



**Republic v Ministry of Education & 3 others; MGJB (Suing on behalf of a minors, SKG and SKG1) (Exparte Applicant) (Judicial Review 10 of 2020) [2021] KEHC 7682 (KLR) (22 April 2021) (Judgment)**

*Republic v Ministry of Education & 3 others Ex parte MGJB (Suing on behalf of a minors, SKG and SKG) [2021] eKLR*

Neutral citation: [2021] KEHC 7682 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**JUDICIAL REVIEW 10 OF 2020**

**JM NGUGI, J**

**APRIL 22, 2021**

**IN THE MATTER OF AN APPLICATION BY DR. MGJB (SUING ON BEHALF OF A MINORS, SKG AND SKG1) FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF BASIC EDUCATION ACT NO 14 OF 2013**

**AND**

**IN THE MATTER OF SECTION 9 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**IN THE MATTER OF MINISTRY OF EDUCATION SESSIONAL PAPER NO. 1 OF 2019**

**AND**

**IN THE MATTER OF THE ARTICLES 10, 12, 19, 20, 21, 22, 23, 27, 28, 43, 47, 50, 53, 165, 258, 259 OF THE CONSTITUTION (2010)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**CABINET SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATIONS COUNCIL (KNEC) .. 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**



**High Court declines to quash decisions to revise the academic calendar in response to the COVID 19 pandemic.**

*The 2nd respondent (the Cabinet Secretary, Ministry of Education) issued a press statement on July 7, 2020, indicating that due to the COVID 19 pandemic all basic education learning institutions would re-open in January 2021 and that the 2020 school year would be lost. He also stated that there would be no KCPE and KCSE in the year 2020 and that the 2020 standard eight and form four candidates would sit their examinations in the year 2021. The applicant challenged the decision in that press statement. The court held that it could not be said that it would be unjust or unconscionable to permit the respondents to reschedule national examinations and to delay the start month for PP1 learners by six months owing to school closures. It was within the authority of the respondents to make the decision that the only effective way to cover the curriculum was through in-person learning and that it was only upon coverage of the curriculum that learners, as a collective, were permitted to sit for the national examinations. The decision was not so unreasonable as to invite a finding by the court that its effects would be unconscionable on the learners.*

Reported by John Ribia

**Constitutional Law** - national values and principles of governance - public participation - legal threshold to be met in fulfilment of public participation requirements - where a decision affecting learners in basic educational institutions was made and the learner's representatives were consulted but the learners and their parents were not consulted - whether all persons affected by a decision had be afforded an oral hearing - whether it was necessary to consult the National Education Board and the County Education Boards in making a decision to re-open basic education institutions and revise the academic calendar in response to COVID 19 - Constitution of Kenya 2010, article 10; Basic Education Act, No 14 of 2013, section 71.

**Judicial Review** - grounds for judicial review - irrationality and unreasonableness - legal threshold to be met in proving irrationality or unreasonableness - whether the decisions by the Cabinet Secretary, Ministry of Education, on re-opening of basic learning institutions and revision of the school calendar in response to COVID 19, were unreasonable or irrational.

**Judicial Review** - grounds for judicial review - breach of legitimate expectation - circumstances under which a legitimate expectation would arise - whether learners had a legitimate expectation to progress from one class to the next class as per the set academic calendar - whether a decision to revise academic calendars, in response to the COVID 19 pandemic, which affected learners' academic progress was made in breach of the learners' legitimate expectation.

**Brief facts**

The 2<sup>nd</sup> respondent (the Cabinet Secretary, Ministry of Education) issued a press statement on July 7, 2020, indicating that due to the COVID 19 pandemic all basic education learning institutions would re-open in January 2021 and that the 2020 school year would be lost. He also stated that there would be no KCPE and KCSE in the year 2020 and that the 2020 standard eight and form four candidates would sit their examinations in the year 2021.

The applicant challenged the decision in that press statement. He stated that the respondent did not give prior notice before making the decision which abruptly cut the school progress of many children. He added that the parents and students affected were not heard before the decision was made and it was not clear how the decision was arrived at. In making the impugned decision, the respondents had consulted the COVID 19 Education Response Team (COVID 19 Response Team.) The applicant argued that the team was not selected in a transparent manner and the consultations should have been done with the National Education Board established under section 71 of the Basic Education Act and various County Education Boards.



The applicant further stated that the decision wrongfully disallowed admission to pre-primary (PP1 and PP2) or progress to standard eight or any other class. He added that there would be no KCSE and KCPE registration in 2021 for the existing standard seven and form three students. According to the applicant, the failure to allow for academic progress because the 2020 curriculum would not have been completed was unlawful and irrational.

On November 16, 2020, the 2<sup>nd</sup> respondent made another decision. It allowed for the enrolment of children into pre-primary (PP1) classes starting from July 2021. Term 2 for candidates other than those sitting for KCSE and KCPE was to begin in January 2021. The applicant had complaints about that decision and he sought to amend his application. He stated that academic progress was still hindered and that registration, preparation and sitting for KCPE and KCSE Examinations for the year 2021 was indirectly stopped.

The applicant's amendments were done via a further affidavit without leave of court but the court deemed the amended prayers as properly before the court and granted the respondents time to file their responses. The court stated that the matter was a public interest matter and under article 159 it was imperative to do substantive justice without resort to technicalities. It also found that it was harsh and disproportionate to strike out the proposed amendments. The respondents did not file responses to the amended application.

### **Issues**

- i. What was the legal threshold to be met in fulfilment of public participation requirements?
- ii. Whether the decisions by the Cabinet Secretary, Ministry of Education, on re-opening of basic education institutions and revision of the school calendar in response to COVID 19, were made in a manner that fulfilled public participation requirements.
- iii. Whether the decisions by the Cabinet Secretary, Ministry of Education, on re-opening of basic education institutions and revision of the school calendar in response to COVID 19, were unreasonable or irrational.
- iv. What was an applicant that sought judicial review remedies on grounds of irrationality or unreasonableness required to prove?
- v. Under what circumstances would the doctrine of legitimate expectation arise?

### **Held**

1. Public participation was provided for under article 10 of the Constitution. The requirement was that there had to be sufficient public participation and stakeholder engagement allowing policy-makers or law-makers to consider the views of the public before making decisions that affected the public. The position in law was not that all persons had to express their views or be heard in order for the constitutional imperative to be met. It was not required that every affected person should be given an oral hearing. What was required was that reasonable notice of the proposed decision was given and that the views of those in attendance had been taken into consideration.
2. The yardstick for public participation was that a reasonable opportunity had to be given to members of the public and all interested parties to know about the issue and have an adequate say. A personal hearing for every affected person was not a requirement.
3. There were clear efforts by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to get views from stakeholders and experts before making the impugned decisions. For example, the Kenya Parents Association, a civil society organization recognized by the Basic Education Act which had membership in both National and County Education Boards as provided for in sections 10 and 20(1) of the Basic Education Act, respectively, was given an opportunity to present its views. The respondents also formed the COVID Response Team.
4. The efforts of the respondents in fulfilment of public participation requirements were clear. However, the respondents needed to put more deliberate efforts to get the views of parents and learners and not just their representatives.



