REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Maraga, CJ & P; Ibrahim, Ojwang, Njoki & Lenaola SCJJ)

PETITION 16 OF 2016

– BETWEEN –

METHODIST CHURCH IN KENYA.....PETITIONER

– AND –

1. MOHAMED FUGICHA

2. TEACHERS SERVICE COMMISSION

3. COUNTY DIRECTOR OF EDUCATION - ISIOLO COUNTY

4. DISTRICT EDUCATION OFFICER - ISIOLO SUB-COUNTY.....RESPONDENTS

(*An appeal from the Judgment of the Court of Appeal at Nyeri (Waki, Nambuye & Kiage JJ.A)*

in Civil Appeal No. 22 of 2012 dated and delivered on 7th September, 2016)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The amended petition of appeal dated 10th January 2017 is based upon Article 163 (4) (a) of the Constitution, Section 15(2) of the Supreme Court Act, and Rules 9 and 33 of the Supreme Court Rules, 2012. It is supported by an affidavit sworn by Kimaita John Machuguma on 7th October 2016, in his capacity as development co-ordinator of the petitioner.

[2] The petitioner seeks the reliefs that:

a. the petition be allowed;

b. the Judgment of the Court of Appeal at Nyeri in Civil Appeal No. 22 of 2015 dated 7th September 2016 be set aside;

c. this Court be pleased to declare that the 1st respondent herein had no cross-petition, within the meaning of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) or of

Article 22 of the Constitution;

d. if this Court, like the Court of Appeal, decides to deem paragraph 34 of the 1st respondent's replying affidavit (sworn on 4th November, 2014) to be a *cross-petition*, the cause should be referred back to the High Court for fresh hearing, involving all interested and affected parties; and

e. costs of this petition, and for the proceedings at the Court of Appeal, be awarded to the petitioner herein.

[3] The petition is founded upon 24 grounds, which may be thus summarised:

a. the Court of Appeal erred in granting reliefs and Orders that were not sought in the appeal by the 1st respondent herein;

b. the Court of Appeal erred in finding and holding that paragraph 34 of the petitioner's affidavit sworn by Mohamed Fugicha on 4th November 2014 constituted a *cross-petition*, and in proceeding to determine the appeal on such a premise;

c. the Court of Appeal erred in failing to find that, upon determining that paragraph 34 of the appellant's replying affidavit sworn on 4th November 2014 constituted a cross-petition, it was obliged to give an opportunity to the respondents in such a cross-petition to defend themselves;

d. the Court of Appeal had adopted a wrong perception of the proceedings before the High Court, and on that basis reached the erroneous finding that there was no factual or legal basis for the trial Judge to hold that allowing Muslim girls to wear *hijab* favoured such students, and discriminated against the non-Muslims;

e. the Court of Appeal erred in finding that the petitioner violated Articles 8, 27 and 32 of the Constitution; and

f. the Judgment of the Court of Appeal offends Articles 24, 27, 50 and 159 of the Constitution, as it purports to resolve matters of religious controversy that belong in the province of constitutional amendment and of legislation.

B. BACKGROUND

[4] The cause in the High Court pitted the Methodist Church in Kenya against the Teachers Service Commission, the County Director of Education, Isiolo County, the District Education Officer, Isiolo Sub- County, and an interested party, Mohamed Fugicha – a parent with three students enrolled at St. Paul's Kiwanjani Day Mixed Secondary School.

[5] The factual background preceding the petition in the High Court is as follows. The Church affirmed that it was the sponsor of the school, located on a five-acre piece of land, where it had been set up in 2006, and had a population of 412 students of diverse religious backgrounds.

[6] The Church averred that the School had a school uniform policy prescribed in the admission letter which each student and his or her parents duly signed, upon admission. In any event, controversy arose over the issue of the uniform, on 22nd June 2014. It was stated that the source of this controversy was an informal request by the Deputy Governor of Isiolo County, that all Muslim girls in the school be allowed to wear the *hijab* and white trousers, in addition to the prescribed uniform.

[7] It was averred that, a week later, unknown persons brought the *hijab* and white trousers for the Muslim girls, who subsequently reported to the school donning them. This conduct, it was stated, led to tension and disharmony. It was averred that when the school requested adherence to the established uniform code, the Muslim girls and boys engaged in protests, breaking window panes, and menacing teachers and Christian students, before trooping to the District Education Officer's offices, apparently to entreat official endorsement of their conduct.

[8] It was averred that, on 9th September 2014, the 3rd respondent directed the school's Board of Management, the Parent Teachers Association and the Church to meet and exhaustively discuss the *hijab* and white trouser issue. It is alleged that out of the 22 members who attended the meeting, 18 voted for *status quo* to remain; three voted in favour of *hijab* and trousers, and one recommended longer skirts for girls.

[9] It was averred that contrary to the majority decision of 9th September 2014, the 3rd respondent directed that the Muslim girls should wear *hijab* and white trousers. She directed, besides, that the principal of the School be transferred elsewhere; and a transfer letter to that effect was issued on 12th September 2014.

