



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**(JUDICIAL REVIEW & CONSTITUTIONAL DIVISION**  
**JUDICIAL REVIEW CAUSE NO. 10 OF 2016**

**IN THE MATTER OF THE LAW REFORM ACT & CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY JOHN KARANJA KIMUNYA, JOSPHAT  
KANGANGI NYAGA, CHARLES WARUI MUTUGI, and LYDIA WANJIRU NGIGE**

**FOR AN ORDER OF CERITORARI**

**AND**

**IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012 AND THE  
PUBLIC FINANCE MANAGEMENT (THE KIRINYAGA COUNTY EDUCATION BURSARY  
FUND) REGULATIONS, 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COUNTY EXECUTIVE COMMITTEE MEMBER**

**EDUCATION AND PUBLIC SERVICE.....RESPONDENT**

*Ex parte*

**JOHN KARANJA KIMUNYA**

**JOSEPHAT KANGANGI NYAGA**

**CHARLES WARUI MUTUGI, and**

**LYDIA WANJIRU NGIGE**

**Interested parties**

**THE GOVERNOR KIRINYAGA COUNT;**

**THE SPEAKER KIRINYAGA COUNTY ASSEMBLY**

THE CLERK KIRINYAGA COUNTY ASSEMBLY

THE LEADER OF MAJORITY KIRINYAGA COUNTY ASSEMBLY; AND

WINFRED WAIRIMU WARUI suing on behalf of M W G, AND M G (Minors) BURSARY APPLICANTS

JUDGMENT

**Introduction:**

1. By a Notice of Motion dated 19<sup>th</sup> January, 2017 the applicants herein John Karanja Kimunya, Josphat Kangangi Nyaga, Charles Warui Mutugi and Lydia Wanjiru Ngige seek the following orders:

*i. That an order of certiorari do issue to remove to the High Court the notice issued by the Kirinyaga County executive Committee Member for Education and Public Service in his letter dated 2<sup>nd</sup> November, 2016 disbanding all the 20 Kirinyaga County Ward Education Bursary Committees for the purpose of the said notice being quashed.*

*ii. That a declaration do issue to the effect that the disbandment of all the 20 Kirinyaga County Ward Education Bursary Committees to wit Ngariama Ward KCBF Committee, Baragwi Ward KCBF Committee, Karumandi Ward KCBF Committee, Kabare Ward KCBF Committee, Njukiini Ward KCBF Committee, Inoi Ward KCBF Committee, Kanyekiine Ward KCBF Committee, Kerugoya Ward KCBF Committee, Mutira Ward KCBF Committee, Kariti Ward KCBF Committee, Mukure Ward KCBF Committee, Kiini Ward KCBF Committee, Wamumu Ward KCBF Committee, Thiba Ward KCBF Committee, Kangai Ward KCBF Committee, Mutithi Ward KCBF Committee, Tebere Ward KCBF Committee, Gathigiriri Ward KCBF Committee, Murinduko Ward KCBF Committee and Nyagati Ward KCBF Committee, contrary to the Public Finance Management Act No. 18 of 2012 and The Public Finance Management (The Kirinyaga County Education Bursary Fund) regulations, 2016 was and is invalid [ultra vires] and void ab initio and of no effect.*

*iii. Costs of this application be provided for.*

*iv. Such further and other relief that the Honourable Court may deem just and expedient to grant.*

**2. Applicant's Case:**

The application is also based on the following grounds:

*a. By a letter dated 2<sup>nd</sup> November, 2016 the Kirinyaga County Executive Committee Member for Education and Public Service disbanded all the 20 Kirinyaga County Ward Education Bursary Committees.*

*b. The said action by the Kirinyaga County Executive Committee Member for Education and Public Service was illegal and beyond his powers as neither the Public Finance Management Act No. 18 of 2012 nor The Public Finance Management (The Kirinyaga County Education Bursary Fund) Regulations, 2016 enable or allow him to take such action.*

*c. All the members of the 20 Kirinyaga County Ward Education Bursary Committees were appointed on 12<sup>th</sup> May, 2014 for a period of 3 years ending on 11<sup>th</sup> May, 2017.*

