need to file a response.

22. It was submitted that the Respondents took note of the issues raised in the Petition and were of the opinion that this is a matter that can be settled out of court hence the non-filing of any response. That it is imperative for this court to weigh the balancing and competing interest of all parties. That, the relationship between the Petitioner/Respondent and the Respondent/Applicant herein emerges from a parent/teacher relationship and the main issue for deliberation before the court is; who has the responsibility to bear the cost of the damages?
23. It was submitted that for the Honourable Court to reach a fair conclusion, there would be need for a full trial based on the principles of natural Justice and fair hearing under the provision of Articles 25 (c), 47 and 50 of *the Constitution*. It was contended that the orders granted are final in nature and have left nothing in the Application or the petition for determination. That, the finality of the orders issued goes against the nature, aim and purpose of conservatory orders. Reliance was placed on *Muslims for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others [2011] eKLR* where the court stated;

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the Application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusively or finality arising that will or may operate adversely vis- a- vis the case of either parties. The principle is similar to that in temporary interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

24. It was submitted that the orders granted are prejudicial to the Respondent/Applicant in the sense that repairs have already been done to allow the students back to School and the said repairs have been done on a credit basis and the said creditors are demanding their money. That, the refund of the money as ordered is therefore detrimental to the Respondents.

Submissions by the Respondent/ Petitioner

25. For the Respondent the issues for determination are;
- a. Whether the ex-parte orders issued infringe on the right of the Respondents as granted by Article 50 of *the constitution*.
 - b. Whether the current Application merits the condition for grant of the orders of stay
26. It was submitted that the ex-parte orders were meant to cushion parents against paying ksh.5,000 per student because the Respondents had not brought to this court proof of how they arrived at a figure of ksh.5,000 per student. Reliance was placed on Article 27(2) of *the Constitution* for the submission that equality includes the full and equal enjoyment of all rights and fundamental freedoms.
27. It was submitted that in an attempt to circumvent the authority of this court, the ODPP charged six (6) students of Mwaani Boys’ high School on 04/11/ 2024 at Makueni Magistrates court Criminal Case no. E616 OF 2024 with arson and destroying School property worth Ksh. 5,302,950. It was contended that it was strange that by 04/11/2024 the Respondents had evidence against the six students that they



- had caused damages to the tune of Ksh. 5,302,950 yet had not provided any in this Petition to support the required mandatory payment of ksh.5,000
28. Relying on Order 42 Rule 6 of the Civil Procedure Rules, it was submitted that the Respondents had not demonstrated the substantial loss which they would incur if the court did not grant the orders.
29. It was submitted that the court must ask itself the following fundamental questions;
- a. What do the Respondents/Applicants intend to achieve by seeking stay orders?
 - b. Has the School stopped operating because of non-collection of the ksh.5,000?
 - c. Do they plan to start collecting the ksh.5,000 from every student when already there is a criminal case the subordinate court in which the ODPP has accused only 6 students to have been involved and has already quantified the value of the damages?
 - d. On what basis or evidence against the entire Mwaani boy's student body do the Respondents have that they are now viciously fighting through their application for stay order whose intent and purpose is to allow them collect ksh.5,000.
30. It was submitted that the Respondents have not approached this court with clean hands as the school computer payment system automatically added ksh.5,000 to the normal School fees in violation of orders of this court which was acknowledged by the principal Mr. Kimongo in the open court hearing.
31. As to whether the current Application merits the condition for grant of the orders of stay, it was submitted in the negative for the following reasons;
- a. The Respondents violated the same order they are seeking to stay by collecting ksh.5,000 through the school computer system.
 - b. The Respondents have not brought any audit to ascertain the total amount in damages that necessitated the demand for Ksh. 5,000 on each student.
 - c. There is a pending criminal proceedings against six (6) students of Mwaani accusing them of being responsible for the fire incident and so punishing the entire student population for sins of 6 is in itself immoral.
32. Finally, it was submitted that this Application is brought in bad faith, is vexatious, frivolous, malicious and has no basis to stand a chance of getting any favorable outcome. That it is dead on arrival and this honourable court must affirm so and dismiss it with punitive costs.
33. Upon careful consideration of the Application, the response and rival submissions, the only issue for determination is whether the Application is merited.

Analysis & Determination

34. Were the Respondents notified of the date when the orders were issued? Were they condemned unheard?
35. The record shows that the Application leading to the impugned orders was filed on 02/10/2024 under certificate of urgency. On 14/10/2024, a Senior State Counsel- Ms. Robi- appeared for all the Respondents and acknowledged receipt of the Application and petition. She informed the court that she had not been able to file the response. The court noted that the 3rd Respondent had not been served and directed that service be effected. Directions were given that all Respondents to file their responses within 7 days of service.



