REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E227 OF 2021

-BETWEEN-

DAVID WANYEKI KAGO……...…..…...…....PETITIONER

-VERSUS-

THE KENYA NATIONAL EXAMINATIONS COUNCIL…..……RESPONDENT

JUDGMENT

Introduction:

1. Kenya is one of the fast developing countries in the world. Although it is classified as among the third world countries, it has a high potential for becoming a second or first world country soon.

2. Towards attaining that goal, the Government has tirelessly undertaken requisite projects ranging from infrastructural to academia.

3. On matters education, the Ministry of Education, Science and Technology in 2013 published its road map in attaining the social pillar in Kenya Vision 2030 in relation to education. The document was the ***Kenya Vision 2030 Medium Term Plan II Education and Training 2013-2018: Towards a Globally Competitive and Prosperous Kenya.*** Its preamble stated as follows: -

> *The Social Pillar in Kenya Vision 2030 aims at creating a comprehensive, equitable and just society based on democratic ideals. Under this pillar, education and training is expected to be the principle catalyst towards realization of Vision 2030. The Constitution of Kenya 2010 makes education a basic right under the Bill of Rights where basic education is guaranteed for all children and the state is obliged to make its provision possible progressively. In light of Vision 2030, other levels of education and training such as technical and vocal education will play a crucial role in transforming the country to a middle income economy.*

4. The above plan has remained critical in formulating various Government policies in the education sector. Some of the policies relate to the conduct of national examinations in Kenya.

5. In this matter, the Petitioner herein, *David Wanyeki Kago*, challenged the constitutionality of various circulars issued by the Respondent, *The Kenya National Examinations Council,* in the manner the Respondent intended to carry out the 2021 National examinations in the Primary and Secondary Schools categories. Those are the *Kenya Certificate of Primary Examinations* (hereinafter referred to as ***'the KCPE'***) and the *Kenya Certificate of Secondary Examinations* (hereinafter referred to as ***'the KCSE'***).

6. The Petition is opposed.

The Petition:

7. The Petitioner initially filed a Petition dated 18th June, 2021. He also filed an application by way of Notice of Motion of even date seeking conservatory orders staying the implementation of various circulars issued by the Respondent on the conduct of the KCPE and KCSE examinations.

8. Both the Petition and the application were amended with the leave of the Court and the Petitioner filed an Amended Petition and an Amended Notice of Motion both dated 16th July, 2021.

9. The Amended Petition and the Amended Notice of Motion were supported by affidavits sworn by the Petitioner. Due to the urgency of the matter, this Court considered, upon hearing the parties, whether interim orders would be issued pending *the inter parties* hearing of the Amended Notice of Motion.

10. In a ruling dated 30th July, 2021, the Court declined to issue the orders sought and made the following further orders: -

> *(a) The Petitioner to file and serve any supplementary response, if need be, together with written submissions on the Amended Petition and the Amended Notice of Motion dated 16th July, 2021 within 14 days;*
>
> *(b) The Respondent to file and serve written submissions to the Amended Petition and the Amended Notice of Motion dated 16th July, 2021 within 14 days of service;*
>
> *(c) The Amended Petition and the Amended Notice of Motion dated 16th July, 2021 shall be heard together and by way of reliance on affidavit evidence and written submissions;*
>
> *(d) Highlighting of submissions on a date agreeable to the Court and parties.*

11. The parties duly complied with the above orders.

12. The Petitioner described himself as a resident of Nairobi County, a law abiding citizen and a public spirited individual.

13. The gravamen of the Petitioner's complaint was that *vide* a circular dated 18th May, 2021 (hereinafter referred to as '***the May Circular'***) the Respondent issued various guidelines on the registration of candidates for the 2021 KCPE, KCSE and KCSE qualifying test (QT) examinations.

14. According to the Petitioner, paragraph 1.1 of the May Circular provided that the registration of candidates for the 2021 KCPE, KCSE and KCSE QT examinations will start from 2nd June, 2021 and end on 31st July, 2021.

15. It is further pleaded that paragraph 1.2 of the May Circular provided that any school that had between 5 and 14 candidates will be hosted by another centre to be determined by the Sub-County Director of Education. It also provided that schools with less than five (5) candidates were to register their candidates in another approved examination centre in the same Sub-County.

16. The Petitioner contended that the Respondent issued another circular dated 11th June, 2021 (hereinafter referred to as '***the June Circular'***). The June Circular issued further guidelines including: -

> *· All head teachers of primary schools and principals of secondary schools with less than Forty (40) candidates will be hosted by an examination centres with more than Forty (40) candidates during the 2021 KCPE and KCSE examinations.*
>
> *· The host school should be located within the Sub County where the hosted schools are. Both the host school and the hosted school(s) should be served from one distribution point (Container).*
>
> *· During the conduct of the examination, the Host Head Teacher/Principal will be the only authorized officer to collect the examination materials from the container, coordinate the conduct and return the candidates answer scripts to the Container during each day of the examination.*
>
> *· All sub county Directors of Education are informed to submit the list of the host examination centres and hosted examination centres for the March/April 2021 KCPE and KCSE examination by 15th August,2021.*

17. The Petitioner further contended that soon thereafter, the Respondent issued yet another circular dated 28th June 2021 (hereinafter referred to as '***the Further June Circular'***) wherein the Respondent issued further guidelines including a directive that all Primary and Secondary schools from both public and private with less than thirty (30) candidates will be hosted by centres of their choice during the 2021 KCPE and KCSE Examinations.

18. The Petitioner was aggrieved by the manner and quick succession in which the Respondent issued the three circulars. To him, the circulars are contradictory and are aimed at circumventing the provisions of the Kenya National Examinations Council Act and the Regulations made thereunder. The circulars are also decreed to be in contravention of Articles 10, 43 and 94(6) of the Constitution.

19. Through the Amended Petition, the Petitioner prayed for the following orders: -

> *(a) A declaration do issue that the circular dated 28th June 2021 issued by the Kenya National Examinations Council is in Violation of Articles 10, 43 and 94(6) of the Constitution.*
>
> *(b) ~~(a)~~ A declaration do issue that the circular dated 11th June 2021 issued by the Kenya National Examinations Council is in Violation of Articles 10, 43, and 94(6) of the Constitution.*

(c) A declaration that paragraph 1.1.2 of the Circular dated 28th June 2021 issued by the Kenya National Examinations Council violates Section 4(2) of the Kenya National Examinations Council Act, 2012 and Regulation 8(1) of the Kenya National Examinations Council (Management of Examination] Rules, 2015 and therefore null and void.

(d) ~~(b)~~ A declaration that paragraph 1.2 of the Circular dated 11" June 2021 issued by the Kenya National Examinations Council is an unprocedural amendment of Regulation 8(1) of the Kenya National Examinations Council Management of Examination Rules 2015 *violates Section 48(2) of the Kenya National Examinations Council Act, 2012 and Regulation 8(1) of the Kenya National Examinations Council (Management of Examination) Rules, 2015 and therefore null and void*

(e) An ORDER of certiorari bringing into this court and quashing the Kenya National Examinations Council Circular on hosting on the review on number of candidates from less than 40 to 30 for schools required to be hosted during the 2021 KCPE and KCSE Examinations dated 28 June 2021 in its entirety,

(f) ~~(c)~~ AN order of certiorari bringing to this court and quashing the Kenya National Examinations Council Circular on hosting of candidates with less than Forty candidates during the 2021 KCPE and KCSE dated 11th June 2021 in its entirety,

(g) Or that such other order(s) as this Honourable Court shall deem just.