*d. In taking the said action the Kirinyaga County Executive Committee Member for Education and Public Service relied on regulation 5(1) and 5(2) of the current Public Finance*

*Management (The Kirinyaga County Education Bursary Fund) Regulations, 2016 which provides for a maximum of 5 members to each County Ward Education Bursary Fund) Regulations, 2014 comprise of 10 members each.*

*e. The Public Finance Management (The Kirinyaga County Education Bursary Fund) Regulations, 2016 does not contain a transitory provision to align the current County Ward Education Bursary Committees to the new regulations and neither does it provide for disbandment of the committees.*

*f. Consequently, the actions of the Kirinyaga County Executive Committee member for Education and Public Service will result in unduly delaying and/or curtailing the process of awarding bursaries to needy, vulnerable and disabled students especially in the new school year beginning in January, 2017.*

*g. It is therefore in the interest of justice and fairness that this Honourable Court does grant the applicants an ORDER OF CERTIORARI to remove to the High Court the notice issued by the Kirinyaga County Executive Committee Member for Education and Public Service in his letter dated 2<sup>nd</sup> November, 2016 disbanding all the 20 Kirinyaga County Ward Education Bursary Committees for the purpose of the said notice being quashed.*

*h. Further, it is also in the interest of justice and fairness that this Honourable Court does make a declaration that the disbandment of all the 20 Kirinyaga County Ward Education Bursary Committees to wit Ngariama Ward KCBF Committee, Baragwi Ward KCBF Committee, Karumandi Ward KCBF Committee, Kabare Ward KCBF Committee, Njukiini Ward KCBF Committee, Inoi Ward KCBF Committee, Kanyekiine Ward KCBF Committee, Kerugoya Ward KCBF Committee, Mutira Ward KCBF Committee, Kariti Ward KCBF Committee, Mukure Ward KCBF Committee, Kiini Ward KCBF Committee, Wamumu Ward KCBF Committee, Thiba Ward KCBF Committee, Kangai Ward KCBF Committee, Mutithi Ward KCBF Committee, Tebere Ward KCBF Committee, Gathigiriri Ward KCBF Committee, Murinduko Ward KCBF Committee and Nyagati Ward KCBF Committee, contrary to the Public Finance Management Act No. 18 of 2012 and the Public Finance Management (the Kirinyaga County Education Bursary Fund) Regulations, 2016 was and is invalid [ultra vires] and void ab initio and of no effect.*

The application is also based on the statutory statement dated 30<sup>th</sup> December, 2016 and the verifying affidavit of John Karanja Kimunya sworn on 30<sup>th</sup> December, 2016.

3. According to the Applicant, Kirinyaga County Executive Officer issued a notice in a letter dated 2<sup>nd</sup> November, 2016 and disbanded all the 20 Kirinyaga County Ward Education Bursary Committees. This was contrary to the **Public finance Management Act No. 18/2012** and **Public Finance Management (The Kirinyaga County Education Bursary Fund) Regulations 2016**. The contention by the applicant is that in taking the said action the Kirinyaga County Executive Committee Member for Education and Public Service relied on **regulation 5(1) and 5(2)** of the current **Public Finance Management (The Kirinyaga County Education Bursary Fund) Regulations 2016** which provides for five members to each County Ward Education Bursary Committees. Whereas the current committees appointed under 2014 Regulations comprise of ten members each. That regulations of 2016 do not contain transitory provision to align the current County Ward Education Bursary Committees to the new regulations and does not provide for disbandment of the committees. That actions of Kirinyaga County Executive Committee Member for Education and Public Service will result in unduly delaying and/or curtailing the process of awarding bursaries to the needy, vulnerable and disabled students especially in the new school year beginning in January, 2017. That there be a declaration that the disbandment of the 20 Kirinyaga County Ward Education Bursary Committees was invalid (*ultra vires*) and void *ab initio* and of no effect. The Court to quash the notice issued by Kirinyaga County Executive Committee Member for Education and Public Service.

