



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 41 OF 2013

**JOHN KIPLANGAT BARBARET.....1ST
PETITIONER**

**KIPSANG TOWETT STANLEY.....2ND
PETITIONER**

**RICHARD SAMOEL.....3RD
PETITIONER**

**RICHARD TANGUS.....4TH
PETITIONER**

VERSUS

**ATTORNEY GENERAL.....1ST
RESPONDENT**

CABINET SECRETARY IN THE MINISTRY OF EDUCATION,

**SCIENCE AND TECHNOLOGY.....2ND
RESPONDENT**

**TEACHERS SERVICE COMMISSION.....3RD
RESPONDENT**

**ISIAH KIPLANGAT ARAP CHELUGET.....4TH
RESPONDENT**

**KENYA NATIONAL EXAMINATION COUNCIL.....5TH
RESPONDENT**

JUDGMENT

1. The First and Second Petitioners are the Chairman and Secretary respectively of the Sagamian Community on whose behalf they have filed this Petition. The Third and Fourth Petitioners are Chairman and Committee Member of the Sagamian Primary School Committee. In the Petition dated 4th November 2013, they allege that their rights to equality and freedom from discrimination under Article 27, freedom of association under Article 36

and rights to education under Articles 43 (1) (f) and 53(1)(b) and (2) of the Constitution were infringed by the Respondents. They therefore seek the following reliefs-

(a) A declaration that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school and failing to provide it with teachers and other facilities for education, like other primary schools in Kenya, the Respondents have violated the Petitioners' rights to equality and freedom from discrimination under Article 27 of the Constitution;

(b) A declaration that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school and failing to provide it with teachers and other facilities for education, like other primary schools in Kenya, the Respondents have violated the Petitioners' rights to freedom of Association under Article 36 of the Constitution;

(c) A declaration that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school and failing to provide it with teachers and other facilities for education, like other primary schools in Kenya, the Respondents have violated the Petitioners' rights to education under Article 43 and Article 53(1)(b) and (2) of the Constitution;

(d) An order that the Respondents do re-register Sagamian Primary School as a public school, recognise it and register it as a national examinations centre and to provide it with all educational facilities including employment of teachers just like all other primary schools in the country;

(e) an order that the Respondents do pay to the Petitioners general damages for violation of their fundamental rights;

(f) that this court be pleased to make further orders/directions to secure the enforcement of the Petitioners' fundamental rights and freedoms as it deems fit; and

(g) an order that the Respondents do pay to the Petitioners the costs of this petition.

THE PETITIONERS' CASE

2. The Petition is supported by the affidavit of the First Petitioner and Richard Samoei the Third Petitioner, both sworn on 1st November 2013 and filed on 4th November 2013. The Petitioners are all members of the Sagamian village in Narok South District, Narok County. They have filed the Petition on behalf Sagamian community which comprises of about 3,500 members of the Kipsigis and Ndorobo tribes and therefore a minority and marginalized group within the meaning of Article 56 of the Constitution.

3. This community has occupied about a third of the land known as Land Reference No. NAROK/CIS MARA/IIMOTIOK/54 which is currently registered in the name of the Fourth Respondent. The Petitioners filed a suit in the High Court at Nairobi, Misc. Appl. No. 400 of 2000 (OS) against the Fourth Respondent by which they sought a declaration that they had acquired proprietary rights by way of adverse possession. Their claim was dismissed and there is pending before the Court of Appeal an appeal against the judgment.

4. The present Petition concerns Sagamian Primary School which is situate on the said parcel of land. This school was established in 1973 and was registered by the Ministry of Education under Code No. 24/68 and by the National Examination Council as an Examination Centre and given the Code No. 56314.

5. During the material time, the school received support from the Government. The Petitioners relied on exhibits “JKB5” a letter by the Divisional District Officer to the District Educational Officer requesting for provision of teachers and “JKB7” an appointment letter issued by the Teachers Service Commission to prove that the State was at the time in-charge of appointment of teachers to this school.

6. However, sometimes in the year 1979, the school was burnt down and as a result it was closed down and deregistered by the Second Respondent. Following its closure, a new school Mogoyuet Primary School was established and registered as an Examinations Centre. The students and teachers who were at Sagamian Primary School were transferred to the new school and the property on which Sagamian Primary School was situate was transferred and registered in favour of the Fourth Respondent in the year 1980. This status quo remained until the year 2000 when the community, dissatisfied with the new school, renovated the burnt school and continued offering education to students.

