



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

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

**PETITION NO. 470 OF 2016**

MOSES CHESANG.....1<sup>ST</sup> PETITIONER  
ROSE OWINO.....2<sup>ND</sup> PETITIONER  
ESKIMOS KOBIA KIRUBI.....3<sup>RD</sup> PETITIONER  
ERNEST TSORI.....4<sup>TH</sup> PETITIONER  
ROGERS MWAKACHOLA.....5<sup>TH</sup> PETITIONER  
GILBERT MAGIO.....6<sup>TH</sup> PETITIONER  
VINCENT MBURA.....7<sup>TH</sup> PETITIONER  
JULIUS KIVERENGE.....8<sup>TH</sup> PETITIONER  
BENSON BWOME.....9<sup>TH</sup> PETITIONER  
DANIEL KANGORO KANDIE.....10<sup>TH</sup> PETITIONER  
REBECCA AMENYA.....11<sup>TH</sup> PETITIONER  
ATIANG ATIANG.....12<sup>TH</sup> PETITIONER  
GODSON NGOLYO.....13<sup>TH</sup> PETITIONER  
PETERSON KIGUTU.....14<sup>TH</sup> PETITIONER  
GABRIEL MAKOKHA.....15<sup>TH</sup> PETITIONER  
SHADRACK KYEVA.....16<sup>TH</sup> PETITIONER  
JOSPAT MUKEMBU.....17<sup>TH</sup> PETITIONER  
SHABAN SAIDI MAGOJO.....18<sup>TH</sup> PETITIONER  
ANTONY NJOROGE NDUNGU.....19<sup>TH</sup> PETITIONER

JOHN CHIRCHIR.....20<sup>TH</sup> PETITIONER

-VERSUS-

THE CABINET SECRETARY,

MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT

THE PRINCIPAL SECRETARY,

STATE DEPARTMENT OF EDUCATION.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR GENERAL OF EDUCATION.....3<sup>RD</sup> RESPONDENT

NICHOLAS MAIYO.....4<sup>TH</sup> RESPONDENT

SARAH GITHINJI.....5<sup>TH</sup> RESPONDENT

ORAI ADAN.....6<sup>TH</sup> RESPONDENT

DR. OSBORN MABALU.....7<sup>TH</sup> RESPONDENT

NATIONAL PARENTS ASSOCIATION.....8<sup>TH</sup> RESPONDENT

### JUDGMENT

#### Introduction:

1. *The National Parents Association*, the 8<sup>th</sup> Respondent herein, is a statutory body comprised of parents with children in Primary and Secondary Schools in Kenya. It is the apex body preceding the Schools Parents Associations, the Sub-County Parents Associations and the County Parents Associations.
2. The Petitioners are office bearers of various Parents Associations in Kenya and also National delegates who *inter alia* take part in the elections of the officials of the National Parents Association.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are public servants variously serving in the Ministry of Education. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents are officials of the National Parents Association, the 8<sup>th</sup> Respondent herein.

#### The Petitioners' case and submissions:

4. The Petitioners amended their Petition with the leave of the Court. The Amended Petition is supported by the Affidavits of *Moses Chesang*, the First Petitioner herein, sworn on 8<sup>th</sup> November, 2016, 26<sup>th</sup> April, 2017, 13<sup>th</sup> December, 2018 and 16<sup>th</sup> December, 2019 respectively. The Amended Petition is, *inter alia*, challenging the elections of the officials of the 8<sup>th</sup> Respondent held on 5<sup>th</sup> October, 2016 at the Kenya Institute of Curriculum Development. The main contention is that the elections were not conducted within the confines of the Constitution and the law.
5. It is further contended that the Petitioners, who are officials of various Parents Associations and who as per the provisions of Article 5 of the Third Schedule to the Basic Education Act, 2013 are to nominate delegates to elect the officials of the 8<sup>th</sup> Respondent were never notified of the said elections and meeting.
6. The brief background of the Petition is that the enactment of the Basic Education Act No. 14 of 2013 birthed the formation of the Schools Parents Associations, the Sub-County Parents Associations, the County Parents Associations and the National Parents Associations in Kenya.
7. With a view to put in place the various Parents Associations, the 1<sup>st</sup> Respondent originated The Operational Guidelines for Election of School Parents Association for Primary and Secondary Schools in May 2014 (hereinafter referred to as '**the Guidelines**'). It also published the Basic Education Regulations, 2015 *vide* Legal Notice No. 39 of 2015.
8. On 8<sup>th</sup> September, 2014, the 2<sup>nd</sup> Respondent issued a circular to all County Directors of Education, Sub-County Directors of Education, Principals and Head Teachers directing them to organize elections of Parents Associations in their schools. Accordingly, the elections were held by school parents of primary and secondary schools in the entire country and the Petitioners duly elected as Chairpersons of the Executive Committee of their respective Schools Parents Associations.
9. According to the Guidelines, the tenure of office for the respective Executive Committees of School Parents Associations was four years.