## **The 1<sup>st</sup> Respondent's Case**

4. The 1<sup>st</sup> respondent Stanley Kithaka Gachugo who is the Kirinyaga County Executive Member of Education and Public Service in opposing the application filed a replying affidavit sworn on 25<sup>th</sup> January, 2017. He deposed that he has a written and filed authority by the 1<sup>st</sup> Interested Party the Governor of Kirinyaga County to swear the affidavit on his behalf.

5. According to the 1<sup>st</sup> Respondent the applicants were members of Kirinyaga County Education Bursary Fund Committee which was constituted and was operating under Public Finance Management (Kirinyaga County Funds Regulation 2014).

6. The 1<sup>st</sup> respondent depones that he disbanded the bursary Fund Committee to which the exparte applicants were members and constituted a new committee under the Public Finance Management Kirinyaga County Bursary Funds Regulation 2016. As such the Kirinyaga County Bursary Funds Regulations 2014 are no longer in existence.

7. According to the 1<sup>st</sup> respondent the Office of the Controller of budget who has the mandate to oversee implementation of budgets for both National and County Government did an analysis of the country's Bursary Fund Regulation and advised that the same was unconstitutional. The analysis is annexed marked KC-1-. This was because the Regulations had provided for involvement of County Assembly members in management of the funds in opening of bank accounts, implementation of funds and preparation of annual returns which violated the core principle of separation of powers and there was a likelihood of conflicts of interests as provided under **Section 8** of the County Government Act. That Controller of Budget raised the following grounds amongst others:

*i. Violation of Doctrine of Separation of Powers under Article 175 of the Constitution.*

*ii. Contravention of Article 201 (d) of the Constitution.*

*iii. Section 9 (2) of the County Governments Acts.*

8. The Respondent deposed that since the Controller of Budge required that the Regulation of 2014 be revised to be in line with the **Constitution** and the **County Government Act**. No more funds could be released as long as the former committees were not disbanded. New regulations were enacted in 2016 and did away with the involvement of County Assembly members. It also reduced to (5) the number of committee membership to ensure the principle of Prudent and Responsible use of Public Funds.

9. The 1<sup>st</sup> respondent deposed that a meeting was held on 6<sup>th</sup> May, 2016 prior to disbanding of the old committee where the exparte applicants attended and were informed of the unconstitutionality of the Regulations under which they were appointed and operated on. Minutes of the meeting are annexed marked KC 5. The exparte applicants were given an option to come up with the proposal on new membership. One Ward came up with membership proposal which was wholly adopted, annexure KC 6.

10. According to the 1<sup>st</sup> respondent a committee was appointed in line with **Section 5(1)** of the 2016 Regulations and the committees have been duly approved by the County Assembly by operation of the Law, annexures KC7, copy of forwarding letter to the County Clerk, KC8, list of members for approval. The new committees were launched on 28<sup>th</sup> May, 2016 and have been in office evaluating and receiving funds, annexures KC 10.

11. The 1<sup>st</sup> respondent deposed that exparte members were voluntary members and cannot claim security of 3 years tenure. They have not shown what was irregular in disparaging the committee or how it was supposed to be done. There are 20 committees and the applicants are from only four and have no basis to apply for orders on behalf of other committees.

12. The 1<sup>st</sup> respondent deposed that the application for Judicial Review must fail. The applicants have not come out clearly on what they want to be quashed as they have severally asked for stay of disbandment and at the same time admitted that the committee is already disbanded. That there will be no delay as the committee is in operation. The *ex parte* applicants stand to lose nothing. They were aware of the demands by the Controller of Budget but have not included him in the application. If application is granted, it will affect the smooth running of the fund and cause untold suffering. He prays that the application be dismissed with costs.

### **The 5<sup>th</sup> Interested Party's Case**

13. According to the 5<sup>th</sup> interested party Winfred Wairimu Warui who is the mother of the applicants of the bursary Mary Wandaru Githaiga and Moses Githaiga who are minors, the application lacks merits and meant to curtail the disbursement of bursary funds to the children who have made application for the fund. The minors are likely to suffer irreparable damage if the application is allowed as it will keep them out of school and delay their education.