20. The Petitioner filed written submissions dated 16th August, 2021. He delineated four issues for determination being: -

i. Whether the Respondent was required to conduct public participation before making the policy directives contained in the three circulars?

ii. Whether the Respondent satisfied its public participation obligations while issuing the circulars?

iii. Whether the circulars are void for being ultra vires?

iv. Whether the Respondents directives on joint hosting are void for offending the principles of legitimate expectation and legal certainty?

21. In answering the first issue, the Petitioner submitted that the Respondent is a state organ hence bound by the provisions of Article 10 of the Constitution.

22. It was further submitted that Article 10 of the Constitution is not merely directive, but is mandatory and ought to be adhered to in its totality. In this regard, the Respondent was faulted in making policy decisions in an imperial manner. The Petitioner cited the Supreme Court of Kenya in ***Communication Commission of Kenya -v- Royal Media Services & 5 Others -*** Petition No.14 of 2014; [2014] eKLR where the Learned Lordships expressed themselves on Article 10 of the Constitution as follows:

The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10 and media independence and freedom.

23. The Court of Appeal decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* [2017] eKLR was also cited in buttressing the import of Article 10 of the Constitution.

24. In contending that the Respondent ought to have carried out adequate public participation before releasing the impugned circulars, the Petitioner made reference to *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR where the Court extensively dealt with the aspect of public participation.

25. Having submitted that it is firmly established that public participation is a right under our constitutional dispensation and its mandatory nature in Article 10 of the Constitution, the Petitioner then submitted on whether the nature of the policy decisions contained in the impugned circulars necessitated public participation.

26. He submitted that the public policy decisions contained in the impugned circulars had wide spread effect to a huge cross section of the public across the nation. He contended that they were not merely simple logistical, operational and internal programmes and/or exercises by the Respondent. They were decisions that transcended the borders of the Respondent and had significant effect on a large cross-section of the public. He further submitted that the public policy decisions will cause thousands of children to sit their national examinations in different schools from those they have been attending. The Respondent was also faulted for not even catering for the logistical difficulties and expenses that will be incurred by the parents and the children who will have to change schools due to the effect of the impugned circulars.

27. According to the Petitioner, the Respondent in making public decisions that would have widespread effect on the public, it was duty

bound to at the very least seek the story and comments of those who are likely to be affected. In doing so the Respondent will not only have complied with the law but the resultant decisions will be enriched by the views of the public. Further, public participation offers the public notice of the impeding public policy decisions as was re-affirmed by the South African Constitutional Court in *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT73/05A) and in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5.

28. On the quality of the public participation allegedly carried out by the Respondent, it was submitted that the Respondent was to come up with an appropriate programme of public participation which gave the public all the relevant information about the proposed public policy decisions and provided an opportunity and forum to the public to debate and ventilate on the proposed decisions before the decisions were made. He referred to *Francis Chachu Ganya & 4 Others vs. Attorney General & Another* [2013] eKLR.

29. Flowing from the above, the question that crystallized was whether the Respondent fashioned a programme of public participation that accorded with the nature of the subject matter contained in its circulars. The Petitioner contended that the Respondent did not conduct any form of public participation with regard to the May and June Circulars.

30. The Petitioner contended that the Respondent had in its own Response to the Petition admitted to the lack of any programme of public participation. The activity the Respondent claimed to be an engagement with stakeholders was a meeting that was held at the Ministry Education on 28th June, 2021.The Petitioner invited the Court to take judicial notice of the fact that was on this same 28th June, 2021 that the Respondent issued the Further June Circular that contained yet another public policy decision.

31. It was further submitted that the people who were invited and attended the said meeting were the Cabinet Secretary for Education and three other officials of the Ministry of Education, two officials of the Respondent and two representatives of the Kenya Private Schools Association.

32. It was the Petitioner's submission that the constitution of the meeting in itself was proof enough that what the Respondent claimed to be public participation did not meet the threshold of sufficient public participation since the majority of the attendees were the policy makers as opposed to the people likely to be affected by the policy decision which included the candidates, the Parents, Teachers, Head Teachers and Principals. The decision in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR was cited in support.

33. It was further submitted that the Respondent did not even deem it necessary to consult public health officials and experts on the issue of joint hosting in the midst of Covid-19 pandemic.

34. The Petitioner lamented that in making the public policy decision contained in the Further June Circular, the Respondent acted like an imperial monarch issuing a decree to be obeyed by its subjects without question. That was evidenced by the Respondent's letter to Heads of Schools and Sub-County Directors of Education instructing them to follow the Further June Circular.

35. The Petitioner urged the Court to impugn the Circulars on account of lack or inadequate public participation.

36. As to whether the Circulars were ultra-vires, the Petitioner submitted that the primary legislative authority in Kenya is bestowed upon Parliament and the County Assemblies under Article 94(5) of the Constitution. Although the delegated legislative authority is allowed in the Constitution, the Petitioner submitted that such delegation was limited by the parameters set out in Article 94(6) of the Constitution.

37. In exercise of its constitutional authority, Parliament enacted the Kenya National Examination Council Act, 2012 (hereinafter referred to as '***the KNEC Act***'). The KNEC Act, *inter alia*, conferred on the Respondent certain delegated legislative authority under Section 48 thereof.

38. The Petitioner noted that the Respondent clarified that its policy decisions contained Circulars did not the merger of examination centres since the hosted centres would still retain their identity. He, however, questioned whether the law conferred such authority on the Respondent to implement the joint hosting of examination centres.

39. He submitted that neither the KNEC Act nor the KNEC Rules confer any authority on the Respondent to order the joint hosting of examination centers. A s such, it followed that the Respondent's directives on joint hosting is *ultra vires*, illegal and unconstitutional. It is an established principle that a state organ can only do that which is expressly authorized in law. The Petitioner relied on *Republic v Kombo & 3 others ex parte Waweru* (2008) 3 KLR (EP) 478 where the Court explained the principle of rule of law as follows: -

> *The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law - and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard.*

40. It was the Petitioner's submission that the Respondent had no legal authority to order the joint hosting of examination centres.

41. The Petitioner also submitted that the Respondent's directives on the joint hosting of examinations were void for offending the principles of legitimate expectation and legal certainty.

42. He submitted that the Candidates who were in examination centres that met the minimum candidature as provided in Rule 8(1) of the KNEC Rules had a legitimate expectation to sit for the national examinations in their current schools. That legitimate expectation was

buttressed by Rule 7(4) of the NNEC Rules which provided as under:

> *A Council examination shall only be administered at an examination centre approved and registered by the Council.*

43. The Petitioner submitted that in issuing the impugned circulars the Respondent offended the principle of legal certainty which was explained by the Court in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR as follows: -

> *The principle [of legal certainty] enables each community to regulate itself; with reference to norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible – an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the law or consequences*.

44. In the end, the Petitioner reiterated his calling that the Petition be allowed as prayed.

The Response:

45. Responding to the Petition, the Respondent filed two Affidavits. They were a Replying Affidavit sworn by one *Wilson Chelimo*, a Deputy Director, Examinations Administration Department in charge of KCPE and KCSE Examinations on 27th July, 2021 and a Further Affidavit sworn by a *Dr. Ibrahim Otieno*, the Director in charge of ICT on 3rd September, 2021.

46. The Respondent also filed written submissions dated 7th September, 2021.

47. In opposing the Petition, the Respondent pleaded that it was mandated by Section 10 of KNEC Act to among others, set and maintain examination standards while conducting public academic, technical and other national examinations within Kenya at basic and tertiary levels. It further submitted that one of its core functions is to develop examination policies, procedures and regulations on the conduct of national examinations.