5. A finding of lack of good faith stakeholder engagement could not be made simply because the court could imagine a better way to conduct a public participation or stakeholder engagement program.
6. The public participation and stakeholder engagements undertaken before the impugned decisions were made did not rise to the level required of policies with wide-ranging impacts on the lives of parents and learners throughout Kenya. There ought to have been more conscious efforts to invite and consider the views of parents and learners even within the constraints imposed by the COVID 19 Pandemic. However, on grounds of lack of sufficient public participation alone, the court hesitated to quash the impugned decisions.
7. It was not clearly the case that the remit of the National Education Board and the County Education Board included the issues covered by the impugned decisions or that it was mandatory for their input to be sought.
8. The provision cited in favour of the involvement of the National Education Board and the County Education Board, in the making of the impugned decisions, was section 71 of the Basic Education Act. Under section 71 of the Basic Education Act, the Cabinet Secretary in consultation with the National Education Board, and the various County Education Boards and institutions and all persons engaged in the promotion, provision and conduct of education had to ensure compliance with quality and relevance in the provision and delivery of education and adopt effective and efficient systems to achieve the desired outcomes and objectives and avoid duplication and waste. The provision did not have much to do with the question of the education calendar in basic education institutions and the connection between the calendar, national examinations and progression to new classes by pupils in the face of a disruption to the normal calendar.
9. The functions of the National Education Board as provided for under section 5(2) of the Basic Education Act did not favour the applicant's suggestion on the necessity of their involvement in the making of the impugned decisions. The failure to consult the National Education Board was not symptomatic of lack of public participation.
10. Where an applicant challenged administrative action that was textually within the scope of functions or authority of the body that acted, the court would not generally perform a merit review of the action complained against unless it was irrational or *Wednesbury* unreasonable.
11. Where a public authority had acted in exercise of its discretion, the court was only entitled to interfere with that exercise of discretion under the following situations:-
  - a. where there was an abuse of discretion;
  - b. where the decision-maker exercised discretion for an improper purpose;
  - c. where the decision-maker was in breach of the duty to act fairly;
  - d. where the decision-maker had failed to exercise statutory discretion reasonably;
  - e. where the decision-maker acted in a manner that frustrated the purpose of the Act donating the power;
  - f. where the decision-maker fettered the discretion given;
  - g. where the decision-maker failed to exercise discretion; and
  - h. where the decision-maker was irrational and unreasonable.
12. The reasons offered for irrationality and unreasonableness in the making of the impugned decision by the applicant were that there had been a failure to care about the time learners had spent in term 1 in 2020, failure to take into account home-based and e-learning which learners undertook during the closure of schools, that the respondents created an irrational link between the opening of schools and sitting of exams yet that link had no basis in facts, law or science, that the impugned decisions prevented four year old children from joining PP1 yet there was no nexus between physical opening of schools and barring those children from joining PP1 in 2021 and that the impugned decision injured the legitimate expectations of children. The applicant's argument that term 1 learning in 2020 and the school fees



- spent on it would be lost, was blunted by the second impugned decision which announced that learners would be back in school in January 2021 to start with term 2.
13. In determining whether there was irrationality, the question was not whether there was an alternative decision which the 2<sup>nd</sup> respondent could have made which would have been more efficient or effective because in doing so the court would be engaging in a merit review. Instead, the correct question was to ask whether the impugned decision served any governmental interest or whether it was rationally related to the articulated governmental interest. Differently put the means and goals of the policy or law had to be rationally related. An applicant could succeed in showing that a law or policy was unreasonable or oppressive if he could show that the means chosen to achieve the legitimate governmental interest were not rationally related to legitimate governmental goals.
  14. The applicant neither claimed nor succeeded in demonstrating that the decisions made by the respondents about the progression of learners – including the revised calendars – were oppressive because they did not pursue any governmental interests or that the means chosen were not rationally related to legitimate government goals.
  15. The respondents explained that they decided that the best response to COVID 19 was to revise the academic calendars so that pupils would progress to new classes at different times than those provided for in the usual calendar. They also explained that they could not use the e-learning programs to determine whether learners could progress to the next class because the e-learning programs were not intended to cover the syllabus but to engage the students and supplement in-person learning. Further they stated that double intakes into certain classes in order to allow academic progress would lead to congestion and would run afoul of guidelines for mitigating COVID 19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had authority to set relevant policies including those relating to academic calendars and national examination timetables for basic education institutions. A court could not quash their decisions on the basis that there existed a better or more efficient policy. A court could only quash the decision where it was so unreasonable that no person exercising due discretion could have made it.
  16. A legitimate expectation arose where a person responsible for taking a decision had induced in someone a reasonable expectation that he would receive or retain a benefit of advantage. There were four pre-conditions to be met in order for the doctrine of legitimate expectation to be applicable: -
    - a. the public authority had to have made a representation through words or conduct amounting to a promise as to how it would act in respect to an identifiable area of activity;
    - b. the public authority had to have made the representation either directly or indirectly to an identifiable individual or group of persons;
    - c. the individual or group had to have acted on the faith of the representation or on its reliance; and
    - d. the representation had to be such that it would be unjust or unconscionable to permit the public authority to resile from the representation.
  17. It could not be said that it would be unjust or unconscionable to permit the respondents to reschedule national examinations and to delay the start month for PP1 learners by six months owing to school closures. It was within the authority of the respondents to make the decision that the only effective way to cover the curriculum was through in-person learning and that it was only upon coverage of the curriculum that learners, as a collective, were permitted to sit for the national examinations. The decision was not so unreasonable as to invite a finding by the court that its effects would be unconscionable on the learners.



18. The impugned decision would not be quashed on the basis of lack of sufficient public participation for two reasons:-
- a. There was evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents put in good faith efforts to get the views of a wide section of stakeholders, experts and representatives of stakeholders; and,
  - b. The matter was a public interest matter calling for the public law remedy of certiorari. It would not be efficacious to grant an order of certiorari due to public interest in the case. That was because in the intervening period candidate classes had taken their national examinations and the new calendar announced was already deep in its implementation stage. The candidate class of 2021 was slated to take its national examinations by the end of the calendar year; while the PP1 class would be joining in July 2021 - two months from the date of the judgment. It would be a disproportionate judicial relief to torpedo all that in order to grant the requested relief. Public interest - including that of the applicant's own children - militated against the grant of the order sought.