[10] The petitioner, aggrieved by this series of events, filed a Constitutional Petition in Nairobi which was transferred to Meru High Court, and registered as Petition No. 30 of 2014. The petition sought nine reliefs, their essence being as follows:

i. a declaration that the respondents' decision to allow Muslim students to wear hijab/trousers was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations;

ii. an injunction preventing the respondents from allowing Muslim students to wear hijab/trousers contrary to the school's rules and regulations;

iii. an Order to quash the decision of the 3rd respondent of 12th September, 2014 purporting to transfer the principal from the school;

iv. an injunction restraining the respondents from interfering with the petitioner in executing its rightful role as a sponsor of the affairs of the school;

v. a mandatory injunction compelling the respondents to comply and ensure full compliance with current school rules and regulations;

vi. an injunction preventing the respondents from dissolving or purporting to stultify the current Board of Management and the Parents-Teachers Association of the school; and

vii. general damages, any other relief, costs and interest.

[11] All the respondents, alongside an interested party joined to the suit on 15th October 2014, contested the petition. The interested party in his affidavit, dated 3rd November 2014 (paragraph 34), thus deponed:

"... I am also cross-petitioning that Muslim Students be allowed to wear a limited form of *hijab* (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution."

[12] *Makau J*, proceeded to outline the issues for determination as follows:

i. whether the petitioner had *locus standi* to file the petition;

ii. whether the petition as against 1st respondent was premature;

iii. whether the respondents' decision to allow Muslims students to wear *Hijab*/Trouser was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations;

iv. whether an injunction preventing the respondents from allowing Muslims students to wear *hijab*/trousers contrary to the school's rules and regulations could issue;

v. whether the school uniform policy indirectly discriminated against the interested party's daughters and other Muslim female students; and

vi. whether the interested party's cross-petition was defective.

[13] By Judgment delivered on 5th March, 2015, *Makau J* allowed the petition, finding as follows: the petitioner had *locus standi* to file the petition; the petition against the 1st respondent was premature, for non-exhaustion of the dispute resolution

mechanism; the petitioner could not interfere with the constitutional, statutory and administrative mandate of the 1st respondent, of performing teaching-service management.

[14] Consequently, he issued the following Orders:

i. the respondents' decision to allow Muslim Students to wear *hijab*/trousers was discriminatory, unlawful, unconstitutional and contrary to the rules and regulations of the school;

ii. injunction preventing the respondents from allowing Muslim students to wear *hijab*, contrary to the rules and regulations of the school;

iii. injunction restraining the respondents from interfering with the petitioner in executing its rightful role as sponsor, in respect of the affairs of the school;

iv. mandatory injunction compelling the respondents to ensure full compliance with the school rules and regulations;

v. injunction preventing the respondents from dissolving or purporting to dissolve the Board of Management and the Parents-Teachers Association of the school;

v. the school uniform policy did not indirectly discriminate against the interested party's daughter and other Muslim female students; and

vi. the interested party's cross-petition was found defective, and was for striking out.

[15] Aggrieved, the interested party sought redress in the Court of Appeal. His memorandum of appeal contained eighteen grounds, which the Appellate Court sustained, holding that the trial Judge had erred, by:

- failing to appreciate the principle of direct and indirect discrimination;
- misapplying the concept of accommodation in discrimination law, inherent in Article 27(4) and (5) of the Constitution, and equating the wearing of *hijab* to a conferment of special status;
- failing to appreciate and uphold the importance of *hijab* as a manifestation of religion, protected under Article 32 of the Constitution;
- holding that allowing *hijab* amounts to elevating Islam over other religions and contrary to Kenya's secular character and the equality principle;
- dismissing the *cross-petition* for non-compliance with the *Mutunga Rules*;
- misapprehending the law on the rights and role of a sponsor under Section 27 of the Basic Education Act, 2013;
- ignoring evidence on record, that the issue of school uniform was contentious;
- failing to uphold the submission that, in the absence of a statute expressly limiting the right to manifest religion, any limitation thereon through school rules was illegal;
- holding that the wearing of *hijab* by Muslim female students was discriminatory towards Christian and other students; and
- holding that the school is a Christian institution, yet it is public.

[16] The Appellate Court focused its deliberations upon four issues, namely:

a. whether or not documents relating to proceedings seeking to enforce the Bill of Rights must all be formal;

b. whether or not allowing Muslim female students at the school to wear a limited form of *hijab* (scarf and a pair of trousers) discriminates against the other students;

c. whether or not allowing Muslim female students to wear a limited form of *hijab* elevates Islam against other religions, and accords its adherents special status contrary to Article 8 of the Constitution; and

d. whether a school uniform policy can limit the fundamental freedom of religion contained in Article 32 of the Constitution.

[17] On 7th September 2016, the Appellate Court determined that a proper reading of the appellant's affidavit in the High Court did not warrant the striking out of the *cross-petition,* in spite of any shortcoming in it. It was the Appellate Court's view that the learned Judge erred by not directing himself to the express provision of Article 22(3) (b), and by failing to enquire into whether paragraph 34 of the appellant's replying affidavit passed the *informality test contemplated in the constitutional text.*

[18] The appellate Judges allowed the appeal. They held that the trial Judge's finding that allowing Muslim girls to wear *hijabs* favoured Muslim girls and prejudiced the non-Muslims, had no legal or factual basis. They also made a definite finding that the School's strictures upon Mr. Mohamed Fugicha's daughters amounted to *indirect discrimination.*

[19] The Appellate Court set aside the Orders of injunction, as well as that striking out the interested party's cross-petition as defective, and substituted it with an Order allowing the said cross-petition. Aggrieved, the petitioner filed the instant appeal, prompting contest by the 1st to 4th respondents.