48. The Respondent posited that since 2015, it established a Regulation on the number of candidates to be hosted during the conduct of KCPE and KCSE examinations provided that any school that has between 6 and 14 candidates is to be hosted by another examination centre to be determined by the Sub-County Director of Education.

49. It further posited that the Respondent registers candidates in Schools which have a valid registration certificate issued by the County Education Board. For effective administration of national examinations, any examination centre with more than 6 candidates are eligible to be recognized as an examination centre and therefore present candidates for the KCPE and KCSE examinations. Such centres will have their own identity and therefore have their candidates' certificates bearing the centre's names. For the administration and conduct of the examination, centres with less than 30 candidates will be hosted but will be recognized as stand-alone examination centres.

50. The Respondent submitted that the joint hosting of examination centres was justified for the following reasons: -

SECURITY:

- · Since 2015, there has been an increase in the enrolment of candidates in both primary and secondary schools, public and private schools of 33% increase in from 1,464,817 to 1,944,210.
- · The National Police Service offers security to not only examinations but also the entire government services. The approximate number of police officers in the country is about 100,000. Out of this, the approximate number of security officers required to offer security in all examination centres during the 2020 national examinations was 56,920. This is likely to increase to about 60,000 in 2021 due to increasing number of new examination centres occasioned by the increasing candidature.
- Currently, there is an inadequate number of security personnel to offer security in the examination centers during the examinations. This has resulted in the engagement of other security personnel such as National Youth Service (NYS servicemen) who are not adequately equipped to provide security during examinations thus compromising the security of the entire examination processes. This is clearly illustrated in Table 1 which shows the number of schools served during examinations;

Table 1: Number of Exam Centres & Candidature

	KCPE		KCSE	
Year	Noa of Centres	Candidature	No. of Centres	Candidature
2015	25,130	938,945	8,647	525,872
2016	25,611	952,391	9,153	577,253

2017	26,284	1,003,44	9,694	615,590
2018	27,157	1,060,710	10,078	664,480
2019	27,807	1,088,989	10,289	699,706
2020	28,460	1,191,608	10,436	752,602

- With the merging of 12,813 schools into other examination centres, a total of 31,294 security officers (two security personnel per centre) in 15,647 centres will be used. Previously the Respondent had 28,460 examination centres requiring 56,920 security officers. The government is better able to provide security to the 15,647 centres and still have adequate personnel for the other critical police work.

Table 2: Data on Hosted Schools

	KCPE		
Year	No. of Centres	No. of Centres with <30 candidates	No. of Centres with <15 candidates
2015	25,130	13,012	2,302
2016	25,611	13,533	734
2017	26,284	13,415	496
2018	27,157	13,461	869
2019	27,807	13,735	1,137
2020	28,460	12,813	1,505

TRANSPORT CHALLENGES:

- · Further, there is also the challenge of inadequate government vehicles for use to deliver and return examination materials to the 479 distribution points (containers) from the 28,460 examination centers. This has led to use of other modes of transport such as personal vehicles and even motor bikes. In some cases, centre managers together with the security officers walk to their examination centers with the examination materials posing a security risk. With 15,648 examination venues, examinations can be delivered adequately by use of government vehicles.
- · Having some of the smaller centres hosted by bigger centres would therefore make it more convenient and less costly in terms of transportation and security to these examination centres as examination materials would be delivered to the 15,648 examination centres instead of 31,294.
- · Some examination centers are located in areas with poor road network and harsh terrain thus making it difficult for the examination materials to be accessed with ease during the examination period. There has been a persistent challenge in some examinations not starting on time thus compromising the security of examinations. Having some of the smaller centres hosted by bigger centres would therefore make it more convenient in terms of transportation, timeliness and security to these examination centres.
- · Having a reduced overall number of examination centres will mean that the cost of running the examination will be reduced due to use of fewer vehicle and drivers. The savings made would be channelled to further improving the administration of examination processes.

MAINTAINING THE INTEGRITY OF THE EXAMINATION:

- · The more the examinations centers, the higher the risk of examination irregularities and malpractices. This is because more effective monitoring of examinations can be carried out in the reduced number of 15,648 examination centers.
- · Fewer examination centres means it will be possible to monitor more examinations centres during the examinations hence reducing examination malpractices and upholding integrity of examinations.

INCREASING ADMINISTRATION COSTS AND BUDGETARY CHALLENGES:

- · Even though the Council had previously registered schools with more than 15 candidates to be examination centers, there is still a challenges of having so many examination centers demanding for higher personnel in terms of centre managers, supervisors and invigilators hence increasing the cost of running the examinations.
- · This has led to increasing costs in terms of payment of centre managers, supervisors, invigilators, security officers, and drivers coupled with the high cost of delivering examination materials to schools together with inadequate number of security personnel to offer security in the examination centres during examinations necessitated the change of strategy by revising the number of examination centres to be hosted from less than 15 to 30 candidates.
- · The Respondent has for the last 3 years been receiving a stagnant KCPE and KCSE examinations grants of Kes. 942,130,682 for KCPE and Kes. 3,081,738,030 for KCSE from the National Treasury through the Ministry of Education. This is despite the fact that since 2015, there has been an increasing enrolment of candidates in both primary and secondary schools by 33% increase from 1,464,817 to 1,944,210. This has necessitated that the Respondent finds possible ways to make the administration of examinations more efficient and cost effective.
- · With the reduced examination centres due to hosting, fewer personnel will be required to be deployed at the centre because only one centre manager and one supervisor will be required in host centres. The number of invigilators will be maintained to ensure scripts of different centres are not mixed. This will reduce the amount supposed to be paid to contracted professionals hence this funds can be channelled to other critical needs such as the payment of examiners.

ENGAGEMENT WITH STAKEHOLDERS:

- · Consultations with stakeholders was done by the Council through the Ministry of Education. A stakeholders meeting comprising of Ministry of Education Officials, KNEC officials, the Kenya Private Schools Association and Parents Association was held on 28th June, 2021 at Jogoo House (Exhibit 'WC 1" is a letter of invitation dated 25th June 2021 that was sent out for the Stakeholder meeting and Exhibit 'WC 2" is the Attendance).
- · The stakeholders expressed their views and raised their concerns and after lengthy deliberations, it was discussed and mutually agreed that in view of the challenges in place, the minimum number of candidates be reviewed downwards from forty (40) to thirty (30).
- ·Following this meeting, a circular REF: KNEC/GEN/EA/EM/KCPE/KCSE/HOSTING 2021/02 dated 28th June, 2021 was prepared and circulated to all Sub County Directors of Education and Heads of Institutions both Primary and Secondary Schools in the republic informing them about the reduction of the minimum number of candidates to be hosted (Exhibit "WC 3" is the circular that was issued to all Heads of Primary and Secondary schools presenting candidates for 2021 KCPE and KCSE Examinations and all Sub-County Directors of Education dated June 2021).

51. The Respondent further pleaded that it had projected that with the merging of these schools a total of 11,308 centres for KCPE and 2,118 Examination venues will be hosted using the 2020 statistics as opposed to 1,505 KCPE and 217 KCSE.

52. It was the Respondent's position that its calendar of activities for the examination period kicks off with the registration then dispatch of nominal rolls to schools; validation of KCPE and KCSE registration data; monitoring of KCSE Group IV Projects; printing and packing of examination test papers; training of examiners; preparing advanced instructions to schools; briefing and sensitization of field officers and stakeholders; receipt and sorting of examination materials; coordination of assessors for Orals, Aural and Practical's; dispatch of stationary for Practicals to the field and finally administration and monitoring of the examinations. All the activities have set timelines leading up to the administration of the 2021 national examinations and delay in the registration will inevitably delay all the other processes and hence force a further realignment of the School Calendar.

