



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

PETITION NO. E227 OF 2021

DAVID WANYEKI KAGO.....PETITIONER

-VERSUS-

THE KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

RULING NO. 1

1. The proceedings in this Petition were instituted under a certificate of urgency. The Petitioner herein, *David Wanyeki Kago*, filed a Petition and an application by way of a Notice of Motion dated 18th June, 2021.
2. The matter was considered by the Duty Court on 21st June, 2021 and the Petitioner was directed to serve the pleadings and the application by the close of that day with a return date of 6th July, 2021 before this Court.
3. When the matter came up on 6th July, 2021 for directions, the Counsel for the Petitioner informed the Court that although he had served the pleadings and the application he was yet to file a return of service. The Petitioner was ordered to once again effect service and return to Court on 15th July, 2021.
4. On 15th July, 2021 the Petitioner informed the Court that the Respondent had issued yet another circular on the registration of the examination centres and that there was a lot of confusion in the manner in which the registration of examination centres was undertaken by the Respondent. Counsel sought for leave to amend the Petition and the application and also requested for interim conservatory orders.
5. Leave to amend the Petition and the Notice of Motion was granted.
6. The Petition and the Notice of Motion were duly amended and served upon the Respondent. Both parties appeared before Court for further directions on 21st July, 2021. Counsel for the Petitioner informed the Court that there was an urgent need to issue interim conservatory orders before the 31st July, 2021 which date the Respondent had set as the last day for the registration of the examination centres in Kenya amid the confusion in the education sector created by the Respondent's three conflicting circulars on the issue.
7. The Court issued directions on the hearing of the Amended Notice of Motion and the Amended Petition. It was further ordered that parties to address the Court on the aspect of the conservatory orders pending the *inter partes* hearing of the Amended Notice of Motion.
8. The parties addressed the Court on 28th July, 2021.
9. This ruling is, therefore, on whether interim orders do issue prior to the *inter-partes* hearing of the Amended Notice of Motion dated 11th July, 2021.
10. The application seeks the following orders: -

1. *THAT on the grounds more specifically set out in the Certificate of Urgency filed herewith, this Application be certified urgent, be granted an early hearing date and that the same be heard on priority basis.*

2. THAT pending the hearing and determination of this Application inter partes, an interim conservatory order be and is hereby issued staying the implementation of the Kenya National Examination Council Circular on review on number of candidates from less than 40 to 30 for schools required to be hosted during the 2021 KCPE and KCSE Examinations dated 28 June 2021.

3.-2-THAT pending the hearing and determination of this Application inter Partes. an interim conservatory order be and is hereby issued staying the implementation of the Kenya National Examination Council Circular on hosting of candidates with less than Forty candidates during the 2021 KCPE and KCSE dated 11th June 2021

4. 9. THAT pending the hearing and determination of this Application inter partes. The Respondent by itself, its employees, agents and or servants be and is hereby restrained from merging or causing the merger of examination centres. ~~with less than Forty(40) candidates with examination centres with more than over Forty (40) candidates:-~~

5. THAT pending the hearing and determination of the Petition filed herewith, a conservatory order be and is hereby issued staying the implementation of the Kenya National Examination Council Circular on review on number of candidates from less than 40 to 30 for schools required to be hosted during the 2021 KCPE and KCSE Examinations dated 28th June 2021.

6.4.THAT pending the hearing and determination of the Petition filed herewith, a conservatory order be and is hereby issued staying the implementation of the Kenya National Examination Council Circular on hosting of candidates with less than Forty candidates during the 2021 KCPE and KCSE dated 11th June 2021.

7.-5-THAT pending the hearing and determination of the Petition filed herewith, the Respondent by itself, its employees, agents and or servants be and is hereby restrained from merging or causing the merger of examination centres. ~~with less than Forty (40) candidates with examination centres with more than over Forty (40) candidates:-~~

8. THAT this Honourable Court be pleased to grant any such further Orders or Directions that the Court considers appropriate in the circumstances.

