REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 91 OF 2017

BETWEEN

SAMUEL NJOROGE WAWERU.....PETITIONER

AND

MINISTRY OF EDUCATION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RESEARCH TRIANGLE INSTITUTE (RTI).....3RD RESPONDENT

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT.....4THRESPONDENT

RULING

1. By a Notice of Motion dated 15th March, 2017 and filed in court on 16th March 2017, **Samuel Noroge Mathenge,** the petitioner/applicant moved this court seeking various conservatory orders. Specifically, the applicant sought an order stopping the 3rd respondent, **RESEARCH TRIANGLE INSTITUTE (RTI)**, from supplying Kiswahili and English (Tusome) Books to standard 1 to 3, sourcing of, distribution and procurement of these books. He also sought an order for implementation of Orange Book on the approved text books and other instructional materials in school and tertiary institutions, and a conservatory order to stop further meetings or processes leading to the reviewing the Curriculum and the unlawful use of public funds, pending the hearing and determination of the petition.

2. The petition is supported by an affidavit of the applicant sworn on 15th March, 2017 as well as grounds on the face of the motion. The applicant deposed that he is opposed to the 3rd respondent being given exclusive rights to develop, publish and supply Kiswahili and English books for standard 1 to 3 in **Tusome Programme.** The applicant further deposed that he is persuaded that the 1st respondent is unilaterally developing class 3 learning materials for the same programme, and that the project is influenced and driven by the 3rd respondent, and for that reason, he fears that the programme may be short lived due to funding problems.

3. The applicant further deposed that he is apprehensive that the decision was taken unilaterally, illegally and without consultation with stakeholders. The applicant deposed that the books recommended in the programme, are not in the orange book which is the official book containing recommended and approved books for learners. He deposed that he had been made to purchase books that were not in the orange book.

The petitioner states that the impugned books will cause confusion in the school programme yet parents were not consulted. He deposed that on checking the books, he found them to be of low quality and poor artwork.

4. According to the applicant, the introduction of these books violated the **Kenya Institute of Curriculum Development Act No. 4 of 2013.** He also contended that the directive to schools that only books supplied by the 3rd respondent be used has caused pandemonium among pupils and teachers and has limited the wide variety of books teachers would use in the course of their duty.

5. The 1st, 2nd and 4th respondents filed a replying affidavit sworn by **Dr. Bellio Kipsang,** Principal Secretary (PS) in the Ministry of Education, sworn on 4th April 2017. Dr. Kipsang deposed that the government carried out early reading grades assessment in lower Primary classes which revealed poor reading quality in the country especially rural areas due to shortage of learning materials in lower classes (1 to 3). The PS further deposed that the research also showed that pupils in classes 1 to 3 had low literacy level which was attributed to the fact that those classes received less attention from teachers, and even parents. He deposed that it was due to this revelation, that **Tusome programme** was recommended and was later launched in 2015, as a partnership between the Ministry of Education and USAID.

6. The PS deposed that the programme increased availability and use of appropriate text books and learning materials to support literacy development and foster reading culture in schools. The programme, he deposed, has enabled each pupil have his/her own book to enhance the ability to read, and the results have been good so far.

7. It was deposed that the programme has been undertaken in conjunction and consultation with other institutions and stakeholders, through workshops, trainings and sensitization meetings involving stakeholders from across the country. The respondents, therefore, denied allegations by the petitioner that Tusome programme was unilaterally initiated.

8. The 3rd respondent filed a replying affidavit sworn on 30th March, 2017 denying the petitioner's allegations. It was deposed that the idea behind **Tusome programme** was to improve literacy, training of teachers on instructional practice, and enhance use of information and communication among others. It was deposed that although the main programme started in 2015, there had been pilot studies which began in 2011 and went up to 2014, and which were very successful leading to the launch in 2015. The 3rd respondent denied that it has exclusive rights to develop, publish and supply Tusome Kiswahili and English language books. According to the 3rd respondent, a technical team from the Ministry of Education, coupled with guidance from the 4th respondent, and participation of teachers, renowned educationists, parents KNUT and other stakeholders, were involved and indeed participated in developing this national literacy programme.

9. It was also deposed that the 1st respondent is actively involved in sustaining the programme and that the programme upholds the provisions of Article 28 of the Convention on the Rights of the Child in respect of the promotion of higher literacy level for all primary school children. It was further stated that **Tusome books** are provided free of charge and at no cost to parents or schools.

10. At the hearing of the motion, Mr. Omari, learned counsel for the petitioner/applicant submitted at length questioning the suitability of **Tusome programme.** Counsel contended that the books had not been approved which was against the policy guidelines which requires that approved books be in the Orange Book. In counsel's view, Tusome books are not approved which explains why they are not found in the **Orange book.** According to learned counsel, suppliers of books have to comply with **the publisher's code of conduct** and should only sell books that are in the Orange Book, 2017. The supplier is also required to be in the list of bona fide book sellers. Mr. Omari termed the 3rd respondent as an unknown entity in the Orange Book, and contended that **Tusome Books** had not been approved for use in schools.