53. It was further pleaded that it is in the public domain that the school calendar had to be re-arranged due to the impact of the closure of schools following the COVID-19 pandemic. That, any further changes and delays will further affect the school calendar and the efforts that the Government has made towards returning children to an ordinary school calendar. Table 4 shows the set 2021 school calendar.

Table 4 -2021 SCHOOL CALENDAR

	OPENING	CLOSING	
Term 1	26th July,2021	1st October,2021	10 Weeks
Half Term	26th August,2021	29th August,2021	3 Days
Holiday	2nd October,2021	10th October,2021	1 Week
Term 2	11th	23rd	10 Weeks
Holiday	24th	2nd January,2022	1 Week
Term 3	3 rd January 2022	4th March 2022	9 Weeks

Holiday	5th March 2022	24th April 2022	
KCPE Period	7th March 2022	9th March 2022	3 Days
KCSE Period	11th March 2022	1st April 2022	3 Weeks
KCSE Marking	4th April 2022	22nd April 2022	3 Weeks

54. Being alive to the challenges likely to be posed by the circulars to some examination centres across the Country, the Respondent pleaded that it was with this understanding that the Respondent requested the Sub-County Directors of Education to identify those centres whose candidates' are fewer than 30 but who cannot be hosted by other centres for various reasons or special circumstances in the Further June Circular.

55. The Respondent posited that it was working closely with the Sub-County Directors of Education across the Country and that it had already received many such requests and was working on them on a case by case basis. Special consideration shall be given in those circumstances.

56. It was further pleaded that the Sub-County Directors of Education had been tasked through the Ministry of Education, to assess the capacity of the hosting schools to determine the number of candidates to be hosted in order to adhere to Rules and Regulations on the conduct of examinations.

57. It was also pleaded that the Sub-County Directors of Education were to submit their final lists of the host examination centres and hosted examination centres for March/April 2021 KCPE and KCSE examination by August 30th 2021.

58. It was pleaded that at the close of the registration exercise for the 2021 Examinations, the Respondent had registered 608 and 91 new KCPE and KCSE examination centres respectively with less than 30 candidates. The Respondent had also registered 27 new centres with less than 15 candidates.

59. The Respondent averred that the Ministry of Education and the Respondent will also ensure the following to ensure the proper administration and integrity of the school examinations:

· As has been the practice in the past, during the conduct of examinations, the Ministry of Education will close schools for Class 1-7 and Forms 1-3. This will ensure that the schools have enough classrooms for use by the hosted candidates;

· The sitting arrangements of the candidates in all examination centers will be maintained at the spacing of 1.5 Meters in the examination rooms in observance of COVID-19 protocols;

· The number of invigilators required will be maintained to ensure compliance with the KNEC rule of 20 candidates per one invigilator;

· The policy shall not be applicable to Special Need Schools who shall continue to conduct examinations at their examination centres irrespective of their candidature; and

· Candidates from different schools will not be mixed. Each school will have its own classroom and centre managers to assist.

60. The Respondent believed that with the reduction of examination centers, the monitoring will be more effectively conducted to deter the occurrence of examination related malpractices and maintain the integrity of the examination. It lamented that any orders to quash the directive contained in the Further June Circular raising the minimum number of candidates per examination centre to 30 will affect the preparing and administration of the entire examination process and have impact on the school calendar.

61. In its submissions, the Respondent posited that it had acted in good faith and in public interest to ensure that the national examinations were conducted in consonance with the practical realties on the ground. The Respondent reiterated its position in the pleadings and urged the Court to dismiss the Petition.

62. According to the Respondent, the impugned circulars related mainly to logistical matters aimed at the better administration of the 2021 national school examinations hence did not call for public participation.

63. The Respondent further submitted that it, nevertheless, undertook public participation by conducting a consultative meeting on 28th June, 2021 where the contents of the Further June Circular were agreed on.

64. On whether the Respondent acted *ultra-vires*, it was submitted that the Further June Circular was subsequently superseded by a further circular dated 21st July 2021 (hereinafter referred to as '***the July Circular'***).

65. That the July Circular clarified that the hosting of schools which did not have a candidature of at least thirty (30) students during the conduct of the 2021 KCPE and CSE examinations at other examination centres. The clarification was that the Circulars related to hosting and not registration of candidates hence there was no violation of the Rule 8 of the KNEC Rules.

66. The Respondent held that it had not acted *ultra-vires*. It sought the dismissal of the Petition with costs.

Issues for determination:

67. From the reading of the Court documents filed and consideration of the submissions of the Parties, I have identified the following issues for determination. They are: -

i. Whether the formulation and implementation of the impugned Circulars is in violation of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.

ii. Whether the June Circular and the Further June Circular contravene Articles 43 and 94(6) of the Constitution.

iii. Whether the June Circular and the Further June Circular are ultra-vires the KNEC Act and KNEC Rules.

iv. Whether the Candidates had legitimate expectation to sit for the national examination at the centres they physically registered for the said examinations.

v. Whether the joint hosting of examination centres is likely to increase the risk of candidates contracting COVID-19.

vi. What remedies, if any, should issue?

68. I will deal with each of the above issues sequentially.

Analysis and determinations:

i. Whether the formulation and implementation of the impugned Circulars is in violation of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures:

69. From the onset, it is of importance to note that the issue of joint hosting of examination centres was dealt with by the Respondent through four Circulars. They are the May Circular, the June Circular, the Further June Circular and the July Circular.

70. In these proceedings, however, the Petitioner did not impugn the May Circular and the July Circular. The May Circular was pleaded to and a copy thereof annexed by the Petitioner in his disposition. The July Circular was pleaded to and annexed to the Replying Affidavit of Wilson Chelimo sworn on 27th July, 2021.

71. On 20th September, 2021, the Petitioner was granted leave by this Court to file a Further Affidavit. From the record, it seems that the Petitioner did not file any such disposition.

72. In his Amended Petition, the Petitioner sought various reliefs which none related to the May Circular and the July Circular. I will, therefore, not deal with the constitutionality and legality of the May Circular and the July Circular in this matter.

73. I have taken the above trajectory on the basis of the settled position in law that parties are bound by their pleadings. That position was reiterated by the Court of Appeal in ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR*** which decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where *Sylvester Umaru Onu, JSC* stated that: -

> *It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.*

74. *Adereji, JSC* in the same case expressed himself thus on the importance and place of pleadings: -

> ***…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……***
>
> ***…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.***

75. The Supreme Court of Kenya as well agreed with the above legal position in a ruling in ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.***

76. Having so said, I will now consider whether the June Circular and the Further June Circular contravened Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.

77. Article 2 of the Constitution declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

78. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

79. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

> *Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution*.

80. On Article 10 of the Constitution, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

> *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*
>
> *Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*

81. I have, in many decisions, held the position that the Constitution remains the supreme law of the land and that it binds everyone. I do not, therefore, ascribe to any otherwise suggestion.

82. The Respondent described itself as a public entity charged with the mandate of conducting national examinations in Kenya under the general direction of the KNEC Act, the KNEC Rules and other laws.

83. That being the case, the Respondent is, as a public entity is, hence, constitutionally bound to, and in appropriate cases, undertake public participation in its decision making processes.