C. SUBMISSIONS MADE BY COUNSEL

(i) Petitioner

[20] The petitioner submitted that paragraph 34 of the replying affidavit did not meet the requirements of a *cross-petition*: for it was inconsistent with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) principle and procedure Rules, 2013 otherwise known as the *Mutunga Rules,* which required a reasonable degree of precision in depicting of any infringement of fundamental rights and freedoms.

[21] The petitioner contended that upon the Court of Appeal making a finding that paragraph 34 contained a *'cross-petition',* it ought to have sent it back to the High Court for hearing, as the petitioners were not afforded an opportunity to respond to it.

[22] The petitioner further submitted that the effect of the Appellate Court's decision was to hold that Rule 10 (2) of the *Mutunga Rules* violate Article 22 (3) (b) of the Constitution, yet such a standpoint was neither pleaded nor canvassed by parties.

[23] The petitioner furthermore submitted that, allowing the prevalence of one religion over another in a public institution, would amount to discrimination against a myriad of other religions not accorded the same freedom of expression.

[24] The petitioner relied, for comparative experience, on Article 8 of the Constitution, drawing analogy with the United States Constitution which states that "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*" – also known as the Establishment Clause. It was urged that this clause had been scrutinized in ***Engel v. Vitale***, 370 U.S. 421 (1962), and the recital of a Christian prayer at the beginning of the School year was declared to be unconstitutional.

[25] To the same intent, the petitioner cited other cases of a comparative kind: ***Kruzifix-Urteil*** [crucifix Decision] (May 16, 1995), BVerfGE 93; ***Everson v. Board of Education 330,*** U.S. 1 (1947); ***Stone v. Graham***, 449 U.S. 39 (1980); ***Sahin v. Turkey Application*** 44774/98 2004; ***Dahlab v. Switzerland*** (Application No 42393/98; ***Wisconsin v. Yoder*** 406 U.S. 205 (1972); and the ***Headscarf Decision***, BVerfGE 108.

[26] On the strength of such decisions, the petitioner urged that only Parliament, as the democratically-elected body, and not the Court of Appeal, can determine matters of religious and secular controversy that involve the limitation of rights, as enshrined in Articles 24, 27, 50 and 159 of the Constitution.

[27] The petitioner also contended that the Appellate Court had disregarded the trite principle of law that *parties are bound by their pleadings*, when it came to the conclusion that the school uniform policy indirectly discriminated against the Muslim students, despite the fact that the school's rules and regulations had not been challenged in any Court.

[28] The petitioner lastly contested certain directions of the Appellate Court, addressed to the Cabinet Secretary for Education and the Attorney General, as having no factual or legal basis – as they were not parties to the proceedings.

(ii) 1st Respondent

[29] The 1st respondent submitted that the Court of Appeal had quite properly upheld his *cross-petition,* because paragraph 34 and the entire replying affidavit transcended the *informality test* contemplated in Rule 10 (3) of the *Mutunga Rules.* Yet this Rule, it was urged, is derived from Article 22 (3) (b) of the Constitution, which signals that the said Rules are designed to assist, and not hinder the prosecution of human rights violations.

[30] It was urged that the petitioner had an opportunity to respond to the *cross-petition*, at both the High Court and the Appellate Court, though it had squandered the opportunity. This notwithstanding, the 1st respondent urged that he had prosecuted his *cross-petition* at the High Court, and the petitioner had responded to the substance of it.

[31] The 1st respondent further submitted that since the High Court had dealt with the *merits* of the *cross-petition*, the Appellate Court rightly considered the same, making appropriate Orders which, by no means, did impinge on the petitioner's Article-50 right to fair hearing. He thus perceived as misplaced, the petitioner's invocation of Article 27 of the Constitution, in contesting the Court of Appeal's stand.

[32] The 1st respondent finally submitted that he had duly shown indirect discrimination embodied in the school uniform policy or rule, at the Appellate Court. He thus urged this Court to uphold the Court of Appeal's decision.

(iii) 2nd Respondent

[33] The 2nd respondent submitted that the claim against it arose from its decision to transfer Mr. George M. Mbijiwe who was at the material time the Principal of the School; and that the High Court dismissed the petitioner's case against this respondent who in the Court of Appeal, did not raise any cause of action against the 2nd respondent. It was in that context urged that the Appellate Court did not interfere with the High Court's finding, with respect to the 2nd respondent.

[34] Though not a party to the dispute in the Appellate Court, the 2nd respondent nonetheless submitted that it had invoked the *'principle of accommodation',* to allow the Muslim students to wear the *hijab* and white trousers. The 2nd respondent had besides, urged the said Court to accommodate the pertinent Cabinet Secretary's policy guide on the question, for educational institutions in general – and this had been allowed.