7. The government withdrew all the support it had accorded to this school prior to its closure. Although it continues to recognise the school as a public school and includes it in the inter-zonal examinations and other sporting activities organised by the Cabinet Secretary in-charge of Education, the State has refused to reregister it as Centre for national examinations. As a result the school is forced to send its students to other schools which is not only tedious but has also led to conflicts as the schools are now demanding that in order to be allowed to undertake the national examinations, the students from Sagamian Primary School must attend classes at the examination centre.

8. It was further averred that the State has since the school was revived not offered any financial support and the Third Respondent has not deployed any teachers to the school. The community now employs teachers and supplies funds for the running of the school.

9. The Petitioners contend that by denying the pupils of Sagamian Primary School the right to free primary education facilities that are available to other students attending public schools, the State is acting in contravention of the right of the Petitioners and the children to equality and freedom from discrimination under Article 27 and the right to free and compulsory basic education under Article 53(1)(b) of the Constitution.

10. Further they alleged that their right to freedom of association under Article 36(1) of the Constitution was infringed when they were denied the right to have a school of their choice and the opportunity to associate and learn together with other pupils of their community.

11. Finally the Petitioners argued that the state is mandated by Article 56 of the Constitution to put in place affirmative action and programs designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields. The pupils of Sagamian Pirmary Scool who are members of the Sagamian community are marginalized members of the Narok community who are entitled to this protection.

THE RESPONDENTS' CASE

12. The Hon. Attorney General was the First Respondent and he was sued on behalf of the State as its principal legal adviser. The Second Respondent, the Cabinet Secretary in the Ministry of Education, Science and Technology was sued in his capacity as the person responsible for education matters and policy including implementation of free compulsory basic primary education. The Second Respondent's duties include the registration of all learning institutions in the country. The Third Respondent, Teachers Service Commission is a Commission established under Article 137 of the Constitution with the mandate to recruit, employ and assign teachers for service in any public school or institution. It was accused of failing its mandate to recruit and post students to Sagamian Primary School.

13. The Fourth Respondent is the person in whose name the land on which the school is built is registered and who it is alleged was behind the destruction and deregistration of the school. The Kenya National Examinations Council, the Fifth Respondent, is a body corporate established under Section 3 of the Kenya National Examinations Act (*Cap. 225A, Laws of Kenya*) with the mandate to conduct examinations and was sued for failing to register the school as a centre for undertaking national examinations.

14. The Hon. Attorney General entered appearance for the First and Second Respondents and filed the Grounds of Opposition dated 7th October, 2014 in response to the Petition. It was their case, simply, that the Petitioners had failed to prove the ownership rights over the parcel of land on which the school was situate, which was a requirement for the registration of any school, whether private or public. They therefore argued that the Petition has been filed prematurely and inferred that it should await the determination of the property rights of the Petitioners and the Fourth Respondent by the Court of Appeal.

15. The Third Respondent filed a Replying Affidavit sworn by Vitali Juma on 2nd January, 2014. He deponed that the Third Respondent is the sole employer of all teachers in the Public Service and is mandated to assign the teachers in its employment for service in any public school or institution and after the school was deregistered as a public school in 1979, it withdrew its teachers and assigned them to the neighbouring schools.

16. The Third Respondent contended that it has no mandate to assign teachers to the school as it has never been re-registered and does not exist in the records held with the Third Respondent's Sub County Officers. It contended that it was ready and willing to perform its constitutional mandate subject to compliance with other relevant legal provisions. It was its contention that the Petitioners have no claim against it.

THE SUBMISSIONS

17. The parties agreed to have the matter disposed by way of written submissions which were highlighted in this court on 10/10/2014.

18. In the submissions filed on behalf of the Petitioner on 26th May 2014, it was argued that the right to free and basic education is unconditional and is to be realised immediately and not progressively. Counsel distinguished the general right to education provided for under Article 43 of the Constitution as a social economic right and the right to free and compulsory education accorded to every child under Article 53 of the Constitution.

19. It was further submitted that under the Constitution and the Basic Education Act, No. 14 of 2013, the State has a positive duty to ensure the realisation of the right to free and compulsory education generally. The State had failed to discharge this duty by failing to recognize or register the school as a public institution. The Third Respondent had also failed in its constitutional mandate to assign teachers to the school. The fact of lack of registration was not relevant as the interest of the three hundred (300) or so students was more important, registration notwithstanding. The Fourth Respondent had unlawfully instigated the closure of the school. According to Counsel his rights as the registered owner are subservient to those of the students of the school. The Fifth Respondent also in contravention of the right of the Petitioners and without any reason, had failed to register the school as a centre for national examinations.