*Application partly allowed*

#### **Orders**

- i. *The application failed in all other ways and the all the other reliefs were declined.*
- ii. *Each party would bear its own costs.*

#### **Citations**

##### **East Africa**

1. *AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council and another; Republic v Public Procurement Administrative Review Board & 2 others ex parte Rongo University* Judicial Review Application 605 of 2017; [2018] eKLR –(Mentioned)
2. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017; [2017] eKLR –(Explained)
3. *Joseph Enock Aura v The Cabinet Secretary, Ministry of Education, Science & Technology & 3 others* Constitutional Petition No 2189 of 2020: [2020] eKLR- (Distinguished)
4. *Law Society of Kenya v Attorney General* Constitutional Petition 3 of 2016; [2016] eKLR- (Explained)
5. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] eKLR –(Explained)
6. *Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government & 3 others* Civil Appeal 42 of 2014; [2014] eKLR –(Explained)
7. *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal 185 of 2001; [2002] (Followed)
8. *Republic v Chuka University Ex Parte Kennedy Omondi Waringa & 16 others* Judicial Review Case 113 of 2017; [2018] eKLR-(Mentioned)
9. *Republic v County Government of Kiambu Ex Parte Robert Gakuru & another* Judicial Review Case 434 of 2015; [2016] eKLR-(Explained)
10. *Republic v Minister for Home Affairs and others ex parte Sitamze* Miscellaneous Civil Application 1652 of 2004; [2008] eKLR –(Mentioned)
11. *Uchumi 44 Travellers Sacco & 7 others v County Government of Nakuru & 2 others* Judicial Review 10 of 2020; [2021] eKLR-(Followed)
12. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* Constitutional Petition No 159 of 2019 and 201 of 201 (Consolidated); [2020] eKLR –(Explained)

##### **South Africa**

- Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* [2010] ZACC 5; 2010(6) BCLR 520 (CC) –(Explained)



## **United Kingdom**

*North Wales Police v Evans* [1982] 1 WLR- (Followed)

### **Texts & Journals**

1. Scott, r., *et al* (Eds) (1997) *The Supreme Court Practice* London: Sweet & Maxwell Ltd Vol 53/1-14/6
2. De Smith, *et al* (Eds) (2001) *Judicial Review of Administrative Action* London: Sweet & Maxwell 6<sup>th</sup> Edn p 609

### **Statutes**

#### **East Africa**

1. Constitution of Kenya, 2010 articles 10, 47, 159 –(Interpreted)
2. Basic Education Act, 2013 (Act No 14 of 2013) sections 4(t); 5(2); 10; 20(1); 53; 71 –(Interpreted)

#### **East Africa**

1. *AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council and another; Republic v Public Procurement Administrative Review Board & 2 others ex parte Rongo University* Judicial Review Application 605 of 2017; [2018] eKLR –(Mentioned)
2. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017; [2017] eKLR –(Explained)
3. *Joseph Enock Aura v The Cabinet Secretary, Ministry of Education, Science & Technology & 3 others* Constitutional Petition No 2189 of 2020: [2020] eKLR- (Distinguished)
4. *Law Society of Kenya v Attorney General* Constitutional Petition 3 of 2016; [2016] eKLR- (Explained)
5. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] eKLR –(Explained)
6. *Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government & 3 others* Civil Appeal 42 of 2014; [2014] eKLR –(Explained)
7. *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal 185 of 2001; [2002] (Followed)
8. *Republic v Chuka University Ex Parte Kennedy Omondi Waringa & 16 others* Judicial Review Case 113 of 2017; [2018] eKLR-(Mentioned)
9. *Republic v County Government of Kiambu Ex Parte Robert Gakuru & another* Judicial Review Case 434 of 2015; [2016] eKLR-(Explained)
10. *Republic v Minister for Home Affairs and others ex parte Sitamze* Miscellaneous Civil Application 1652 of 2004; [2008] eKLR –(Mentioned)
11. *Uchumi 44 Travellers Sacco & 7 others v County Government of Nakuru & 2 others* Judicial Review 10 of 2020; [2021] eKLR-(Followed)
12. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* Constitutional Petition No 159 of 2019 and 201 of 201 (Consolidated); [2020] eKLR –(Explained)

#### **South Africa**

*Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* [2010] ZACC 5; 2010(6) BCLR 520 (CC) –(Explained)

## **United Kingdom**

*North Wales Police v Evans* [1982] 1 WLR- (Followed)

### **Texts & Journals**

1. Scott, r., *et al* (Eds) (1997) *The Supreme Court Practice* London: Sweet & Maxwell Ltd Vol 53/1-14/6
2. De Smith, *et al* (Eds) (2001) *Judicial Review of Administrative Action* London: Sweet & Maxwell 6<sup>th</sup> Edn p 609



## Statutes

### *East Africa*

1. Constitution of Kenya, 2010 articles 10, 47, 159 – (Interpreted)
2. Basic Education Act, 2013 (Act No 14 of 2013) sections 4(t); 5(2); 10; 20(1); 53; 71 – (Interpreted)

## JUDGMENT

1. The *ex parte* Applicant, a surgeon in Nakuru County, has brought this Judicial Review Application on behalf of his two children who are minors and in the public interest. One of his children is thirteen years old and in Standard Seven while one is four years old and is on the verge of Pre-Primary 1 (PP1).
2. The Judicial Review Application dated July 13, 2020 contains the following four prayers reproduced verbatim:
  - a) The Honourable Court be pleased to issue an order of *certiorari* and quash the respondents' decision made and contained in press release and broadcast dated July 7, 2020 which has an effect of stopping enrollment of *ex parte* applicant's daughters and thousands of other Kenyan pupils/students (children) into pre-primary (PP1) classes in the year 2021 and stopping the progress of the *ex parte* applicant's daughters and thousands of other Kenyan pupils/students (children) from proceedings to the next classes (especially to standard 8 and form 4) in the year 2021 national examinations and indirectly stopping the registration, preparation and sitting of the KCPE and/or KCSE examinations for the year 2021 set by the 3<sup>rd</sup> respondent.
  - b) The Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents jointly and severally, from enforcing the contents press release and broadcast dated 7th July 2020 and/or any further decisions or any way barring the enrollment of *ex parte* applicant's daughters and thousands of other Kenyan pupils/students (children) into pre-primary (PP1) classes in the year 2021 and/or progressing to the next classes (especially to standard 8 and form 4) for both in primary and secondary schools (if they so wish) and registering and sitting for KCPE and/or KCSE Examinations for/ and in the year 2021.
  - c) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents to allow pre-primary (PP1) enrollment classes for the year 2021 and allow progression to the next class(es) in 2021 for the *ex parte* applicant's daughters and thousands of other Kenyan pupils/students (children) (both primary and secondary) and specifically register and examine the *ex parte* applicant's daughters and thousands of other Kenyan pupils/students (children) who may wish to be registered and to sit 2021 National examinations (in 2021) including KCPE & KCSE and eventual release of results and certificates.
  - d) Costs of this application be awarded to the *ex parte* applicant.