[35] The 2nd respondent in addition submitted that the petitioner had raised no cause of action against it in the instant petition, and urged that the petition against it be dismissed with costs.

(iv) 3rd and 4th Respondents

[36] The 3rd and 4th respondents limited their submissions to the issue as to whether the Court of Appeal erred in failing to find that wearing a *hijab* by Muslim girl students violated the Constitution. They urged that the 'freedom of religion' ought to be upheld, as required by the terms of the Constitution, and that in that process and in relation to the instant matter, both Article 53 of the Constitution and the provisions of the Basic Education Act, 2013 ordained that the best interests of the child required an education that is holistic in orientation.

[37] The 3rd and 4th respondents also urged that the petitioner had not shown how its rights would be prejudiced if the Muslim students were accommodated in the relevant religious particulars. It was in that regard urged that the prevailing conditions in this case had to be distinguished from those attendant upon the case law called in aid by the petitioner.

D. ISSUES FOR DETERMINATION

[38] The foregoing review revolves the main themes for this Court's determination to be as follows:

i. whether paragraph 34 of the 1st respondent's replying affidavit constituted a cross-petition; and

ii. whether this Court should interfere with the Court of Appeal's decision.

E. ANALYSIS

(i) Cross-petition and interested parties.

[39] The guiding provisions on cross-petitions are to be found in Rules 10 and 15 (3) of the *Mutunga Rules* – the latter providing as follows:

"The respondent may file a cross -petition which shall disclose the matter set out in Rule 10 (2)."

Rule 10 (2) then provides as follows:

"The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

"(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."

[40] In addressing the cross petition, the status of the 1st respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an 'interested party.' The question then arises as to whether an 'interested party' has the capacity to institute a 'cross petition'.

[41] The *Mutunga Rules* define 'interested party' as:

"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation".

[42] This Court, in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others,*** Petition No. 12 of 2013 [2014] eKLR, thus observed of *interveners*, or interested parties:

"[14] *Black's Law Dictionary, 9th Edition,* ***defines 'intervener' (at page 897) thus:***

'One who voluntarily enters a pending lawsuit because of a personal stake in it';

[and defines 'interested party' (at p.1232) thus:]

'A party who has a recognizable stake (and therefore standing) in a matter….'

"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio****. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

[43] It thus emerges quite plainly that the High Court can join interested parties to proceedings, where necessary. That is why In ***Meme v. Republic*** [2004] 1 EA 124; [2004] 1 KLR 637, the High Court observed that a party could be enjoined in a matter on the basis of certain considerations viz:

"(i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

[44] On the same lines of reasoning, the High Court, in ***Judicial Service Commission v. Speaker of the National Assembly and Attorney General***, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 [eKLR] (*Odunga J.)* has thus stated (paragraph 4):

"The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as 'a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'. From the foregoing it is clear that an interested party as opposed to an *amicus curiae* ***or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."***

[45] The inference commends itself that, the trial court was well within its rights to admit Mr. Fugicha as an interested party, in the instant case.

[46] In the above context, the petitioner's cause in the High Court was that the respondents had accorded the Muslim students preferential treatment by allowing them to wear *hijab*/trousers, in departure from the School's rules and regulations on uniform; and that this amounted to discrimination against the Christian students, contrary to the terms of Article 27 of the Constitution.

[47] Essentially, the petitioner's case was therefore that the respondents had not kept uniformity of dressing standards for all students, and that this entailed a disparity that rested upon religious practice. The petitioner had urged that its intent was to secure standard rules for all, as a factor of regularity in institutional practice.

[48] The 1st respondent in the High Court was the Teachers Service Commission. The petitioner's grievance against it was that it had transferred the principal of the school on account of his stand regarding the established school uniform. The claim against the 1st respondent was dismissed by the learned High Court Judge, on the basis that: it was premature, as the petitioner had not properly invoked the provisions of the Constitution; the Court cannot interfere with the constitutional, statutory and administrative functions of the 1st respondent; the principal of the school had not appealed against, or sought review of the 1st respondent's decision, and the petitioner had not exhausted the available dispute resolution mechanism to address the matter.

[49] The 2nd respondent was the County Director of Education. The petitioner's grievance against this party was that he had directed that Muslim girls should wear *hijab* and white trousers, contrary to the agreement at the meeting of 9th September 2014 involving the School's Board of Management, the Parents-Teachers Association and the petitioner. The 3rd respondent was the District Education Officer, against whom the claim was that she had categorically stated that 'unless the Hijab and trousers were allowed in the School, there would be bloodshed.'

[50] The 2nd and 3rd respondents' case in the High Court was made through a replying affidavit sworn on 17th October 2014 by the 2nd respondent, on behalf of herself and the 3rd respondent. She stated that the decision to allow the Muslim students to adorn *hijabs* was only meant to mitigate the animosity that had caused much unrest in the school, and to allow the students to settle down

and prepare for national examinations.

[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of *hijab* would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. It is on this basis that he *cross-petitioned at paragraph 34 of his replying affidavit,* for the Muslim students to be allowed to wear the *hijab,* in accordance with Articles 27 (5) and 32 of the Constitution.