20. With regard to the right to equal protection of the law and freedom from discrimination under Article 27, it was submitted that the Petitioners are entitled to the same privileges that are accorded to other public schools. They include, the right to be recognised as a public school, the right to be recognised as a national examination centre, to be provided for with teachers, text books and other equipment availed to similar public schools.

21. It was Counsel's submission that the Petitioners had proved the violation of their rights and were therefore entitled to the reliefs sought.

22. In the brief submissions filed for the First and Second Respondents on 8th October 2014, the averments in the grounds of opposition were reiterated. It was these Respondents' case that the Petitioners have the obligation to comply with the requirements of the law including proving ownership of the property in order to be registered. The Second Respondent could not register the school developed on a parcel of land on which there subsists a dispute of ownership.

23. The Third Respondent filed its written submissions on 23rd June 2014. Its position was that the Petitioners were not entitled to any of the reliefs sought against it. Its mandate under Article 237 (2) of the Constitution is to provide teachers under its employ for service in any public school or institution. Sagamian Primary School is not currently a public school having not been reregistered after being closed down. Therefore it has no mandate to post any teachers to this institution.

24. From the foregoing, the issues for determination in this Petition are:

- (a) whether the Respondents' actions were in contravention of the rights to basic education of Sagamian Primary School students;*
- (b) Whether the students of Sagamian Primary Schools rights to equal protection of the law and freedom from discrimination were infringed; and*
- (c) whether the Petitioners are entitled to general damages.*

WHETHER THE STUDENTS' RIGHTS TO BASIC EDUCATION WERE INFRINGED

25. Education is in a sense, the bedrock of the development of a society. It provides for means by which an individual is able to pursue happiness, free himself from the bonds of

poverty and ignorance and effectively participate in the governance and development of the State. The United Nations Committee on Economic, Social and Cultural Rights stated in its General Comment 13-

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding, children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

26. The South African Court in **SECTION 27 & Others VS MINISTER OF EDUCATION & ANOTHER [2012] SA 579 (GNP)**, while interpreting in the context of the national law and international instruments to which South Africa is a party, describes the need to access education as **“not a privilege but a right creating with it duties and obligations and where the right is violated, activating the need to craft appropriate remedies.”**

27. Kenya has ratified various treaties which provide for this right and which now form part of the written law pursuant to Article 2 (6) of the Constitution. Article 26 of the **Universal Declaration of Human Rights**, Articles 13 (1) and 14 of the **International Convention on Economic, Social and Cultural Rights**, Article 28 (1) (a) of the **United Nations Convention on the Rights of the Child** and **Article 11 of the African Charter on the Rights and Welfare of the Child** all provide for the right to education which shall be secured by the state parties. The instruments also provide that basic education should be free and compulsory. An obligation is placed on State parties to ensure the realization of this right by its citizens.

28. The Constitution also provides for the right to education as one of the social economic rights under Article 43 (1) (f) of the Constitution and therefore one which the State is obligated to take measures to ensure progressive realisation by its citizens. However Article 53 implies a different intention with regard to the right of a child to basic education. It confers on every child the right to free and compulsory education which right a child is entitled to immediate realisation.

29. To give effect to Article 53 of the Act, Parliament enacted the Basic Education Act, 2013 (*No. 14 of 2013*). This Act defines “*basic education*” as the “*educational programmes offered and impacted to a person in an institution of basic education.*” The provision of basic education is guided by among others, the principles of the right to free and basic and compulsory education and provision of appropriate human resources, funds, equipment, infrastructure and related resources that meet the needs of every child in basic education. By prohibiting public schools from charging tuition fees to the parents of attending students, the

state undertakes to meet the costs of the children, hence guaranteeing their right to free education.

30. The recognition and registration of Sagamian Primary School as a public school is important because it entitles the students to free education. In contrast with a private institution set up under the Act, these children are exempted from payment of any tuition fees and any further charges must be approved by the Cabinet Secretary in charge of education. Their studies are undertaken at the cost of the State which must provide all the resources required. It is because of the lack of this recognition that the Third Respondent does not post teachers to the school at its cost and the Fifth Respondent has failed to register it as a centre for undertaking national examinations.