11. In learned counsel's view, there is a constitutional right to the Kenyan child and parent which touches

on their fundamental rights, and children should, therefore, not be exposed to foreign material and content. He relied on a number of decision and prayed that the application be granted.

12. **Miss Chibole,** learned counsel for the 1st, 2nd and 4th respondents, opposed the motion and submitted that the programme is necessary for the literacy of children in classes 1 to 3. Counsel submitted that the programme was arrived at after exhaustive research and consultation. Learned counsel contended that the programme was aimed at improving literacy level in lower primary classes, and that contrary to beliefs by the petitioner/applicant, the programme has not introduced any foreign materials or content. Counsel submitted that what has been introduced is new teaching methodology with the aim of achieving higher literacy levels in lower classes. **Miss Chibole** argued that the programme was aimed at ensuring there was equality in the lower cadre of learners, that the programme was a government policy, and that there had been sufficient public participation and consultation over the programme.

13. Counsel referred to the case of ***Board of Management of Uhuru Secondary School v City County Director of Education*** [2015] eKLR and ***Mwangi wa Iria & 2 others v Speaker of Muran'ga County Assembly & 3 others*** 2015 eKLRto show that the application did not meet the threshold for grant of conservatory orders.

16. **Mrs Opiyo**, learned counsel for the 3rd respondent, also opposed the motion and submitted, that a pilot study had been undertaken prior to the rolling out of the programme countrywide. Counsel submitted that the study undertaken had revealed improved literacy level in lower primary where the programme had been initiated. It therefore became a national literacy programme which was launched in 2015, and rolled out countrywide. Learned counsel contended that before the rollout of the programme, there had been public consultation and participation, and organizations such as Kenya Publishers Association, KNUT, Head Teachers Association and other stakeholders were involved.

15. Counsel argued that **Tusome programme** was much more than the impugned text books. According to counsel, the programme meant a lot to the lower primary pupils' literacy awareness. In counsel's view, children in lower classes now have access to books, which will enhance their literacy level. On the submission that Tusome books are not in the Orange Book, counsel argued that Tusome books have been approved by the 4th respondent and that there is no restriction on which books teachers may buy for teaching. Counsel contended that it would be against public interest to grant conservatory orders.

16. I have considered the motion, responses thereto submissions by counsel and authorities cited. What is before Court is an application seeking conservatory orders restraining the respondents from going on with **Tusome programme,** a literacy programme targeting pupils in the lower primary schools in our education, namely; classes; classes 1 to 3. The applicant feels that the programme was introduced without necessary consultation and public participation and, in his view, it is dangerous to the children of this country in terms of material and content, and that it may not be sustainable in the long run. The respondents do not agree with the applicant.

17. The principles upon which a court may grant conservatory orders are now well settled in this country. An applicant must demonstrate to the satisfaction of the Court that unless conservatory orders are granted, continued breach will result into an infringement of rights. In the case of ***Gitaru Peter Munya v Dickson Mwaura Githinji & 2 Others*** [2014] eKLR, the Supreme Court stated;

> *i.* ***"Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."***

18. The principles had earlier been stated by **Musinga J** (as he then was) in the case of ***Centre for Rights,***

Education and Awareness(CREW) & 7 Others v Attorney General **[2011]eKLR** thus;

> *i.* ***"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution."***

19. In the case of ***Centre for Human Rights and Democracy & 2 Others V Judges and Magistrates Vetting Board & 2 Others*** Petition No 11 of 2012**,** the court observed that in deciding whether or not to grant conservatory orders, the court should consider the following factors that is; the credential of the petitioner, *prima facie* correctness or nature of information available to the court, whether the grievances expressed in applying for conservatory orders are genuine legitimate deserving or appropriate, whether the applicant has demonstrated the gravity or seriousness of the dispute, or whether the applicant is engaged in wild vague indefinite or reckless allegations. (***See also Trade Union Congress of Kenya v National Hospital Insurance Fund*** [2015] eKLR).

20. It is, therefore, strite law that while considering an application for conservatory orders, the court should consider the effect of not granting a conservatory order. The court should ask itself; what would be the effect if the order was declined, would the petition lose its substratum? In other words, the court should consider whether the grant or denial of the conservatory order would enhance constitutional values and objects specific to the rights and or freedoms in the Bill of Rights. *See* ***Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others*** **p**etition no. 7 of 2014 and ***Satrose Ayuma & 11 others v Registered Trustees of Kenya Railways Staff Benefits Scheme*** [2011]eKLR.