[52] The cross-petition was expressed in straight terms: "**I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and … I am also cross-petitioning that Muslim Students be allowed to wear a limited form of *hijab* (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution."**

[53] 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 Karioki Muruatetu & Another v. Republic & 5 others,*** 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."

[55] Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of Article 163 (7) of the Constitution which provides that '*All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court."* Moreover, this cross-petition did not comply with Rule 15 (3) of the *Mutunga Rules* which speaks to a *respondent* filing a cross-petition; and it was also not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

[56] We further note that the petition is unyielding that the *cross – petition* did not meet the set out requirements, it was defective and inconsistent with the *Mutunga Rules, further,* they argue that consideration of the same by the Appellate Court violated their right to fair trial denying them opportunity to prepare and canvass the issue raised in the *cross-petition.*

[57] We agree that the issues set out in the cross-petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, *could not,* as wrongfully determined by both the High

Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the Petitioner's right to be heard, as provided for under Articles 25 and 50 of the Constitution.

[58] Furthermore and with due respect to the Appellate Court, we are persuaded that the *cross-petition* was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so.

[59] In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.

(ii) Should this Court interfere with the Court of Appeal's decision"

[60] Our findings above would effectively dispose prayer (c) of the petition before us that a declaration be made that the 1st respondent herein had no proper cross-petition to be determined. It also disposes of prayer (c) which was an alternative to prayer (d). That leaves us with prayers (a) and (b) – that the judgment of the Court of Appeal be set aside with costs.

What were the orders of the Court of Appeal" They were that:

"[p.75] The High Court's order that the decision to allow Muslim students to wear hijab/trousers is discriminatory, unlawful and unconstitutional is set aside.

a. The order of injunction preventing the respondents from allowing Muslim students to wear hijab contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

b. The mandatory injunction compelling the respndents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the hijab/trousers in addition to the school uniform.

c. The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested partys' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the hijab.

d. The order striking out the interested party's cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

e. The order granting the costs of the petitionto the petitioner is set aside and substituted with an order that each party do bear its own costs.

We in addition direct as follows:

1. That the Board of Management of St. Paul's Kiwanjani Day mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular items of clothing in addition to the school uniform.

2. This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the

fundamental right to freedom of religion and belief under Article 32 of the Constitution and equality and freedom from discrimination under Article 27 of the Constitution for all pupils and students in Kenya's educational system.

3. Each party shall bear its own costs of this appeal.

To our minds, once we have found that there was no proper cross-petition to be addressed by either of the Superior Courts, it follows that orders (a) (b) (c) (d) and (e) as well as the additional orders (1) and (2) must be set aside.

On costs, noting the nature of matter and the circumstances of parties, we shall exercise discretion and order that each party ought to bear its costs.

F. THE DISSENTING JUDGMENT OF OJWANG, SCJ

A. INTRODUCTION

[61] In a delicate social-cum-religious issue regarding the governing rules for national educational institutions, which featured in litigation in the trial and appellate Courts, there was but *one* primary question: must the Muslim students be subjected, in common with students of other religious persuasions, to an approved school uniform which proscribes the *hijab*"

[62] The *hijab* is defined in the *Concise Oxford English Dictionary,* 12th ed. (Angus Stevenson and Maurice Waite) (Oxford: Oxford University Press, 2011) (p. 673) as: "a head covering won in public by some Muslim women"; "the religious code which governs the wearing of such clothing".

[63] The cause at the first instance, in the High Court, pitted the Methodist Church in Kenya against, firstly the Teachers Service Commission; secondly the County Director of Education for Isiolo County; thirdly the District Education Officer for Isiolo Sub-County; and lastly – and quite significantly – a party referred to as "interested party", Mohammed Fugicha, a parent with three students enrolled at St. Paul's Kiwanjani Day Mixed Secondary School.

[64] The fact that the party most intimately concerned as complainant in the cause, had been denoted as "interested party" at first instance, but now before this Court appears as the *first respondent,* tells a tale that carries the *objective substance of the litigation,* as well as the *intent,* and the *scheme of the matter* coming up before the Supreme Court: the justice of the case revolves around *Mohamed Fugicha,* the parent of the school children in respect of whom the right to the *hijab* is sought.

B. CAUSE RESTING ON ONE QUESTION: THE *HIJAB*

[65] The Methodist Church of Kenya, the appellant, affirmed that it was the sponsor of the relevant school, which was located on a five-acre parcel of land, from which it had operated since 2006, and now serving a student-population of 412 students, of *diverse religious backgrounds.*

[66] The appellant stated that the School had a dress-code policy prescribed by the admission letter, which each student and his or her parents duly signed upon admission. Controversy, by the appellant's averment, had arisen on 22 June 2014, in relation to the dress-code. The origin of the controversy had been an informal request by the Deputy Governor of Isiolo County that all Muslim girls in the School be allowed to wear the *hijab* and white trousers, in addition to the prescribed uniform. Subsequently, it was averred, unknown persons brought the *hijab* and white trousers for the Muslim girls, who thereafter donned the same. Such action, it was averred, occasioned tension and disharmony. When the School demanded adherence to the established uniform-code, the Muslim girls and boys engaged in protests, breaking window panes, and menacing teachers and students of Christian tradition, before entreating with District education officials seeking endorsement of the Muslim cause.