31. The question for determination is whether Sagamian Primary School is a public school and which the state has a duty to provide for resources. Section 43 of the Basic Education Act defines a public school as one which is *established, owned or operated by the Government and includes sponsored schools.*” Prior to its closure this school was recognized as a public school which was maintained and operated by the State. There was evidence that the Third Respondent was in charge of appointing and allocating its teachers. In any event the fact that it was a public school has not been disputed by the Respondents.

32. State Counsel for the First and Second Respondents however contends that the school was not reregistered after being renovated by the community because of the dispute between the Petitioners and other members of the Sagamian Community on the one part and the Fourth Respondent. He referred this court to a court case filed by the Petitioners in which the title of the Fourth Respondent was upheld and whose appeal is pending for hearing in the Court of Appeal. He argued that without proof of ownership of the land a prerequisite for registration of any school whether public or private, Sagamian Primary School could not be reregistered. He also argued that this issue of ownership has already been determined by the High Court and could not be raised in this Petition.

33. The school which is the subject of this Petition, is a public utility that was managed by the Minister of Education which has now been replaced by the Second Respondent. Being a public utility the rights and interest over this property are vested in the State who hold it in trust for the people. The Second Respondent in particular who now has the duty to maintain and administer education institutions, has a mandate to safeguard and preserve the utilities over which it is in charge.

34. Accordingly, in my considered view, any claim touching any interest or rights over such a public utility by or against a third party can properly be made by or against the State. To place the burden on the Petitioners to prove a right of the State over public property would amount to an abrogation of the duty of the state under the Constitution. The First and Second Respondent cannot then contend that the Petitioners have an obligation to prove ownership of the land.

35. Although land Title Number NAROK/CIS-MARA/ILMOTIIOK/54 which was the subject matter in the High Court at Nairobi, Misc Appl. No. 400 of 2003 is also the subject in this suit for it is the parcel of land on which the school is built I find that the nature of the

claims are entirely different. This Petition is not about ownership of the land but is rather for reinstatement of public status to the school.

36. This Petition concerns a public school which was established on this land prior to the registration of the land in favour of the Fourth Respondent in 1980. In this regard the registration of the school land in favour of the Fourth Respondent at the time is a matter that ought to be subject of legitimate inquiry under Article 40(6) as to whether land on which a public school stood, was lawfully acquired. It concerns the rights of the students of this community to utilize a school, run by the State, and to have this school recognized as a public school which in turn will enable them enjoy the benefits accorded to other students of public schools. For this reason I would not consider the Petition an abuse of the court process or the issues raised herein *res judicata*.

37. The onus is therefore upon the First and Second Respondents to show when and how Sagamian Primary School for which it was responsible ceased being a public school. This court cannot at this juncture determine the legality of the the Fourth Respondent's title to the land or whether due process was followed in its acquisition for it has neither been asked to determine the issue nor has the Respondent been given a chance to present evidence in this regard. However it may look into the evidence of whether the public utility on this land was alienated by the Respondents who claim they are not responsible for its management.

38. They have offered no evidence to controvert the contentions of the Petitioners. There was no evidence that after being closed down the user of this property was converted from a public utility and subsequently adjudicated to third parties. It was the evidence of the Second and Third Respondents that the school was closed down solely because of the damage occasioned by the fire. In fact after its renovation, they continued regarding it as a public school which participated in the inter-zonal examinations and sports.

39. In my view, therefore, the school remained a public utility to-date. The fact of the subsisting land dispute between the Petitioners and the Fourth Respondent or his estate does not discharge the Second, Third and Fifth Respondents from their duties to maintain the school and offer it all the resources needed, all in accordance with respective mandates under the Constitution and enabling legislation.

40. I therefore find that the Second Respondent denied the children of Sagamian Primary School their right to free and compulsory basic education. Without any lawful justification it failed to provide them with funds and other facilities accorded to other public schools thereby denying them the chance to realise their right to education. Further Article 21 (1) of the Constitution, places a fundamental duty on the state and every state organ to *observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights*. By failing to support the efforts of this marginalised community to realise their right to education, the State acted and is acting retrogressively.

WHETHER THE STUDENTS RIGHTS TO EQUAL PROTECTION OF THE LAW AND FREEDOM FROM DISCRIMINATION WAS INFRINGED

41. Article 27 of the Constitution provides for the right to equality and freedom from discrimination. This right accords upon every person the right to equal protection and equal

benefit of the law. Equality includes the full and equal enjoyment of the fundamental rights and freedoms.