84. The concepts of public participation and stakeholders' consultation or engagement were discussed with precision in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 ***William Odhiambo Ramogi & Others -vs- Attorney General & 4 Others; Muslims for Human Rights & 2 Others*** (2020) eKLR as follows: -

> *117. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** while referring to the South African decision in **Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** adopted the following definition of public participation: -*
>
> > *According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process***.**
>
> *118. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary** 10th Edition defines 'consultation' as follows: -*
>
> > *The act of asking the advice or opinion of someone. A meeting in which parties consult or confer***.**
>
> *119. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** quoted with approval Ngcobo J in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** as follows: -*
>
> > ***……****The more discrete and identifiable the potentially affected section of the population, and the more intense the possible*

effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say….

120. In a Three-Judge bench the High Court in consolidated ***Constitutional Petition Nos. 305 of 2012, 34 of 2013*** *and* ***12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** *the Court addressed the concept of consultation in the following manner: -*

> ***….*** *A public participation programme, must…show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added)*

121. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

122. The importance of public participation cannot be gainsaid. The Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -*

> *The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.*

123. In ***Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A),*** *the South African Constitutional Court stated as follows: -*

> *A commitment to a right to…public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…*

124. The South African Constitutional Court in ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5*** *discussed the importance of public participation as follows: -*

> ***….****engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.*

125. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(supra) referred to* ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** *stated as follows: -*

> *the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.*

85. The High Court in ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*** **Machakos,** High Court Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014 [2015] eKLR developed the following *six principles* to be taken into account whenever the application of the doctrine of public participation comes into issue:

> *First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*
>
> *Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*
>
> *Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.*

See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them….

Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

86. Returning to the case at hand, the central contention is the manner in which the June Circular and the Further June Circular were developed by the Respondent and their subsequent implementation by the Sub-County Education Directors.

87. The Respondent contended that the nature of the two impugned circulars were purely administrative and did not call for any public consultation. Even on such standing, the Respondent contended that it nevertheless conducted a consultative meeting with the stakeholders on 28th June, 2021 after which it issued the Further June Circular and the July Circular. As said, the July Circular is not contested.

88. The Petitioner was of the converse position. He strongly submitted that there was indeed need for meaningful and adequate participation and consultation before the issuance and implementation of the two impugned circulars.

89. The issue as to whether decisions by public entities ought to be subjected to public participation was discussed by this Court in ***William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others*** case (supra). The matter dealt with the manner in which a state corporation ought to exercise statutory power. The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In ***Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR,*** *the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process.* ***Rika, J,*** *expressed himself as follows: -*

> *Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N. Gakuru& Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the*

processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

90. I will now consider the nature and effect of the June Circular and the Further June Circular. For ease of reference and for completeness of record, I will reproduce both circulars.

91. The June Circular (dated 11th June, 2021) was as follows: -

KNEC/GEN/EA/EM/KCPE/KCSE/HOSTING/2021/02

11TH JUNE, 2021

To: i) All Heads of Primary and Secondary Schools presenting Candidates for the 2021 KCPE and KCSE examinations,

ii) All Sub County Directors of Education.

SUBJECT: ***HOSTING OF SCHOOLS WITH LESS THAN FORTY (40) CANDIDATES DURING THE 2021 KCPE AND KCSE EXAMINATIONS***

The Kenya National Examinations Council (KNEC) wishes to bring to your attention the following information as regards the hosting of schools with less than forty (40) candidates during the conduct of the 2021 KCPE and KCSE Examinations;

1.1 As per our previous circular KNEC/GEN/CS/PRO/CIR/DEC, 2021/02/ rev 7.2 dated 18 May, 2021 on registration of 2021 KCPE and KCSE candidates' clause 1.2 stated that "Any school that has between 6 and 14 candidates will be hosted by another centre to be determined by the Sub County Director of Education.

1.2 As guided by the Ministry of Education all Head Teachers of Primary Schools and Principals of Secondary Schools from both Private and Public Schools with less than Forty (40) candidates will be hosted by an examination centre with more than Forty (40) candidates during the 2021 KCPE and KCSE examinations

1.3 The host school should be located within the Sub County where the hosted schools are Both the host school and the hosted school(s) should be served from one distribution point (Container)

1.4 During the conduct of the examination the Host Head Teacher/ Principal will be the only authorized officer to collect the examination materials from the container, coordinate the conduct and return the candidates answer scripts to the Container during each day of the examination.

1.5 All Sub-County directors of Education re informed to submit the list of the host examination centres and hosted examination centres for the March/April, 2021 KCPE and KCSE examinations by 15th August, 2021.

The Further June Circular (dated 28th June, 2021) was tailored as follows: -

KNEC/GEN/EA/EM/KCPE/KCSE/HOSTING/2021/02

28TH JUNE, 2021

RE: ***REVIEW ON NUMBER OF CANDIDATES FROM LESS THAN 40 TO 30 FOR SCHOOLS REQUIRED TO BE HOSTED DURING THE 2021 KCPE AND KCSE EXAMINATIONS***

TO: i) ***All Heads of Primary and Secondary Schools Presenting Candidates for 2021 KCPE and KCSE Examinations***

ii) All Sub-County Directors of Education

The Kenya National Examinations Council wishes to bring to your attention changes regarding the hosting of schools for KCPE and KCSE examinations. During the conduct of the 2021 KCPE and KCSE Examinations, all schools with less than ***thirty (30)*** *candidates will have to be hosted. This is a departure from the previous number of* ***forty (40)*** *candidates that had been communicated earlier.*

KNEC had sent out a circular referenced KNEC/GEN/EA/KCPE/KCSE/HOSTING/2021/02 to All Head Teachers of Primary Schools and Principals of Secondary Schools presenting candidates for 2021 KCPE and KCSE from both private and public schools. The Council had requested that centres with ***less than forty (40) candidates*** *be hosted by an Examination Centre with more than forty (40) candidates during the 2021 KCPE and KCSE Examination.*

Following consultation with the Kenya Private Schools Association (KPSA) under the guidance of the Ministry of Education (MoE), the following issues were agreed upon:

1.1.1 There shall be no registration of new examination centres with ***less than thirty (30)*** *candidates for both public and private schools;*

1.1.2 All primary and secondary schools from both public and private with ***less than thirty (30)*** *candidates will be hosted by centres of their choice during the 2021 KCPE and KCSE Examinations;*

1.1.3 This policy will not apply to special need schools. Special need schools will be expected to conduct examinations at their examination centres;

1.1.4 Schools with less than ***thirty (30)*** *candidates and are more* ***than 5 kilometres*** *away from the nearest examination centre must seek special approval from the Council before* ***August 15th, 2021*** *to conduct examination in their centres;*

1.2 The host school and the hosted school(s) should be located within the same sub- county. Both the host school and the hosted school(s) should be served from the same distribution centre (container);

1.3 During the conduct of examination, the host ***Head Teacher/Principal*** *will be the one authorized to collect examination materials from the container, coordinate the conduct and return of the candidates answer scripts to the container during each examination day; and*

1.4 All Sub County Directors of Education (SCDES) are required to submit the list of host examination centres and hosted examination centres for March/April 2021 KCPE and KCSE examination by ***August 15th, 2021.***

92. Both circulars were addressed to all Heads of Primary and Secondary Schools presenting candidates for 2021 KCPE and KCSE Examinations and all Sub-County Directors of Education. The circulars were, therefore, meant for all Heads of Primary and Secondary Schools and Sub-County Directors of Education in Kenya. They were meant for implementation. On such implementation, some of the candidates sitting for 2021 KCPE and KCSE Examinations will be affected in that they will have to sit for their respective examinations in different schools, although still retaining their examination registration centre numbers. These are the candidates in examination centres with less than 30 candidates.