14. She deposed that the applicants are not sincere as they were voluntary members of the committee and have turned back to say they want to remain members for three years. According to the interested party, a volunteer cannot curtail the interests of a child in terms of education if indeed he is genuinely working for the interest of this child.

15. The 5<sup>th</sup> interested party further deposed that the *ex parte* applicants are hell bent trouble shooters seeking to curtail the execution of the duties of the 1<sup>st</sup> respondent for their selfish interest. That the issue has passed all the necessary stages as espoused by a letter dated 28<sup>th</sup> November, 2016 annexure WWW-1- to Kirinyaga County Assembly originating from department of Education and Public Service.

16. She deposed further that the 1<sup>st</sup> respondent has put in place regulations and formed a list of representatives of respective ward Bursary Committee whom they have been dealing with and if the application is allowed it will disrupt the smooth and fair allocation of bursary funds to the needy children especially her two children who have applied for bursary disbandment, annexure WWW 11. That the applicants the issue of bursary funds has been addressed conclusively.

17. The *ex parte* applicants filed a supplementary affidavit sworn by John Karanja Kimunya. According to the *ex parte* applicants the Controller of Budget did not state that funds could not be released as long as committees were not disbanded but rather recommended amendment to the 2014 regulations so that they could conform to the law. Further that the County Committee member for Education and Public Service did not inform members of the status of the 2014 regulations neither were the applicants present in the said meeting in annexure KC 5. That the list of names of members of the alleged new ward KCBF Committees has never been tabled in the Floor of the Kirinyaga County Assembly nor has it approved them as shown on annexure KC 7 dated 28<sup>th</sup> November, 2016 as it bears no stamp of receipt and date when it arrived at the Kirinyaga County Assembly. According to the applicants the order papers for the Kirinyaga County Assembly do not reveal the tabling of names of the new Ward KCBF Committees. That the issuance of appointment letter and allowing the new Ward KCBF Committees to operate was done illegally and was *ultra vires* the powers of Kirinyaga County Committee Member for Education and Public Service in absence of Kirinyaga County approval.

18. According to the *ex parte* applicants, the Public Finance Management Act No. 18/2012 the Public Finance Management and (The Kirinyaga County Education Bursary Fund) Regulations 2016 do not enable nor allow the Kirinyaga County Executive Committee Member for Education and Public Service to disband all the 20 KCBF and his action was illegal and beyond his powers.

19. The *ex parte* applicants filed written submissions. They urged the court to find that the actions of the respondent were devoid of jurisdiction, *ultra vires* and contrary to the provisions of the law or its principles and consequently the same are illegal and void *ab initio* and of no effect. They urged me to allow the application.

20. The respondents filed submissions. They contend that there was a division by the applicants from their statutory statement and pleadings. They never raised an issue over appointment and approval of order paper in their pleadings and order papers. That the applicants failed to join the County Assembly as a party. That the court will not be called upon to rubber stamp, sanction or extend to lifetime or other operations of unconstitutional committees. It is also contended that the application has been overtaken by events. There is a new committee which has not been joined as party. That the papers are ambiguous and have not satisfied the grounds for judicial review. They pray that the application be dismissed.

21. The 5<sup>th</sup> interested party filed submissions and contends that the applicants are not genuine in their pursuit, are self seekers and their only interest is to make demands which are not in the best interests of the 5<sup>th</sup> interested party. That there is nothing that has been overlooked to warrant judicial review. That the committee was not established through any regulations and was an amorphous being. The interested party submits that the application ought to be dismissed.

### **Determination**

22. I have considered all the issues raised, the affidavits both in support of and in opposition to the application, the submissions and the law and authorities relied upon.

23. The issue for determination is whether the action by the County Executive Committee Member for Education and Public Service to disband all the 20 Kirinyaga County Ward Education Bursary Committees was illegal and beyond his powers.