42. In the General Comment 18, Non-discrimination (Thirty-seventh session, 1989), the Committee on the International Convention on Civil and Political Rights defined the term discrimination, as used in the convention to imply -

“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

43. Section 4(f) of the Basic Education Act 2013 also upholds the principle of equality and provides for the protection of the right of every child in a public school to equal standards of education including the medium of instruction used in schools for all children of the same educational level.

44. As stated hereinabove, Sagamian Primary School is a public school which until it was burnt down by known or suspected arsonists, was maintained by the State. In addition today, the Basic Education Act 2013, provides that the parents of students attending public schools shall not pay any tuition fees. The students of this school are therefore entitled to the same amenities that are accorded to the students of other public schools.

45. Article 53(1)(b) grants every child the right to free and compulsory basic education, now, and not in the future. The State has given effect to that provision by enacting the Basic Education Act, 2013. The provision of teachers, the waiver of tuition fees and registration of a school as an Examination Centre is a Service. It cannot be predicated upon ownership of land.

46. If ownership of land were a basis for rendering services, then it could be logically argued, that the rental of private premises by many organs of State, and rendering of services by the State organs from such premises, is unlawful because those premises are privately owned. Such argument would not be correct, and some would say such argument is absurd, for the simple reason that rendering of a service is not dependent on ownership. Service can be rendered from premises upon which ownership or terms of rental are disputed, or subject to agreement.

47. By failing to register the subject school as a public school, the Second Respondent has not only maintained but has also perpetuated the marginalization of the Petitioners and by extension their children as a minority and marginalised people contrary to Article 56 of the Constitution.

48. Similarly, by failing to waive the fees, and provide teachers the Second, Third and Fifth Respondents have violated the rights of the Petitioners and their children by

denying them the constitutional right to free and compulsory basic education contrary to Article 53(1)(b) of the Constitution and the provisions of the Basic Education Act, 2013. The Petitioners and their children have a right to benefit equally from the law, and should not be treated differently from other parents of, and students attending public schools, for that would be infringement of Article 27(1) of the Constitution.

CONCLUSION

49. For all those reasons, I find and hold that in failing to register Sagamian Primary School as a public school, the Second Respondent has occasioned the curtailment, and has curtailed the enjoyment by the Petitioners, and students of the school, their right to education and also prevented them from benefitting from the law. The breach and failure by the Second Respondents resonates on the Third and Fifth Respondents' equal failure and denial to provide the school with teachers.

50. In the circumstances I make the following declarations -

(1) that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school and failing to provide it with teachers and other facilities for education, like other primary schools in Kenya, the Respondents have violated the Petitioners' rights to equality and freedom from discrimination under Article 27 of the Constitution.

(2) that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school and failing to provide it with teachers and other facilities of education, like other primary schools pupils in Kenya, the Second, Third and Fourth Respondents have violated the Petitioners' rights to freedom of Association under Article 36 of the Constitution.

(3) that by deregistering Sagamian Primary School, refusing pupils to sit for National Examinations in that school, and failing to provide teachers and other facilities of education like other primary schools pupils in Kenya, the Second, Third and Fifth Respondents have violated the Petitioners and students rights to education under Articles 43(1)(f) and 53(1)(b) and (2) of the Constitution.

51. And I make the following orders -

(1) Direct the Respondents to re-register the Sagamian Primary School as a public school, recognize and register it as a National Examinations Centre, and provide it with all education facilities, including employment of teachers just like all other primary schools in the Republic of Kenya.

(2) that the Third Respondent in particular do allocate a sufficient number of teachers to the school within forty-five (45) days of the date hereof.

(3) The Fifth Respondent shall register Sagamian Primary School as a National Examination Centre within forty-five (45) days of the date hereof.

(4) The Second, Third and Fifth Respondents and the Petitioners, shall initiate dialogue with the Fourth Respondent or his estate, within forty-five (45) days of the

date thereof on the delineation of and extend and boundaries of Sagamian Primary School, and compensation (if any) to the Fourth Respondent and issue a separate title to Sagamian Primary School which area of land shall include adequate area for future expansion of the school to secondary and tertiary institution of learning.

(5) In the public nature and interest of this Petition, I direct that each party shall bear its own costs.

There shall be declarations and orders accordingly.

Dated, signed and delivered at Nakuru this 21st day of November, 2014

M. J. ANYARA EMUKULE

JUDGE



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