[67] It is clear from the depositions in the trial Court that, on 9 September 2014, the 3rd respondent had directed the School's Board of Management, the Parents-Teachers Association and the Church to meet and exhaustively deliberate upon the *hijab* issue. The petitioner, who was dissatisfied with the scheme and outcomes of such deliberations, lodged Petition No. 30 of 2014 which came up before the High Court at Meru, and the essence of which raised constitutional issues. The petitioner sought, *inter alia*:

a. a declaration that the respondents' decision to allow Muslim students to wear the *hijab* was discriminatory, unlawful, unconstitutional and contrary to the School's rules and regulations;

b. an injunction preventing the respondents from allowing Muslim students to wear the *hijab* contrary to the School's rules and regulations;

c. an injunction restraining the respondents from interfering with the petitioner in executing its proper role as sponsor of the processes of the school;

d. a mandatory injunction compelling the respondents to comply and ensure full adherence to the School's rules and regulations.

[68] As already noted, the 1st respondent, who constitutes the very backbone of this ultimate appellate cause, features in the High Court proceedings only in a somewhat peripheral depiction, as "interested party" – an equivocation no less matched by the labelling of his motion before that Court, masked as "cross-petition." In a true suit scenario, the "interested party" at the trial stage would have appeared as a primary party, a *defendant*, and quite clearly, would have been entitled to lodge a cross-petition in the ordinary sense.

[69] From the tenor of this dissenting Judgment, it will already be clear that the 1st respondent before the Supreme Court was much more than just an "interested party' before the trial Court. No less clear is it that the most crucial question – if not the *sole question,* for most practical purposes – before the High Court was the *constitutional right of dress-choice* in accordance with recognized religious orientation, and its relevance and priority, within the schooling process. *(It is precisely the same constitutional question that had preoccupied the Appellate Court in its motions;* and it is that same constitutional preoccupation that, quite clearly, now falls to this apex Court).

C. TRIAL, PETITION, CROSS-PETITION

[70] Running parallel to the misnomer in the High Court was the ill-applied concept of "cross-petition" – the "interested party" in his affidavit of 3 November 2014 (para. 34) thus deponing:

"… I am also cross-petitioning that Muslim students be allowed to wear a limited form of *hijab* ***(a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and the right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution".***

[71] Even with such open questions as to the status of "interested party", and "cross-petition", the High Court found it proper to *determine the core issue* – namely, the *hijab* as part of the school uniform; and from such a stand, *the Appellate Court too, departed not.*

[72] Was such a stand, before the first two superior Courts, a *judicious and valid* one" Ought the Supreme Court to stand by the two Courts" Is this a choice guided by supreme principle of constitutional character" Or is it a matter well meriting resolution on the basis of *technicalities of ordinary statutory or related prescriptions"*

[73] Article 159 (2) (d) and (e) of the Constitution of Kenya, 2010 thus stipulates:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

…

d. justice shall be administered without undue regard to procedural technicalities; and

e. the purpose and principles of this Constitution shall be protected and promoted".

[74] The said Article 159 (e) requires the Courts of justice to uphold "the purpose and principles of this Constitution". The abode of such "purposes and principles" is *Article 10,* clause (b) of which calls upon us to uphold:

"human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized".

[75] A regular scheme for thus discharging the judicial mandate is embodied in a number of statutes. A typical such statute is the *Civil Procedure Act (Cap. 21, Laws of Kenya),* Section 1A (1) of which thus provides:

"The overriding objective of this Act and the rules made hereunder is to facilitate the *just, expeditious, proportionate* ***and*** *affordable resolution* ***of the civil disputes governed by the Act."***

[76] It is within such a framework of discharge of mandate that the High Court *(Makau, J.)* did proceed to make its findings and Orders of 5 March 2015 – wherefrom *an appeal* duly proceeded to the Court of Appeal. The original theme of the cause, the *hijab*, remained *the real question in contention* at the Court of Appeal, where the mover was the "interested party" before the High Court, canvassing *constitutional issues* in relation to school dress-code.

[77] The primary questions on first appeal directly or indirectly touched on the *hijab* as a concurrent element in the school dress-code – these being:

(i) that the High Court Judge failed to appreciate the manifestations of direct and indirect discrimination;

(ii) that the Judge had misapplied the concept of "accommodation" in the law relating to discrimination, in the terms of Article 27 (4) and (5) of the Constitution, by perceiving the *hijab* as a symbol of special status;

(iii) that the Judge failed to appreciate the importance of the *hijab* as a religious observance, protected under Article 32 of the Constitution;

(iv) that the Judge arrived at the wrong conclusion, that allowing the *hijab* was tantamount to the elevation of Islam above other religions, contrary to Kenya's secular character, and to the equality principle;

(v) that the trial Judge had erred in dismissing the "cross-petition" on the basis of bare technicalities of procedure;

(vi) that the trial Judge had misapprehended the law on the role of a sponsor, such as the Methodist Church of Kenya, under Section 27 of the Basic Education Act, 2013;

(vii) that the trial Judge erred by ignoring the evidence on record, that the issue of appropriate school uniform was a contentious one;

(viii) that the trial Judge failed to uphold the submission that, in the absence of a statute qualifying the mode of practice of religion, any restriction thereof, through school rules, lacked legality;

(ix) that the trial Judge erred in holding that the wearing of the *hijab* by Muslim female students was discriminatory towards Christian and other students;

(x) that the trial Judge erred in holding the School to be a Christian institution, whereas it was a public institution in every sense.