On or about 11<sup>th</sup> July, 2016, while the Petitioners were still in office, the 1<sup>st</sup> Respondent issued a circular under reference MOE/HQ/3/13/2 directing the County Directors of Education, Sub-County Directors of Education, Principals and Head Teachers of Schools to forthwith conduct School, Sub-County and County Parents Associations' elections.

10. The Petitioners retained their positions in the various elections held under the direction of the 1<sup>st</sup> Respondent. As such, they all qualified as Delegates of the 8<sup>th</sup> Respondent with powers to take part in elections of the office bearers of the 8<sup>th</sup> Respondent.

11. It is averred that the Respondents, in total disregard to the Constitution, the law and the Guidelines, proceeded to convene a Delegates Meeting wherein they conducted elections of the officials of the 8<sup>th</sup> Respondent. That was on 5<sup>th</sup> October, 2016. It is contended that none of the Petitioners was ever notified of the said Delegates Meeting or the elections.

12. It is further averred that the National Parents Association Delegates Conference held on 5<sup>th</sup> October, 2016 was attended by only 94 persons out of the total number of over 30,000 Delegates from schools across the country. The elections lacked the two-thirds quorum as provided for in the Guidelines. It is further averred that the 94 persons who purported to elect officials of the 8<sup>th</sup> Respondent were hand-picked by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to represent the 47 counties and were not necessarily those delegates nominated by Schools Parents Associations to attend the Delegates Meeting.

13. The Petitioners also challenge the manner in which the elections were conducted. They posit that there was no National Delegates Register, the election was not conducted by a neutral body, ballots bore the Ministry of Education logo, the election was presided over by the Director General of Education, who is the 3<sup>rd</sup> Respondent herein, and who also counted the votes.

14. Resulting from the foregoing, the Petitioners contend that the election of the officials of the 8<sup>th</sup> Respondent did not meet the constitutional and legal threshold and as such it ought not stand.

15. The Petitioners therefore seeks the following orders: -

*a) A declaration that the election of Nicholas Maiyo, Sarah Githinji, Orai Adan and Dr. Osborn Mabalalu (the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents) on the 5<sup>th</sup> day of October, 2016 as officials of the 8<sup>th</sup> Respondents violated the Petitioners' fundamental rights and freedoms guaranteed in Articles 27(4), 36(1) and 47(1) of the Constitution of Kenya, and is null and void for all intent and purposes.*

*b) A mandatory Order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, either by themselves, their servants, agents, organs, or any person working under them from interfering with the independence of the School Parents Associations, Sub County Parents Associations of organizing their own election activities including election of the 8<sup>th</sup> Respondent officials at a place of their choice and further restraining the respondents, either by themselves, their servants, agents, organs, or any person working under them from attending the elections of the 8<sup>th</sup> Respondent to avoid influencing the election outcomes.*

*c) Leave be granted to the Petitioners to, within thirty (30) days of the order herein, to invite all Schools Parents Associations Chairpersons to nominate delegates to elect officials of the 8<sup>th</sup> Respondent and the cost of attending the National delegates conference be borne from the Schools Parents Associations' account.*

*d) An order staying and quashing the Respondent's letter reference no. MOE/HQ/3/13/2 of 11<sup>th</sup> July, 2016 and further staying and quashing all parallel School Parents Association, Sub county Parents Association, County Parents Association and the 8<sup>th</sup> Respondent elections conducted and presided over either by the Respondents themselves, their servants or agents in 2016.*

*e) Costs of and incidental to this petition.*

*f) Any other order that this honorable court deems fit and just to grant in the circumstances.*

16. The Amended Petition is further supported by the submissions dated 21<sup>st</sup> August, 2017. It is contended that Section 55(2) as read together with the Third Schedule of the Basic Education Act (hereinafter referred to as '**the Education Act**') mandates the establishment of Parents Associations. Section 2 of the Third Schedule stipulates for establishment of executive committees of schools Parents Associations. Accordingly, by dint of Section 3 of the Third Schedule of the Education Act a Parents Association has the absolute right to freely and without hindrance to conduct its affairs. Furthermore, it is argued that Section 54 of the Education Act reposes the 1<sup>st</sup> Respondent the general superintendence and management of basic education and that is realized through public officers such as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appointed in the Public Service.

17. It is vehemently submitted that neither the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents have the power to rescind, terminate or nullify the elective offices of the Petitioners earned through a public process of election of respective Executive Committee offices. It was further submitted that the 2<sup>nd</sup> Respondent's action in calling for fresh parallel School, Sub-County and County Parents Association elections through circular letter no. MOE/HSQ/3/13/2 of 11<sup>th</sup> July, 2016 without giving the Petitioners any notice was in bad faith, arbitrary and in contravention of Section 3, 4 and 6 of the Fair Administrative Actions Act No. 4 of 201 and Article 47 of the Constitution.