3. The Press Statement dated July 7, 2020 which the *ex parte* Applicant wants to be subjected to judicial review (hereinafter referred to as “First Impugned Press Statement” or simply, “First Impugned Decision”) was issued by the 2nd Respondent. It contains the following consequential paragraphs:

Faced with this uncertain environment, the stakeholders have resolved to re-open all basic education learning institutions in January, 2021. This is based on the assumption that the infection curve will have flattened by December, 2020. The implications of this resolution are that:

- i. There will be no KCPE and KCSE examinations in 2020.
  - ii. The 2020 Standard Eight and Form Four cohorts will sit their examinations in 2021.
  - iii. The 2020 school calendar year will be considered lost due to Covid-19 restrictions.
4. The Applicant is aggrieved by this decision. He initially brought his Application to solely challenge this First Impugned Decision. However, during the pendency of the suit, the 1st Respondent issued a second Press Release dated November 16, 2021 (hereinafter, the “Second Impugned Decision”) which somewhat modified or modulated the First Impugned Decision. As outlined below, the Applicant expanded his Application to challenge the Second Impugned Decision as well.
5. The Applicant’s principal complaint is that the Respondents acted “without any notice whatsoever” when they made the Impugned Decisions whose effect would be that the Applicant’s daughters and other Kenyan pupils/students (children) school progress “to be abruptly cut such that there is no admission to pre- primary school (PP1 &PP2) and no progress to standard 8 or any other class and no registration and sitting for KCPE and KCSE 2021 (for the current standard 7 and form 3 pupils/student respectively).”
6. The Applicant finds the Respondents decision that no students in Kenya would progress to the next year because they would not have completed the 2020 curriculum to be unlawful and irrational for a number of reasons explained below.
7. In support of his Application, the Applicant filed his Supporting Affidavit dated July 17, 2020; a Further Affidavit dated November 24, 2020 and Written Submissions dated December 23, 2020.
8. The Respondents filed a Replying Affidavit by Dr. Belio Kipsang dated October 2, 2020 and a Further Affidavit by the same person dated November 18, 2020 on behalf of the 1st Respondent. Dr. Kipsang is the Principal Secretary, Ministry of Education, State Department of Early Learning and Basic Education. Dr. Mercy Kerogo, the Acting Chief Executive Officer of the 3rd Respondent (KNEC) also filed a Replying Affidavit dated September 4, 2020. The Honourable Attorney General, through Learned State Counsel, Ms. Winnie Cheruiyot, also filed Written Submissions in opposition to the Petition.
9. In his Further Affidavit of November 24, 2020, the Applicant substantially amended his Petition. The main thrust of the amendment was as to expand the Application to include a challenge to the Second Impugned Decision. However, as can be seen below, the Applicant also ambitiously expanded the scope of the reliefs he is seeking.
10. Though there are technical questions whether an Applicant in a Judicial Review Application can successfully amend his Application by way of a Further Affidavit and without leave of the Court,



I ultimately deemed the Amended Prayers as properly before the Court and granted time for the Respondents to file further responses to it. I allowed this course for three reasons:

- a. First, I took into consideration that the Applicant brings the present Application not only on behalf of his two children and but in the public interest and that, therefore, it is imperative that the substantive questions are determined as much as possible without resort to technicalities. This is, of course, a Constitutional imperative under Article 159 of the Constitution.
- b. Second, I considered that the Applicant is acting pro se in this litigation; and it would be unduly harsh and disproportionate to strike out the suggested amendments in the circumstances.
- c. Third, I afforded the Respondents an opportunity to respond to the amendments. As it turned out, however, the Respondent did not eventually file any further responses and the State Counsel representing the Honourable Attorney General was forced to announce the closure of her pleadings after two extensions by the Court.

11. The amended reliefs by the Applicant are quite copious. They are, in my view, reflective of the fact that the Applicant is acting in person. As such, they tend to overlap, be repetitive and verge on the tautological at different turns. Nonetheless, I have reproduced them verbatim below:

- (a) The Honourable Court be pleased to issue an order of *certiorari* and quash the Respondents' decision made and contained in press release and broadcast dated July 7, 2020 which inter alia has an effect of stopping enrollment of *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) into pre-primary (PPI) classes in the year 2021 and stopping the progress of the *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) from proceedings to the next classes (especially to standard 8 and form 4) in the 2021 national examinations and indirectly stopping the registration, preparation and sitting of the KCPE and/or KCSE examinations for the year 2021 set by the 3rd Respondent.
- (b) The Honourable Court be pleased to issue an order of *certiorari* and quash the Respondents' decision made and contained in press release and broadcast dated November 16, 2020 signed by the 2nd Respondent herein Prof. George Magoha and further deponed on 18th November, 2020 in the 3rd paragraph of further affidavit by respondents' Principal Secretary in Charge of State Department of Early Learning and Basic Education Dr. Belio Kipsang, 1st Respondent herein which inter alia had an effect of pushing *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) enrollment into pre-primary (PPI) classes into July 2021, starting of term 2 in January, 2021, staying at home of grade 4 (2021 grade 5) and incoming form 1 (current standard 8) in 2021, and international schools reopening in January 2021, and stopping the progress of the *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) from proceedings to the next classes (especially to standard 8 and form 4) in the year 2021 national examinations and indirectly stopping the registration, preparation, preparation and sitting of the KCPE and/or KCSE examinations for the year 2021 set by the 3rd Respondent.



- (c) The Honourable Court be pleased to issue an order of prohibition prohibiting the Respondents jointly and severally, from enforcing the contents press released and broadcast dated 7th July, 2020 and/or any further decisions or any was inter alia barring the enrollment of *ex parte* Applicant's daughters and thousands of other Kenyans pupils/students (children) into pre-primary (PPI) classes in the year 2021 and/or progressing to the next classes (especially to standard 8 and form 4) for both in primary and secondary schools (If they so wish) and registering and sitting for KCPE and/or KCSE Examinations for/ and in the year 2021.
- (d) Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents jointly and severally, their servants, agents and any person or entity under their direction and behest from enforcing the contents press release and broadcast dated 16<sup>th</sup> November, 2020 signed by the 2nd Respondent herein Prof. George Magoha and further deposed on 18th November, 2020 in the 3rd paragraph of further affidavit by Respondent's principal secretary in charge of State department of early learning and basic education Dr. Belio Kipsang which inter alia had an effect of pushing *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) enrollment into pre-primary (PPI) classes into July 2021, starting of term 2 in January 2021, staying at home up to July 2021 of grade 4 (2021 grade 5) and incoming standard 8 (2021 from 1) in 2021, and international schools reopening in January, 2021, and stopping the progress of the *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) from proceeding to the next classes (especially to standard 8 and form 4) in the year 2021 national examinations and indirectly stopping the registration, preparation and sitting of the KCPE and/or KCSE examinations for the years 2021 (for those who wish) set by the 3rd Respondent in the year 2021.
- (e) Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents jointly and severally, their servants, agents and any person or entity under their direction and behest from arbitrarily declaring that *ex parte* Applicant's daughter and thousands of Kenyan children would not covered the curriculum or would not have covered the curriculum, without examining/assessing them objectively, scientifically or otherwise.
- (f) The Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents and the so called 16-member committee – The so called “COVID-19 Education Response Team-the Committee” comprising *inter alia* National Council of churches of Kenya (NCCCK). Chairperson KEPSHA, Trade Unions, Government Curriculum Development Committee, County Government Representatives, Kenya National Examinations Council (KNEC). Partnerships & East African Community, Directorate of Secondary Education, Muslim Education Council, Kenya Association of Independent International Institutions, The Kenya Conference of Catholic Bishops, The Chairman Kenya Parents Association, Chief Executive Officer – The Kenya Private Schools Association (KPSA). The Chairperson – The Kenya Secondary Schools Heads Association



KESSHA) and Representatives of Teachers Service Commission (TSC) or any other entity from making or purporting to make any binding recommendation/decision on issues of education except as per the law.