93. Other cadres of people likely to be affected by the two impugned circulars are the parents of the said candidates as well as their Teachers.

94. It can, hence, be gleaned that the June Circular and the Further June Circular were not meant to guide the Respondent's day-to-day operations. Instead, they were meant to affect some Schools, Sub-County Directors of Education, candidates and parents. The said circulars, therefore, transcended the borders of the Respondent's internal affairs into the arena of, and had a significant effect on the major sector players, stakeholders and the public at large.

95. Having said so, this Court now finds and hold that the June Circular and the Further June Circular were to be subjected to public participation or stakeholder engagement at the very least before they were arrived at and later offered for implementation.

96. Given the nature of the circumstances in this matter, the next sub-issue is the nature and adequacy of public participation or stakeholder engagement.

97. In Petition No. 104 of 2020 ***Kaps Parking Limited & Another vs. The County Government of Nairobi & Another*** (2021) eKLR this Court discussed the manner in which public participation is to be carried out as follows: -

137. ***The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters.*** *First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must*

be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See ***Robert M. Gakuru's case*** *(supra) among others).*

98. In **Petition Nos. 532 of 2013 & 12, 35, 36, 42 & 72 of 2014** and in **Judicial Review Miscellaneous Application 61 of 2014 (Consolidated),** the adequacy of public participation was discussed as follows: -

…. *Whereas the magnitude of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation. As was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra): -*

> *Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens….[the Assembly] should create conditions that are conducive to the effective exercise of the right to participate in the law-making process. This can be realised in various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament, to mention a few……It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the lawmaking process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.…….…..In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."*

99. In this case, since the impugned circulars only affected a certain class of Schools, parents and candidates, stakeholder engagement would have sufficed as opposed to undertaking nation-wide public participation programmes. The Respondent whether through itself or the Ministry of Education ought to have ensured that the views of those affected were sought.

100. The Respondent averred that indeed those affected were consulted. Annexure *'WC 01'* of the Replying Affidavit of William Chelimo alluded to such. I have perused the said document. It is a letter dated 25th June, 2021. It was authored by the Chief of Staff in the Ministry of Education and was addressed to the Chairperson and Secretary of the Kenya Private Schools Association, the Respondent's Chief Executive Officer, Director, Secondary Education and Director, Primary Education.

101. A total of 5 people were invited for the meeting. Apart from the two representatives of the Kenya Private Schools Association and the Respondent, the other two addresses were part of the Education Ministry. According to the List of Attendees, 8 people attended the meeting. Four of them were from the Ministry of Education, two from the Respondent and the rest from the Kenya Private Schools Association.

102. This Court finds that kind of stakeholder engagement problematic for three reasons. First, the meeting was held on 28th June, 2021 meaning that there was no such consultative forum prior to the issuance of the June Circular. The June Circular was, thus, issued and offered for implementation unilaterally.

103. Second, the Further June Circular neither made any reference to the stakeholders' meeting nor the resolutions thereof. Three, even if the Sub-County Directors of Education may be considered as part of the Ministry of Education, hence, not necessarily to be consulted, at least the concerned parents were to be consulted. This Court believes that just like the way the Kenya Private Schools Association was invited, the National Parents Association, which is a statutory national body of all parents ought to have as well be consulted. That would have taken care of both the parents and the candidates. However, that did not happen.

104. It is, therefore, the finding of this Court that whereas the June Circular was not subjected to any form of stakeholders' consultation or at all, there was no adequate consultation in respect to the Further June Circular.

105. I will now ascertain whether the issuance and implementation of the June Circular and the Further June Circular were in contravention

of **Article 47** of the Constitution and the *Fair Administrative Actions Act* No. 4 of 2015 (hereinafter referred to as '***the FAA Act'***).

106. **Article 47** of the Constitution provides that: -

> *(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
>
> > *(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
> >
> > *(b) promote efficient administration.*

107. The legislation that was contemplated under Article 47(3) of the Constitution is the FAA Act. **Section 5(1)** thereof provides that: -

> *(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—*
>
> > *(a) issue a public notice of the proposed administrative action inviting public views in that regard;*
> >
> > *(b) consider all views submitted in relation to the matter before taking the administrative action;*
> >
> > *(c) consider all relevant and materials facts; and*
> >
> > *(d) where the administrator proceeds to take the administrative action proposed in the notice—*
> >
> > > *(i) give reasons for the decision of administrative action as taken;*
> > >
> > > *(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and*
> > >
> > > *(iii) specify the manner and period within which such appeal shall be lodged.*

108. Section 2 of the FAA Act defines an '*administrative action'* and an '*administrator*' as follows: -

> *'**administrative action**' includes -*
>
> *(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
>
> *(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;*
>
> *'**administrator**' means 'a person who takes an administrative action or who makes an administrative decision'.*
>
> ***"decision"** means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be.*
>
> ***"failure"** in relation to the taking of a decision, includes a refusal to take the decision.*

109. Addressing itself to the above provisions, the Court of Appeal in ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** held that: -

> *Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.*

110. Similarly, the High Court in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR*** discussed the issue as follows: -

25. *In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*

These are: -

Illegality*- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*

Fairness*- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

Irrationality and proportionality*-The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

111. Deriving from the above, an administrative action involves an act, omission or decision by any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The decisions to issue and implement the June Circular and the Further June Circular affected the legal rights of the stakeholders. They were, therefore, administrative actions and, as such, ought to have been lawful, reasonable and procedurally fair.

112. There is no doubt that the KNEC Act and KNEC Rules permit the Respondent to issue and implement circulars including the impugned ones. Subject to other considerations and to the extent that statutory powers are granted to the Respondent to issue such circulars, the circulars may be deemed to pass one limb of the legality test. I will consider the other limb under the analysis as to whether the decisions were *ultra vires* the KNEC Act and the KNEC Rules in the third issue in this judgment.

113. On the reasonability test, this Court is to ascertain whether the decisions were arbitrary or reasonable. The Court of Appeal in ***Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR*** made reference to the **Black's Law Dictionary 8th Edition** that defined arbitrariness in the following manner: -

in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

114. The High Court in ***Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR*** referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -

the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

115. The Supreme Court of China in ***Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188*** had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

116. The term '*arbitrariness'* had earlier on been defined by the Court (Supreme Court of China) in ***Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212*** when it comprehensively observed as follows;

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

117. The Respondent gave the rationale behind the issuance and implementation of the circulars. There were very convincing and reasonable grounds on the need to adopt such measures. The reasons range from security to the integrity of the examinations.

118. The Respondent further demonstrated how it came up with the decisions through dispositions and graphical presentation. Such

decisions, therefore, were not arbitrary. They were well thought and of sound basis. The decisions contained in the impugned circulars, hence, passed the reasonability test.

119. As to whether the processes towards the issuance and implementation of the impugned circulars were procedurally fair, this Court has already found out that the June Circular was not subjected to any form of stakeholders' consultation or at all and that there was no adequate consultation in respect to the Further June Circular. It, therefore, means that the circulars did not pass the procedural fairness test.

120. In the end, this Court finds no difficulty in holding that the Respondent violated Articles 10(2)(a) and 47 of the Constitution for failure to undertake sufficient stakeholders' engagement or at all prior to the issuance and implementation of the the June Circular and the Further June Circular.