11. With a view of not dealing with the substantive application at the interim stage, the Court directed the parties to tender brief submissions in support of their various positions. By the time the matter was considered aforesaid, the Respondent had filed a Replying Affidavit to the Amended Petition sworn by *Wilson Chelimo*, the Respondent's Deputy Director in-charge of School examinations.

12. At this point in time, I will briefly recap the submissions made.

13. The Petitioner, while relying on the Amended Petition and the amended application referred to the grounds in support of the application. Counsel highlighted on two main grounds. The *first* ground is that factual background of the matter. It was stated that the Respondent, being the body charged with the duty of administering national examinations in Kenya, had issued three conflicting circulars and directions on hosting of examinations in respect of examination centres with less than 30 candidates.

14. It was submitted that initially the Respondent complied with the law as provided for in Rule 8 of the *Kenya National Examination Council (Management of Examinations) Rules, 2015* which set the minimum number of candidates for a school to be eligible for registration as an examination centre at 15 candidates. It was further submitted that by a circular dated 11th June, 2021, the Respondent unlawfully changed the minimum number of candidates from 15 candidates to 40 candidates. Further, by another circular dated 28th June, 2021 the Respondent again revised the minimum number to 30 candidates.

15. The Petitioner argued that the circulars were administrative actions and were issued in a quick succession hence causing confusion to the examination centres in the manner in which the Respondent dealt with such a sensitive matter.

16. This Court was urged to restore the *status quo* on the matter to the position provided under Rule 8 of the Kenya National Examination Council (Management of Examinations) Rules, 2015. The Court was reminded that unless the orders are granted, come 31st July, 2021 the Respondent was intent on unilaterally merging all examination centres with less than 30 candidates with other examination centres in Kenya.

17. The Petitioner further submitted on the principles governing the grant of conservatory orders and made reference to several decisions in support of the grant of the interim orders. In the end, the Petitioner submitted that since the constitutionality of the circulars was at stake, then their implementation ought to be stayed.

18. The Respondent relied on the Replying Affidavit. It opposed the issuance of the orders sought. As a starting point, the Respondent submitted that the Petitioner was intentionally misrepresenting the issue before Court. According to the Respondent, the impugned exercise was not on merging of examination centres as alleged, but it was on hosting of the examination centres with less than 30 candidates in other suitable examination centres.

19. The Respondent gave the rationale behind the exercise. According to the Respondent, the exercise of conducting examinations in Kenya is delicate and sensitive and involves several actors. One of such actors is the Kenya Police Service which provides security during examination periods. As a result of increase of examination centres in Kenya over time, it was submitted that, the provision of security had been so much overstretched that the administration of the national examinations in some parts of the country was seriously affected to an extent of some examinations being taken on different times, a situation that compromised the integrity of the entire examinations.

20. The Respondent also submitted that the exercise was aimed at closing the integrity challenge in that the examination centres with less than 30 candidates will be hosted in other centres with sufficient infrastructure with the aim of reducing the number of security personnel engaged during examination exercises. It was, however, clarified that the examination centres with less than 30 candidates will still maintain

their separate identity and the issue of merging of the examination centres was just, but imaginary. In the end, and as usual, the examination results will be released to each individual examination centre.

21. The Respondent further submitted that the implementation of the impugned directives was not unilateral, but it was arrived at upon appropriate consultation and intended to be carried out on a case-by-case basis. Accordingly, appropriate instructions had already been issued to the Sub-County Education Directors in writing which a copy thereof is part of the record. The Respondent is intent on carrying out of the exercise on the recommendations of the Sub-County Education Directors and further noted that in some instances the joint hosting exercise will not be practical.