- (g) The Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents from making and adverse administrative action/decision which is not in the best interest of the *ex parte* Applicant's daughters and thousands of Kenyan children affected by the decision.
- (h) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents to allow pre-primary (PPI) enrollment classes in January, 2021.
- (i) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents to stop forcing grade 4 (2021 grade 5) and standard 8 (2021 form 1) to stay at home while others are learning.
- (j) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents to allow progression to the next class(es) the *ex parte* Applicant's daughters and thousands of other Kenyan pupils/students (children) (both primary and secondary)
- (k) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents into taking into consideration Respondents' initiated and other forms of digital e-learning platforms as part of learning.
- (l) The Honourable Court be pleased to issue an order of *mandamus*, compelling the 3rd Respondents (together with 1st and 2nd Respondents) to specifically register and examine the *ex parte* Applicant's daughter and thousands of other eligible Kenyan pupils/students (children) who may wish to be registered and to sit 2021 National examinations (in 2021) including KCPE & KCSE and all other assessments in all other classes and eventual release of results and certificates.
- (m) The Honourable Court be pleased to issue an order of *mandamus*, compelling the Respondents to involve all education stakeholders (according to the [Constitution](#) and the law) before arriving at any decision affecting education of Kenyan children.
- (n) That the Honourable Court do issue an order for compensation of *ex parte* Applicant's daughters Shain Kerubo Gikenyi and Shantell Kemunto Gikenyi for the psychological suffering they have undergone due to irrational, irregular, illegal administrative action of the Respondents contrary to [Constitution](#) and international tools on protection of children.
- (o) Any other relief, or/and any modification of my prayers this Honourable Court deem fit for the sake of Justice of our children.
- (p) Costs of this Application be borne by Respondents and awarded to the *ex parte* Applicant.



12. To boil it down, the Applicant describes the Impugned Decisions as administratively irrational. In his pleadings and submissions, he assails the Impugned Decisions on two major grounds:
  - a. First, in terms of procedure, the Applicant argues that the Impugned Decisions are unlawful because neither he nor his children or thousands of other parents and children in similar position were given an opportunity to give their views before the Impugned Decisions were made and further that the procedure followed was in violation of the *Basic Education Act*.
  - b. Second, the Applicant argues that the Impugned Decisions are substantively irrational for a number of reasons.
13. These two, then, rightly frame the issues for determination in this case. The only final two issues are consequent upon these two: whether the reliefs asked for should be granted; and what the appropriate orders for costs should be.

**A. Are the impugned decisions amenable to be quashed for procedural defects?**

14. The Applicant complains, in the first instance, that the two Impugned Decisions should be quashed for fatal procedural defects namely that they were made without giving any opportunity or notice to him, his two children or thousand other similarly situated parents and children an opportunity to be heard and to demonstrate that they had sufficiently covered the curriculum to be allowed to sit their national exams and to progress to Secondary School and PP1.
15. The Applicant argues that the Respondents have not shown how they arrived at the decisions encapsulated in the two Impugned Decisions; and further that no prior notice or hearing for the pupils or their parents were issued. He complains that the Impugned Decisions were arrived at without examining the pupils to determine the objectivity of the 1st Respondent's presumptions on the question of curriculum coverage or the ineligibility of pupils to progress to the next class.
16. The Applicant hypothesizes that what he finds to be impermissible presumptions about coverage of curriculum and ineligibility of pupils to advance to the next class were the produce of a faulty process: one in which the pupils and their parents were not involved. This non-involvement, the Applicant argues, is fatal and, on its own should warrant the quashing of the Impugned Decisions. Without saying so directly, the Applicant, in essence, argues that the Impugned Decisions were reached without sufficient stakeholder engagement.
17. The Applicant refers to the COVID-19 Education Response Team (hereinafter, "COVID Response Team") appointed by the 2nd Respondent to advise him on the issues, policies and strategies that the education sector needs to address in response to the COVID-19 challenges" as an "amorphous" and "with questionable expertise."
18. The Applicant further argues that the decisions taken by the 2nd Respondent on the matters he is challenging in the suit could only have been made in consultation with, inter alia, the National Education Board established under section 71 of the *Basic Education Act* and various County Education Boards and "and institutions and all persons engaged in the promotion, provision and conduct of education." The Applicant argues that this mandatory consultation did not happen; and that, instead, the 2nd Respondent relied on advice given by the "amorphous" COVID Response Team. The Applicant argues that the COVID Response Team was appointed without any transparency and that its participation cannot be sufficient to amount to consultation. The Applicant finds the course



of action taken by the 2nd Respondent to not only run afoul the Constitution especially Article 10, but to also violate the Basic Education Act.

19. In response to this line of attack, the 1st Respondent responds that the 2nd Respondent acted lawfully and after structured consultations. Dr. Kipsang swears in his affidavit dated November 18, 2020 that:

14. That the stakeholders that were present during the meeting and endorsed the decision in [a] press release dated 7th July, 2020 was not amorphous but represented various organizations as shown in the attendance list. Marked as annexure BRK2.

15. That it is not possible that all Kenyan pupils and parents be directly involved in decision-making process and that they have representatives who made contributions during the decision making process and THAT being alive to the foregoing, on May 12, 2020, the Cabinet Secretary appointed a sixteen (16) member Committee as a response team to the COVID-19 Pandemic in the education sector. The team was christened,

“The COVID-19 Education Response Team (hereinafter referred to as “the Committee”). The Committee’s membership was drawn from relevant trade unions, government curriculum development institutions, county government representatives, representatives of the Kenya National Examinations Council, the Directorate of Policy, Partnerships & East Africa Community, Directorate of Secondary Education, the Muslim Education Council, the National Council of Churches of Kenya, the Kenya Association for Independent International Schools, the Kenya Conference of Catholic Bishops, the Chairman – Kenya Parents Association, the Chief Executive Officer – the Kenya Private Schools Association, the Chairperson – KEPSHA, the Chairperson – Kenya Secondary Schools Heads Association and representatives of the Teachers Service Commission.

20. The Applicant is adamant that the Impugned Decisions were not made after thorough and exhaustive public participation of the people as required by Article 10 of the Constitution; and that the Respondents relied on ad hoc opinions and conjecture of wanting “amorphous” stakeholders which “did not involve the Applicant’s daughters and thousands other Kenyan children and/or their parents according to the Basic Education Act.” He says that his daughters and other Kenyan children were “denied an opportunity to defend themselves and/or to give their input before any decision affecting them is reached.”

21. To support this prong of his arguments, the Applicant cited a number of decisions including AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council and Another; Republic v Public Procurement Administrative Review Board & 2 Others ex parte Rongo University [2018] eKLR; Republic v Chuka University ex parte Kennedy Omondi Waringa & 16 Others [2018] eKLR.

22. Public participation as provided for in Article 10 of the Constitution of Kenya is now considered a well-established justiciable crucible for government policies and laws. A recent five-judge decision in William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others (Mombasa Constitutional Petition No. 159 of 2019 as Consolidated with Mombasa Constitutional Petition No. 201 of 2019) comprehensively delineated our jurisprudence on Articles 10 and 47 of the Constitution on public



participation and stakeholders' engagement. The Court cited 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 where the Court 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."

23. The Court explained the Constitutional importance of public participation by citing the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* where the Court of Appeal stated:

"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."