(ii) Whether the June Circular and the Further June Circular contravene Articles 43 and 94(6) of the Constitution:

121. Having already captured the parties' cases on this issue, I will now consider whether the issue is merited.

122. I will first look at whether the impugned circulars contravene Article 43 of the Constitution. The provision states as follows: -

> *(1) Every person has the right—*
>
> *(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*
>
> *(b) to accessible and adequate housing, and to reasonable standards of sanitation;*
>
> *(c) to be free from hunger, and to have adequate food of acceptable quality;*
>
> *(d) to clean and safe water in adequate quantities;*
>
> *(e) to social security; and*
>
> *(f) to education.*
>
> *(2) A person shall not be denied emergency medical treatment.*
>
> *(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*

123. Article 43 of the Constitution provides a range of rights. They are a minimum of 8 of them.

124. Apart from generally referring to the above Article, the Petitioner did not state with precision the right under Article 43 of the Constitution which was allegedly infringed and the manner in which the same was so infringed.

125. The need to plead with precision has been underpinned by both *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as ***'the Mutunga Rules'***) and judicial pronouncements.

126. Rule 10 of the Mutunga Rules provides for the form of a Petition. It emphasizes clarity of the Article of the Constitution allegedly infringed and the manner of such contravention coupled with the nature of the resultant injury.

127. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** had the following to say on the form of Petitions: -

> *Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

128. The Petitioner did not plead with precision on the allegation that Article 43 of the Constitution is infringed. He left it at large. It cannot be the duty of the Court to plead on behalf of a party. Parties are bound by their pleadings.

129. In this case, the Petitioner engaged in a fishing expedition. Such a pleading is an omnibus pleading and it cannot stand the test of the Mutunga Rules and settled judicial precedents. It is for rejection.

130. I will now turn to Article 94(6) of the Constitution. It states as follows: -

> *6) An Act of Parliament, or legislation of a county, that confers on any Stateorgan, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for*

which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

131. A plain reading of the provision is that the same relates to Acts of Parliament and County legislations. It sets some parameters to be met by such legislations.

132. The Petition herein does not in any way challenge any Act of Parliament or a County legislation or any subsidiary legislation. The Petition challenged the constitutionality and legality of the two impugned circulars.

133. Even though it can be argued that subsidiary legislation emanates from a statute hence it is generally regarded as an extension of that legislation, still the Petitioner herein did not challenge the constitutionality of any Act of Parliament, County legislation or any subsidiary legislation. Again, what he challenged was the constitutionality and legality of the impugned Circulars.

134. The Petitioner cannot, therefore, rely on Article 94(6) of the Constitution to challenge the constitutionality of the impugned Circulars. Such an approach is misconceived, misplaced and devoid of any merit.

135. In sum, the whole issue is answered in the negative.

(iii) Whether the June Circular and the Further June Circular are *ultra-vires* the KNEC Act and KNEC Rules:

136. The parties' arguments on this issue have already been captured in the foregoing part of this judgment.

137. The doctrine of *ultra-vires* was elaborately discussed in ***Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant*** **[**2019] eKLR.

138. In the said case, *Mativo, J* elaborately discussed the doctrine as follows: -

23. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality." Differently stated, in response to a challenge to the legality of administrative action, courts generally need to consider the compliance with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

24. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites. So long as administrators comply with these two rules, their decisions are safe. This fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the administrative decision does not comply with the basic requirements of legality.

25. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

26. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute. A government Minister is bound to adhere to the law. The courts when exercising this power of construction are enforcing the rule of law, by requiring government functionaries to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[17]*One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.*

27. Statutes do not exist in a vacuum.[18] *They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.*[19] *The courts should therefore strive to interpret powers in accordance with these principles.*

28. What must be borne in mind is that exercise of statutory power has a constitutional underpinning and that the Constitution should be the point of reference for any one exercising statutory power. Thus, exercise of public power must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law. Such rights cannot be narrowly construed. Differently put, every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

29. In Council of Civil Service Unions v. Minister for the Civil Service[20] *Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action ultra vires. These grounds are illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's*

classification, namely proportionality.[21]What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it to "unreasonableness" in Wednesbury Case.[22] By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

30. Judicial intervention is posited on the idea that the objective is to ensure that the agency of government functionary remains within the area assigned to it by Parliament. A decision, which falls outside that area, can therefore be described, interchangeably, as a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

31. ***Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did, and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple ultra vires*** *and errors as to precedent facts. Errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.*

32. ***The ultra vires principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature****. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The ultra vires principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense, the ultra vires principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised. It must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The ultra vires principle thus conceived provided both the basis for judicial intervention and established its limits.*

139. It is contended that the June and Further June Circulars contravened Section 48(2) of the KNEC Act and Rule 8(1) of the KNEC Rules.

140. Section 48 of the KNEC Act mandates the Respondent to make rules in order to properly discharge its duties. The provision provides as follows: -

48. (1) The Council may make rules generally for the better carrying into effect the provisions of this Act.

(2) Without limiting the generality of the foregoing, rules made under this Act may provide for the following—

(a) conduct of examinations;

(b) the nature and extent of examinations irregularity and the penalty thereof;

(c) the determination and management of examinations;

(d) equation of certificates including prescribing what examinations may be equated by the Council;

(e) the terms and conditions of service, including pension and other retirement benefits of the staff of the Council;

(f) measures for the discipline of the staff of the Council; (g) the financial procedures of the Council;

(h) examination fees and other charges payable to the Council;

(i) prescribe any other matter which requires to be prescribed under this Act.

141. Rule 8 of the KNEC Rules provide as follows: -

(1) An examination centre shall register a minimum of—

(a) fifteen candidates for school examination; and

(b) ten candidates for post school examinations.

(2) Any examination centre which registers less than the number of candidates stipulated in paragraph (1) and wishes to remain as an examination centre shall pay the cost of registering the minimum number of candidates required.

(3) The Council may review the minimum number of candidates for every examination centre from time to time.

142. Section 48(2) of the KNEC Act relates to the power of the Respondent to make a range of rules. In fact, the Respondent is mandated to

make a total of nine set of rules under that provision covering various aspects. The Petition is, therefore, not specific on the set of rules he is basing his challenge on. It is not clear as to which set of rules out of the nine the Petitioner is aggrieved by. Again, and like in the preceding issue, the prayer herein is tantamount to a fishing expedition. It is an omnibus prayer and such a prayer cannot see the light of the day.

143. Be that as it may, Rule 8 of the KNEC Rules relates to registration of candidates. In this matter, the impugned circulars are on the joint hosting of examination centres. Clearly those two issues are diametrically different. The whole of Rule 8 of the KNEC Rules does not relate to the joint hosting of examination centres. It relates to registration of candidates.

144. Demonstrating that the Respondent has acted within the law in the registration of candidates, it deposed that it has continued to register students in line with the KNEC Rules and that it had even registered several examination centres with a minimum of 15 candidates.

145. From the foregoing analysis, it appears that the Petitioner's contention is misconceived. The Petitioner failed to make a distinction between the registration of candidates under Rule 8 of the KNEC Rules and the issue of joint hosting of examination centres as directed under the circulars. There is no evidence supporting the contention that the joint hosting of examination centres contravenes any statute.

146. This Court, therefore, answers the issue in the negative.

(iv) Whether the Candidates had legitimate expectation to sit for the national examination at the physical centres they registered for the said examinations.

147. The term *'legitimate expectation'* is a conglomerate of two words; that is 'legitimate' and 'expectation'. According to **Black's Law Dictionary** 9th Edition, (Bryan A. Garner, Thomson Reuters Publishers) the word *'legitimate'* is defined at page 984 to mean: - *Complying with the law; lawful. Genuine; valid*

148. The same dictionary defines '*expectation'* at page 658 in the following terms: -

> the act of looking forward; anticipation. A basis on which something is expected to happen; esp., the prospect of receiving wealth, honors, or the like.

