



REPUBLIC OF KENYA



**MKS (Suing as father and next friend of EMS) v Board of Management, Kiambu High School (Petition E003 of 2025) [2025] KEHC 11687 (KLR) (1 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11687 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KIAMBU**  
**PETITION E003 OF 2025**  
**A MSHILA, J**  
**AUGUST 1, 2025**  
**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF**  
**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES**  
**28, 29 (D), 43 (1), 50 (1)(D) AND 53 (1)(D) OF THE CONSTITUTION OF KENYA**

**BETWEEN**  
**MKS (SUING AS FATHER AND NEXT FRIEND OF EMS) ..... PETITIONER**  
**AND**  
**BOARD OF MANAGEMENT, KIAMBU HIGH SCHOOL ..... RESPONDENT**

**RULING**

1. This is a Ruling on the Respondents' Notice of Preliminary Objection dated 25<sup>th</sup> February, 2025 on the whole of the Petition dated 25<sup>th</sup> January, 2025. The preliminary objection is premised on the following grounds;-
  - a. The Petition is bad in law, premature and is an abuse of the court process as the Petitioner has not exhausted the dispute resolution mechanisms under the *Basic Education Act*, No.14 of 2013 and Regulation 41 of the Basic Education Regulations.
  - b. The Petition is unmerited and ought to be struck out and or dismissed forthwith as the dispute should be heard by the Education Appeals Tribunal as established under Section 93 of the *Basic Education Act*, No.14 of 2013.
2. By way of background, the Petitioner herein filed the Constitutional Petition dated 25<sup>th</sup> January, 2025 seeking for the following prayers;-



- a. A declaration by this Honourable Court that the actions of the respondents in ordering the petitioner not to take the minor to school on the schools reopening day, in suspending the minor from school for alleged bhang use and in subjecting the minor to a needless drug test violated the minor's constitutional rights protected under Articles 28, 29 (d), 43 (1)(f), 47(1), 50(1) and 53 (1)(d) of *the Constitution* of Kenya.
  - b. An award of compensation for violation of the minor's constitutional rights protected under Articles 28, 29 (d), 43 (1)(f), 47(1), 50(1) and 53 (1)(d) of *the Constitution* of Kenya.
  - c. Costs and interest.
  - d. Any other order of relief the court may deem fit to grant.
3. The petition is supported by the facts on the face of the petition and the verifying affidavit dated 25<sup>th</sup> January, 2025 sworn by the petitioner. The petitioner averred that he is the father of the subject minor, a form student at the Respondent's institution. On 8<sup>th</sup> January, 2025, the reopening date for the first term, the Petitioner received a message from the school's principal stating that the minor should not report to school for the Petitioner's failure to attend a Discipline Committee meeting scheduled for 29<sup>th</sup> October, 2024, the previous term.
  4. On 15<sup>th</sup> January, 2025 the Petitioner received a letter from the school stating that the minor had been suspended for using bhang in the school. The letter recommended that the minor underwent a drug test at "Elewa Ulevi" and that he would be required to appear before the Respondent on 23<sup>rd</sup> January, 2025 if the test turned positive. The test was negative and the principal allowed the minor to class. This prompted the petitioner to file the instant petition alleging that the minor missed classes for eight days, was subjected to embarrassment before his parents, teachers and classmates for being subjected to an unnecessary drug test.
  5. The preliminary objection was canvassed by way of written submissions. Respective counsel submitted as follows:-

### **Respondent's Submissions**

6. In support of the preliminary objection, Respondent's counsel submitted that this Court lacks jurisdiction to hear and determine the petition because the petitioner had not exhausted the appropriate dispute resolution mechanisms under the *Basic Education Act*, No.14 of 2013. Counsel submitted that the matter relates to indiscipline of the student who was suspended and later returned to school. The *Basic Education Act* and Regulations are clear on the applicable dispute resolution mechanisms in the circumstances. The appropriate forum would be the Education Appeals Tribunal established under section 93 of the *Basic Education Act*, No.14 of 2013.
7. Reliance was placed on regulations 40 and 41 of the Basic Education Regulations and the case of GM & Another (Parents suing as next friend to TZM (Minor)) v Board of Management, St. Mary's School; Nairobi County Education Board, Ministry of Education & Another (Interested Parties)(Judicial Review Miscellaneous Application E062 of 2025)[2025] KEHC 5783 (KLR) (Judicial Review) (8 May 2025)(Ruling).