24. The Court also cited, with approval, 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."

25. In the present case, there is no doubt that the 2nd Respondent sought out to make policies in the form of the two Impugned Decisions; policies which literally affected millions of Kenya students; their parents; and teachers. It follows that the making of such a policy required public participation and stakeholder engagement. It is pointless to belabour the Constitutional text and its commentaries in various decided cases on this point. Suffice it to add that the *Basic Education Act* accentuates this requirement, as the Applicant argues, in section 4(t) of the Act as well as various other provisions of that statute.



26. The question for determination is whether the 2nd Respondent engaged in sufficient public participation and stakeholder consultation before announcing the Impugned Decisions. The Applicant says that he did not, and, as outlined above, proffers three reasons for his belief:
- a. First, the Applicant says that neither he nor his daughters were given an opportunity to be heard on the question; and neither were the other similarly-situated children and their parents.
  - b. Second, the Applicant says that the COVID Response Team appointed by the 2nd Respondent was “amorphous” and not sufficiently representative.
  - c. Third, the Applicant says that the Impugned Decisions were made in violation of section 71 of the *Basic Education Act*.
27. Was there sufficient public participation in this case and were the Impugned Decisions reached in violation of section 71 of the *Basic Education Act*?
28. Let us begin here. The law is not that all persons must express their views or be heard in order for the Constitutional imperative to be met. As the High Court stated in *Law Society of Kenya v Attorney General* [2016] eKLR:
- “The law is not that all persons must express their views or that they must be heard and that the hearing must be oral.... What is required is that reasonable steps be taken to facilitate the said participation....Therefore even in cases where there are oral hearings the mere fact that a particular person has not been heard does not necessarily warrant the whole process being nullified...”
29. Similarly, the Court of Appeal pronounced itself in similar terms in *Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* [2014] eKLR where it cited the South African Constitutional Court in rendering itself thus:
- As the trial Court Judge correctly observed, the words of Chaskalson, CJ in the South African case of Minister for Health v New Clicks South Africa (Pty) Ltd, succinctly cover the situation in this case:
- It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made.
- What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration.
30. Finally, in *Republic v County Government of Kiambu ex parte Robert Gakuru & Another* [2016] eKLR, Justice Odunga felicitously stated as follows on this point:
50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of



facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

31. The conclusion is, as this Court announced in *Uchumi 44 Travellers Sacco & 7 Others v County Government of Nakuru & 2 Others* [2021] eKLR that:

...it cannot be expected that a public authority would, before formulating a policy, consult each citizen or stakeholder and accord them a personal hearing. That would make governance impossible. As the case-law guides, the expectation is that an adequate notice will be given to the public and special efforts made to alert stakeholders and then carry out the engagement. There is, also, no expectation that each individual stakeholder must have a say or that their take on an issue must be dispositive. The requirement is, in good faith, engage the stakeholders, hear their point of view and consider them in the ultimate policy formulated.

32. In the present case, all considered, can it be said that the Respondents engaged the stakeholders in good faith? The Respondents point to two pieces of evidence to exhibit their good faith engagement: the formation of COVID Response Team and what they say is its high representative quotient; and sign-up sheets of the meeting that arrived at the Impugned Decisions which, they argue, demonstrate that the meeting was highly consultative. The Applicant argues that the COVID Response Team is not representative at all; and further that the sign-up sheets of the meeting without more cannot be evidence of public participation.
33. It is, truly, a close case whether the threshold of public participation has been met in the present case. There are clear efforts by the 1st and 2nd Respondents to get views from stakeholders and experts which, they say, culminated in the Impugned Decisions. They point out that the Applicant's interests were represented by a member of the Kenya Parents Association which is a civil society organization recognized by the *Basic Education Act* and has membership in both National and County Education Boards as provided for in sections 10 and 20(1) of the *Basic Education Act* respectively.
34. The Respondents argue that the Applicant has not made any complaints against the Kenya Parents Association which was called to represent his views; and further argue that the Applicant was deemed to have notice that the Association will represent his views when the appointments were done and publicly announced.
35. I am not entirely persuaded that this reasoning by the Respondents is entirely logical but I am prepared to accept the good faith efforts by the Respondents to get as many views of the key stakeholders on the question before coming up with the Impugned Decisions. When all is said and done, this Court would be reluctant to invalidate the Impugned Decisions on the basis of lack of public participation given the clear efforts made to get the views of stakeholders before announcing the policies even though the Respondents needed to put more deliberate efforts to get the views of parents and learners – not just their representatives. In doing so, I am conscious of the fact that public participation is not a magical quotient which can be established by quantum calculations. Oft times, the Court tests for good faith engagement of stakeholders and gives the agency in question much latitude to design its own program of public participation or stakeholder engagement. It is not always that the Court will be thoroughly impressed by the meticulousness and thoroughness of public participation before giving a policy a pass. There will be times where the Court would only give the agency the benefit of doubt because it



is not enough to make a finding of lack of good faith merely because the Court could imagine a better way to conduct a public participation or stakeholder engagement program.

36. The upshot on this question is the following: the Court makes a finding that the public participation and stakeholder consultations achieved before coming up with the Impugned Decisions does not rise to the level required of policies of such wide-ranging impacts on the lives of parents and learners throughout Kenya. There ought to have been more conscious efforts to invite and consider the views of parents and learners even within the constraints imposed by the COVID-19 Pandemic. However, despite this findings, as I explain below, I hesitate to quash the Impugned Decisions on this ground alone.
37. What about the claim that the two procedures utilized to come up with the two policies violate requirements of the *Basic Education Act* because they did not involve the National Education Board and the County Education Boards? I am simply uncertain that the remit of the National Education Board and the County Education Board includes the questions covered in the Impugned Decisions and therefore mandatorily required that the Boards be involved.
38. The provision of the *Basic Education Act* which is cited to support the argument that the 2nd Respondent was mandatorily required to consult the National and County Education Boards before arriving at the Impugned Decisions is section 71. That section is headlined:

“Standards, quality and relevance in education.” It stipulates thus:

The Cabinet Secretary in consultation with the National Education Board, and the various County Education Boards and institutions and all persons engaged in the promotion, provision and conduct of education shall—

- (a) ensure compliance with quality and relevance in the provision and delivery of education;
  - (b) adapt effective and efficient systems to achieve the desired outcomes and objectives and avoid duplication and waste.
39. Needless to say, this provision does not seem, on plain reading, to have much to do with the question of the educational calendar in Basic Education institutions and the connection between the calendar, national examinations and progressions to new classes by pupils in the face of a disruption to the normal calendar. The reading favoured by the Applicant is not aided by looking at the functions of the National Education Board. These are listed in section 5(2) of the *Basic Education Act* as follows:
- (1) The functions of the Board shall be to advise the Cabinet Secretary, the department of education and related departments on policy matters in respect to-
    - (a) Collaboration with the Quality Assurance and Standards Council, Teachers Service Commission and with other Stakeholders to promote standards in basic education and training;
    - (b) Working with all relevant authorities and agencies to ensure that all the barriers to the right to quality education are removed and that the National and



County governments facilitate the realization of the right to education by all Kenyans;

- (c) The initiation of guidelines for approval by the Cabinet Secretary on the establishment of basic education institutions;
- (d) Putting measures to ensure, where applicable, transition to the next level of education, especially for the vulnerable and marginalized children;
- (e) Any other matter as shall be from time to time be referred to the Board by the Cabinet Secretary.