149. As can be discerned from the foregoing separate definitions, legitimate expectation therefore means: -

> The act of looking forward or anticipating something that is lawful/genuine or valid.
>
> A legal basis upon which someone expects that something is to happen.

150. The Supreme Court in ***Communications Commissions of Kenya & 5 others vs Royal Media Services Ltd and 5 others,*** (2014) e KLR articulated the requirements for successful reliance on the doctrine of legitimate expectation as follows: -

> *[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.*
>
> *[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation….*
>
> *[269] The emerging principles may be succinctly set out as follows:*
>
> ***a. there must be an express, clear and unambiguous promise given by a public authority;***
>
> ***b. the expectation itself must be reasonable;***
>
> ***c. the representation must be one which it was competent and lawful for the decision-maker to make; and***
>
> ***d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution***.

151. The Court of Appeal in Nairobi Civil Appeal No. 150 of 2018, Kenya Revenue Authority v Universal Corporation Ltd [2020] eKLR had occasion to shed light on the principles that guide the Court while applying the doctrine of legitimate expectation. In agreeing with various High Court decisions, the Learned Judges of Appeal made the following summary of when legitimate expectation arises: -

> **…** a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the pubic authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker's action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the

affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.

152. In ***Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi*** [2007] eKLR the Court dealt with the doctrine as follows: -

> *...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."*

153. In ***Halsbury's Laws of England***, 4th Edition, Vol. 1 (1) the doctrine of legitimate expectation is outlined as follows at paragraph 81: -

> *A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice.*

154. This Court has patiently perused the KNEC Act, the KNEC Rules, Kenya National Examinations Council (Kenya Certificate of Primary Education) Rules, 1997, the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009, the Kenya National Examinations Council (Examination Fees and Other Charges) Rules, 2015, the Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules, 2015, the Kenya National Examinations Council (Handling of Examination Irregularities) Rules, 2015 and the Kenya National Examinations Council (Conduct of Examination) Rules, 2015.

155. In all those provisions, there is no statement that a candidate must sit for the examination he/she registered for at the physical registration centre where he/she registered as a candidate. It is, however, variously provided that the Respondent must approve the transfer of a candidate from one examination centre to another.

156. That being the case and subject to the fulfillment of the requisite conditions, the candidates who registered for their examinations at a certain physical examination centre may be within reasonable parameters to expect to sit for the national examinations at the said physical examination centres.

157. As said, such expectation is, however, further subject to all perceivable conditions remaining constant. For instance, due to natural and unforeseen calamities or acts of aggression, candidates may be forced to change the physical location of the examination centre. That said, it, therefore, means that the physical location of an examination centre may change, but certainly the registration centre remains intact. Such a determination is based on a case-by-case basis. It all revolves on the peculiar circumstances of a case.

158. Another consideration is the digital age in which the world is in today. As a result of advancement in communication technology, it is possible to hold online examinations. If such happens, the need for physical appearances is negated.

159. Whereas candidates reasonable expect to sit for the examinations at the physical locations of their examination centres, it remains a fact that circumstances may compel the change of such physical locations. That must have been the deliberate reason why the law does not make any provisions on candidates sitting for their examinations at the physical examination centres they registered for the examinations.

160. In this case, there is no evidence that the Respondent made any express, clear and unambiguous promise to the candidates to sit for the examinations at the physical locations of their examination centres. That being the case, the expectation must fail.

161. The issue is answered in the negative.

(v) Whether the joint hosting of examination centres is likely to increase the risk of candidates <u>contracting COVID-19:</u>

162. The national examinations in issue are yet to be conducted. However, the Petitioner foresaw a scenario where, by the time the examinations will be administered, the Covid-19 pandemic will still be prevalent and that the Government will not be able to take care of the then situation thereby exposing the candidates to contracting the disease.

163. For the Petitioner to succeed in proving the issue, there must be evidence of how the situation will be by the time the examinations will be administered. It is not a matter of guess work. It must be on the basis of evidence. That is the calling in *Sections 107(1), (2)* and *109* of the *Evidence Act*, Cap. 80 of the Laws of Kenya.

164. The Petition is, hence, too speculative. It is based on unsettled factual averments. A Court is barred by the Doctrine of Ripeness from exercising jurisdiction in such instances.

165. In ***Kiriro wa Ngugi & 19 others v Attorney General & 2 others*** [2020] eKLR the High Court dealt with the doctrine as follows: -

107. *Lastly is the Ripeness Doctrine. The doctrine focuses on the time when a dispute is presented for adjudication. The* ***Black's Law Dictionary*** *10th Edition, [supra] at page 1524 defines ripeness as:*

> *The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made*

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

109. The Court of Appeal in ***National Assembly of Kenya & another v Institute for Social Accountability & 6 others*** *Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:*

> *[72] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.*
>
> *[74] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.*

110. In ***National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others*** *[supra] the Court of Appeal held:*

> *[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.*

111. *In* ***Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others*** *Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:*

> *[27] Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases……The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.*

166. As the matters alluded to by the Petitioner are yet to crystallize into disputes, the issue hereby fails.

Remedies:

167. From the above analysis, the Petition has partly succeeded. Whereas the Petitioner has failed to impugn the June and Further June Circulars on the basis of Articles 43 and 94(6) of the Constitution, the principle of *ultra-vires*, the principle of legitimate expectation and Covid-19 arguments, he has, nevertheless, succeeded to prove that the impugned circulars contravene Articles 10(2)(a) and 47 of the Constitution.

168. In such a scenario the Court is called upon to consider appropriate remedies. The Court of Appeal in ***Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR*** held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in ***Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR*** held that Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

169. In ***Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311***, **Rawal, J** (as she then was) stated that:

> *While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself.* ***Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.*** *See Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520…The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See* **The Judicial Review Handbook** *(3rd Edn) by Michael Fordham at 361.*

170. The Constitutional Court of South Africa in ***Fose vs. Minister of Safety & Security [1977] ZACC 6*** emphasized the foregoing as

follows: -

> *Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.*

171. In this case, the May Circular and the July Circular are not impugned. The purport of the July Circular was to give fresh instructions on the joint hosting of examination centres. It is a stand-alone communication and it speaks clearly on what the addresses are to do. The circular neither depends on nor is it an extension of the Further June Circular.

172. It is, therefore, a fact that, even if the June and Further June Circulars are quashed, still the July Circular is sufficient to accord the necessary guidelines on the joint hosting of the examinations. In other words, the quashing of the June and Further June Circulars will have no impact at all on the overall joint hosting of examination centres. This Court must, however, state that the position would have been different had the July Circular been impugned.

173. Having said so, I must reiterate that an order which serves no purpose ought not to be granted by a Court. A Court should not act in vain. Quashing the June and Further June Circulars, in the unique circumstances of this case, will be an exercise in futility. It will yield to nothing as the joint hosting of the examination centres will still be undertaken on the basis of the July Circular. This Court declines that invitation.

Disposition:

174. In the end, the most appropriate order to issue is to disallow the Petition. As such, this Court finally finds that the Petition and the Amended Notice of Motion dated 16th July, 2021 are unmerited. They are hereby dismissed with no order as to costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **27th** day of **January, 2022.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Rienye, Learned Counsel for the Petitioner.

Miss. Bisley Bisam, Learned Counsel for the Respondent.

Elizabeth Wanjohi – Court Assistant