D. CROSS-PETITION, TECHNICALITIES, CONSTITUTIONAL PRINCIPLE

[78] The definitional technicalities attached to the terms "interested party" and "cross-petition", did not deter the Appellate Court, which, quite properly in my opinion, addressed itself to the fundamental cause, and dispensed justice with the requisite judicial authority. *This* is the kernel of my departure from the Judgment rendered by the majority in this case.

[79] The Appellate Court, on 7 September 2016, rightly, in my view, determined that a proper reading of the appellant's affidavit at the High Court did not warrant the striking-out of the interested party's *cross-petition,* in spite of such shortcoming as it

had. There would be no justification for overlooking the Constitution's requirement (Article 22 (3) (b)) that any "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"*.

[80] I find no basis for departing from the stand of the Appellate Court Judges: that the trial Judge's finding disallowing Muslim girls wearing the *hijab* in school, was devoid of any legal or factual merits.

E. CROSS-PETITION: DOES ITS MODE OF LABELLING DETERMINE THE RIGHTS OF PARTIES"

[81] Notwithstanding the *hijab* question standing as the main subject in this whole case, it is the Bench-majority's standpoint that the 1st respondent had no right to pursue it at first instance, or in the appellate process: only because he had appeared as *"interested party"*. It is the majority's stand that the Appellate Court, once it beheld a *"cross-petition" from an "interested party"*, was duty-bound to remit it back to the High Court, to conduct a fresh hearing upon it, before it might subsequently wend its way to the Appellate Court. From the facts attending the proceedings, however, it is abundantly clear that the trial Judge *did deal* with the *merits of the "cross-petition*".

[82] Such a position is well vindicated by the record. The *petitioner* did indeed submit, before the High Court, that para. 34 of the interested party's replying affidavit would not properly constitute a *cross-petition*. On this point, *the trial Judge made reference to counsel's submissions*, and thus observed (para. 105 of the Judgment):

"[Learned counsel] Mr. Kibe Mungai in response to the interested party's submission … referred to the interested party's replying affidavit dated 5 November 2014 under paragraph 34 and submitted that the interested party is attempting to link the issues of religious rights to the right to education. Under Article 32 of the Constitution of Kenya, 2010 he submitted [that] the rights are enjoyable subject to limitations set out in the Constitution. That such rights are limited in Kenya to ensure [consistency] with Article 8 of the Constitution of Kenya, 201 which states [that] there shall be no State religion".

[83] The learned Judge proceeded as follows (para. 106):

"Counsel submitted that there is no allegation that the uniform denies Muslim students religious rights, adding [that] under the Constitution it is compulsory for every child to be in school, and that under Article 27 of the Constitution … the right to equality in education allows access to schoo[ling]. He urged [that] there was no allegation of denial of education on [the] ground of religion. He urged [that on the basis of] Article 24 of the Constitution …] religious rights can be limited – urging that if the interested party wants** hijabs, **he can have the matter taken to Parliament and/or Constitutional Court".

[84] That the trial Judge intimately took up the *hijab* question, deliberated upon it, and elaborately pronounced himself thereupon, is still more evident from the terms of para. 117 of the Judgment:

"Mr. Kibe Mungai responded that there is no connection for Muslim girls wearing** hijab, **and the right [for] Muslim girls to secure compulsory education. He submitted that under [the] Basic Education [Act, 2013] nothing turns on the** hijab. **He pointed out that [the] interested party's point is in the case of [Muslim girls] being educated [, being allowed to] enjoy special status by wearing [by the] Islamic [dress] code. He submitted that [this] has nothing to do with education, but is a religious claim for [special] status. He submitted [that] such [a] claim is discriminatory and offends Article 27 of the Constitution."

[85] In yet more evidence as to the trial Court's attention to the *hijab* theme, the learned Judge thus remarked [para. 118]:

"Mr. Kibe Mungai responded that under para. 34 of the interested party's replying affidavit, he was trying to make out a case that [the prescribed] school uniform violated the interested party's right to religion. He urged [that] Article 32 of the Constitution has to be placed in [the] context of school. He submitted that there is admission of Muslims in school, and the [pertinent] religious beliefs are [duly] respected …, not violated."