40. In the end, therefore, while public participation and stakeholder engagement was required and mandated by the *Constitution* at Article 10 and the guiding principles in the *Basic Education Act*, the failure to specifically consult the National Education Board and the County Education Board was not, per se, symptomatic of lack of public participation. Further, as analyzed above, while the quantum and level of public participation in this case can hardly be adjudged to be a model of citizen involvement in policy making, in the specific circumstances of this case, the good faith efforts expended will inoculate the Impugned Decisions from invalidation on account of lack of public participation.

#### **B. Are the impugned decisions substantively irrational?**

41. The Applicant is quite clear about the scope of Judicial Review and was careful to fit his complaints against the Impugned Decisions into an acceptable ground for review of policy decisions by a public body. Thus, he pleaded and made efforts to argue that the Impugned Decisions are substantively irrational and are a candidate for being quashed.

42. This framing flows from our established jurisprudence that when an Applicant challenges an administrative or executive action which is textually within the scope of functions or authority of the body that acted, the Court does not, generally, perform a merit review of the action complained against unless the action is irrational or Wednesbury-unreasonable.

43. The nature of Judicial Review is succinctly described in *North Wales Police v Evans* [1982] 1 WLR. The holding in that case is the main theme in the treatise, *The Supreme Court Practice*, 1997 Vol. 53/1-14/6 which is in the following words:

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

44. The Court of Appeal beautifully paraphrased it thus in *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd.*:-

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant



matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision."

45. Hence, as our Courts have said before, "where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:-
- (i) where there is an abuse of discretion;
  - (ii) where the decision-maker exercises discretion for an improper purpose;
  - (iii) where the decision- maker is in breach of the duty to act fairly;
  - (iv) where the decision-maker has failed to exercise statutory discretion reasonably;
  - (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
  - (vi) where the decision-maker fetters the discretion given;
  - (vii) where the decision-maker fails to exercise discretion;
  - (viii) where the decision-maker is irrational and unreasonable." See *Republic vs. Minister for Home Affairs and Others ex parte Sitamze*.
46. In the present case, as I understand it, the Applicant makes the claim that the Impugned Decisions are irrational administrative actions. Sifting through the many paragraphs in the Notice of Motion and two affidavits sworn by the Applicant as well as by discerning his equally voluminous Written Submissions, one can identify at least four reasons that led to the Applicant to the unmistakable and injured view that the Impugned Decisions are administratively irrational. They are as follows:
- c. First, at least with respect to the First Impugned Decision, the Applicant argues that it was made without any "care" for the time already spent in Term 1 of 2020.
  - d. Second, the Applicant argues that the Impugned Decisions are irrational because they do not take into account the home-based and e-learning which was done by the students after the closure of schools.
  - e. Third, the Applicant argues that the Respondents have created an irrational link between the opening of schools and sitting of exams yet that link has no basis in facts, law or science.
  - f. Fourth, the Applicant argues that the Impugned Decisions bar four-year old children from joining PP1 yet there is no nexus between physical opening of schools and barring these children from joining PP1 in 2021.
  - g. Fifth, the Applicant argues that the Impugned Decisions injure the legitimate expectations of the children.
47. Regarding the first ground, the bulk of the Applicant's arguments were based on the First Impugned Decision which announced that Academic Year 2020 would be considered "lost." He was concerned that students were already in the tail end of the first term when schools were closed and all that learning would be discounted. He was also concerned about the monetary implications of the decision for parents because, he argued, it would mean that all monies paid as school fees for the year would be lost;



and parents have to pay again. To a large extent, this argument was blunted by the Second Impugned Decision which announced new opening dates for the second term. The Second Impugned Decision, thus, revised the notion that the Academic Year 2020 was considered “lost.” Instead, it provided a new calendar straddling 2020 and 2021 for completing the academic year for the different classes.

48. The second, third and fourth set of arguments by the Applicant are related and a lot more substantial. The Applicant argues that after the closure of physical schools, the 1st and 2nd Respondents issued a manual entitled, “The Kenya Basic Education Covid-19 Emergency Response.” The manual, he argues, urged learners to use e-learning at the government approved e-learning platforms through the Kenya Institute of Curriculum Development (KICED) and broadcasted through radio, TV (like Elimu TV; Edu Channel; KBC Channel 1) and radio stations as well as other electronic learning portals and platforms.
49. The Applicant insists that he as well as other Kenyan parents and students accepted the e-learning advocated by the 1st and 2nd Respondents as a means of covering the syllabus for the Academic Year 2020. As a result, the Applicant says that his two children, together with thousands of others embraced digital learning and diligently continued with e-curriculum with the use of home-based learning and digital e-learning with the legitimate expectation to complete their academic year so that they could progress to the next class, in the case of the Applicant’s daughter, Standard Eight in 2021 and sit her KCPE exam. It is, therefore, irrational for the 1st and 2nd Respondents to turn around and refuse to recognize the e-learning and home-based learning solutions they put out.
50. In addition, the Applicant finds it incredibly irrational that the Respondents reached the Impugned Decisions based on the presumption that the pupils would not have sufficiently covered the curriculum in order to progress to the next class yet they did not test the learners to reach that conclusion. He finds it definitionally irrational for the Respondents to act on the presumption that all the learners did not cover the curriculum whether they took e-learning programs or not; and without subjecting them to any examination.
51. The Respondents, on the other hand, argues that the e-learning programs commissioned by them were not meant to cover curriculum for the academic Year 2020 but to engage the students while the schools were closed. They say that by pursuing e-learning options, the expectation was not that the learners would be considered ready to progress to the next class or to take national examinations.
52. The Applicant says that the rational position to take would have been to test all students who say they have taken e-learning programs and test them to determine their suitability to progress to the next class rather than, in a blanket fashion, determine that all students would need to cover the materials afresh.
53. The Respondents insist that this is a “factual issue and not triable within the ambit of Judicial review...” This is because, the Respondents argue, judicial review proceedings only deals with the decision-making process and not the decision itself.
54. The Respondents submit as follows on this question:
  - a) That as a result of COVID-19 Pandemic, the Respondents were forced to make decisions to close schools in order to preserve the physical, emotional and psychological health of the learners.
  - b) That although the Ministry of Education has introduced virtual learning, the same was meant to keep the learners engaged and not to cover the curriculum sufficiently for the students to advance to the next class or stage;