36. All the Respondents are represented by Counsel who had acknowledged service. The 7days (from 14/10/2024) lapsed on 21/10/2014. By that date, the Respondents had not even entered Appearance. On 28/10/2014, the matter came up for mention but this court was indisposed and the registry staff automatically fixed another mention date on 07/11/2024. Accordingly, the court communicated the mention date to the Petitioner via email but since the Respondents had not filed any document, the said communication could not be sent to them.
37. On 07/11/2024, the court noted that the Respondents had not been notified of the date but also noted that they had not entered appearance or filed a response. In the circumstances and in consideration of the fact that counsel had appeared on 14/10/2024 and that the timeline for filing responses had lapsed on 21/10/2024, there nothing to indicate that there was any opposition to the prayers sought.
38. In support of the current Application, counsel for the respondents submitted that there was no need to file a response because she had been instructed to pursue an out of court settlement. It is clearly evident that the respondents had not complied with the directions of the court and the same had not been stayed or set aside. Neither was there no consensus that because there were negotiations the parties would not comply. The respondent's application is in a way an attempt to justify the failure to comply. Surely that is not tenable. Rules and procedures are meant to ensure that the administration of justice is smooth and that parties and the court know what to expect from each other.
39. Counsel also argued that she could not have acted without her client's which were instructions were given on 27/10/2024, which instructions were to pursue an out of court settlement. I have already addressed this ground.
40. I have demonstrated that the Respondents were aware of this matter by 14/10/2024 and had sufficient time to comply but they did not. The Respondents are seeking the exercise of discretion by this court. In *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR the Court of Appeal (Visram, Koome & Odek JJ.A) stated;
- “...the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”.
41. The orders of this court issued on 07/11/2024 allowed the Petitioners Application dated 01/10/2024 in terms of prayers 6, 7 & 9 which were framed as follows;
6. That this honorable court be pleased to issue an order to the 1st and 2nd Respondents to reimburse and or refund to the parents or students the full amount of kshs 5,000/= or part of the money paid by parents or students required by the 1st and 2nd Respondents as payments for damages to those who would have paid prior to filing this Application.
7. That in the alternative to order no 6 hereinabove, this honourable court be pleased to issue an order to the 1st and 2nd Respondents to re-channel the kshs 5,000/= or any amount of money paid by parents or students into the school fees payment for those students who would have paid this amount prior to filing this Application.
9. Those costs of this Application be in the cause.
42. The direct consequence of setting aside the above orders is that the 1st and 2nd Respondents will be at liberty to implement their decision of obtaining kshs 5,000/= from each student for payment for



damages caused by the fire. Clearly in the circumstances of this case that will be problematic for the following reasons;

43. Firstly, there is no evidence of that figure was arrived at and whether or not all the students in the school are guilty of causing the fire. The submission that that failure to set aside the orders will be prejudicial because repairs have already been done on credit basis and the creditors are demanding their money notwithstanding, no evidence was exhibited in the supporting affidavit to support the alleged damage, the cost incurred in the repairs or the alleged demand notes from the creditors. Consequently, the Respondents have come to court for an equitable remedy but their hands are not clean.
44. A glance at Makueni Chief Magistrate's Court Criminal Case No. E616 of 2024 shows that 6 students have been charged with the offence of Arson contrary to section 332(a) of the Penal Code. The particulars of the offence are that;

“On the 20th day of September 2024 at Mwaani Boys Secondary School, in Makueni Sub-County within Makueni County, the accused persons jointly with others not before this court, willfully and unlawfully set fire to Simba House dormitory valued at kshs 5,302,950/ = belonging to Mwaani Boys Secondary School.”
45. The Respondents have narrowed down the responsibility for the arson to six students, and there is a value has been attached to the alleged loss yet the Respondents have not availed any valuation report to this court. The charge sheet was drafted on 30/10/2024 . This information was available to Ms. Robi when she prepared her supporting affidavit on 28/11/2024, but the same has been withheld from this court.
46. Thirdly, the Respondents have acknowledged that the main issue before court is; who has responsibility to bear the cost of the damages? It is therefore ironical for the Respondents to seek orders which will allow them to continue demanding a mandatory charge of kshs 5,000 yet the issue is pending determination.
47. From the foregoing, I am of the view that the Respondents in this matter have not acted in good faith, they are here with unclean hands and my view is that the consequences of setting aside the orders will not serve the interests of justice.
48. Is the petition spent by these orders? Not at all. The real questions for determination still remain- the alleged violation of the rights of the petitioners. This court simply put to a hold the acts that were said to be violating those rights pending the determination of the petition.
49. In the circumstances, I find that the application is without merit and the same is declined .

DATED, SIGNED AND DELIVERED VIA CTS THIS 29TH AUGUST 2025

MUMBUA T MATHEKA

JUDGE

Applicants' Advocates

Office of the Attorney General

Respondent in Person