24. The pervuew of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Union –Vs- Minister for Civil Service (1985) A.C. 374 at 401 D** when he stated that:

*“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.....By ‘irrationality’ I mean what can now be succinctly referred to as ‘wednesbury unreasonableness’.....It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.....I have described the 3<sup>rd</sup> head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”*

This was also so held in **Republic –V- Land Registrar Taita Taveta District & Another 2015 eKLR.**

25. I am minded that judicial review remedies are discretionary and the court would not grant them in certain circumstances even if the same are merited. This has been so observed in **Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1) (1) Paragraph 12 page 270;**

*“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus).....are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or*

*be incapable of practical fulfillment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary' decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."*

26. The concern of the court is the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

27. In the case of Municipal Council of **Mombasa -V- Republic & Umoja Consultants Ltd Civil Appeal No. 185/2001** it was held;

*"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 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.....It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."*

28. Those are in my view the general principles in judicial review.

29. The bone of contention by the exparte applicants is a letter dated 2<sup>nd</sup> November, 2016 by the Kirinyaga County Executive Committee Member for Education and Public Service disbanding all the 20 Kirinyaga County Ward Education Bursary Committees. This is said was contrary to Public Finance Management Act No. 18 of 2012 and the Public Finance Management Act (the Kirinyaga County Education Bursary Fund) Regulations 2016.

30. The letter dated 2<sup>nd</sup> November, 2016 annexure JKK-1- to the supporting affidavit sworn by John Karanja Kimunya disbanded the 20 Ward Bursary Committees with immediate effect.

31. The respondents and the interested party have admitted in their pleadings that indeed the Kirinyaga County Executive Committee Member for Education and Public Service did in actual fact disband all the 20 Kirinyaga County Ward Education bursary Committees.

32. The **Public Finance Management Act No. 18/2012** (Kirinyaga County Bursary Fund Regulations 2016) did not provide for transitory procedures. The Public finance Management Act No. 18/2012 provides that the Committee had to be in office for three years.

33. The exparte applicants were appointed under the 2014 regulations. At the time the Kirinyaga County Executive Committee Member disbanded the committees, the 2014 regulations under which the exparte applicants were appointed had been repealed and replaced with the 2016 regulations.

34. The burden was on the exparte applicants to prove that the action by the Kirinyaga County Executive Committee Member for Education and Public Service acted illegally. **Section 107** of the Evidence Act:-

*(1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

*(2) "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

35. The 1<sup>st</sup> respondent case is that the Controller of Budget who, in execution of his mandate under **Article 228(5)** of the **Constitution** which provides:

***“The Controller shall not approve any withdrawal from a public fund unless satisfied that the withdrawal is authorized by law.”***

found that the Ward Bursary Funds Committees violated the doctrine of separation of powers as provided under **Article 175** of the **Constitution**. The membership violated **Section 9 (2)** of the **County Government Act** which vests an oversight role on the County Assembly over implementation of County Projects. **Section 9 (2) County Government Act** bars members of County Assembly from direct or indirect involvement in the executive functions of County Government and its administration. Thus the inclusion of Members of County Assembly was in violation of the Act. The analysis is annexure KC-1- to the respondent’s affidavit sworn on 25<sup>th</sup> January, 2017.

36. The analysis of Kirinyaga County Education Support Fund regulations 2014 annexure KC-1- shows that these issues were raised by the Controller of Budget including the issue of principle of prudence/responsibility as the committee was too big contrary to **Article 201 (d)** of the **Constitution**. The recommendation was that the regulations be amended to conform with the law.

37. According to the 1<sup>st</sup> respondent acting on the recommendations, the Kirinyaga Education Bursary Funds 2016 was enacted where the involvement of County Assembly members was done away with and members reduced to 5 from 10, annexure KC 4.

38. Before disbanding a meeting was held on 6<sup>th</sup> May, 2016 where members including the exparte applicants attended. Annexure KC 5. The issue of the committees was discussed and that there was new regulation. These regulations of 2016 at Paragraph 5 (1) and (2) gave the Executive Committee Member power to appoint members of the Committee.

39. The committees were approved by the County Assembly and it was launched on 28<sup>th</sup> May, 2016 and started its work annexures KC7, 8, 9 AND 10.