21. The issue at hand relates to **Tusome programme** a literacy programme targeting lower primary classes (1 to 3)that is said to have been rolled out throughout the country.. According to the respondents, the programme is aimed at enhancing literacy level in the lower cadre after pilot studies of the programme established that children in those classes had a lower literary level. They, contended that the programme was aimed at enhancing equality in literacy among all the children in the country, and that it is a government policy and programme with aid from the 3rd respondent and **USAID,** intended to help children develop a culture of reading, thereby improving their literacy level.

22. The petitioner's complaint, as I understand it, is that the programme was unilaterally initiated and developed without public participation. there is also a contention by the applicant that the 3rd respondent was favored when it was asked to develop, print and supply **Tusome books**. Further contention is that these (Tusome) books are not in the Orange books which ordinarily contains approved school books for all levels, which, in his view, are sufficient grounds for granting the conservatory orders sought.

23. At this stage of proceedings, the Court must remind itself that it is not dealing with the petition but an interlocutory a motion for conservatory orders. It must therefore take into account the principles stated the decisions cited above in deciding whether or not to grant conservatory orders.

24. **Article 53 (1) (b)** of the Constitution provides that *every child has a right to free and compulsory basic education.* To that extent, basic education is a Constitutional and fundamental right to every child in this country. Education is the ability to read and write, that is literacy. The duty to ensure that children get education is a duty imposed on both the state and parents. **Section 30** of the **Basic Education Act,** 2013 provides as follows;

> ***Every parent whose child is-;***
>
> ***Kenyan,***
>
> ***Resides in Kenya,***
>
> *1.* ***Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental,***

intellectual or social development of the child.”

2. A parent who fails to take his or her child to school as required under subsection (1) commits an offence. (emphasis)

25. **Section 28** of the same Act imposes a duty on the Cabinet Secretary **(CS)** to implement the right of every child to free and compulsory basic education, and he has to do this in consultation with the National Education Board and the relevant County Education Boards for the establishment of learning centres such as pre-primary, primary and secondary schools, mobile schools and adult and continuing education centers, appropriate boarding schools in arid and semi-arid areas and other centers including for those children with disabilities.

26. **Section 39** of the Act places on the **CS** the duty of ensuring the success of compulsory basic education to among others; provide infrastructure including schools, learning and teaching equipment and appropriate financial resources, as well as provide quality basic education conforming to the set standards and norms.

27. The petitioner has argued that there was neither consultation nor public participation in coming up with Tusome Programme. The respondents on their part have maintained that there was stakeholders engagement, consultation and public participation.

28. It must be born in mind that the dispute is about education of the children of this country, especially in the very vulnerable stage of classes 1 to 3. Whether or not **Tusome, English** and **Kiswahili language books** are fit for these children in this country and whether they were supposed to be included in the orange books, and the manner of development and distribution of these books is at the heart of this petition. The answer to these questions cannot, in my view, be determined at the interlocutory stage. At the moment what the Court should concern itself with is whether or not there are sufficient grounds to warrant grant of the conservatory orders sought.

29. As it has been argued by the respondent and conceded by counsel for the petitioner, this programme was piloted between 2011 and 2014 in various parts of the country, and was later rolled out across the country in 2015. That would mean the programme has been going on for a couple of years now, and the impugned books have been distributed across the country and are in use. What would be the effect of granting conservatory orders at the moment? would that mean the books would not be put to use until the petition is heard and determined?. Suppose the petition does not succeed in the end; what would the impact to the pupils and the education sector and the country? Would the conservatory orders have negatively affected the children’s constitutional right to Education? These are critical questions the Court must bear in mind at this stage when addressing the application before it. Whatever the situation, the Court should avoid a scenario that would cause more violation of rights than protect and promote of those rights.

30. As **Ojwang J** (as he then was)observed in ***Suleiman v Amboseli Resort Limited*** [2004] 2 KLR 589; ***the court in responding to prayers, should always opt for the lower risk rather than the higher risk of injustice***. Considering the fact that the orders sought will affect not only children but the public at large, because there are areas in this country that do not easily access books and quality education, and also taking into account that the programme has led to improvement in literacy level among children in the areas where the programme was piloted, and also bearing in mind that the programme has been rolled out countrywide, I am of the view that the circumstances of the case militate against grant of conservatory orders at this stage.

31. It behoves everyone to ensure that children do not only get education but quality education. And for that reason, the rights of children to continue with education under the **Tusome Programme** is a lower risk than the injustice conservatory orders may cause if granted at this stage were the court to later find that the petition was unmeritorious. It is better to maintain the lower risk than suspend education of the children an injustice that cannot be remedied if the petition was to fail.

32. For the above reasons the application dated 17th March, 2017 is hereby dismissed with no order as to costs.

Dated signed and delivered at Nairobi this 2nd day of August 2017

E C MWITA

JUDGE