18. The Petitioners contend that the Petitioners, Sub-County and County Parents Association officials elected with the knowledge and at the behest of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents between 10<sup>th</sup> September, 2014 and 30<sup>th</sup> September, 2014 in line with Regulation 6.0 of the Guidelines were eligible to occupy office for term period of 3 years and for a further term of 3 years subject to re-election and by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents effectively nullifying their elections culminating in fresh elections of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents is a violation

of the Guidelines.

19. The Petitioners referred to some decisions in support of their case.

**The Respondents' case and submissions:**

20. The Respondents did not file any response to the Petition.

21. The Attorney General acting for the Respondents instead filed written submissions dated 14<sup>th</sup> March, 2018.

22. It is submitted that the Petition lacks merit and it ought to be dismissed. The Respondents admit that the Principal Secretary by dint of Section 95(3)(o) of the Education Act issued the Guidelines. It is argued that the Petitioners were not elected at the County level as delegates to represent their respective counties at the national level. Instead, the position is that every county elected 9 representatives or officials who comprised the County Executive Committee for Parents Associations and thereafter every county elected two delegates to the National Conference for election of the National Executive Committee.

23. The Respondents did not refer to any decisions in support of their case.

**Analysis and Determination:**

24. I have considered the Amended Petition, the Affidavits, the Submissions and Authorities relied on and I have fully understood the matter before me.

25. In essence, the main issue for determination is whether the Petitioners' rights were infringed by the Respondents' decision to conduct election of the officials of the 8<sup>th</sup> Respondent and whether the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents were rightfully elected as the officials of the 8<sup>th</sup> Respondent.

26. As said above, the Petition is not factually opposed. It therefore means that all the factual averments stand uncontroverted save in instances where the Court may take judicial notice. There was no joinder of issues in this matter.

27. The Court of Appeal in *Denmus Oigoro Oonge vs. Njuca Consolidated Ltd [2012] eKLR* was categorical, when dealing with failure to file a reply to defence, that if a party does not deny any factual issues against it then it is deemed to have admitted such averments. The Court stated as follows: -

*16. The proper construction of the Rule 8 (1), in my view, is the one stated in Katiba Wholesellers Agency (K) Ltd vs United Insurance Co. Ltd., Civil Appeal No. 140 of 2002 where this court stated that: -*

*... it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations...*

28. Applying the foregoing in this case, it, hence, follows that all the factual allegations by the Petitioners in the manner the elections of the officials of the 8<sup>th</sup> Respondent were conducted stand affirmed. I will, nevertheless, briefly look at the law.

29. **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.*

30. The legislation that was contemplated under Article 47(3) is the Fair Administrative 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.

31. Section 2 of the Fair Administrative 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'.

32. 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.

33. 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 its 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...*

34. Deriving from the above, there is no doubt that the impugned decision was an administrative action. That is because the decision affected the legal rights and interests of the Petitioners. As such, the impugned decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

35. On lawfulness, there is no doubt that the formation and administration of various Parents Associations in Kenya is provided for under the Third Schedule of the Education Act.

36. Whereas the Constitution bestows a duty upon public policy decision makers to accord those affected by their decisions opportunities to participate in the processes towards making such decisions, the adequacy, mode and extent of such participation largely depends on what is reasonable in the circumstances of each case. That is what is commonly referred to as '**the reasonableness test**'.

37. As long as the necessary information is availed to the public or the class of people affected by the public policy decisions and they are afforded a forum in which they can adequately ventilate them, then the constitutional requirement is met.

38. In this case, the allegation that the Petitioners were never served with any notice for the elections of office bearers of the 8<sup>th</sup> Respondent is not in doubt. As such, the issues of reasonability and procedural fairness were flouted in the face.

39. In this matter, I find no difficulty in holding that the Respondents' actions variously infringed Article 47 of the Constitution and the Fair Administrative Actions Act in not according the Petitioners the opportunity to participate in the election of the office bearers of the 8<sup>th</sup> Respondent. The Respondents' actions are, hence, constitutionally infirm.

40. Having so found, it goes without say that all the officials of the 8<sup>th</sup> Respondent who were elected on 5<sup>th</sup> October, 2016 are in office contrary to the Constitution and the law.

**Disposition:**

41. In the end, the following orders do hereby issue: -

**(a) A Declaration hereby issues that the election of Nicholas Maiyo, Sarah Githinji, Orai Adan and Dr. Osborn Mabalalu on the 5<sup>th</sup> October, 2016 as officials of the National Parents Association violated the Petitioners' fundamental rights and freedoms guaranteed in Articles 27(4), 36(1) and 47(1) of the Constitution of Kenya, and is null and void.**

**(b) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall within 90 days conduct fresh elections of the National Parents Association.**

**(c) There shall be no order as to costs.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 21<sup>st</sup> day of January 2021.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Aywa**, Learned Counsels for the Petitioners.

**Miss. Anne Mwangi**, Learned Counsel instructed by the Honourable Attorney General for the Respondents.

**Dominic Waweru** – Court Assistant