40. Though the exparte applicants raised the issue on the appointment of the new committee as to whether they were approved by the County Assembly, this was a clear departure from their pleadings. The applicants were bound by their statutory statement. They cannot raise the issue as it would be prejudicial to the respondents. It would also affect persons who were not made parties to this suit. A party is bound by his pleadings. In **Independent Electoral and Boundaries Commission and Another -V- Stephen Mutinda Mule and Others C.A. No. 219/2013 Court of Appeal** it was held:

***“It was held for the sake of certainty and finality each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.....Indeed the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.”***

41. Parties should not be allowed to depart from their pleadings to avoid any surprises which may not give the other party an opportunity to adequately prepare and present their evidence in court. Authorities abound to hold that parties are not allowed to depart from their pleadings. The applicants’ submission that the launch, issuance of appointment letters allowing new committees to operate was done illegally and was *ultra vires* the powers of Kirinyaga County Executive Committee Member for Education and Public Service in the absence of Kirinyaga County Assembly cannot be entertained.

42. The 1<sup>st</sup> respondent he acted on recommendation of the Controller of Budget when he replaced the Regulations of 2014 with the Regulations of 2016. The Regulations of 2016 mandated him to appoint a new committee which would be approved by the County Assembly. This was done. Furthermore the applicants were fully informed and involved before action of disbandment was taken. The respondent acted fairly.

43. By the time the County Executive Member for Education wrote to disband the committee which was in office under 2014 Regulations, these Regulations had been replaced by the Regulations of 2016. It goes without saying that when the Regulations of 2014 were thrown out the ‘child’ i.e. the committee which was in office under the regulations was thrown out. The County Executive Committee Member by writing the letter of 2<sup>nd</sup> November, 2016 was just confirming that which had already been done.

44. The applicants have failed to prove that there was an illegality. They could not remain in office in contravention of the **Constitution** and the **County Government Act. Article 2** of the **Constitution** provides for the supremacy of the Constitution and binds all persons and all state organs at both levels of Government. Article 2 (4) of the Constitution provides that “**Any law.....that is in contravention of the Constitution is void to the extent of the inconsistency.....**”

The Regulations of 2014 were void due to the fact that they contravened the Constitution. When a law is in contravention of the Constitution anything done under that law becomes invalid.

45. The ex parte applicants came to court after the Regulations of 2014 were replaced. The ex parte applicants are not seeking to quash the Regulations of 2016. The 2016 Regulations under which new committees exist still stand. There would be two parallel committees. The ex parte applicants have not shown what the Executive Committee Member should have done.

46. As I have already pointed out the granting of judicial review orders is discretionary. The Court has a wide discretion. The Court has to consider the effect of granting the order, whether the granting of the order is futile or unnecessary, and whether practical problems including administrative chaos and public inconvenience and effect on 3<sup>rd</sup> parties who deal with the body in question would arise. **Halsbury Laws of England Supra** refers.

47. It has been shown by affidavit that the orders would cause administrative chaos as there is a new committee in place and beneficiaries of the fund would be affected and inconvenienced. I am of the view that considering the circumstances of this case and the issue at hand, to grant the order would be futile and unnecessary. It would allow committee members to remain in office under no Regulations and cause administrative chaos.

48. In the **High Court J.R. Misc. Civil Application No. 193/2012 Nairobi** it was held;

***“A court cannot order the respondent to take an illegal act since it only compels the Respondent to carry out that which he is legally bound to do.”***

If the letter dated 2<sup>nd</sup> November, 2016 is quashed, it would be telling the respondent to retain the unconstitutional committee in office which would be an illegal act.

49. It follows that the ex-part applicants’ application dated 19<sup>th</sup> January, 2017 must fail. I dismiss the application. I make no orders as to costs.

***Dated and delivered at Kerugoya this 24<sup>th</sup> day of February, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open court in the presence of M/S Wanjiru for Respondent, Mr. Kimathi for the applicants and court assistant Naomi Murage.

**L. W. GITARI**

**JUDGE**