- c) That the precautionary principle and the governmental interest in preserving the lives of the learners has necessitated the Ministry of Education to keep schools closed.
  - d) That due to equity concerns, it was important that all learners were treated the same whether they could afford to cover the content of the curriculum virtually at home or not.
55. Hence to the question of testing students who had taken the e-learning program, the Respondents point to the equity and equality implications of the alternative suggested by the Applicant. The starting point is that it is the 2nd Respondent who is charged with the responsibility “for the overall governance and management of basic education.” (Section 53 of the *Basic Education Act*.) The 2nd Respondent, therefore, has the authority to make the policies contained in the Impugned Decisions. Such a decision once made, cannot be subjected to merit review by this Court. However, as the Applicant correctly suggests, where the decisions can be shown to be substantively irrational or Wednesbury-unreasonable, then the Court can review them. The test is where the decision is so unreasonable that no authority or Tribunal would make such a decision unless it is actuated by considerations other than those allowed in law.
56. This is the threshold that the Applicant needed to reach in order to be entitled to orders quashing the Impugned Decisions on substantive irrationality grounds. The question to ask is not whether there is an alternative decision which the 2nd Respondent could have made which would have been more “efficient” or “effective”; for to do so would be to engage in merit review of a policy decision by the Executive. Instead, the correct question to ask is whether the Impugned Decisions served any legitimate governmental interest; or whether the Impugned Decisions are rationally related to the articulated governmental interest. Differently put, the means and goals of the Policy or law must be rationally related. An Applicant can succeed in showing that a law or policy is unreasonable or oppressive if he can show that the means chosen to achieve the legitimate governmental interest is not rationally related to legitimate government goals.
57. In the present case, the Applicant neither claimed nor succeeded in demonstrating that the decisions made by the Respondents about the progression of learners – including the revised calendars – are oppressive because they do not pursue any governmental interests or that the means chosen is not rationally related to legitimate government goals.
58. Here, the Respondents have explained that they determined that the best way to respond to the COVID-19 Pandemic was to revise the academic calendars so that pupils will progress to the new classes at different times than the usual calendar. The Respondents explained that they reached a decision that it would have been unavailing for them to use the e-learning programs to determine if the learners were ready to progress to the next class because the stated objectives of those programs were not to cover the syllabus but to engage the students and supplement in-person learning. The Respondents have further explained that it was not feasible to plan for a double intake of learners if particular classes are allowed to progress because the congestion would run afoul the other guidelines for the mitigation of the Pandemic.
59. What the Respondents did not articulate, which would also be a serious concern, in my view, are the equality implications of permitting only certain students who could access e-learning programs to sit for exams and progress to the next classes. Given the well-known Internet penetration and distribution realities in Kenya, such a decision would have the impact of unequally treating large segments of



the population who have no access to e-learning programs. This would, potentially, offend the non-discrimination clauses of the *Constitution*.

60. The bottom line, though, is that it is the 1st and 2nd Respondents who have authority to set the relevant policies including the academic calendars and national exams timetables for Basic Education Institutions. Once that decision is made, a Court cannot quash it merely because, in the view of the Court or an Applicant, there existed a better or more efficient policy. A Court can only quash the decision where it is so unreasonable that no person exercising due discretion could have made it. The Applicant has not reached this high threshold in the present case.
61. The final substantial issue raised by the Applicant is on the doctrine of legitimate expectations: he argues that the learners have a legitimate expectation to progress to the next class. The Respondents have answered this in paragraph 11 of the Further Affidavit by Dr. Kipsang sworn on November 18, 2020:

"That learners do not have any legitimate expectation that if they attend e-learning they shall be examined within the period which the examinations had been scheduled in the normal circumstances

The COVID-19 Pandemic is an act of God beyond human control and intervention and that it is unpredictable and hence cannot expect learning institutions that will take normal course of events."

62. As the Respondents concede, it is true that they have, in the past years admitted PP1 pupils at the beginning of every calendar year; and it has administered National Examinations towards the end of each calendar year. However, they insist that it is not a breach of the legitimate expectations to reschedule the National Examinations to a different month; and to reschedule the month of admission of PP1 owing to the Pandemic.
63. The authoritative De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* 6th Edn. Sweet & Maxwell at page 609 defines legitimate expectation thus:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the Constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

64. This concise definition outlines the four core pre-conditions for the doctrine of legitimate expectations to apply:
- a) First, the Public Authority must have made a representation through words or conduct amount to a promise as to how it will act in respect to an identifiable area of activity;
  - b) Second, the Public Authority must have made the representation either directly or indirectly to an identifiable individual or group of persons;
  - c) Third, the individual or group must have acted on the faith of the representation or on its reliance; and



- d) Fourth, the representation must be such that it would be unjust or unconscionable to permit the Public Authority to resile from the representation.

65. In the present case, the Applicant has not been able to surmount the fourth requirement to establish a claim under the doctrine of legitimate expectation: it cannot be said that it would be unjust or unconscionable to permit the Respondents to reschedule the National Examinations and to delay the start month for PP1 learners by six months owing to the school closures. The Applicant's arguments that the rescheduling of the academic calendar is irrational because it is baselessly tied to the physical opening of the schools is, in my view, adequately answered by the submission that the Respondents have concluded that the only effective way to cover the curriculum is through in-person learning; and only upon coverage of the curriculum are learners, as a collective, permitted to sit for the National Examinations. As articulated above, the Applicant might disagree with this determination by the Respondents or even find it to be insufficiently scientific. However, it is within the province of the Respondents to make that determination and that determination is not so unreasonable as to invite a finding by this Court that its effects would be unconscionable on the learners.

### C. Other matters

66. During the pendency of the proceedings in this suit, the Constitutional and Human Rights Division of the High Court at Milimani delivered its decision in Constitutional Petition No. 2189 of 2020: *Joseph Enock Aura v The Cabinet Secretary, Ministry of Education, Science & Technology & 3 Others* [2020] eKLR. Since the case primarily involved a Constitutional challenge to the physical closure of schools, I asked the parties to the present suit to address the Court on whether the decision in that case affected the issues in the present suit. The parties addressed the question at length in their submissions. I have read them keenly. Ultimately, however, I concluded that the issues presented in that case were quite distinct from those presented in the present suit.

### D. Disposition and orders

67. Earlier on in this judgment, I made a finding on the issue of public participation and stakeholder consultation thus: the Court makes a finding that the public participation and stakeholder consultations achieved before coming up with the Impugned Decisions does not rise to the level required of policies of such wide-ranging impacts on the lives of parents and learners throughout Kenya. There ought to have been more conscious efforts to invite and consider the views of parents and learners even within the constraints imposed by the COVID-19 Pandemic. However, the Court also makes a finding that despite this failure, the Impugned Decisions are not amenable to be quashed only on this ground for two reasons:

- a) First, as pointed out above, there is evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents put in good faith efforts to get the views of a wide section of stakeholders, experts and representatives of stakeholders; and
- b) Second, this being a public interest matter calling for a public law remedy of *certiorari*, it would not be efficacious to grant an order for *certiorari* due to the public interest in the case. This is because in the intervening period candidate classes have taken their national examinations, and the new calendar announced already deep in its implementation stage. The candidate class of 2021 is slated to take its national examinations by the end of the calendar year; while PP1 Class will be joining in July, 2021 – two months from now.



It would be a disproportionate judicial relief to torpedo all these in order to grant the requested relief. Public interest – including those of the Applicant’s own children – militates against the grant of the order sought.

68. The Application fails in all other ways and all the other reliefs are declined.

69. This being a public interest case, each party will bear its own costs.

70. Orders accordingly.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

.....

**JOEL NGUGI**

**JUDGE**

**Note:**

This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.