22. The Respondent submitted that with the joint hosting of examination centres, it hoped to reduce the number of security personnel engaged during the examination periods further to making a little saving out of its overstretched operational budget. It was, however, clarified that the Respondent was aware that it may be called upon to cater for some costs arising out of the joint hosting.

23. It was also clarified that the deadline of 31st July, 2021 was not in respect to the joint hosting exercise, but was on the registration of candidates in the examination centres.

24. The Respondent then urged the Court not to issue the orders sought as that will have a huge negative impact on the management and administration of the national examinations, thereby compromising the integrity of examinations.

25. As I indicated earlier in this ruling, this decision is limited to whether interim orders ought to issue pending the *inter-partes* hearing of the application. In that case, therefore, this Court must exercise extra caution in dealing with the issues at hand as it risks making conclusive findings at a very early stage in the matter. (See the Court of Appeal in **Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR** and the High Court in **Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR**).

26. Being accordingly guided, this Court will restrain itself from, in any way whatsoever, attempting to resolve any of the contentious issues. Such issues fall within the province of the *inter-partes* hearing of the application and the main Petition.

27. At this point in time, this Court will, on a *prima facie* basis, consider the matter as whole and weigh it against the competing parties' interests.

28. I have carefully perused the pleadings and documents on record. In the main, the Amended Petition variously challenges the constitutionality of the circulars issued by the Respondent on the joint hosting of examination centres.

29. This Court has considered the parties' cases and submissions, as well as, the impact of either granting or declining to grant the interim orders at this stage of the proceedings.

30. As at now, what comes out is that the joint hosting of the examination centres may not be the same as merging the examination centres. Each examination centre retains its separate identity. The joint hosting appears to be a logistical undertaking aimed at reducing the number of security personnel engaged during the examination periods and the attendant costs. That is, however, subject to further scrutiny at the hearing. Be that as it may, the Petitioner is aggrieved by the joint hosting of centres and challenges its constitutionality.

31. Against the factual background is a consideration of the law and settled legal principles on the subject of conservatory orders. While remaining alive to the principles as variously discussed in case law, including the Supreme Court in **Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**, and without venturing into the heart thereof, I believe, and do hereby find that, the parties will not, at this point in time, suffer any prejudice in the event the orders sought are not granted.

32. In arriving at the above finding, I have given serious thought to the following, that: -

- (i) The management and administration of national examinations in Kenya is a process which begins with the registration of examination centres and candidates running all the way to the release of the examination results;
- (ii) The process is time bound;
- (iii) The preparations on the joint hosting of examination centres are on-going;
- (iv) The examination centres will still retain their centre identity;
- (v) The Respondent will still be able to administer the examinations in the event the legitimacy and standing of the circulars are impugned;
- (vi) The Court is yet to fully interrogate the applicability of the principles guiding the granting of conservatory orders against the parties' positions, submissions and decisions;
- (vii) The determination of the Petition can be fast-tracked.

33. On the basis of the foregoing, this Court finds that it can be only fair that the grant of the interim orders or otherwise awaits the determination of the Amended Notice of Motion.

34. Flowing from the above, this Court hereby declines the request to issue conservatory orders pending the *inter partes* hearing of the Amended Notice of Motion dated 16th July, 2021.

35. Having so found, the following orders and directions do hereby issue: -

(a) The Petitioner to file and serve any supplementary response, if need be, together with written submissions on the Amended Petition and the Amended Notice of Motion dated 16th July, 2021 within 14 days;

(b) The Respondent to file and serve written submissions to the Amended Petition and the Amended Notice of Motion dated 16th July, 2021 within 14 days of service;

(c) The Amended Petition and the Amended Notice of Motion dated 16th July, 2021 shall be heard together and by way of reliance on affidavit evidence and written submissions;

(d) Highlighting of submissions on a date agreeable to the Court and parties.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of July, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Rienye, Learned Counsel for the Petitioner.

Miss. Bisley Bisam, Learned Counsel for the Respondent.

Elizabeth Wambui – Court Assistant