### **Petitioner's Submissions**

8. The Petitioner submitted that none of the provisions of the *Basic Education Act* cited by the Respondents apply to the petition. The minor was suspended on 15<sup>th</sup> January 2025 for alleged use of bhang. The petitioner was directed to escort the minor for drug test and that if the test turned



positive the minor would be required to appear before the disciplinary tribunal on 23<sup>rd</sup> January, 2025. The test turned negative and the minor was allowed back to class. No further action was taken by the Respondent that would have caused the applicability of regulations 40 and 41 of the Basic Education Regulations.

9. The petitioner averred that the petition falls under the exceptions to the exhaustion doctrine because the dispute resolution mechanism proposed by the Respondent may be unsuitable to handle the matter because there is no decision under Rule 40 of the Basic Education Regulations amenable for appeal before the Education Appeals Tribunal. The Petitioner relied on *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR.

### **Issue for Determination**

10. The only issue for determination as discerned from the pleadings and the respective parties' written submissions is whether the preliminary objection is merited.

### **Analysis**

11. The Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] E.A. 696 held:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. The Respondent stated that this Court lacks jurisdiction because the matter falls under regulations 40 and 41 of the Basic Education Regulations and should have been filed in the Educations Appeals Tribunal.

13. Regulation 39 of the Basic Education Regulations provides;-

“39. Procedure for handling disciplinary cases:-

- (1) The particulars of the complaint preferred against the learner shall be read out to the parent or guardian and the learner at the meeting with the Board of Management under regulation 38, and the learner shall be asked to defend himself or herself.
- (2) Where the parent or guardian fails to appear, the business of the Board shall be adjourned, and the matter shall be deferred and a new date set and communicated for the parties to appear.
- (3) Where the parent or guardian fails to attend on the rescheduled date, the case shall be heard and determined such absence notwithstanding.
- (4) In all disciplinary proceedings affecting a learner the attendance of the Sub-county Education Officer shall be mandatory.



- (5) The recommendations of the Board of Management shall within two days be communicated to the County Director of Education.”

14. Further Regulation 40 provides:-

“ 40. Exclusion of learner from the institution in case of indiscipline

Where the County Director of Education receives the recommendation of the Board of Management then he or she shall seek the advice of the County Education Board as to whether to—

- (a) order for conditional or unconditional re-admission of the learner;
- (b) transfer the learner to an alternative institution; or
- (c) transfer the learner to a corrective center in the context of education.”

15. Finally, Regulation 41 provides;

“ 41. Appeals to the Tribunal

Any Person aggrieved by a decision under regulation 40 may appeal to the Education Appeals Tribunal.”

16. The procedure for handling of disciplinary cases is set out in regulation 39 of the Basic Education Regulations. The school’s Board of Management is required to hear the complaint against a student and make recommendations to the County Director of Education. Under regulation 40, once the County Director of Education receives the recommendations, he seeks the advice of the County Education Board as to whether to order for conditional or unconditional re-admission of the learner, transfer of the learner to an alternative institution or transfer of the learner to a corrective centre in the context of education. Under regulation 41 any person aggrieved by a decision under regulation 40 may appeal to the Education Appeals Tribunal.

17. In the instant case it seems that none of the above provisions were invoked or put in motion. The alleged letter dated 15<sup>th</sup> January, 2025 was a conditional suspension as a temporary measure for the student to undergo a drug test, particularly to check whether the student used bhang. If the test turned positive, the student would have been required to appear before the Board of Management on 23<sup>rd</sup> January, 2025. The test turned negative on 15<sup>th</sup> January, 2025 and the student was allowed back to class. The father is aggrieved by the lost school days and the embarrassment caused to the minor. He asserts that the minor’s rights were contravened. It is upon this court to make a decision on this issue. The matter is therefore properly before this Court.

18. There were no recommendations made by the Board of Management to the County Director of Education under regulation 40. There was therefore no decision by the County Director of Education and the County Education Board under regulation 40 that could be subjected to an appeal before the Education Appeal Tribunal under regulation 41. This case is patently out of purview of regulations 40 and 41 of the Basic Education Regulations. It could not be filed before the Education Appeals Tribunal without some measure of difficulty. Consequently, the doctrine of exhaustion does not apply in this matter.



19. The upshot is that the preliminary objection lacks merit and it is hereby overruled. The petition shall proceed for hearing to its logical conclusion.
20. Costs shall be in the cause.
21. Mention on 22/10/2025 for directions on the hearing of the Petition

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 1<sup>ST</sup> DAY OF AUGUST, 2025.**

**A. MSHILA**

**JUDGE**

In the presence of:-

Sanja – Court Assistant

Amondi h/b for Mugoi-For the Petitioner

Nzilani-For the Respondent