[86] What is the import of such *detailed statements emanating from the trial Judge"* It is quite evident that the petitioner was accorded a *substantial hearing,* on the "*cross-petition"* – regardless of the technicality attending the formal lodgement of the "cross-petition". It is of no legal consequence, in my perception, that the replying affidavit was inelegant in para. 34, with 1st respondent herein averring that he was *"cross-petitioning"*. (To recall, the Constitutional charter [Article 159 (2) (d)] declares that *"justice shall*

be administered without undue regard to procedural technicalities"; and Article 22 (3) (b) declares that *"[any] formalities relating to proceedings … are [to be] kept to the minimum").*

[87] The "interested party's" stance was that the "cross-petition" *did indeed go to the very core of the live dispute before the trial Court,* with the petitioner then seeking as the crucial prayers, Orders such as would entail distinct compromise to the position of Muslim students, to wit:

(i) a declaration that the respondents' decision to allow Muslim students to wear the *hijab* was *discriminatory, unlawful, unconstitutional and contrary to the rules and regulations of the school;*

(ii) an injunction preventing the respondents from allowing Muslim students to wear the *hijab.*

[88] Quite to the contrary, the 1st respondent herein, at the trial Court stage, asked the Court to allow Muslim girl-students to don a limited form of *hijab*, in line with their entitlement under Articles 27 (5) and 32 of the Constitution. The matter was *squarely dealt with by the trial Court,* and *a determination made which became the subject of appeal.* Is this a matter for remittal to the High Court" I seriously doubt it, both on the substance of the law, and as a question of systematic, efficient and professional administration within the judicial portfolio.

[89] While it is the case that the reference to "cross-petition" had been inexact in a technical sense, it is for recognition that such flaw was, as a matter of law, *mitigated by the superior processes of both the High Court and the Appellate Court,* which reaffirmed the cause embodied in the "cross-petition", appraised the pertinent question, and made the governing pronouncement thereupon.

F. FINDINGS: CONSIDERATIONS OF MERIT

[90] The trial Judge held the dress code as applied by the 2nd and 3rd respondents to be unlawful, thus pronouncing himself (para. 188):

"The interested party has not alleged that the Christian students are enjoying special preferential treatment over Muslim students. It is my view that … allowing Muslim girl students to [don] the religious attire would amount to discrimination against Christian students and other students at St. Paul's Kiwanjani Mixed Day Secondary School. In addition to the above, it had not been demonstrated that the school uniform is offensive to Muslim girl students to warrant court interference".

[91] The Appellate Court, by contrast, was of the view that the concepts of justice, fairness or reasonableness would not only permit, but in fact *do require, differential treatment.* Such, in my perception, is an eminently rational stand, and is for upholding. The Appellate Court rightly, in my opinion, found that: "there was no factual or legal basis for the holding by the learned [trial] Judge that, allowing Muslim girls to wear the *hijab* favoured Muslim girl students, and discriminated against non-Muslims"; and "the petitioner paid no, or insufficient, attention to the proscribed indirect discrimination and the principle of accommodation, as the answer to the problem of discrimination". It is my standpoint that the scheme of jurisprudence outlined by the Appellate Court, on the relevant question, is appositely pragmatic and rational, and well reflects the desirable judicial stand.

[92] I apprehend the terms of Article 259 (1) of the Constitution, with regard to the prescriptions that this charter is to be "interpreted in a manner that" (a) "promotes its purposes, values and principles", (b) "advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights", (c) "permits the development of the law" and (d) "contributes to the good governance" – to ordain that *it devolves to the Judge to assign objective meaning and constructive perception to the unbounded prescriptions of the constitutional norm.*

[93] I consider the same precept to extend to *all statute laws, or particular provisions thereof, so cast as to bear unbounded normative prescriptions.*

[94] It is in that context that I now interpret the terms of Section 27 (d) of the Basic Education Act, 2013 (Act No. 14 of 2013): imposing upon a school's sponsor (such as the petitioner herein) the obligation of "maintenance of spiritual development while safeguarding the denominations or religious adherence of others".

[95] It is my standpoint, in departure from the Bench majority, that all the applicable terms of the Constitution and of the

enacted law, do entail the finding – precisely in keeping with that of the Appellate Court – that a *right balance amidst people holding different faiths*, in the multi-cultural environment prevailing at the pertinent school, will by no means be jeopardized on account of the variation to the school dress-code. I would, therefore, have dismissed the appeal.

G. PREFERRED EDICT

[96] It would have been my edict that the Board of Management, St. Paul's Kiwanjani Day Mixed Secondary School, do forthwith initiate, after due consultation with its stakeholders (in particular the parents and students), a process of amendment to the rules relating to dress-code: the object being the accommodation of those students whose religious beliefs require them to wear, in addition to regular uniform, certain particular items of clothing.

[97] I would have directed that the text of this Judgment, along with the Appellate Court's Judgment of 7 September 2016, be forthwith served upon the Cabinet Secretary in charge of the Education docket, to sustain the formulation and application of appropriate rules, regulations or directions – so designed as to uphold the fundamental rights of the Constitution on matters of belief and of religion, of equality, and of freedom from discrimination, as prescribed in Article 27 and 32, and in respect of all schooling establishments in relevant counties. However, as the majority are of a contrary opinion, the final orders are as set out below.

G. DISPOSITION

[98] Consequently, the Court's Orders are as follows:

(i) That the appeal is hereby allowed;

(ii) That the judgment of the Court of Appeal dated 7th September 2016 is hereby set aside;

(iii) Parties to bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of January 2019.

..... **.....**

D. K. MARAGA **M. K. IBRAHIM**

CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

..... **.....**

J. B. OJWANG **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA