



**Havi v Cabinet Secretary, Responsible For Matters Relating to Basic Education & 7 others;
Kenya Private Schools Association & 4 others (Interested Parties) (Petition E371 of 2021)
[2024] KEHC 7735 (KLR) (Constitutional and Human Rights) (18 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7735 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E371 OF 2021
HI ONG'UDI, AK NDUNG'U & JM CHIGITI, JJ
JUNE 18, 2024

BETWEEN

NELSON ANDAYI HAVI PETITIONER

AND

**CABINET SECRETARY, RESPONSIBLE FOR MATTERS RELATING TO BASIC
EDUCATION 1ST RESPONDENT**

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT .. 2ND RESPONDENT

KENYA NATIONAL EXAMINATIONS COUNCIL 3RD RESPONDENT

TEACHERS SERVICE COMMISSION 4TH RESPONDENT

KENYA NATIONAL UNION OF TEACHERS 5TH RESPONDENT

NATIONAL ASSEMBLY 6TH RESPONDENT

DR. FRED OKENGO MATIANG'I 7TH RESPONDENT

PROF GEORGE ALBERT OMORE MAGOHA 8TH RESPONDENT

AND

KENYA PRIVATE SCHOOLS ASSOCIATION INTERESTED PARTY

**KENYA PRIMARY SCHOOLS HEAD TEACHERS
ASSOCIATION INTERESTED PARTY**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS
(KUPPET) INTERESTED PARTY**

THE NATIONAL PARENTS ASSOCIATION (NPA) INTERESTED PARTY



Halting the implementation of CBC (Competence Based Curriculum) offends the right to education and the best interest of the child

The main question before the court was the constitutionality of the manner of implementation of the CBC program and whether it could be stopped. The court held that CBC was rolled out in all public schools in the country. Stopping implementation as sought by the petitioner would only serve to wreak havoc and cause disorder in the country's education system. That would ultimately be very prejudicial and have a disproportionate effect on the children and the parents. It would offend the right to education and the best interest of the child principle. Overall, that would be against public interest and the balance of convenience tilted towards maintaining the system.

Reported by Robai Nasike

Constitutional Law – constitutional petitions – affidavits in constitutional petitions – failure to file a supporting or further affidavit in a constitutional petition – where a party failed to file a supporting or further affidavit upon substitution of a petitioner who had already filed a supporting affidavit – whether failure to file a further or supporting affidavit by a petitioner was fatal to a constitutional petition - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 11 (1), 11 (2) and 12 (1) (b).

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – applying the doctrine of proportionality when granting orders that affected two competing rights – balancing the effect of invalidating the CBC since no regulations were supporting it viz-a-viz the right to education and the best interest of the child - whether the omission to enact regulations supporting the CBC resulted in a failure to realize the intention of the Basic Education Act – whether the invalidation of the implementation of CBC was proper and in the best interest of the child – Constitution of Kenya, 2010, article 232.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – granting proper orders where it was claimed that the CBC was implemented on the basis of Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019 without the necessary legislation – where the omission was brought to the attention of the court some 2 years after implementation of the CBC – whether the 1st respondent acted contrary to the law by relying on Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019, on CBC, without an amendment to section 41 of the Basic Education Act - Constitution of Kenya, 2010, article 23 (3).

Constitutional Law – constitutional petitions – laches – time within which to file a constitutional petition – whether there was a time limit regarding the time within which a constitutional petition ought to be filed – whether there was inordinate delay in filing a constitutional petition seeking to scrap out the CBC program, which had been implemented for 4 years.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – the doctrine of constitutional avoidance – where issues raised in a constitutional petition could be handled by another better and available forum – whether the issue on implementation of CBC could be resolved by another efficient and available forum.

Constitutional Law – fundamental rights and freedoms – best interest of the child – right to a clean and healthy environment – whether the CBC exposes children to child labour because the introduction and implementation of CBC constructively designated children as recruits for casual labour and arbitrarily imposed vocational training approaches meant for adults on children – whether introducing and implementing a system and structure of education under the CBC which required single use of course books per child per grade thereby increasing the risk of environmental degradation, was a threat to the right to a clean and healthy environment – Constitution of Kenya, 2010, articles 21 (3), 42, 43, 53, and 69 (1).



Constitutional Law – fundamental rights and freedoms – implementation of fundamental rights and freedoms – claims that the Cabinet Secretaries in the Ministry of Education failed to discharge their duties with respect to implementation of the CBC – whether the Cabinet Secretaries, as public officers, could be held liable for the actions undertaken while performing their duties – Constitution of Kenya, 2010, article 236; National Government Co-ordination Act, section 22.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – proper remedies to be issued in a constitutional petition – whether prayer for injunction and conservatory orders against further implementation of the CBC could be granted – whether a structural interdict regarding implementation of CBC could be issued – Constitution of Kenya, 2010, article 23.

Constitutional Law – public participation – scope of public participation – what constituted public participation – whether there was public participation in the amendment of the CBC.

Brief facts

The petitioner being aggrieved by the substitution of the 8-4-4 system and educational framework with the 2-6-3-3 system and curriculum, via the implementation of the Competence Based Curriculum (CBC), filed the instant petition dated September 16, 2021. The petition was based on the supporting affidavit of Esther Awuor Adero Ang'awa, who was substituted by the petitioner.

The petitioner's case was that there were no regulations made as envisaged under section 73(4) of the Basic Education Act No. 14 of 2013. Therefore, the implementation of CBC was done contrary to the law. According to the petitioner, CBC was implemented on the basis of Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019 without the necessary legislation. It was his case that section 41 of the Basic Education Act ought to have been amended to introduce the new system. The petitioner pleaded that the introduction and implementation of CBC constructively designated children as recruits for casual labour and arbitrarily imposed vocational training approaches meant for adults on children in contravention of articles 21(3), 53(1)(b) and (d) and 53(2) of the Constitution. The petitioner accused the respondents of introducing and implementing a system and structure of education under the CBC which required single use of course books per child per grade thereby increasing the risk of environmental degradation in contravention of articles 21(3), 42 and 69(1) (g) and (h) of the constitution.

It was the petitioner's case that the 7th respondent was the Cabinet Secretary responsible for matters relating to Basic Education during the material time. It was contended that he had denied, violated, infringed and further contravened the Constitution of Kenya in so far as the rights of children to education and free and compulsory education were concerned, by his failure to comply with sections 39, 41, 73 and 74 of the Basic Education Act and, further, that he had contravened articles 2(1) & (2), 3(1), 10, 53(1)(c), 73, 75, 95(3), 153(4)(a), (b) and 232. Accordingly, the petitioner sought to stop the implementation of CBC.

Issues

- i. Whether failure to file a further or supporting affidavit by a petitioner was fatal to a constitutional petition.
- ii. Whether the omission to enact regulations supporting the CBC resulted in a failure to realize the intention of the Basic Education Act, hence the invalidation of the implementation of CBC was proper and in the best interest of the child.
- iii. Whether the 1st respondent acted contrary to the law by relying on Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019, on CBC, without amendment to section 41 of the Basic Education Act.
- iv. Whether there was an inordinate delay in filing a constitutional petition seeking to scrap out the CBC program, which had been implemented for 4 years.
- v. Whether the issue on implementation of CBC could be resolved by another efficient and available forum.
- vi. Whether there was public participation in the amendment of the CBC.



- vii. Whether the CBC exposed children to child labour because the introduction and implementation of CBC constructively designated children as recruits for casual labour and arbitrarily imposed vocational training approaches meant for adults on children.
- viii. Whether introducing and implementing a system and structure of education under the CBC which required single use of course books per child per grade thereby increasing the risk of environmental degradation, was a threat to the right to a clean and healthy environment.
- ix. Whether the Cabinet Secretaries, as public officers, could be held liable for the actions undertaken while performing their duties.
- x. Whether the prayer for an injunction and conservatory orders against further implementation of the CBC could be granted.
- xi. Whether a structural interdict regarding the implementation of CBC could be issued.

Held

1. The petitioner had not filed a supporting or further affidavit in the matter. By dint of rule 11(1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga Rules*), a petition filed under the Rules could be supported by an affidavit. In addition, if a party wished to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there was no supporting affidavit.
2. Other than being substituted as the petitioner, the petitioner neither filed any affidavit nor annexed any document to the petition. The only affidavit on record and annexures were those of Esther Awuor Adero Ang'awa, a stranger to the petition. To that extent, therefore, the many issues of facts advanced in the instant petition found no support.
3. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013, for the enforcement of the Bill of Rights and which by the practice of the court had been used for all constitutional litigation, there was no requirement that a petition be supported by an affidavit on the facts. Failure to file an affidavit or annex documents was not fatal to a petition. The instant petition raised both issues of law and fact. The issues of fact found no support.
4. The petitioner needed to prove whether the omission by the 1st respondent to make regulations resulted in a failure to realize the intention of the Basic Education Act; or was an impediment in the exercise of fundamental rights or freedoms of the petitioner. That burden had not been discharged there being no evidence by way of affidavit or otherwise.
5. CBC was rolled out in all public schools in the country. Stopping implementation as sought by the petitioner would only serve to wreak havoc and cause disorder in the country's education system. That would ultimately be very prejudicial and have a disproportionate effect on the children and the parents. It would offend the right to education and the best interest of the child principle. Overall, that would be against public interest and the balance of convenience tilted towards maintaining the system.
6. The doctrine of proportionality was a legal method used by courts, typically constitutional courts, to decide hard cases, which were cases where two or more legitimate rights collided. In such cases, a decision necessarily led to one right prevailing at the expense of another. To decide such cases correctly, the court must balance the satisfaction of some rights and the damage to other rights resulting from a judgment.
7. The CBC was already rolled out and over eight (8) million children were undergoing the new system. Teachers had undergone retooling and teaching materials and aids were prepared and distributed. Classrooms were built to cater for Junior Secondary School learners. The government made budgetary allocations, and indeed, funds had so far been spent on the programme. The children already enrolled in the CBC system have advanced substantially in their studies as well as age. The 4th respondent in a bid to further implement the CBC sought to employ more teachers. Granting the orders as sought would lead to a wastage of government resources and taxpayers' money which would lead to a colossal loss of public funds. That would ultimately offend article 232 of the Constitution. In addition, it would



- amount to loss of employment as well as wastage of all the resources that the government had invested in the retooling/training of the teachers.
8. The petitioner's case was that CBC was implemented on the basis of Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019 without the necessary legislation. While that was an omission on the part of the respondents, it was worth noting that the petitioner approached the court over 2 years after the implementation of CBC. No evidence had been tendered to explain the inordinate delay. At the time of the filing of the petition, CBC was already at an advanced stage. Therefore, despite the lapse on the part of the respondents, acceding to the petitioner's plea would be tantamount to throwing the baby out with the bath water.
 9. The court was alive to its power and duty to remedy omissions through the grant of appropriate reliefs outside article 23(3) or the reliefs sought in the petition by way of structural interdicts. The instant petition was a suitable case for such intervention. The Report of the Presidential Working Party on Education Reform (PWPER) identified the gap in section 41 of the Basic Education Act wherein they made a recommendation for the amendment of the said section to provide for the system and structure of education in Kenya. Granting the orders as sought by the petitioner would offend the public interest and prejudice children irreparably. In any event, the petitioner did not tender any evidence to show any prejudice that he would suffer should the CBC continue being implemented in Kenya.
 10. The petition was filed on September 16, 2021, while the CBC was rolled out in 2018 as a pilot phase, and in 2019 as the effective rolling out date. A child who started CBC from the piloting stage [2018] had by the time of filing the petition spent about four (4) years in the system, and the child who started CBC from its effective implementation [2019] had at the time of filing spent three (3) years in the system. The petitioner brought the petition about four (4) years after the pioneer class of CBC. The issues raised in the petition and the remedies sought were of great public interest and would have far-reaching ramifications on education in the country and children's constitutional right to education. It could not be gainsaid that a timely filing of the petition was necessary. There was no attempt on the part of the petitioner to explain the delay, hence the delay was inordinate and inexcusable.
 11. Public participation in public affairs depended on the specific issue and required four basic parameters;
 1. the public should have reasonable access to the information they were asked to provide their views on.
 2. the information should be made clear and understood, with language being a crucial factor.
 3. the public should have sufficient time to interrogate the information and provide their views.
 4. there should be a defined process for the public or stakeholders to respond to the matter. That approach ensured that the public had a clear understanding of the matter at hand.
 12. Public participation should be more than a mere formality; it should enable individuals to express their viewpoints, thereby guaranteeing the fulfilment of legal and constitutional obligations. The same did not require everyone to share their views, as that would give a virtual veto power to each individual in the community. However, a program must show intentional inclusivity and diversity, avoiding attempts to exclude genuine stakeholders. The subsidiarity principle should be considered when designing a public participation regime, ensuring those most affected had a bigger say and that their views were deliberately sought and considered.
 13. The respondents, particularly the 1st respondent had serious engagements with major stakeholders including, the public, learners, Kenya National Union of Teachers, Kenya Union of Post Primary Teachers, field officers and faith-based organizations in the various steps towards the implementation of CBC. It was also confirmed that the 1st respondent worked closely with the 2nd, 3rd and 4th respondents as the latter executed their respective mandates under the law. The 1st respondent also actively engaged the 5th respondent, 2nd, 3rd and 4th interested parties, key stakeholders in the education sector. The respondents achieved the legal threshold for public participation as envisaged in law. In the premises,



- the claim by the petitioner that there was no engagement with the stakeholders and the public was devoid of merit.
14. Numerous stakeholder and public engagements were held by the respondents before the CBC was rolled out. They included consultative forums, training, seminars, validation workshops, meetings to develop curriculum, call for memoranda through the daily newspapers, consultative processes involving relevant government agencies and authorities, teachers' unions, parents and pupils. The petitioner had a forum within which to agitate his concerns for consideration and possible redress.
 15. the petitioner did not attend any of the important engagements. When the Presidential Working Party on Education Reform was set up on September 29, 2022, members of the public were invited to present their concerns on matters of education reforms. The petitioner had not indicated that he participated in said forum. When the report was finally released to the President on June 9, 2023, the said report was filed in court and parties were given an opportunity to comment or make submissions on the same. The petitioner informed the court that he had no reactions to post.
 16. Within the report and among the many recommendations in the report, there was a recommendation touching on matters around the Basic Education Act and in particular sections 41, 43 and regulation 79(b) of the Basic Education Regulations 2015. The petitioner had an available forum within which to have his issues resolved other than through the instant petition which included the opportunity to present them to the Presidential Working Party on Education Reform.
 17. What the petitioner described as child labour, were activities that the CBC had adopted to enable the respondents to promote, protect and fulfil the right to education for the child towards the realization of articles 43 and 53 of the Constitution as well as the State obligations as set out in the Vision 2030 and the East African Treaty in so far as preparing the children for the labour market was concerned. The shift to CBC was necessary in the evolving technological and industrial advancements to ensure that necessary relevant skills were imparted to learners. No evidence had been placed before the court to demonstrate that CBC constructively designated children as recruits for casual labour.
 18. The petitioner accused the respondents of introducing and implementing a system and structure of education under the CBC which required single use of course books per child per grade thereby increasing the risk of environmental degradation in contravention of articles 21(3), 42 and 69(1) (g) and (h) of the Constitution. The burden of proof was on the petitioner to demonstrate that the course books were a threat to the environment. No evidence whatsoever was placed before the court in that regard and the petitioner therefore failed to prove that limb.
 19. A public officer was not liable for anything done in execution of the functions of his office if done in good faith. Where a statute expressly provided for a specific action by a Cabinet Secretary or any public officer, as the case may be, the legal duty must be discharged in default of which censure or sanction may be decreed by court. The court took judicial notice of the fact that despite the 7th respondent's involvement in the initial stages of transition to the CBC and that by the time CBC was implemented, he had long left the Ministry of Education having moved ministries on January 26, 2018. In those circumstances, the alleged violations and extent of liability on his part as a person had not been established and/or proved to a degree of certainty and the court would be reluctant to visit any censure or sanction on him.
 20. There was no evidence in support of the prayer for injunction and conservatory order either and therefore the legal threshold for injunction or conservatory order had not been achieved. Public interest and the likely prejudice that would be visited on the children of the country and the general disruption and disorder that would occur should implementation of CBC be stopped at the present stage, ought to be considered. On the flip side of the coin, the petitioner had not demonstrated any prejudice he would suffer should the implementation continue.
 21. Regulations under section 73 of the Basic Education Act had not been made, and in order to ensure standards, quality and relevance in curriculum development was continuously developed,



reviewed, evaluated and monitored, an order was necessary to ensure such regulations were in place. Within the report of the Presidential Working Party on Education Reform there were numerous recommendations on the Education Sector, with specific timelines for implementation. The recommendations if implemented would impact positively on the CBC system and the education sector generally. An order was necessary to ensure the implementation of the recommendations necessitating monitoring, evaluation and implementation of the report. There was need for capacity building and awareness creation on the recommendations as generated by the report on the Presidential Working Party on Education Reform.

Petition dismissed.

Orders

- i. *The 1st respondent shall initiate the process of amending section 41 of the Basic Education Act to align the structure of education with the CBC within 120 days.*
- ii. *The 1st respondent shall make regulations as demanded of him by section 73 of the Basic Education Act No. 4 of 2013 within 120 days.*
- iii. *The 1st respondent shall set up a committee to ensure the implementation of the recommendations of the report of The Presidential Working Party on Education Reform dated June 9, 2023 within 90 days.*
- iv. *No orders as to costs.*

Citations

Cases

Kenya

1. *Bernard Kibor Kitur v Alfred Kiptoo Keter & another* Petition (Application) 27 of 2018; [2018] KESC 18 (KLR) - (Explained)
2. *Bernard Samuel Kasinga v Attorney General, Constituencies Development Fund Board, Constituency Development Fund Committee/Mutito Constituency, Kiema Kilonzo, Francis Mumo Kitetu, Kyenza Mutavanya Mutia, Simon Mwatwa Ndambuki & Tom Mwalimu Kilonzo* Petition 402 of 2012; [2012] KEHC 5968 (KLR) - (Explained)
3. *Bloggers Association of Kenya (Bake) v Attorney General, Speaker, National Assembly, Inspector General of National Police Service, Director of The Public Prosecution, Article 19 East Africa & Kenya Union of Journalists* Petition 206 of 2018; [2018] KEHC 9469 (KLR) - (Mentioned)
4. *British American Tobacco Ltd v Cabinet Secretary for Ministry of Health & 5 Others* Civil Appeal 112 of 2016; [2017] KECA 763 (KLR) - (Mentioned)
5. *Bryson Mangla v AG & Others* Nairobi Pet No 284 of 2016 - (Explained)
6. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Mentioned)
7. *Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others* Civil Appeal 51 & 58 of 2016 (Consolidated); [2018] eKLR - (Explained)
8. *Christian Juma Wabwire v Attorney General* Petition 50 of 2013; [2019] KEHC 1049 (KLR) - (Mentioned)
9. *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* Petition 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR - (Applied)
10. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
11. *Communications Courier & Another vs. Telkom (K) Ltd* Civil Case 249 of 2005; [2005] KEHC 632 (KLR) - (Mentioned)
12. *East Africa Cables v. Public Procurement Complaints Review and Appeals Board & Another* Civil Application 109 of 2007; [2007] KECA 249 (KLR) - (Explained)



13. *Eric Mugambi vs. Ministry of Education, State Department of Basic Education and the Kenya Institute of Curriculum Development* Petition No.49 of 2017 - (Explained)
14. *Gabriel Nyabola vs Attorney General & 2 others* [2014] eKLR - (Mentioned)
15. *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* Application No. 5 of 2014; [2014] eKLR - (Applied)
16. *Henry N. Gichuru vs The Minister for Health & The Kenyatta National Hospital Board* Civil Miscellaneous Application 417 of 2002; [2002] KEHC 239 (KLR) - (Mentioned)
17. *Independent Electoral & Boundaries Commission v David Ndi and Others* Petition No. 12 of 2021 [UR] - (Applied)
18. *Independent Electoral and Boundaries Commission (IEBC) v Ndi* Civil Application E291 of 2021; [2021] KECA 33 (KLR) - (Explained)
19. *International Centre for Policy and Conflict & 5 Others v The Hon. Attorney-General & 4 Others* Petition No. 552, 573, 579 of 2012 - (Explained)
20. *Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW))* Civil Appeal 151 of 2011; [2016] KEHC 5318 (KLR) - (Mentioned)
21. *Isaac Aluoch Polo Aluochier v National Alliance and 542 others* Petition 297 of 2016; [2016] KEHC 8418 (KLR) - (Explained)
22. *J M A (minor suing through the uncle and next friend A A M) V PAUL NJOGO KIHARA* Civil Case 238 of 2004; [2005] KEHC 638 (KLR) - (Explained)
23. *James Nyasora Ngarangi and Others v. Attorney General*
24. *Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai Estate* Petition No. 4 of 2012; [2013] eKLR - (Mentioned)
25. *John Kabui Mwai & 3 Others v. Kenya National Examination Council & 2 Others* HC. Petition No. 298 of 2008 - (Applied)
26. *John Kabui Mwai & 3 Others v. Kenya National Examination Council & 2 Others* Petition 15 of 2011; [2011] KEHC 1696 (KLR) - (Applied)
27. *John Kimani Mwangi Vs Town Clerk Kangema Nairobi* Petition No. 1039 of 2007 - (Mentioned)
28. *Joseph K. Nderitu and 3 Others vs. Attorney General and 2 Others* Petition No. 29 of 2012; (2014) eKLR - (Mentioned)
29. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Followed)
30. *Justus Kariuki Mate & another vs. Martin Nyaga Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
31. *Kamleshman Sukhlal Damji Pattni & Another V Republic* Miscellaneous Civil Application 322 & 810 of 1999 ; [2001] eKLR - (Explained)
32. *Kandie v Alassane BA & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Mentioned)
33. *Kenya Deposit Insurance Corporation v Richardson & David Limited & Central Bank of Kenya* Civil Appeal No 66 of 2016 ;[2017] eKLR - (Mentioned)
34. *Kenya Small Scale Farmers Forum, Moses Shaba, Omar Kutara, Justus Lavi, Esther Jepkogei Bett, Kenya Human Rights Commission & Paul Kungania Rukaria v Republic of Kenya, Attorney General & Kenya National Commission on Human Rights* Petition 1174 of 2007; [2013] KEHC 6747 (KLR) - (Mentioned)
35. *Kiambu County Tenants Welfare Association v Attorney General & County Government of Kiambu* Constitutional Petition 392 of 2013; [2017] KEHC 8869 (KLR) - (Mentioned)
36. *Law Society of Kenya v Attorney General & another; Warsame & another (Interested Parties)* Petition 307 of 2018; [2019] KEHC 10881 (KLR) - (Mentioned)
37. *LNK v Attorney General & another* Civil Appeal 68 of 2018 ; [2021] KEHC 5847 (KLR) - (Explained)



38. *M AA vs. ROO* H.C. Civil Appeal 21 of 2009 ; [2013] eKLR - (Mentioned)
39. *M.A.A vs A.B.S* Civil Appeal 32 of 2017 ; [2018] KEHC 8340 (KLR) - (Explained)
40. *MAK v RMAA & 4 others* Petition 2 (E003) of 2022; [2023] KESC 21 (KLR) - (Explained)
41. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Mentioned)
42. *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
43. *Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* Petition 2 of 2018; [2021] KESC 50 (KLR) - (Mentioned)
44. *Mwangi S. Kimenyi vs. Attorney General and Another* Civil Suit 720 of 2009; [2014] KEHC 4220 (KLR) - (Explained)
45. *MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)* Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR) - (Applied)
46. *Nairobi Metropolitan PSV Saccos Union Limited & 25; others vs County of Nairobi Government & 3 others* Petition 486 of 2013 ; [2013]eKLR - (Explained)
47. *Narok County Government & Governor Narok County v Richard Bwogo Birir & Attorney General* Civil Appeal 74 of 2014; [2015] KECA 118 (KLR) - (Explained)
48. *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* Petition 16 of 2019; [2023] KESC 17 (KLR) - (Mentioned)
49. *Okiya Omtatah Okoiti v County Government of Kiambu* Constitutional Petition 48 of 2018; [2018] KEHC 2649 (KLR) - (Mentioned)
50. *Patrick Ouma Onyango & 12 Others vs. Attorney General & 2 Others* [2005] eKLR - (Mentioned)
51. *Peter N. Kariuki vs. Attorney General* Civil Appeal 79 of 2012; [2014] eKLR - (Explained)
52. *R v Council of Legal Education* Misc Civ Case 137 of 2004; [2007] eKLR - (Mentioned)
53. *Republic v Council of Legal Education & Kenya School of Law Ex parte Sabiha Kassamia & Ntele James Kipambi* Judicial Review Application 703 of 2018; [2018] KEHC 10101 (KLR) - (Applied)
54. *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* Judicial Review 63 of 2013; [2014] KEHC 5564 (KLR) - (Explained)
55. *Republic v Kiambu County executive Committee, Kiambu County Assembly, Law Reform Commission & Attorney General ex parte James Gacheru Kariuki & 9 Others* Judicial Review 4 of 2016; [2017] KEHC 5037 (KLR) - (Explained)
56. *Richard Bwogo Birir v Narok County Government & 2 others* Petition 1 of 2014; [2014] KEELRC 759 (KLR) - (Explained)
57. *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Explained)
58. *S.W.M v G.M.K* Petition 235 of 2011; [2012] KEHC 5512 (KLR) - (Mentioned)
59. *Stephen Wasike Wakho & another v Security Express Limited* Civil Suit 292 of 2002; [2006] KEHC 1320 - (Mentioned)
60. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Explained)
61. *Turkana County Government & 20 others v Attorney General & others* Petition 113 of 2015; [2016] eKLR - (Followed)
62. *Walter Osapiri Barasa vs Cabinet Secretary, Ministry of Interior and National Coordination and 6 others* Constitutional Petition 488 of 2013 ; [2014] KEHC 7542 (KLR) - (Explained)
63. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)



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1. *Doctors for Life International vs. Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) - (Explained)
2. *Hoffmann v. South African Airway* (CCT17/00) [2000] ZACC 17 - (Mentioned)
3. *Matatiele Municipality & Others vs President of the Republic of South Africa & Others* (2) CCT73 05A [2006] ZACC 12; 2007 (1) BCLR 47 (CC)13 - (Mentioned)
4. *Minister of Basic Education vs Basic Education for All* (20793/2014) [2015] ZASCA 198 - (Explained)

United Kingdom

Richardson v. Mellish (1824–34) ALL ER 258 - (Explained)

India

1. *Maharashtra State Board vs. Kurmarsheth & others* [1985] CLR 1083 - (Explained)
2. *Reserve Bank of India v. Pearless General Finance and Investment Co. Ltd* [1987] 1 SCC 424 - (Mentioned)

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Statutes

Kenya

1. Basic Education Act (cap 211) section 33(a), 39, 41, 42(2); 43; 73(1), (4); 74; 95(2)(a); part V – (Interpreted)
2. Basic Education Regulations (2015 cap 211 Sub Leg) regulation 79(b) – (Interpreted)
3. Children Act (cap 141) sections 2, 8 - (Interpreted)
4. Constitution (2010) articles 1(3)(a); 2(1),(2); 10; 19; 21(1),(2),(3); 22(3); 24; 27(1),(2), (4),(5); 33(1); 43(1)(d),(f); 47(1),(2); 53(1),(b),(c), (d), (2); 54(1)(a) 55(a),(c); 56; 73; 94(1),(2); 109(1); 131(1)(b); 159(2)(d)(e); 165; 201; 232; 236; 237(3); 258; 259; 260; Schedule Fourth - (Interpreted)
5. Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules (2013) (Constitution of Kenya Sub Leg) rules 5 (c); 11(1)(2)
6. Employment Act (cap 226) section 2 - (Interpreted)
7. Evidence Act (cap 80) section 107, 108, 109 - (Interpreted)
8. Fair Administrative Action Act (cap 7L) sections 5(2)(b)(c); 7(1)(a), (2) - (Interpreted)
9. Higher Education Loans Board Act (cap 213) In general - (Cited)
10. Interpretation And General Provisions Act (cap 2) section 36(3)(Interpreted)
11. Kenya Institute of Curriculum Development Act (cap 211A) section 2, 4, 29 -(Interpreted)
12. Kenya National Commission for UNESCO Act (cap 215) In general - (Cited)
13. Kenya National Examinations Council Act (cap 214 A) In general - (Cited)
14. Kenya National Qualification Framework Act (cap 214) In general - (Cited)
15. Labour Relations Act (cap 233) In general - (Cited)
16. Nairobi City County Finance Act (2013) In general - (Cited)
17. National Government Co-ordination Act (cap 127) sections 9(3); 22 – (Interpreted)
18. Public Finance Management Act (cap 412A) In general - (Cited)
19. Public Officer Ethics Act (cap 185B) section 9 – (Interpreted)
20. Science, Technology and Innovation Act (cap 511) In general - (Cited)
21. Societies Act (cap 108) In general - (Cited)
22. Teachers Service Commission Act (cap 212) In general - (Cited)
23. Technical and Vocational Education and Training Act (cap 210A) In general - (Cited)



Advocates

None mentioned

JUDGMENT

Brief Background

1. The petitioner being aggrieved by the substitution of the 8-4-4 system and educational framework with the 2-6-3-3 system and curriculum, via the implementation of the Competence Based Curriculum (CBC), filed this petition dated September 16, 2021.

The Parties

2. The petitioner is an adult male, Kenyan citizen, and an Advocate of the High Court of Kenya. He came on board the petition having been substituted for Esther Awuor Adero Ang'awa, the initial petitioner, vide an order of court issued on the June 9, 2022. Suffice it to note that upon substitution and amendment of the petition to have Nelson Andayi Havi as the petitioner, he did not file any affidavit and all responses to the petition are directed at the affidavit filed by Esther Awuor Adero Ang'awa sworn on September 16, 2021.
3. The 1st respondent is a State Officer in the National Executive responsible for basic education of children in Kenya.
4. The 2nd respondent is a State Agency responsible for advising the government on curriculum development and implementing policies related to curriculum development in basic and tertiary education.
5. The 3rd respondent is a State Agency responsible for setting and maintaining examination standards, conducting research on educational assessment and advising the government on examination related policies.
6. The 4th respondent is a Constitutional Commission responsible for the recruitment, employment and training of teachers in public schools, as well as advising the government on matters related to the teaching profession.
7. The 5th respondent is a union of teachers registered under the *Labour Relations Act*.
8. The 6th respondent is the legislative arm of the government of Kenya, responsible for enacting legislation and exercising oversight over the 1st and 2nd respondents.
9. The 7th respondent is the former Cabinet Secretary responsible for matters relating to basic education, sued in his personal capacity for allegedly violating the *Constitution*, and the *Basic Education Act* by altering and replacing the system and structure of basic education.
10. The 8th respondent (deceased) was at the material time the Cabinet Secretary responsible for matters relating to basic education, sued in his personal capacity for allegedly violating the Constitution and the *Basic Education Act* by altering and replacing the system and structure of basic education and rolling out a curriculum that has not been developed in accordance with the law. The case against him has since been marked as withdrawn.
11. The 1st interested party, Kenya private Schools Association (KEPSA) is an association registered in Kenya representing registered private schools.



12. The 2nd interested party Kenya Primary Schools Headteachers Association (KEPSHA) is an association of primary school headteachers registered in 2004 under the [societies Act](#) (CAP 80).
13. The 3rd interested party Kenya Union of Post Primary Education Teachers (KUPPET) is a sole duly registered and recognized trade union representing post primary teachers and trainers in Kenya.
14. The 4th interested party, National Parents Association (NPA) is an association established under the [Basic Education Act](#), 2013 as a public participation and feedback mechanism for protecting the rights and interests of learners in Public Basic Education Institutions.
15. The 5th interested party Katiba Institute is a non-profit and non-governmental organization registered under the laws of Kenya.

The Petitioner's Case

16. The petitioner seeks for the following orders, that:
 - a. A declaration be and is hereby made that the 1st, 2nd, 3rd and 4th respondents acted in contravention of section 41 of the [Basic Education Act](#) No 4 of 2013 in purporting to overhaul and replace the system and structure of basic education from: early childhood education; primary education; secondary education; and middle level institutions of basic education commonly known as 8-4-4 and substitute it with: early years education; middle school and senior school through The Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya and thereby violated articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, 27(1),(2), (4) and (5), 33(1), 43(1)(f), 47(1) and (2), 53(b) and (d) and (2), 55(c), 56, 73 and 232 of The [Constitution](#) of Kenya.
 - b. A declaration be and is hereby made that the holders of the State Office of the 1st respondent responsible for the contravention of Section 41 of the [Basic Education Act](#) No 4 of 2013 and violation of articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, 27(1), (2), (4) and (5), 33(1), 43(1)(0), 47(1) and (2), 53(b) and (d) and (2), 55(c), 56, 73 and 232 of The [Constitution](#) of Kenya namely Dr. Fred Okengo Matiang'i and Prof George Albert Omore Magotha being the 7th and 8th respondents herein respectively are unsuitable to hold public office.
 - c. A declaration be and is hereby made that the 1st, 2nd, 3rd and 4th respondents cannot overhaul the existing system and structure of basic education (8-4-4) and curriculum thereto and replace it in the absence of a curriculum developed within the framework of regulations made by the 1st and 2nd respondents in consultation with stakeholders in terms of section 73(4) of the [Basic Education Act](#) No 14 of 2013 and regulations made by the 2nd respondent in terms of section 4 of the [Kenya Institute of Curriculum Development Act](#) No 4 of 2013 and any curriculum developed, rolled out and implemented by the 1st and 2nd respondents in the absence of regulations is unlawful, null and void.
 - d. A declaration be and is hereby made that the introduction of the Kenya Competence(y) Based Curriculum through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya by the 1st and 2nd Respondents to replace the existing system and structure of basic education (8-4-4) and curriculum thereto without a curriculum developed in accordance with sections 73 and 74 of the [Basic Education Act](#) No 14 of 2013 and section 4



of the [Kenya Institute of Curriculum Development Act](#) No 4 of 2013 violates articles 2(1) and (2), 10, 47, 232 of The [Constitution](#) of Kenya.

- e. A declaration be and is hereby made that Kenya Competence(y) Based Curriculum is based upon vocational education and training approaches conceptualized for specific use in training adults in vocational skills, is inapplicable for basic education of children in Kenya, is discriminatory and the introduction thereof by the 1st, 2nd, 3rd and 4th respondents through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya violates articles 21 and 27 of The [Constitution](#) of Kenya on equality and freedom from discrimination, violates the right to education under article 43(1)(f) of The Constitution of Kenya, violates every child's right to free and compulsory education under article 53(1)(b) of The Constitution of Kenya, violates the right to freedom of expression under article 33(1)(a), (b) and (c) and amounts to torture contrary to article 29(d) and article 53(1)(d) and (2) of The [Constitution](#) of Kenya.
 - f. An order of injunction be and is hereby made restraining the 1st, 2nd, 3rd and 4th respondents from further implementing the Kenya Competence(y) Based Curriculum introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya in place of the existing system and structure of basic education (8-4-4) codified under section 41 of the [Basic Education Act](#) No 14 of 2013 and the existing curriculum in respect thereto.
 - g. An order be and is hereby made directed to the 1st and 2nd respondents to draw regulations in respect to policy and guidelines on curricula in accordance with sections 73 and 74 of the Basic Education Act No 14 of 2013 and Section 4 of the Kenya Institute of Curriculum Development Act No 4 of 2013 respectively and table the same before the 6th respondent for approval within 90 days of the making of the order in that regard.
 - h. A conservatory order be and is hereby issued directed at the 1st, 2nd, 3rd and 4th respondents staying further implementation of the Kenya Competence(y) Based Curriculum (CBC) for basic education introduced through the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya.
 - i. Any other relief as the court may deem fit to grant.
17. The petition is based on the supporting affidavit of Esther Awuor Adero Ang'awa dated September 16, 2021. It is the petitioner's case that the 1st respondent violated the Constitution of Kenya in relation to children's rights to education - free and compulsory basic education as guaranteed under - article 53(1)(c) of the [Constitution](#) of Kenya as read together with section 39 of the [Basic Education Act](#) No. 14 of 2013.
18. The specific violations are given as failure to consult with stakeholders, implementing appropriate regulations for curriculum development, putting in place a legal framework for curriculum review every five years, consulting with national quality assurance bodies, curriculum development agencies, and industry, and formulating criteria for accreditation of curriculum development agencies for basic education programs.
19. The 2nd respondent is alleged to have failed to act in accordance with the Constitution of Kenya, by failing to provide the 6th respondent with full and regular reports on the system and structure of basic education and the CBC.



20. It is his case that the respondents have failed to manifest high standards of professional ethics, act efficiently, effectively, and economically in the use of public resources, be responsive, prompt, effective, impartial, and equitable in the provision of services, involve the people in the process of policy making, act with accountability, and act with transparency as required by article 232 of The Constitution of Kenya.
21. It is urged that the attempt to overhaul the existing system and structure of education without reference to the Constitution of Kenya, legislation, or the rule of law, disregards the rule of law, excludes the participation of the people, fails to ensure social justice, and acts in bad governance.
22. The 6th respondent is said to have violated the Constitution of Kenya, with regard to the rights of minors to education, specifically free and compulsory basic education. This entails neglecting its responsibility to establish laws and regulations governing the formulation and endorsement of basic education curricula, failing to supervise the constitutional, statutory, and administrative operations of the 1st, 2nd, 3rd, 4th, 7th, and 8th respondents, and attempting to abdicate the role and obligation to ensure free and mandatory basic education by shifting the financial burden to parents via the CBC.
23. The 7th respondent, who then held the position of State Officer and Public Officer, is argued to have contravened the Constitution of Kenya with regard to the education rights of children. That this is evidenced by their failure to engage in stakeholder consultation, establish a legal framework for curriculum reviews every five years and initiate policy reviews on curriculum matters pertaining to the structure and system of basic education thereby violating provisions of the Constitution of Kenya - including articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(3), 43(1)(f), 53(1)(b), 95(3), and (5)(b).
24. Further, that the 1st respondent seeks to replace the system and structure of education established under Section 41 of the Basic Education Act No 14 of 2013 with an alternative system and structure under the guise of implementing the CBC. This would constitute an infringement of the legislative functions and powers of the 6th Respondent.
25. The petitioner contends that the 1st to 4th and 6th to 8th respondents have been carrying out the implementation of the CBC in Kenya, an approach that has been declared unconstitutional and unlawful (sic) - In violation of articles 21(3), 53(1)(b) and (d), and 53(2) of the Constitution of Kenya. That the CBC has been formulated with the intention of enlisting children for temporary labor and imposing adult-oriented vocational training teaching methods to them.
26. Furthermore, that the CBC has imposed arbitrary predetermined trajectories for children and allocated a specific proportion of children the opportunity to follow each trajectory. This restricts children's access to all available knowledge and information across the predetermined trajectories and stifles their artistic expression, academic autonomy and scientific inquiry – in violation of articles 21(3), 25, 29(d), 53(1)(b) and (d), and 53(2) of the Constitution of Kenya.
27. That CBC lacks a comprehensive assessment framework, reducing teacher interaction and affecting education quality. It demands resources without considering Kenyans' needs, and mandates limited course text usage, promoting environmental degradation.
28. In the end, the petitioner asserts that the conduct of the 1st to 4th respondents is unequivocally unlawful and unconstitutional, detrimental to the future of Kenyan children and requires the remedies requested in the petition.
29. That in accordance with articles 23, 165, 258, 259 and 260 of The *Constitution* of Kenya, the High Court has the authority to hear the petitioner's complaints and grant a stay of proceedings



(sic) to prevent the Respondents from undermining the principles of justice in their unlawful and unconstitutional effort to redesign and replace the structure and system of primary education in Kenya.

1st Respondent's Case

30. The 1st respondent in response to the petition filed a replying affidavit sworn by Dr Julius O Jwan dated November 11, 2021 answering the averments in the affidavit of Esther Awuor Adero Ang'awa. He depones that he is the Principal Secretary, State Department of Early Learning and Basic Education in the Ministry of Education.
31. He avers that under article 131(1)(b) of the Constitution, executive authority is exercised at the national level by the President with the assistance of the Deputy President and Cabinet Secretaries and that, at all material times, the 7th and 8th respondents were vested with requisite state authority in the exercise of their functions.
32. He further avers that currently there are in excess of 8 million children already in the CBC programme and issuance of the orders sought will have very adverse consequences upon them. The 1st respondent avers that other than stating that she is the mother of MK, a child in 'class 3', a grade not under CBC, Esther Awuor Adero Ang'awa has failed to demonstrate any prejudice that has been occasioned to her by implementation of the CBC programme in Kenya.
33. Dr. Jwan avers that the petition seems to have been erroneously premised on personal policy preferences of a private individual (Esther Awuor Adero Ang'awa) over those of competent state agencies vested with the constitutional and statutory mandate to formulate and implement the same.
34. According to him, the petitioner has not demonstrated any expertise in curriculum development and implementation and most of the allegations in which the petition is premised upon are misinformation and hearsay.
35. Further, that from the petitioner's tweet on twitter dated September 8, 2021, it is obvious that the petitioner's intention is disingenuous, neither is it in the best interest of the child, as she went on social media gearing up for a fight through litigation without first raising her concerns or engaging the respondents regarding her concerns on CBC. That, she went ahead in search of both information and so-called experts to put together her case against the respondents.
36. Dr. Jwan avers that some of the issues raised in the current petition were substantively in issue and determined by a court of competent jurisdiction in Petition No 49 of 2017 (*Eric Mugambi v Ministry of Education, State Department of Basic Education and the Kenya Institute of Curriculum Development*). According to him, the following issues fell for determination; Whether the petitioner was given a chance to participate in the new curriculum development and Whether the Petitioner has suffered any constitutional violations which can be remedied vide a constitutional petition.
37. Dr Jwan avers that the High Court in its determination in Petition No 49 of 2017 (*supra*) found that the Ministry of Education, State Department of Basic Education had provided a detailed account of the background of the curriculum change, and every stage and process of the change was shown to have been extremely participatory and the court's finding was that it was satisfied that the petitioner was given an opportunity to participate in the proposed changes.
38. He further avers that the 2nd respondent conducted a national study on summative evaluation of both the primary and secondary education. The methodology of the summative evaluation entailed the collection of data from the Counties with responses to the questionnaires, interviews and



group discussions drawn from all stakeholders, including teachers, learners, parents, industry players, education officers, opinion leaders, religious leaders among many others.

39. According to him, the evaluation was focused on the achievement of the objectives, relevance of the existing curriculum, adequacy and quality of resources for effective curriculum implementation. The Kenya system was benchmarked with Malaysia and South Korea for best practices where it was observed that the education system in Malaysia and South Korea had played a pivotal role in social, economic and technological development in giving every citizen a chance to be productive and contribute to their Countries national development.
40. Further, that it was reported from the evaluation reports, that the 2nd respondent involved the relevant stakeholders in the conceptualization and policy formulation, held consultative meetings with County Executive Committee members in charge of education on curriculum reforms in March 2016, carried out a needs assessment on basic education by stakeholders, and identified various gaps in the existing curriculum and also held several consultative forums, trainings, seminars, validation workshops and meetings to develop curriculum support materials.
41. Dr. Jwan gave an elaborate history of the development and changes in the education system in Kenya running from 1964 to the advent of the 8-4-4 system of education and now to the CBC. He has made reference to the numerous taskforce and committee reports generated over the period, the last one being the Mackay Report which acknowledged that the 8-4-4 system was a consequence, or an unintended outcome of the need to increase university education by one year, and as such the Petitioner's clamor for a reversion to the 8-4-4 structure of education is tantamount to asking the court to adopt a structure and curriculum that came about as a result of "an unintended outcome".
42. It is the 1st respondent's case, that Pre-Primary Education is provided for as a function of County Governments which is aligned with section 41 of the *Basic Education Act* No 14 of 2013.
43. Dr Jwan further depones that the Basic Education Curriculum Framework is the blue print of CBC which addresses mainstreaming of Pre-Primary into the education structure. He adds that this is a recommendation of Vision 2030.
44. He further depones that vision 2030 proposed three pillars which are the Political Pillar, Economic Pillar and Social Pillar, which aim to improve the quality of life for all Kenyans by targeting a cross-Section of citizens and social welfare projects and programmes and this quest is the basis for transformation in eight key social sectors which include education and training. Further, that under the social pillar, Vision 2030 seeks to have 100% transition from primary to secondary school.
45. In the subsequent mid-term plans the Vision is said to have proposed comprehensive curriculum review, reform and digitalization in response to the Constitution ie, national values (mentoring and molding), talents nurturing and any other emerging issues in education.
46. Dr. Jwan further depones that upon the promulgation of the Constitution in August 2010 which granted every child the right to free and compulsory basic education under article 53(1)(b), the Government found it necessary to align the education sector to the Vision 2030 blue print and the Constitution.
47. Consequently, the Taskforce on Realignment of the Education Sector to the New Constitution was appointed by the then Minister for Basic Education, Prof Sam K Onger, through Gazette Notice No 1063 of January 28, 2011. The Task force had 38 members and specific Terms of Reference of the Taskforce were to:



- i. Analyse the implications of the new Constitution on education, training and research for national development;
 - ii. Review the education system in Kenya;
 - iii. Undertake a situational analysis of the education sector;
 - iv. Undertake a needs assessment to establish gaps;
 - v. Present periodic reports as and when required.
 - vi. Propose an appropriate educational management framework at the National, County and institutional level;
 - vii. Review policy and legal frameworks;
 - viii. Review the necessary literature, consult the stakeholders and receive submissions, memoranda and make recommendations to guide education and training along the lines of both the Constitution, 2010 and Vision 2030.
48. The Taskforce's Report (The Odhiambo Report) concluded that numerical titles such as 8-4-4, had failed to indicate what the particular education system represented and that therefore the new system ought to focus on child development, skills and competences to be learnt and the ultimate outcome at each level from Early Childhood Care and Development to University level.
 49. The competencies and skills would enable the learners to meet the human resource aspirations of Vision 2030, by offering a choice of subjects and career pathways. The Report recognized the right of all Kenyans to Basic Education as stipulated under articles 43(1)(d), 53(1)(b) and 54(1)(b) of the Constitution, 2010 which calls for a system of education that would guarantee this inalienable right.
 50. Dr Jwan highlights other recommendations in the Odhiambo Report, which include a proposed structure of education noting several weaknesses of the 8-4-4 system and introducing a structure of education that was not rigid and with subject pathways.
 51. He depones that one of the key recommendations made in the Odhiambo Report was the establishment of regulatory structures for coordinating institutions with regulatory functions in education and training, and the need to provide the legal framework of the various education laws that subsequently led to the enactment of the Basic Education Act No 14 of 2013, the Kenya Institute of Curriculum Development Act No. 4 of 2013 and the Kenya National Examinations Council Act No 29 of 2012.
 52. Dr. Jwan avers that the East African Community Partner States (Kenya, Uganda, Tanzania, Rwanda and Burundi) have made, deliberate decisions to cooperate in various spheres of regional development, among them, in education sector and the Treaty clearly stipulates the commitment of the Partner States to harmonize their education and training systems in order to provide for concerted efforts in the development of human resources and mobility of people, labour, and services.
 53. It is deponed that harmonization of education curriculum would foster regional integration through facilitating easy movement of learners across the five Partner States and it was necessary to enhance mutual recognition of education certificates of the partner states.
 54. He further depones that in line with its mandate under Part 1 of the Fourth Schedule of the Constitution, 2010 the government embarked on the development of policy to address all issues in the education sector.



55. It is deponed that this culminated in Sessional Paper of 2012 which was later numbered Sessional Paper No. 1 of 2019 giving rise to The [Basic Education Act](#) No. 14 of 2013, The [Kenya Institute of Curriculum Development Act](#) No. 4 of 2013, The [Kenya National Examination Council Act](#) No 29 of 2012, The [Higher Education Loans Board Act](#), CAP 213A (Revised Edition 2012), The [Teachers Service Commission Act](#) No 20 of 2012, The [Technical and Vocational Education and Training Act](#) No. 29 of 2013, The [Kenya National Qualification Framework Act](#) No 22 of 2014, The [Kenya National Commission for UNESCO Act](#) No 5 of 2013 and The [Science, Technology and Innovation Act](#) No 28 of 2012.
56. In addition, Dr Jwan avers that the National Curriculum Policy is the basis upon which CBC is being implemented and that its rationale is to consolidate the various parameters that are essential for the envisaged education curriculum and also provide a framework for governance and management of the implementation of the reform process. Further, that the policy's purpose is to guide the curriculum reform process at all levels of education and training in Kenya.
57. According to Dr Jwan, the 2nd respondent followed a systematic process in developing CBC and these included the following steps;
- i. Need Assessment.
 - ii. Policy Formulation.
 - iii. Curriculum Design.
 - iv. Design/Syllabus Approval;
 - v. Development of Curriculum Support Material;
 - vi. Teacher Preparation;
 - vii. Pre-Testing/piloting/phasing;
 - viii. National Implementation;
 - ix. Monitoring and Evaluation.
58. He adds that CBC seeks to empower the child with life skills, and therefore is not a tool of child labour. The 2nd respondent has always been keen to ensure child labour prevention is anchored in the curriculum and its support materials. The issues of Child labour prevention is said to be one of the pertinent and contemporary issues (PCIs) that mainstreamed across the entire curricula from Early Years of Education to Senior School and that CBC is keen on exposing children to hands on learning activities referred to as projects.
59. The Project Based Learning refers to a dynamic classroom approach in which students actively explore real-world problems, challenges and acquisition of deeper knowledge. It is deponed that during the socialization process, different people contribute to the preparation of a child for his/her role in the society and that the guidelines of CBC in enhancing community learning are founded on the society's social behavior.
60. On degradation of the environment it is deponed that within the provisions of the instructional materials vote head, heads of institutions are guided on how to purchase appropriate covers which can protect the textbooks from wear and tear and this ensures that they remain covered until they attain the 4 years book shelf life and beyond.



61. The deponent further avers that the books are biodegradable and schools have been working with industries such as Kamongo Waste Paper Kenya Limited which collects old books for recycling. Learners under the CBC are empowered and taught how to conserve the environment.
62. He avers that the Cabinet Secretary Ministry of Education vide Gazette Notice No 5328 constituted a Taskforce on Enhancing Access, Relevance, Transition, Equity and Quality for Effective Curriculum Reforms Implementation whose mandate was to advise on issues, policies and strategies that the Education Sector needs to address in order to enhance access, relevance, transition, equity and quality for effective curriculum reforms implementation.
63. The report by the Taskforce (Fatuma Chege report) released in December 2020 made the following key findings and recommendations:
 - i. Domicile Junior Secondary School (JSS) in the secondary school structure.
 - ii. Undertake progressive expansion of capacities of existing secondary schools that have adequate land to accommodate more learners in 2023.
 - iii. Make provision for primary schools, in close proximity and improve the infrastructure in one to create a Junior Secondary School.
 - iv. Merge under-enrolled primary school, in close proximity and improve the infrastructure in one to create a Junior Secondary School.
 - v. Develop a framework to facilitate sharing and management of infrastructure among primary and secondary schools that will be established in the same compound.
 - vi. Placement to Junior Secondary Schools be based on formative and summative assessments.
 - vii. Review the Secondary Education Placement guidelines to provide clear criteria, including the use of assessments for placement of learners in Junior Secondary School.
 - viii. Develop a National School Transport policy and facilitate establishment of pooled school transport system, where possible, to enhance day schooling.
 - ix. Enhance capacity of the School Equipment Production Unit (SEPU) to facilitate provision of resources for science kits and other related materials for effective implementation of the Junior and Senior Secondary Education curriculum.
 - x. Develop regulations on Minimum Quality Education Norms and Standards for Basic Education.
 - xi. Establish multi-agency, National, County and Sub-County Transition Committees for effective transition and placement of learners from Primary to Junior Secondary.
 - xii. Consider on the need basis, introduction of double-track strategy as an option to manage increased secondary school enrolment.
64. Dr Jwan avers that the learners' enrolment levels under CBC is 8,176,046 distributed as follows;
 - i. Pre-Primary 1- 1,510,758
 - ii. Pre-Primary 2- 1,322,139
 - iii. Grade 1- 1,068,438
 - iv. Grade 2- 1,034,958



- v. Grade 3- 1,061,959
 - vi. Grade 4- 1,050,782
 - vii. Grade 5- 1,127,012
65. The above learners it is deponed risk suffering irreparable damage if the court grants the orders sought.
66. He further avers that the budgetary allocations for the implementation of Basic Education have been made and that the information sought by the Petitioner is accessible to the public.
67. The deponent avers that stopping and/or reversing the implementation of CBC as at the time of swearing the replying affidavit the petitioner's prayers would attract dire implications including wastage of tax payer resources amounting to Kshs 77,163,487,960 that has so far been appropriated for CBC implementation, causing massive confusion among the learners and teachers alike, and risk grinding the entire education system to a halt.
68. The deponent also argues that expecting Grade 5 children to join Class 6 and do their national examinations in Class 8 with only 2 years of preparation in a curriculum that is totally different from what they have been prepared for would be grossly unfair and will naturally result in failures on unprecedented scale.
69. Any disruption of CBC implementation according to the 1st respondent, would interfere with; Grade 6 Summative Assessment which was at the time of the affidavit underway, preparations for the establishment of Junior Secondary schools, also underway, and, with the limited timelines before the transition to junior secondary school in January 2023 and Teacher training which was ongoing.
70. He further avers that the petitioner has not demonstrated the infringement of the rights of the Child under article 53(1) and (2) of the *Constitution* for the orders sought to be granted. The deponent states that the reliefs sought in the notice of motion and the petition are inimical to public interest, and are grossly disproportionate in any event weighting the private preferences of a single individual against the rights of numerous other Kenyans.

The 2nd Respondent's Case

71. In response to the petition, the 2nd respondent filed a replying affidavit sworn by Jacqueline Onyango on November 12, 2021. She depones that she is the Senior Deputy Director, Curriculum Development at the 2nd respondent.
72. The deponent completely reiterates the contents of the 1st respondent's replying affidavit. She denies all allegations, both specific and vague, set out in the Petition and affidavit in support thereof regarding the failure by the 2nd Respondent to comply with the provisions of the Constitution of Kenya and Section 41 of the Basic Education Act, No 14 of 2013.
73. The deponent also urges that contrary to paragraphs 132, 133, 136, 137, 138, 139, 140 and 141} in the affidavit of Esther Awuor Adero Ang'awa, the 2nd respondent has not violated, infringed or contravened nor threatened to contravene the Constitution of Kenya in so far as the rights of children to education and free and compulsory basic education is concerned.

The 3rd Respondent's Case

74. The 3rd respondent filed a replying affidavit sworn on 1 November 2, 2021 by Dr David Njengere Kabita the Chief Executive Officer of the 3rd respondent.



75. He avers that the Competency Based Assessment has given the guiding theory on competency-based assessment being the Gardner's Multiple Intelligence which provided that given the need to identify, develop and nurture the talents of learners in the CBC, enabling learners to leverage their strengths is more likely to be educationally effective since learners learn in ways that are identifiably distinctive.
76. He further avers, that it is not true that the 3rd respondent did not set examination standards, did not undertake any research on educational assessment and that it failed to advise the government on policy decisions taken in respect to CBC.
77. The deponent avers that should the honourable court grant the orders sought, irreparable harm will be occasioned to the more than 7 million children who are currently undertaking the CBC since the roll-out nationwide in 2019.
78. The 3rd respondent conducted the Pilot Assessment Study for Kenya Primary School Education Assessment (KPSEA) to the 2021 Grade 5 cohort of learners between 27th and September 30, 2021 with the aim of evaluating the quality of assessment tools and field administration procedures before the conduct of the main summative assessment at the end of Grade 6 in 2022. The pilot study provided an opportunity for learners, teachers and other educators to give feedback that would enable the 3rd respondent to review the test items based on their psychometric properties as well as review the different activities to be carried out during the actual summative assessment in 2022.
79. He further avers that the resources used were to the tune of Kshs 40 million and manpower that was expended towards the pilot study.
80. The deponent avers that the petitioner failed to demonstrate the prejudice and imminent harm that would be suffered by the children of Kenya justifying the issuance of the orders sought. Further, that she failed to demonstrate the urgency of the matter since the CBC was rolled out in 2019 and is currently being implemented from pre-primary to Grade 5.
81. It is deponed that allowing the orders sought would disrupt the school calendar in a manner that would have far reaching ramifications for years to come and which cannot be easily remedied by this court.

The 4th Respondent's Case

82. The 4th respondent filed a replying affidavit dated December 17, 2021 sworn by Dr Reuben Nthamburi Mugwuku, the Director in charge of Quality Assurance & Standards Directorate at the Teachers Service Commission.
83. Dr. Mugwuku depones that during the 7-4-2-3 curriculum no structured post qualification re-tooling and/or capacity building programmes were offered to teachers to enable them deliver the curriculum. However, the teachers of Kenya taught and successfully delivered the curriculum as expected based on the pre-service and in-service training.
84. He depones that despite there being no further training of teachers during the transition to the 8-4-4 curriculum, the Kenyan teachers relying on the pre-service training and competencies mastered the concept of the new curriculum and successfully implemented the 8-4-4 system. This is a clear indication that the pre-service teachers training programme is comprehensive in substance, rich in methodology and robust in imparting skills which enables teachers to implement any form of curriculum designed by the state.
85. With the introduction of the CBC, it was pertinent for the Commission to re-tool its teachers on the new pedagogical skills to enable teachers to effectively deliver the new Curriculum and hence



- in partnership with other government agencies, the 4th respondent embarked on capacity building/training of teachers to retool and equip them with the skill-set for effective implementation of the CBC.
86. This according to Dr Mugwuku was aimed at ensuring that teachers are supported through continuous capacity building sessions at the classroom level and as a result, the Commission is said to have for the past five (5) years not only invested financial resources to the implementation of the CBC but also Human and logistical resources.
87. It is further averred that throughout the years 2018/2019 to date, teachers positively responded to the invite for training/retooling and as such the Commission has been able to train different clusters of teachers as follows:
- a. 1023 CSOs regular and 388 special needs education (SNE) CSOs trained as trainers of trainers and they have been instrumental in the training of teachers of grade 1 to 5. This target group have been trained 5 times in both Competency Based Curriculum and Competency Based Assessment.
 - b. 2,394 Champion teachers regular and 480 champion teachers for SNE trained as trainers to support CSOs in the teacher training from 2019 to 2021.
 - c. 29, 157 Head teachers both regular and SNE from public and private schools.
 - d. 195,850 teachers of grade 1 to 5. This number includes teachers from public regular schools, SNE schools and private schools.
88. It is also deponed that the petitioner has misconstrued the mandate of the Commission by demanding that the Commission advises the National Government on matters relating to the overhaul of the system and structure of basic education as The Commission's constitutional mandate is restricted to Teacher Management Function and to advise the National Government on matters relating to the teaching profession and not overhaul of the system and structure of basic education.
89. Further, that the Commission has at all material times conducted reviews on the standards of education and training of persons entering the teaching service and provided the requisite advisories to the government on the same as is required of it vide article 237(3) of the Constitution.
90. It is further averred that the Commission has all along conducted reviews on the demand and supply of teachers and provided the requisite advisories to the government through parliament on the same. It is also deponed that the Commission reviewed the Entry Grades for Primary Teacher Education from C plain to C plain with cluster subjects. This is said to have led to upgrading the PI Teachers Certificate to Diploma in Primary Education.
91. The deponent further states that the Commission has always been oversighted by Parliament on matters concerning teacher management, regulation of the teaching service and implementation of CBC as is constitutionally required, and in response thereto, provided satisfactory explanation demonstrating smooth implementation of the CBC.
92. It is further averred that the Commission has acted in accordance with the provisions of the law in the discharge of its mandate in the implementation of the CBC. According to the deponent no evidence has been adduced that the Commission has transferred any costs to any parent in a bid to abdicate and/or frustrate the provision of free and compulsory basic education. The cost of the training of teachers has been fully borne by the Government of the Republic of Kenya.
93. Further, that the petitioner has failed to particularize any violation of her rights and the manner in which the Commission has allegedly violated her rights. It is stated that the petition herein does not



meet the test of precision in constitutional litigation as set out of in the Anarita Karimi and Mumo Matemu cases.

94. The petitioner is said to have misconstrued, misinterpreted and misapplied the provisions of sections 41, 73 and 74 of the *Basic Education Act* No 14 of 2013.
95. She is also accused of failing to explain the inordinate and inexcusable delay in filing the petition.

The 5th Respondent's Case

96. In response to the petition the 5th respondent filed a replying affidavit sworn by Henry Collins Oyuu on February 15, 2022.
97. Mr Oyuu avers that CBC was piloted in the years 2017 and 2018 and later on implemented in all primary schools in the year 2019, and therefore, the petitioner's attempt to prevent its further implementation yet it affects all learners in public schools in the entire country will only serve to wreak havoc and cause disorder in the country's education system. It is deponed that the Petitioner has not explained the delay in bringing the present Petition.
98. It is also averred that KNUT's position has since changed since the commissioning of research projects under the previous leadership that culminated in the publication of two reports, namely 'Teachers Preparedness for the Implementation of the Competency - Based Curriculum in Pre-Primary and Lower Primary Grades in Kenya' and 'Summative Evaluation of the Pilot Phase of Competence Based Curriculum in Kenya' dated March 2019 and August 2019 respectively. Further that the petitioner while citing and relying on the reports, does not place them in their rightful context and time. Mr Oyuu also depones that the reports do not represent the 5th respondent's position as at the time the Petition was filed.
99. Mr Oyuu further avers that the CBC has been achieved through a consultative process involving the relevant government agencies and authorities including the Ministry of Education, the Teachers Service Commission, the teachers through their unions and various stakeholders including parents. Further, that nothing in CBC and its implementation contradicts, offends or violates any of the provisions of the *Basic Education Act*, 2013 or the *Constitution*, 2010.

The 6th Respondent's Case

100. The 6th respondent filed a replying affidavit sworn on December 1, 2021 by Michael Sialai the Clerk of the National Assembly of Kenya.
101. It is deponed that the *Constitution* of Kenya 2010 provides under article 1(3)(a) that the sovereign power of the people is delegated to among others, the Parliament of Kenya and the legislative assemblies in the county governments. Article 94(1) and (2) of the *Constitution* is said to provide that the legislative authority of the people of Kenya is derived from the people and is vested and exercised by Parliament which means that it manifests the will of the people and exercises their sovereignty.
102. Further, that article 109(1) of the *Constitution* provides that Parliament shall exercise its legislative power through bills passed by Parliament and assented to by the President and, owing to this, the National Assembly enacted the *Basic Education Act* No 14 of 2013 with the aim of giving effect to article 53(1)(b) of the Constitution which provides for the right of every child to access free and compulsory basic education.
103. Additionally, it is averred that the Act was enacted to promote and regulate free and compulsory basic education; provide for accreditation, registration, governance and management of institutions



- of basic education; provide establishment of the National Education Board, the Education Standards and Quality Assurance Commission and the County Education Boards and for connected purposes.
104. It is deponed that the Act also promotes the implementation of article 43(1)(f) on the right to education and article 55(a) of the *Constitution* which provides that the State is required to take measures to ensure that the youth access relevant education and training. Some of the objectives of the Basic Education Act include the promotion of quality and relevance of education. It is the 6th respondent's case that the Act further aims to encourage independent and critical thinking and cultivate skills, disciplines and capacities for reconstruction and development.
 105. Mr Sialai further deponed that the Government in its effort to redesign Kenya's education sector in order to enhance quality education for sustainable development through the then Minister for Education in 2012, appointed the Task Force on the Re-Alignment of the Education Sector to the Constitution of Kenya 2010 to realign the education sector with the Constitution 2010 and Vision 2030.
 106. It is further deponed that Sessional Paper No 14 of 2012 on Reforming Education and Training Sectors in Kenya acknowledged that the focus on summative evaluation of primary and secondary education curricula that existed presented gaps since much of the primary and secondary school curriculum content did not focus on practical skills necessary for economic development.
 107. Further, that the acquisition of requisite practical, technological and entrepreneurial skills was not addressed and this created a situation where the study of practical and vocationally orientated subjects was regarded as the least desirable option to learners. According to the 6th respondent, the curriculum was not competence based.
 108. He further deponed that the Ministry of Education formulated the Ministry of Education Sessional Paper No 1 of 2019 on A Policy Framework for Reforming Education and Training for Sustainable Development in Kenya in order to address the long-standing vision to reform the existing structure of basic education. It is also deponed that on March 5, 2019, the Sessional Paper No I of 2019 was tabled before the 6th respondent and thereafter committed to the Departmental Committee on Education and Research for consideration.
 109. Further, that the first version of Sessional Paper No I of 2019 was withdrawn and another one tabled before the House on April 25, 2019. Upon addressing the gaps, the Ministry submitted an amended sessional paper for consideration by the National Assembly in August 2019, which paper the Committee observed had addressed the gaps that existed in the previous paper.
 110. Some of the gaps that were identified included issues of implementation cost, strengthening capacity, resource mobilization and putting in place adequate infrastructure for the implementation of the new curriculum among other things. The revised Sessional Paper No 1 of 2019 was tabled before the National Assembly on September 17, 2019 and passed. It is the 6th respondent's case that the Sessional Paper was passed in accordance with the Constitution and the National Assembly Standing Orders.
 111. Further, it is deponed that in order to fully comprehend the constitutionality or otherwise of an Act, its purpose and effect must also be considered and this requires an assessment as to what the provision is directed or aimed at and whether the intention of the drafters can be discerned with clarity.
 112. He avers that the general principles of statutory interpretation require that statutory provisions should always be interpreted purposively, relevant statutory provision, always properly contextualized and all statutes, construed consistently with the Constitution. Section 41 according to the 6th Respondent



read holistically will bring to bear that its purpose was to ensure that the provision of pre-primary; primary, secondary and middle level institutions of basic education are provided for.

113. Additionally, it is averred that the Act in no way restricted the Ministry of Education to provide education strictly on the 8-4-4 Curriculum basis. It is averred that the petitioner has failed to prove any inconsistency between the provisions of the Act and those of the Sessional Paper No 1 of 2019.

The 7th Respondent's Case

114. The 7th respondent raised seven (7) grounds of opposition as follows;

1. The 7th respondent is wrongly enjoined in this motion as the 7th respondent has no personal interest and/or desire independent of the duties hereto vested upon him and which were executed in this capacity of Cabinet Secretary as envisaged by the Constitution of Kenya;
2. The Basic Education Act No 14 of 2013 does not purport to set out a specific and precise education structure, which cannot be altered or changed, to be implemented in the country's education system. On the contrary, section 42(2) and 95(2)(a) of the Act permits the Cabinet Secretary to make regulations which prescribe and provide for an appropriate structure for education and training. In coming up with the Competence Based Curriculum, CBC, the 7th respondent whilst acting in his capacity as the then Cabinet Secretary responsible for matters relating to basic education, was well within his discretion and powers to come up with the CBC to which, the Act provides under section 73(1) that the same should be subject to review after a period of 5 years. The 7th respondent cannot be said to have acted in violation of the constitution.
3. Even though the CBC, was initiated during the tenure of office of the 7th respondent as the then Cabinet Secretary Responsible for Matters Relating to Basic Education, he was only executing his duties and mandates of a Cabinet Secretary as espoused under section 9 of the *Public Officer Ethics Act* and section 9(3) of the *National Government Co-ordination Act* Cap No 1 of 2013. The 7th respondent therefore cannot be faulted or victimized for executing his lawfully given duties and responsibilities.
4. The 7th respondent was acting in the capacity of a public/ state officer to fulfil and attain his mandate under article 21(3) of the *Constitution* and section 9(3) of the *National Government Co-ordination Act* to formulate a policy that will improve and better the education system in the country. This is in consonance with the provisions under article 43(1)(f), 53(1)(b), 54 (1) (b) and 55(a) of the *Constitution* of Kenya. This required the 7th respondent, acting within the powers bestowed upon him under section 9(3) of the *National Government Coordination Act*, to ensure access to attainable education for each member of the society. The 7th respondent cannot therefore be held liable for carrying out his constitutionally given mandate.
5. Under article 236 of the *Constitution* as read with section 22 of the *National Government Co-ordination Act*, a Public/ State Officer has been cushioned against bearing liability for actions done in good faith and in line with his duties and responsibilities as a state officer and the 7th respondent can therefore not be victimized for performing his constitutionally mandated duties and responsibilities.
6. In addition to 5 above, a Cabinet Secretary is protected from any personal liability even though the actions to which he is accused of are outside his scope of powers, so long as it is professed to be done in pursuance of the constitution and the constitutional values espoused therein.



That notwithstanding, the presence of bona-fide ratifies executive actions taken by the 7th Respondent.

7. The petitioner has failed to set out the purported constitutional violations vindicatory of the 7th respondent personally to warrant his joinder to the petition as the said purported allegations levied against the 7th respondent were official state duties and responsibilities to wit, were well documented by the 7th responded as evidenced in its Petition.

The 1st Interested Party's Case

115. The 1st interested party's response and submissions to the petition are not in the court file or the Court's Case Tracking System (CTS).

The 2nd Interested Party's Case

116. The 2nd interested party withdrew from the petition on March 15, 2024.

The 3rd Interested Party's Case

117. In its replying affidavit dated December 10, 2021, sworn by Akelo M.T Misoro, the Secretary General, avers that the system was well received and approved by its members. This was on condition that its members be trained so as to be able to effectively administer the curriculum.
118. Further, he depones that the 3rd interested party was among the stakeholders that issued its views and recommendations at the pilot stage of the curriculum's implementation. In its view, the CBC system key goals are in harmony with the dictates of the Constitution in particular articles 43(1)(f) and 53 and in accord with section 33(a) of the *Basic Education Act*.
119. He correspondingly points out that the Basic Education Act does not set out a specific education structure that is not amenable to alteration. In fact, the Act under section 42(2) and 95(2) allows the Cabinet Secretary to make regulations that prescribe an appropriate education and training structure. For this reason, he averred that the CBC system was implemented in compliance with the law.
120. He avers that the CBC system is geared towards a holistic development of the learner through its practical and vocational education. This is in contrast to the 8-4 -4 system which solely focussed on a learner passing examinations.
121. The petitioner is as well faulted for inordinate delay in filing this suit. for the reasons set out, the 2nd interested party urges the court to dismiss the petition as it is misconceived and baseless.

The 4th Interested Party's Case

122. The 4th interested party's Chairman, Nicholas Bitok Maiyo, in his replying affidavit sworn on February 24, 2022 avers that the CBC system was implemented in compliance with sections 41, 73 and 74 of the Basic Education Act which empowers the Cabinet Secretary for Education to develop school curriculum in conjunction with the 2nd respondent which mandate the Cabinet Secretary has exercised in the transition from 8-4-4 curriculum to CBC.
123. It is further averred that the CBC system was only rolled out by the 1st and 2nd respondents upon completion of the syllabuses. The government set out a budgetary structure to facilitate implementation of the curriculum. The sum of Ksh Eight (8) billion was utilized to construct junior secondary classes in each public secondary school and teachers trained on the curriculum.



124. Further echoing the proponents of the CBC system, he asserts that this curriculum is the solution to the shortcomings of the 8-4-4 system as the system prioritizes the best interests of the child. He further urges that the petition was not filed in a timely fashion. As such he relies on the equity maxim to the effect that 'equity aids the vigilant not the indolent'.

The 5th Interested Party's Case

125. The 5th interested party in support of the petition filed a replying affidavit sworn by its Executive Director, Christine Nkonge on February 15, 2022. She averred that vide a letter dated 3rd July 2019, the 5th interested party sought information from the Principal Secretary, Ministry of Education on the processes undertaken to implement the CBC system and the expertise of the members of the Taskforce on Enhancing Access, Relevance, Transition, Equity and Quality for Effective Curriculum Reforms Implementation. A similar communication was also made to the 2nd and 3rd respondents on the same day. The 5th interested party also sought to know how the CBC system would affect Grade 3's assessments and examinations. She alleges that the information sought was not supplied.
126. Aggrieved, the 5th interested party filed a complaint with the Commission on Administration of Justice (CAJ) in its letter dated July 29, 2019. This prompted the 2nd and 3rd respondents response to their initial correspondence. The information supplied is deemed to have been scanty and insufficient. Moreover, that the respondents' failure to disclose the information was in violation of a number of constitutional provisions, in particular, the State's obligation with respect to upholding the rights of a child's education. In sum, it is the 5th interested party's case that the conception and the implementation of the CBC system violated articles 3, 10, 19, 21, 24, 27, 33, 42, 43(1)(f), 47 and 53 of the Constitution.

The Petitioner's Submissions

127. The petitioner's written submission is dated July 12, 2022. The petitioner submits on three (3) issues for determination:
- i. Whether there is a difference between the system and structure of education and a curriculum and if yes, whether the 8-4-4 system and structure of education has been replaced with the 2-6-3-3 system and structure of education in accordance with the law.
 - ii. Whether the CBC was developed, rolled out and implemented in accordance with the law.
 - iii. Whether The Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya violates The Constitution of Kenya, Statute and is therefore, unlawful, null and void.
128. On the system of education and curriculum, it is posited that the 8-4-4 system and structure of education is anchored in sections 41 and 42 of the *Basic Education Act* No. 14 of 2013. Curriculum is defined in Section 2 of the *Kenya Institute of Curriculum Development Act* No. 4 2013 as follows: "Curriculum" means all planned learning programmes that facilitate formal, non-formal and informal learning.
129. That section 74 of the *Basic Education Act* No 14 of 2013 mandates the Kenya Institute of Curriculum Development with the responsibility of developing curriculum for basic education.
130. The petitioner maintains that from a plain reading of Statute the system and structure of education and a curriculum are two different concepts.



131. As to the replacement of the 8-4-4 system and structure of education, it is submitted that the 8-4-4 system and structure of education was introduced in January 1985, and has since been coded in sections 41 and 42 of the Basic Education Act No 14 of 2013. It is the petitioner's premise that the replacement of the 8-4-4 system and structure of education is a legislative role of the 6th respondent, and that the existing legislation on the system and structure of education has not been amended or repealed.
132. As per the petitioner, evidence of the replacement of the 8-4-4 system and structure of education is contained in the Jubilee Coalition Manifesto of 2017 where it is stated in part that: In just four years we have overhauled the curriculum and the education system, improved its quality and relevance and restored the integrity of the system.
133. That further evidence is found in the National Sector Strategic Plan, 2018-2022 of the 1st respondent. In it is contained the following statement: It is for this reason that the Kenya Institute of Curriculum Development has developed CBC to replace the 8-4-4 system.
134. Moreover, that the 1st respondent published Sessional Paper No. 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya. In it, it is stated: Under the new structure, basic education is organized into levels. Early Years Education, Middle School and Senior school.
135. That in the deliberations by the Departmental Committee on Education and Research of the 6th respondent on the Sessional Paper No 1 of 2019, the Committee recommended enactment of legislation to sustain the proposed change of the 8-4-4 system and structure of education; which is yet to be done.
136. The petitioner states that the response by the 1st respondent as contained at paragraph 20 of the replying affidavit of Dr. Julius O. Jwan is instructive on this issue. It states in part as follows: The Taskforce in its finding and recommendations identified the various gaps in the education system that need to be addressed. This included the change of structure of education to adopt the 2-6-3-3 in basic education, and the adoption of the CBC approach, among several changes.
137. That the 1st respondent then proceeds to demonstrate at length, that the CBC was developed, rolled out and implemented after public participation, an issue determined in Petition No 49 of 2017, Eric Mugambi v Ministry of Education, State Department of Basic Education and the Kenya Institute of Curriculum Development.
138. That in the aforementioned matter, the question in this Petition on whether the system and structure of education is different from the curriculum was not in issue in the said petition.
139. To the Petitioner, the elaborate procedure preceding the introduction of the 8-4-4 system and structure of education as chronicled in paragraphs 26 to 73 of the replying affidavit of Julius O. Jwan is indicative of the fact that the 8-4-4 system and structure of education cannot be synonymous with a curriculum, and that the change of the latter is not the replacement of the former.
140. It is posited that a contention is raised at paragraphs 71 to 97 of the replying affidavit of Dr Julius O Jwan that section 41 of the Basic Education Act No 14 of 2013 has not provided for a specific structure of education. In the words of the 1st respondent at paragraph 71 of the replying affidavit: What has been provided for by the Act is a broad structure of education, which is certainly not specific to the 8-4-4 system.
141. The 1st respondent proceeds to aver at paragraphs 73 and 74 of the replying affidavit that the 8-4-4 system and structure of education contravenes the Fourth Schedule of the Constitution of Kenya



- which makes Pre-Primary Education mandatory and section 41(a) of the [Basic Education Act](#) No. 14 of 2013.
142. According to the petitioner, a dichotomy in statute having been established between the system and structure of education on one hand, and a curriculum on the other hand, and further, the 6th respondent having recommended the putting in place of legal a framework to enable the replacement of the 8-4-4 system and structure of education, the 1st respondent cannot rely on policy to explain away the requirement for legislation as the foundation of the 2-6-3-3 system and structure of education unlawfully put in place.
143. That the respondents have not demonstrated the source of power upon which they claim to have replaced the 8-4-4 system and structure of education with the 2-6-3-3 system and structure of education. In the absence of such demonstration, The Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya has no legal basis. That several decisions illustrate the legal proposition taken by the Petitioner.
144. First, is Wade & Forsyth, *Administrative Law*, 10th Edn whose relevant extract is at page 2 of the petitioner's List and Bundle of Authorities dated July 12, 2022.
- The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong ... must be able to justify its action as authorized by law - and in nearly every case this will mean authorized directly or indirectly by an Act of Parliament. Every act of governmental power, i.e. every act which affects legal rights, duties or liberties of any person, must be shown to have strict legal pedigree if not found to be perfectly in order the court will invalidate the act, which it can then safely disregard.
145. Second, the requirement under article 10 of the [Constitution](#) of Kenya that the values of good governance which include the rule of law, be applied in the making or implementation of public policy decisions by State organs, state officers, public officers and all persons.
146. Third, is the decision in [Coalition for Reform and Democracy \(CORD\) & 2 others v Republic of Kenya & 10 others](#) [2015] eKLR, the following holding on the rule of law at page 91 of the petitioner's List and Bundle of Authorities dated July 12, 2022 is appropriate:
147. The petitioner maintains that it has been established on facts and the law that the 8-4-4 system and structure of education is founded upon statute, and the same cannot lawfully be replaced with the 2-6-3-3 system and structure of education without amendments to the [Basic Education Act](#) No. 14 of 2013. The petition should therefore, be allowed for this first reason.
148. As to the development, rolling out and implementation of the CBC, the petitioner submits that the concern on this issue is that the CBC was not developed, rolled out and implemented in accordance with the law. The law was violated in several ways.
149. First, the 1st and 2nd respondents did not consult with the relevant stakeholders and make appropriate regulations to implement the provisions of section 73 of the [Basic Education Act](#) No 14 of 2013 pertaining to policy and guidelines on curricula.
150. On the requirement for regulations to regulate the development of curriculum, it is said that the determinative issue is simple; are there regulations made by the 1st respondent under section 73 (4)



of the *Basic Education Act* No 14 of 2013. Further, are there regulations made by the 2nd respondent under section 4 of the *Kenya Institute of Curriculum Development Act* No 4 of 2013.

151. As per the petitioner, the 1st and 2nd respondents have not responded to these two questions. In fact, the two sets of regulations have not been made. In the absence of these regulations, it is doubtful that the CBC has the backing of the law. The Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya is invalid to the extent that the same was developed, rolled out and implemented without the existence of regulations.
152. The petitioner calls attention to the failure by IEBC to enact regulations for the collection of signatures for purposes of a referendum of the Constitution of Kenya Amendment Bill, 2020 which was one of the grounds upon which the Bill was invalidated by the High Court and the Court of Appeal. Relevant is the following holding in the disposition by the Court of Appeal in *Independent, Electoral and Boundaries (IEBC) & others v David Ndi & others* [2021] eKLR.
- “At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsed signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referendum.....”
153. Second, the Basic Education Curriculum Framework, 2017 and Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya is bad for want of public participation.
154. The CBC ignored recommendations by the 5th respondent as contained in the March, 2019 report referred to in paragraph 108 of the petition. It also did not take into account the April 19, 2019 report by Professor Laban P Ayiro, pleaded at paragraph 111 of the Petition. Similarly, the 5 respondent's Report of August, 2019 was not considered as stated in paragraph 114 of the petition.
155. That more information relevant to the development of the CBC as set out in subsequent paragraphs of the petition confirms want of public participation.
156. Reliance is made on the decisions of the Court of Appeal and Supreme Court in *Independent Electoral & Boundaries Commission v David Ndi and others* [2021] eKLR and *Independent Electoral & Boundaries Commission v David Ndi and others* Petition No 12 of 2021 [UR] on the issue of public participation. The petition should succeed on account of this second reason.
157. Ultimately, the petitioner holds the position that the issues converged on three questions upon which the petitioner has demonstrated violations of The Constitution of Kenya and contravention of statute by the respondents. The declaration of invalidity of the decision and actions of the respondents requires consequential orders to remedy the transgression. He prays that the petition dated September 16, 2021 be allowed in its entirety.
158. Further, the petitioner filed his submission in reply, dated September 20, 2022. It is submitted that the petitioner's locus standi and the justiciable violation of his rights are the main issues raised in the submissions of the 1st, 2nd, 3rd, and 5th respondents. The petitioner argues that the formulation, adoption, and implementation of the Curriculum Development Plan (CBC) does not violate his rights. The 5th respondent argues that the issues raised in the petition do not constitute justifiable constitutional issues. The 1st, 2nd, and 3rd respondents claim no evidence of personal injury suffered by the petitioner due to CBC. The 5th respondent argues that any flaw in the change of the system and



- structure of education from 8-4-4 to 2-6-6-3 and the development of CBC is a statutory violation, not a constitutional violation.
159. The respondents' position is dislodged by three answers. First, the petitioner should not have suffered any personal injury to be entitled to seek relief for contravention of the Constitution of Kenya. Article 258 of The Constitution of Kenya explicitly states this question.
 160. The right to petition the court for relief for denial, violation, or infringement of rights or fundamental freedoms, or a contravention of the Constitution of Kenya is a right in rem and not personam. Anyone can come to court for relief provided they can demonstrate a denial, violation, or infringement of a right or fundamental freedom, or a contravention of the Constitution of Kenya. The challenge on locus standi has been surmounted on the strength of express provisions of the Constitution of Kenya.
 161. The issue of whether the petitioner could commence and/or continue this petition on behalf of the public was exhaustively dealt with and determined in the ruling made on June 9, 2022 regarding the application for substitution of the initial Petitioner. Failure to act in accordance with statute is a contravention of The Constitution of Kenya in two ways: it is pervasive to the national values and principles of good governance set out under articles 10(1)(c) and (2) (a) of the Constitution, and it is pervasive to the national values and principles of good governance, such as the rule of law and participation of the people.
 162. In the circumstances, any challenge against the administrative actions and decisions of the respondents in respect to the prescription or change of the system and structure of education, and development of CBC, is rightfully espoused in the petition before the court and is a justiciable cause for contravention of the Constitution of Kenya.
 163. In *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* (2016), the Court of Appeal stated that the law has changed, and the provisions of article 22(3) and 22(4) of the Constitution, as read with article 47 of the *Constitution* and section 5(2)(b) and (c) and section 7(1)(a) and (2) of the *Fair Administrative Action Act* suggest that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by petition under the Rules made pursuant to article 22(3) of the Constitution.
 164. The High Court decision in *Republic v Kiambu County Executive Committee & 3 others ex parte James Gacheru Kariuki & 9 others* (2017) eKLR held that the functional effect of blitting the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in common law and those based expressly in the Constitution is that the challenge of violation of rights and freedoms together with the contravention of the Constitution of Kenya in the actions taken and decisions resulting from the Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya is properly before the Court as a constitutional petition.
 165. It is submitted that the law has now changed, and the provisions of articles 22(3) and 22(4) of the *Constitution* as read with article 47 of the Constitution and sections 5(2)(b) and (c) and section 7(1)(a) and (2) of the *Fair Administrative Action Act* suggest that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action started by petition under the rules made pursuant to article 22(3) of the Constitution. This was stated by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* (2016) eKLR.



166. In addition, the ruling of the High Court in *Republic v. Kiambu County Executive Committee & 3 others ex parte James Gacheru Kariuki & 9 others* (2017) eKLR held as follows on page 28 of the Further List and Bundle of Authorities:

“29. These two clauses read to me as having the functional effect of dividing challenges to the use of public power between those based expressly in the Constitution and those based on the conventional judicial review mechanism based in common law (and, in Kenya, the Kenya Law Reform Act). An order for judicial review can be issued by the High Court in a simple petition to implement the Bill of Rights under article 23 of the Constitution.”

167. The issue of the violation of rights and freedoms together with the actions and decisions arising from The Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya is properly before the court as a constitutional petition.

168. Thirdly, the petition is full of precise articles of the Kenyan Constitution under which a denial, violation, or infringement of a right or fundamental freedom, or a violation of Kenyan *Constitution* is pleaded and specified. Article 43(1)(f) on the right to education; article 53(1)(b) on the right of every child to free and compulsory education; and article 55(1) (a) on the right of every adolescent to obtain the necessary education and training are among the economic and social rights that are highlighted.

169. Unquestionably, the development of CBC through the Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya and the prescription or change of the system and structure of education from 8-4-4 to 2-6-6-3 have an impact on social economic rights, which include the right to education in article 43(1)(f); the right of every child to free and compulsory education in article 53(1)(b); and the right of every youth to access the relevant education and training under article 54 (1)(a). The action before the court presents good arguments about the Bill of Rights.

170. He further states that Judicial review of executive public policy decisions is possible. The 1st, 2nd, and 3rd respondents argue that judgements about executive public policy include curriculum development, system and structure of education changes. It is urged that the court should use judicial restraint as doing otherwise would be against the separation of powers theory. The court is requested not to look into and fix any issues in the process of changing the system and structure of education and developing CBC.

171. For this argument, the Court of Appeal's ruling in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR is mentioned. The 1st, 2nd, and 3rd respondents pursue the argument that their acts and choices on the reform of the educational system and structure, and the growth of CBC, can only be questioned if they were made illogically.

172. The 5th respondent continues to hold that technical policy concerns are best left to qualified experts with technical knowledge in the education sector and what should drive the changes in the system and structure of education and development of CBC.

173. It is necessary to investigate and resolve the legal meaning of the phrase public policy and its application in relation to the development of CBC and the reform of the educational system and structure. The petitioner bases his position on the idea that judgements on public policy have to be taken and carried out in compliance with the law and the Kenyan Constitution. If not, the decisions and acts that follow are void. The invalidity violates the Kenyan Constitution.



174. The Kenyan Constitution has no definition of the terms policy or public policy. The Kenyan Constitution, article 10(1)(c), addresses how public officials, State organs, and all other individuals make and carry out decisions on public policy. The people must be included in the formulation and execution of public policy decisions, and the rule of law must be upheld, the article demands. Furthermore, the ideals and principles of public service are found in article 232(1)(d) of the Kenyan Constitution.
175. The broad ideas by which a government is directed in its conduct of public affairs are characterized as policy in *Black's Law Dictionary*. Conversely, *Black's Law Dictionary* defines public policy as follows: "Generally speaking, judicial or legislative principles and standards seen to be of primary importance to the state and society at large..."
176. The Kenyan Constitution firmly establishes the rule of law and Public engagement as national values and governance principles. The 1st, 2nd, 3rd, and 5th respondents are members of State organs and officers, which are required by law to uphold the law and include the public in the formulation or execution of public policy choices. It is not appropriate for the 1st and 2nd respondents to act as though they are gods. This is made abundantly evident by the Kenyan Constitution articles 10(1)(c) and 232(1)(d).
177. The petitioner submits that if the development of CBC and the shift of the educational system from 8-4-4 to 2-6-6-3 are executive public policy decisions, they must be carried out strictly in accordance with the directives and edicts of the Kenyan Constitution and pertinent legislation. In a similar vein, the rights and freedoms listed in the Bill of Rights have to be upheld rather than revoked. As the 1st, 2nd, 3rd, and 5th respondents noted, the formulation and execution of public policy decisions cannot be vague, devoid of procedure, and removed from court scrutiny.
178. That one of the legislative delegations is the creation of curricula. The 6th respondent owes the 1st and 2nd respondents this responsibility. It is a responsibility that corresponds to the definition of public policy choice. Absence of regulations to specify the development process as mandated by sections 73(4) of the Basic Education Act and sections 4 and 29 of the *Kenya Institute of Curriculum Development Act* No 4 of 2013 made the development of CBC illegal.
179. The idea that State organs and State officers cannot break the law, limit public involvement, or go rogue in the name of public policy decisions is emphasized by two rulings. In *Richardson v Mellish* (1824–34) ALL ER 258 the following warning was issued about depending on public policy:
- "I object to fighting too vehemently for public policy. It is a pretty wild horse, and you never know where it will take you after you get aboard. You could get lost in sound law. When other points fall short, it is never contested at all."
180. According to the interpretation of public policy provided in *Christ for All Nations v Apollo Insurance Co Ltd* (2002) EA 366, only everything which is legitimate can be acknowledged as being in line with "Public Policy of Kenya".
181. Public policy is a subset of public interest. Regarding the latter, it is common law that whatever is defended as having been done in the public interest and, as such, exempt from a declaration of invalidity for the benefit of the larger good, must have been lawful in the first place. The utilitarian theory mentioned by the 1st, 2nd, 3rd, and 5th respondents cannot thus support the 2-6-6-3 system and structure of education, and CBC conceived in flagrant defiance of The Constitution of Kenya and statute.
182. Whatever time and money has been spent to that aim, if it is illegal, it is illegal. The 1st and 2nd respondents do not get a break on the sums of money alleged to have been spent in the formulation



and execution of the contested decisions under the ruling in *East Africa Cables v Public Procurement Complaints Review and Appeals Board & another* (2007), which must give way to the new dispensation in the Constitution of Kenya. The place of public interest was defined in *Republic v County Government of Mombasa ex-parte Outdoor Advertising Association of Kenya* (2014) eKLR as follows:

“Public interest must conform to the constitution and the law as the rule of law is one of the national values of the constitution under article 10 of the Constitution. There can never be public interest in breach of the law. The decision of the respondent is indefensible on the public interest.”

183. He submitted that the court needs to find out whether Policy Framework for Reforming Education and Training for Sustainable Development in Kenya and Sessional Training Paper No 1 of 2019 are the foundations of the 2017 Basic Education Curriculum. Legal conformity must be ensured by investigating the legitimacy of the procedures used in the conception and execution of the 2-6-6-3 system and educational framework, as well as CBC. Are they decisions made by the executive on public policy or legislative actions? Was it obligatory to follow the law throughout the formation of CBC and the shift of the educational system to 2-6-6-3?
184. The petitioner answers to the aforementioned questions as follows. A legislative role (principal or delegate) under Part V of the *Basic Education Act* No 14 of 2013 is the shift of the educational system and structure from 8-4-4 to 2-6-6-3.
185. This is the reason the Departmental Committee on Education and Research of the 6th respondent, which is charged with legislative authority under article 94(1) of the Kenyan Constitution, voiced its concerns on the modification of the educational system and structure in the absence of a suitable legal framework. The National Assembly Departmental Committee on Education and Research Report on Sessional Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya contains the stance of the sixth respondent.
186. The petitioner argues that the policy has not recommended any legal framework that requires harmonizing and revision in line with the requirements of the new constitution (2010) and vision 2030. This is appropriate, according to the Departmental Committee on Education and Research of the 6th respondent.
187. To close all the holes, the Committee found before the implementation process starts, the Committee advises the Ministry of Education to modify Sessional Paper No. 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya.
188. A full house of the six respondents had never before tabled and evaluated the Basic Education Curriculum Framework, 2017 or Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya. They were not passed as legislative directives as mandated by section 36 (3) of the *Interpretation and General Provisions Act* cap 2 of the Kenyan Laws.
189. The Departmental Committee on Education and Research last considered this recommendation on September 17, 2019, at page 1277 of Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya:
 - “2. The Committee gave the Secretariat instructions to draft a report on the session paper that the Committee would review and present to the House.”



190. The Committee's CBC comment: "The Committee took notice of the fact that it had not been given the Taskforce for Improving Access, Retention, Transition, Equity, and Quality for Effective Curriculum Reform to review. For this reason, the Sessional Paper left unclear the dates, implementation matrix, and anticipated results of the curriculum revisions. It is also yet unknown at what level various exam kinds would be given in the basic education under the Competency Based Curriculum (CBC)."
191. Any attempt by the 1st, 2nd, 3rd and 5th respondents to defend their acts and choices under the pretext of Executive public policy decisions is belied by their impunity. That level of secrecy in public management is long gone. In the present constitutional system, the Court cannot keep the public from looking into and scrutinizing decisions.
192. In *Richard Bwogo Birir v Narok County Government & 2 others* (2014) eKLR, the High Court restated the aforementioned stance. It was decided:
- "The respondent cannot be considered to have maintained the principles of human rights, transparency, accountability, and good governance as envisioned in article 10 of the Constitution, the court concludes. The court's considered opinion is that mysterious decisions... cannot be in furtherance of the donated sovereign powers that vest in the people because such mysterious decisions are opaque decisions that belong to the murky world and not a civilised democratic Republic like ours."
193. In *Narok County Government & another v Richard Bwogo Birir & another* (2015) eKLR the Court of Appeal upheld the High Court's finding stating thus;
- "Article 73 says that the power granted to a State officer is a public trust that should be used in a way that is in line with the goals and objectives of the Constitution. The state official is empowered to serve the people, not to govern them. Responsibility to the public for decisions made is one of the tenets of honesty and leadership."
194. The petitioner submits that the 1st, 2nd, 3rd, and 5th respondents, have failed to prove their legal defense of the petition. They have turned to public policy for safety, arguing that the development of CBC and the recommendation or modification of the educational system and structure from 8-4-4 to 2-6-6-3 are null and void. The absence of regulations made the shift from 8-4-4 to 2-6-6-3 and the creation of CBC impossible.
195. The primary basis of the complaint against the development of CBC and the switch from an 8-4-4 educational system to a 2-6-6-3 system is the lack of regulations. The 1st, 2nd, 3rd and 5th respondents have approached the problem in an oversimplified manner, claiming that the absence of regulations is not deadly to the choices and acts made.
196. To analyze the implications of the legal arguments put forth by the 1st, 2nd, 3rd, and 5th respondents, it is essential to lay out the requirements of the relevant statute in context. Legislation (principal and delegate) has the authority to prescribe or alter the educational system and structure. Part V of the Basic Education Act No 14 of 2013 does not elaborate on this topic, but section 42(2) of the Act specifies how the 1st respondent is to carry out that obligation in detail. Section 95(2) imposes an obligation on the 1st respondent to issue rules to provide for an adequate structure for training and education without affecting the generality of subsection (1).



197. The Kenya Institute of Curriculum Development Act No 4 of 2013 assigns the 2nd respondent the public policy responsibility of developing curricula and curricular support materials. However, the Act does not specify the specificity of how this function must be performed
198. In response to the question at hand, the five respondents put forth the legal defence that an action taken in the absence of restrictions does not make it invalid. They assert that the Court of Appeal ruling in *Judicial Service Commission v. Mbalu Mutava & others* (2015) serves as authority for that position. Subsidiary laws, known as regulations, were passed by the 6th Respondent in accordance with section 36(3) of the *Interpretation and General Provisions Act*, cap 2 of the Kenyan legislation.
199. The Kenyan Constitution, as well as the Basic Education Act, mandates the 1st respondent to create regulations outlining a suitable framework for education and training, as well as policy and guidelines for developing curricula. Nine years after the Basic Education Act went into effect, no regulations have been written. According to section 29 of the *Kenya Institute of Curriculum Development Act* and the Kenyan Constitution, the 2nd Respondent had an equal responsibility to establish regulations outlining the protocols to be adhered to in the evaluation and creation of curricula and curricular support materials.
200. The petitioner contends that it is improper for the 1st and 2nd respondents to argue that they cannot be questioned about how the 2-6-6-3 system and educational structure were developed or how CBC was developed and implemented. The petitioner's claim on this matter cannot be refuted by the rulings in *Henry N Gichuru v The Minister for Health (supra)* and *Judicial Service Commission v Mbalu Mutava (supra)*.
201. The interpretation of the terms "may" and "shall" with regard to the adoption of regulations cannot be overly straightforward and escape-oriented. The obligation to behave in line with article 10 of the Kenyan Constitution today serves as the foundation for law. The case of *Judicial Service Commission v Mbalu Mutava (supra)* was not decided exclusively on the basis of the Judicial Service Commission's inability to adopt regulations.
202. The petitioner restates that the 1st and 2nd respondents' creation of regulations was a prerequisite to their acts and decisions to recommend or alter the educational system and structure, as well as to review and establish curricula. There is no justification provided for the failure to create the regulations nine years after the Kenya Institute of Curriculum Development Act and the Basic Education Act went into effect.
203. The dispute over the precise legal definitions of "shall" and "may" should be resolved by the ruling in *Republic v Council of Legal Education & another ex - parte Sabina Kassamia & another* (2018) eKLR. The ruling in *Independent Electoral & Boundaries Commission (IEBC) v David Ndi and others* (2021) eKLR also reflects the right legal position.
204. Specialty in the administration of administrative action is guaranteed by regulations, ensuring decision-making processes are transparent and accountable. They clear up ambiguities and shed light on how administrative actions are conducted in order to give subsequent decisions legal standing.
205. The petitioner argues that the Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya are invalid due to the absence of regulations as prerequisites to their creation. The petitioner posits that legislation formulates and prescribes the educational system and structure, while public policy develops and reviews curricula within a legal framework. However, the 1st, 2nd, 3rd, and 5th respondents have obscured the contrast between the system and structure of education



- and curricula, leading them to make false legal representations, claiming that the examination and development of CBC equates to a shift from the 8-4-4 educational system to 2-6-6-3.
206. The foundation of CBC is the Basic Education Curriculum Framework, 2017, which serves as the legal framework for both the CBC and the 2-6-6-3 system and structure of education. The National Assembly Departmental Committee on Education and Research's report from September 17, 2019, reveals that the Framework and Sessional Paper did not receive the consent of the six respondents, and they never came to pass.
 207. The petitioner argues that public involvement should not be confined to the petitioner alone, but also to stakeholders and the general public. The Departmental Committee on Education and Research Report on Sessional Paper No 1 of 2019 establishes the veracity of this evidence, stating that the Committee for Curriculum Reform had not received any proposals for thinking about it, leading to unclear results, implementation matrix, and deadlines for curriculum revisions.
 208. The petitioner also notes that the opinions and contributions of several consultants are included in the Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1, but the 1st and 2nd respondents did not take these opinions into consideration. The Departmental Committee on Education and Research Report on Sessional Paper No 1 of 2019 also states that the CBC and Sessional Training Paper No 1 of 2019 were not passed due to the lack of public participation.
 209. In conclusion, the petitioner argues that the absence of regulations and the lack of public participation in the development of the CBC and the Sessional Training Paper No 1 of 2019 render the CBC and Sessional Training Paper No 1 of 2019 invalid.
 210. The petitioner, in response to the claims made by the 1st, 2nd, 3rd and 5th respondents on public engagement, alleges that there is no information in the Sessional Paper regarding public engagement. The petitioner argues that all stakeholders' involvement in the M&E process would significantly increase its ownership. He also points out that before September 17, 2019, neither the 1st or 2nd respondent had been asked to comment publicly on the question of changing the educational system and structure from 8-4-4 to 2-6-6-3 and developing CBC. Reproducing the only accepted and documented opposing viewpoint to the acceptance of the new educational system and structure is crucial for the growth of CBC.
 211. In support of that argument the petitioner relies on an excerpt from the 'Departmental Committee on Education and Research Report' on Sessional paper no. 1 of 2019 at page 1279 where Hon Wilson Sossion, MP, states that the Sessional Paper should have been submitted to consultation forums for national stakeholders before being brought before the National Assembly for deliberation. He believed that the Policy Paper was being hurriedly adopted, despite the need for proper consultations. The Petitioner argues that public input did not result in the development of the 2-6-6-3 system, the educational structure, or the CBC. The ownership of The Basic Education Curriculum Framework, 2017 and Sessional Training Paper No 1 of 2019 on Policy Framework for Reforming Education and Training for Sustainable Development in Kenya would have been enhanced and the role of public engagement would have been made clear with regulations.
 212. The petitioner also points out that public engagement cannot be restricted to the placement of notifications in local dailies. Reliance was placed on the case of *Independent Electoral & Boundaries Commission (IEBC) vs David Ndi and others (supra)*



The 1st, 2nd and 3rd Respondents Submissions

213. The 1st, 2nd and 3rd respondents filed written submissions dated September 12, 2022. According to the respondents the petitioner seems to have abandoned to a large extent most of his allegations in his petition and has chosen to narrow down to a few aspects of the petition in his written submissions.
214. It is submitted that according to rule 10 of the ‘Mutunga Rules’, a petition should contain, among other things, the facts relied upon, the provisions violated, the nature of injury complained of and the reliefs sought. The case of *SWM VS GMN* (2012) eKLR, which was cited with approval in the case of *John Kimani Mwangi v Town Clerk Kangema Nairobi* Petition No 1039 of 2007 is referred to on the need to plead with precision and specificity any violation, infringement and/or threat to a petitioner’s constitutional right and fundamental freedom(s) in a constitutional petition.
215. It is also submitted that the petitioner has not adduced any evidence of probative value to demonstrate that the Kenya CBC has infringed any of the numerous provisions of the constitution cited in his petition before the honorable court. Sections 107, 108 and 109 of the *Evidence Act* are referred to on the burden of proof. The cases of *Stephen Wasike Wakho & another v Security Express Limited* (2006) eKLR, *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR and *Christian Juma Wabwire v Attorney General* [2019] eKLR are referred to on burden of proof.
216. It is also the respondents’ respectful submission, that in light of the failure by the petitioner to adduce any evidence of probative value on the allegations of breach of any of the provisions in the chapter on the bill of rights, the petitioner’s claim to that extent must fail and be dismissed on that account.
217. The respondents further submit that granting the declaratory orders sought in the petition will be an affront to the twin doctrines of separation of power and deference as enunciated by the Court of Appeal in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The case of *British American Tobacco Ltd v Cabinet Secretary for Ministry of Health & 5 others* [2017] eKLR is also cited where the Court of Appeal referred to the Indian case of *Maharashtra State Board v Kurmarsheth & others* [1985] CLR 1083 where it was stated that:
- “...so long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations...”
218. The petitioner is said to have misconstrued the term ‘shall employ’ in the Basic Education Act to give it a pedantic meaning devoid of the context of the Act and the constitutional obligations that the Act seeks to give effect to. The case of *Henry N Gichuru v Minister for Health & The Kenyatta National Hospital Board* [2002] eKLR is cited on what the proper construction of the term shall in statutory provisions is.
219. The respondents argue that there is no doubt from the evidence adduced before the honourable court that reverting back to 8-4-4 is not a viable option, and further that there is a convergence of minds in the education sector on that point. It is their argument that the court is also acutely aware that this being a public law claim the court has a wide latitude and discretion in the event it finds in favor of the petitioners to fashion an appropriate relief. These principles it is submitted were recognized in the case of *East African Cables v Public Procurement Complaints, Review and Appeals Board & another* [2007] eKLR.



220. In conclusion, it is their submission that they have adduced sufficient evidence to demonstrate that all relevant stakeholders including Parliament (which provided necessary financial provision for the same) were privy to the development and implementation of the CBC and education policy reforms in issue.

4th Respondent Submissions

221. It is the 4th respondent's submission that the petitioner has not only convoluted issues but also failed to appreciate the distinct mandate of the 4th respondent in curriculum reforms. The petitioner is also accused of failing to clearly and concisely make a case against the commission. The petitioner it is submitted has instead lumped the 4th respondent in one category with the 1st -3rd respondents and made false accusations against the quartet jointly and severally without a clinical dissection of the 4th respondent's distinct mandate.
222. The case against the 4th respondent lacks specificity, precision and particularity as was held in the cases of *Anarita Karimi Njeru v Republic* (1976-1980), *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]. The petitioner it is submitted misconstrued, misinterpreted and misapplied provisions of section 73 and 74 of the Basic Education Act.
223. The 4th respondent also argues that the conservatory orders are interim orders intended to maintain *status quo* pending the hearing and determination of the main suit as was stated in the cases of Nairobi High Court Petition 206 of 2018: *Bloggers Association of Kenya (Blake) vs. Attorney General & 5 others* and Nakuru Civil Appeal 151 of *Invesco Assurance Co vs. MW (Minor suing thro' next friend and mother (HW))*.
224. The 4th respondent further submits that pursuant to the elements for grant of conservatory orders, such orders can only be done at the interim stage by the party seeking to preserve the status quo pending hearing of the main suit. It is the commission's submission that the prayer for conservatory orders in the main petition is defective, unattainable, and bad in law.
225. It is submitted that the court ought to be guided by the principle under article 159(2)(d) & (e), the preamble of the Constitution and the best interest of the child as enacted under article 53(2) in reaching its finding. The 4th respondent submits that it has expended huge amounts of funds in retooling teachers to offer implementation and granting the prayers in the petition will amount to imprudent use of public resources contrary to the provisions of article 201 and the *Public Finance Management Act*. Reliance is placed on the Supreme Court Application No 5 of 2014: *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* on the principle of good governance.
226. The 4th respondent's argument is that the ultimate impact of granting the orders in the petition will be to kill the future of an entire generation who have invested education in the CBC framework both financially and physically and the same will also amount to imprudent use of public resources.
227. On the inordinate and inexcusable delay, the 4th respondent submits that the petition is a clear indication that the petitioner has filed this petition as an afterthought as he waited six good years before approaching the court. The cases of Nairobi High Court Constitutional Petition No 307 of 2018; *Law Society of Kenya v Attorney General & Another; Mohamed Abdulabi Warsame & another* (Interested Parties) and *Communications Courier & Another vs. Telkom (K) Ltd* [199] eKLR are cited on undue and unreasonable delay.



The 5th Respondent's Submissions;

228. The 5th respondent's submissions are dated September 20, 2022 and it is argued that the formulation of systems and structures of education and the curriculum incidental thereto is a highly technical and policy issue that is governed by various statutory provisions. It is submitted that the function formulating the applicable system and structure of education falls within the domain of various statute frameworks and cannot be elevated to a constitutional issue.
229. The case of *International Centre for Policy and Conflict & 5 others v Attorney-General & 4 others*, High Court Petition No 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 (Unreported) is cited where the court affirmed the holding made in the case of *Bernard Samuel Kasinga v AG & others* High Court Petition No 402 of 2012 (unreported) that, "the mere fact that the Constitution is cited or invoked is not enough to elevate the matter for a constitutional matter. Mere allegation of breach of rights — and the citation of inapplicable provisions of the constitution (including the *Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules*: 2014) - does not elevate a matter falling within the purview of private, civil law to a public interest, constitutional matter".
230. It is also the 5th respondent's submission that non-compliance with a statutory provision as alleged in the petition would at best be a statutory violation which does not of itself amount to a constitutional violation. This is said to have been the principle in *Turkana County Government & 20 others v Attorney General & others* [2016] eKLR.
231. The 5th respondent also submits that the court ought to refrain from interfering with the decision-making powers of the statutory agencies if their decisions are made within the mandate entrusted to them by Parliament through enabling legislation. In support of this argument the cases of *Kenya Deposit Insurance Corporation v Richardson & David Limited & Central Bank of Kenya* (unreported) Civil Appeal No 67 of 2016, *Maharashtra State Board of Higher Education and vs Kurmarsheth & Others* [1985] CLR 1083 and of *R v Council of Legal Education* [2007] eKLR are referred to.
232. The court in the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR held as follows;
- “.....In either case, neither the Constitution nor the JSC Act stipulates the procedure to be followed. The JSC has power under S 47(1)(c) of JSC Act to make regulations to provide for preliminary procedures for making any recommendations required to be made under the Constitution, but no such regulations have been made. In the absence of any constitutional or statutory procedure the JSC has administrative discretion to adopt any fair procedure appropriate to its task.”
233. The 5th respondent submits that the allegation of want of public participation for failure to take into account the report by Professor Laban P Ayiro is devoid of the proper import of the constitutional dictates on public participation. The cases of *Okiya Omtatah Okoiti v County Government of Kiambu* [2018] eKLR and *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR are cited in this regard.
234. The 5th respondent also submits that it is clear that there was sufficient public participation in the process, not only prior to, but also during the implementation of CBC. It is also submitted that the relevant stakeholders who have either been joined in these proceedings as respondents or who subsequently applied and were joined as interested parties, have confirmed having been involved in the stakeholder engagements in relation to the introduction and implementation of CBC. Further that



the illustrations of public participation provided by the respondents have not been controverted by the petitioner.

235. The petitioner is said to have failed to lay any credible basis for the grant of any of the reliefs sought in the petition and the same is ripe for dismissal.

The 6th Respondent's Case;

236. The 6th respondent's submissions are dated February 14, 2024 and it is argued that the introduction of the CBC framework is a result of a policy decision emanating from an identified need in society to enhance the quality of education. The cases of *Patrick Ouma Onyango & 12 others vs. Attorney General & 2 others* [2005] eKLR and *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] are referred to on the issue of whether the court should interfere with a formulation of policy, political or legislative process.
237. It is submitted that the 1st respondent has a constitutional duty to make necessary policy decisions to effectively implement their mandates and as such the court ought to exercise restraint and decline to violate the principle of separation of powers.
238. The 6th respondent also submits that the 1st respondent is empowered through the Basic Education Act to undertake necessary curricula reform in the education sector in conjunction with the 2nd respondent as provided in the KICD Act and the guiding regulations emanating from these Acts.
239. According to the 6th respondent the court ought to interpret the provisions of the statute as a whole and in a manner that promotes its purposes and principles. This was held by the courts in the cases of *Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others* [2012] eKLR and *Reserve Bank of India v Pearless General Finance and Investment Co Ltd* [1987] 1 SCC 424.
240. It is also the 6th respondent's case that the general principles of statutory interpretation also require that statutory provisions should always be interpreted purposively and properly contextualized. Further, that they should also be construed consistently with the Constitution.
241. It is accordingly submitted that the petitioner has failed to prove any inconsistency between the provisions of the Act and those of the Sessional Paper No 1 of 2019. It is its case that as was held by the court in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR the courts ought to allow institutions or organs of state leeway to discharge their mandate and only accept invitation when those bodies are demonstrably shown to have acted in contravention of the Constitution.

The 3rd Interested Party's

242. Triple A Advocates on behalf of the 3rd interested party filed submissions dated September 22, 2022 and further supplementary submissions dated January 23, 2024. Counsel identified three issues for discussion namely: whether CBC is a proper education system in line with articles 43(1)(f) and 53 of the Constitution and Sections 4, 28, 41 and 42 of the Basic Education Act No 14 of 2013; whether there is a legal framework for CBC in Kenya and whether this petition has been overtaken by events.
243. Counsel on a preliminary note argued that the heart of the CBC system is self-reliance which the 8-4-4 system failed to provide and teach. In this regard, it is noted the CBC system identifies and nurtures a student's aptitudes, talents and interests at an early stage in preparation for future employment and career progression.



244. For this reason, the CBC system guiding pillars are stated to be in conformity with sections 3, 28, 41 and 42 of Basic Education Act and in tandem with the principles set out under articles 43(1)(f) and 53 of the Constitution. Reliance was placed on *MWK and another v Attorney General & 3 others* (2017) eKLR that, the best interest of the child must be accorded paramount importance in all matters.
245. Counsel further submitted that the respondents conducted extensive public participation before implementation of the CBC system. To buttress this point reliance was placed on *Nairobi Metropolitan PSV Saccos Union Limited & 25; others v County of Nairobi Government & 3 others* (2013) eKLR where the court noted that the respondents had involved the public in the process leading to the enactment of the *Nairobi City County Finance Act* of 2013 since they engaged those who would be affected by their decision hence compliant with the public participation principle. Like dependence was placed on *Matatiele Municipality & others v President of the Republic of South Africa & Others* (2) CCT73 05A [2006] ZACC 12; 2007 (1) BCLR 47 (CC)13.
246. Counsel answered in the affirmative on the second issue. Counsel noted that the petitioner's averments were misleading since the CBC system regulatory framework comprises of: the Constitution, the Task Force on Realignment of the Education Sector to the New Constitution (The Odhiambo Report), Basic Education Act, Kenya Institute of Curriculum Development Act, Kenya National Examination Council Act, High Education loans Board Act, Teachers Service Commission Act, Technical and Vocational Education and Training Act, Kenya National Qualification Framework Act, Kenya National Commission for UNESCO Act, Science, Technology, the Innovation Act and Sessional Paper of 2012 (Renamed Sessional Paper No 1 of 2019).
247. Turning to the third issue, counsel submitted that the CBC system had been implemented for a number of years prior to filing of this suit. Accordingly, it was argued that the petition is a disruption to the education system and further not in the best interest of the child. Furthermore, that due to the delay, the doctrine of inordinate delay had been invoked. Reliance was placed on *Mwangi S. Kimenyi vs. Attorney General and Another* (2014) eKLR that, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.
248. Counsel in the further submissions, noted that the 3rd interested party had succeeded in suspending the implementation of the proposals by the Presidential Working Party on Education Reform (PWPER) as it did not comply with constitutional principles.

The 5th Interested party's Submissions

249. In the submissions dated, May 10, 2023, the 5th interested party through Counsel Emily Kinama, highlighted the issue for determination as: whether the CBC system was developed and implemented in accordance with the law.
250. To begin with, counsel submitted that the respondents violated articles 43(1)(f) and 53(1)(b) of the Constitution in that they introduced a resource intensive curriculum without taking into consideration the needs of the society such as the teachers' trainings and the number and the state of the schools in Kenya. The CBC is also argued to have been implemented without a comprehensive competencies and assessment guiding framework.
251. In this regard, reliance was placed in article 21(2) of the Constitution as read with United Nations Committee on Economic, Social and Cultural Rights (CESCR's) General Comment No. 13. This Comment provides that in establishing an education system the government must ensure the system is available, accessible, acceptable and adaptable. These elements were not adhered to.



252. Furthermore, on the right to free and compulsory basic education, Counsel submitted that CESCR's General Comment 11 (1999) - Plans of action for primary education guides that compulsory education means that education offered must be adequate in quality, relevant to the child and promote the realization of the child's other rights. The State's obligation in this regard was also upheld by the Supreme Court in *Mitu-Bell Welfare Society vs. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).
253. Counsel as well argued that the respondents failed to highlight the economic accessibility and acceptability of the CBC system for the parents' *vis-a-vis* the State and in particular, the sharp contrast between public and private schools. These concerns were well captured in the KNEC Report of the Kenya Early Years Assessment (KEYA) Pilot Study of September 2018 and the Report on Training of Teachers in Competency Based Assessments (CBA) under the Global Partnerships for Education (GPE) Kenya Primary Education Development (Priede) Project compiled by CBA Working Group August 2021.
254. In view of these numerous shortcomings Counsel stressed the CBC system had been implemented in violation of the right to education and free and basic education. Reliance was placed in *Minister of Basic Education vs Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015) where the South African Supreme Court noted that, the National Department of Basic Education and the Limpopo Department of Education violated the s 29(1)(a), s 9 (equality) and s 10 (dignity) right of learners in Limpopo in 2014 by failing to provide all of them with every prescribed textbook before commencement of the teaching of the courses for which they were prescribed. Reliance was also placed on *Initiative for Social Economic Rights v the Attorney General Civil Suit No 355 of 2016*.
255. In like manner, Counsel further submitted that the respondents had violated article 27 of the Constitution. This is since the CBC system introduced a curriculum whose coursework and reading materials are not only expensive but unavailable to children in marginalized groups and poor households. Equally, it was a resource incentive system curriculum that failed to take into consideration the country's realities so as to enable inclusive, quality and equitable implementation of the system across the country.
256. Reliance was placed on *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* (2011) eKLR that, unfair discrimination is treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Reliance was further placed on *James Nyasora Ngarangi and others v Attorney General*, HC Petition No 298 of 2008, *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR and *Harksen v Lane No and others 1998(1) SA 300(CC) and NGOs Co-ordination Board v EG & 4 others; Katiba Institute (amicus curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ).
257. Correspondingly, counsel argued that the respondents violated the right to free and compulsory basic education and the best interests of the child. In support the Supreme Court decision in *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment) where the best interest of the child was discussed. The court noted that, the best interest of the child is determined by the circumstances of the case as they specifically relate to the child. As such, the focus must be on the child and what is best for them. Equally, see the case of *MAA v ROO* [2013] eKLR, *Karen Kandie vs Alassane Ba and another* SC Petition No 2 of 2015; (2017) eKLR and *Joseph K Nderitu & 3 others v Attorney General & 2 others* Petition No 29 of 2012; (2014) eKLR.



258. It is as well submitted that the State breached its obligation under article 21 of the Constitution. This is because the respondents requirement that parents incur the costs of basic education, shows that the State abdicated its obligation with respect to the realization of the right to education.
259. In this regard, reliance was placed on *Gabriel Nyabola v Attorney General & 2 others* (2014) eKLR that, the obligation to respect requires State parties to avoid measures that hinder or prevent the enjoyment of the right to education. Further, the obligation to fulfill incorporates both an obligation to facilitate and to provide while the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The case of *William Musembi and 13 others v Moi Educational Centre Co Ltd & 3 others* (2021) eKLR was cited in that regard.
260. In closing, it was submitted that the remedies available in light of these violations are outlined under article 23(3) of the Constitution. Reliance was placed on *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* (2014) eKLR where the Supreme Court noted that, the word ‘including’ in article 23(3) means that the reliefs listed in the provision are not exhaustive and hence the court can issue other appropriate relief outside those listed. This is further buttressed in the finding in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate* Petition No 4 of 2012; [2013] eKLR and *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17.
261. In this regard, counsel submitted that one of the appropriate reliefs would be issuance of a structural interdict as discussed and elaborated by the Supreme Court in the *Mitubell Welfare Society* (*supra*). This remedy has also been utilized by the court in *Francis Kariuki Muruatetu another v Republic* Petition No 15 & 16 of 2015, (2017) eKLR and *Communications Commission of Kenya* case (*supra*) which were also cited in support.

Analysis and Determination

262. We have carefully considered the petition, responses, learned submissions by counsel and the applicable law. The issues for determination are as follows:
1. Whether it is mandatory to file an affidavit in support of a constitutional petition.
 2. Whether the 1st respondent made regulations under sections 42(2) and 73(4) of the Basic Education Act.
 3. Whether the 1st respondent acted contrary to the law by relying on Basic Education Curriculum Framework 2017 and Sessional Paper No 1 of 2019 without amendment to section 41 of the Basic Education Act.
 4. Whether the petitioner is guilty of Laches.
 5. Whether there was public participation in the implementation of CBC.
 6. Whether the Doctrine of Avoidance is applicable.
 7. Whether the CBC exposes children to child labour.
 8. Whether the materials used in CBC are a threat to the Environment.
 9. Whether the CBC amounts to discrimination against children, subjects them to torture and takes away their freedom of expression.
 10. Whether Dr Fred Okengo Matiang'i and Prof George Albert Omoro Magoha contravened Section 41 of the Basic Education Act and violated the Constitution.



11. Whether an injunction or conservatory order can issue restraining the 1st, 2nd, 3rd and 4th respondents from further implementing the CBC.
12. What orders/reliefs should be granted?

Whether it is mandatory to file an affidavit in support of a Constitutional Petition.

263. By an order dated June 9, 2022, the petitioner herein was substituted in place of Esther Awuor Adero Ang'awa. In its ruling the court stated as follows:

- “ 1. Esther Awuor Adero Ang'awa be and is hereby substituted with Nelson Andayi Havi as the petitioner.
2. The pleadings, proceedings and all document filed herein be and are hereby amended to indicate Nelson Andayi Havi as the petitioner.
3. Each party to bear its own costs of the application.”

264. Constitutional petitions are governed by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 commonly referred to as “Mutunga Rules”.

265. Rule 5(c) thereof provides as follows:

“Where the proceedings have been instituted in the name of the wrong person as the Petitioner or where it is doubtful whether it has been instituted in the name of the right petitioner, the court may at any stage of the proceedings if satisfied that the proceedings have been instituted through a mistake made in good faith and that it is necessary for the determination of the matter in the dispute, order any other persons to be substituted or added as petitioner upon such term as it deems fit”.

266. To that extent therefore, the Petitioner herein is in good standing in the matter.

267. A perusal of the petition readily shows that the petitioner did not file a supporting or further affidavit in the matter. By dint of Rule 11(1) & (2), a petition filed under the rules may be supported by an affidavit. Secondly, if a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

268. We have noted that, other than being substituted as the petitioner in this matter, the petitioner neither filed any affidavit nor annexed any document to the petition. The only affidavit on record and annexures are those of Esther Awuor Adero Ang'awa who is a stranger to this petition. To that extent therefore, the very many issues of facts advanced in this petition find no support at all.

269. The Supreme Court in the case of *Bernard Kibor Kitur v Alfred Kiptoo Keter & another* [2018] eKLR addressing this issue stated:

“With this in mind, we take a look at the obligations of a petitioner in matters of evidence, which is found under rule 12(1)(b) stipulating that in the matter of an affidavit, a petitioner shall file an affidavit personally. The use of the word shall depict that the petitioner must swear his own evidence in support of a petition. As affidavit evidence is evidence that is personal to the deponent, it cannot stand that a Petitioner relies on evidence that he was not privy to. We find that in limiting the substituted petitioner to adopting word for word the averments of the original petitioner, the learned trial judge erred as it was tantamount to



relying on facts not within his knowledge violating rules of Evidence and admitting hearsay evidence.We are therefore in agreement with the appellate court in their finding that an affidavit must state the substance of the evidence and must be confined to facts that the deponent is able of his own knowledge to prove”.

270. In the case of *Isaac Aluoch Polo Aluochier v National Alliance and 542 others* [2016] eKLR, Muriithi, J considered a petition that was not supported by an affidavit setting out the facts of the case and had this to say:

“ 10. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013, for the enforcement of the Bill of Rights and which by the practice of the court have been used for all constitutional litigation, there is no requirement that a petition be supported by an affidavit on the facts”.

271. In *Bryson Mangla v AG & others* Nairobi Pet No 284 of 2016, this court held that:

“ 14. It is conceivable that a petition which challenges, for example, constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct”.

272. We agree with Muriithi J in his finding in *Isaac Aluoch Polo Aluochier v National Alliance and 542 others (supra)* that failure to file an affidavit or annex documents is not fatal to a petition. In the case before us the petition herein raises issues of law and fact and we have expressed ourselves on the position of unsupported facts.

Whether the 1st respondent made regulations under sections 42(2) and 73(4) of the Basic Education Act.

273. Section 42(2) of the Basic Education Act provides that,

“(2) The Cabinet Secretary in consultation with the National Education Board and other relevant stakeholders shall make regulations prescribing an appropriate structure for education and training.”

274. Section 73(4) of the Basic Education Act provides,

“Policy and guidelines on curricula.

The Cabinet Secretary shall, in consultation with the relevant stakeholders make appropriate regulations to implement the provisions of this Section.”

275. Section 95 of the Basic Education Act reads as follows;

“Regulations

1. ...

2. Without prejudice to the generality of subsection (1) the Cabinet Secretary may make regulations to provide for—

(a) an appropriate structure for education and training



- (b) incentives to learners, teachers and non-teaching staff;
- (c) discipline, corrective measures and expulsion to facilitate compliance;
- (d) admission, progression and transfer of learner;
- (e) integration of the madrassa, Duksi and pastoral programmes of instructions into the formal education system as appropriate to improve access and retention;
- (f) to secure appropriate institutional linkages and relative autonomy for the Kenya National Commission for United Nations Educational Scientific and Cultural Organization to enable it to promote education through culture, natural science, social and human sciences, and information and communication technology.”

276. The petitioner’s case is that there are no regulations made as envisaged under section 73(4) of the Basic Education Act No 14 of 2013. Therefore, that the implementation of CBC was done contrary to the law. This contention is not rebutted by the respondents. From the material before court, it is a fact that there are no regulations under section 73(4) of the Basic Education Act. We have however noted the existence of the Basic Education regulations 2015 made by the Cabinet Secretary under the powers conferred by section 95(2) of the Act. It is instructive to note that the CBC was rolled out in the year 2018 during the subsistence of the above regulations.
277. Despite the absence of regulations under section 73 of the Basic Education Act, and in view of the regulations under section 95, the 2nd Respondent did not develop the curriculum in a vacuum.
278. We have grappled with the question of the effect of the absence of regulations under section 73 of the Basic Education Act.
279. In the case of *Walter Osapiri Barasa v Cabinet Secretary, Ministry of Interior and National Coordination and 6 others* 2014 eKLR;

At paragraph 127 the judge while seeking guidance cited the case of *Republic v Minister for Home Affairs ex parte Sitamze* [2008] 2 EA 323... this court made a determination on when the court can intervene with the mandate of a Minister exercising his discretion under rules. The court held that it would be wrong to intervene with the merits of the Minister’s decision except in the following circumstances:

1. Where there is abuse of discretion
2. Where the decision-maker exercises his discretion for an improper purpose
3. Where the decision-maker is in breach of the duty to act fairly
4. Where the decision-maker has failed to exercise statutory discretion reasonably
5. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power
6. Where the decision-maker fetters the discretion given
7. Where the decision-maker fails to exercise discretion



8. Where the decision is irrational and unreasonable

128 In the present case the Minister has not exercised his discretion to make regulations under sections 172 and 173 ICA. Thus, borrowing from the Sitamze case, I can readily think of some basic criteria which would underpin an action to impugn such failure of the Minister. In my view, some of the facts which the petitioner would have to prove include that the failure to make such regulations:

- a. has resulted in a failure to realize the intention of the Act; or
- b. results to an impediment in the exercise of fundamental rights or freedoms of the petitioner; or
- c. results in a situation so unfair, irrational or unreasonable that any reasonable person in the Minister's position would, in the circumstances, readily have made such regulations
- d. amounts to a failure of a glaring and fundamental duty of the Minister which the court would be entitled to remedy with an order to compel him to make such regulations”

280. Flowing from the above holding, the petitioner needed to prove whether the omission by the 1st respondent to make regulations resulted in a failure to realize the intention of the Basic Education Act; or was an impediment in the exercise of fundamental rights or freedoms of the petitioner. This burden has not been discharged there being no evidence by way of affidavit or otherwise.

281. We have further interrogated the issues before us and we are satisfied beyond doubt that the doctrines of proportionality, best interest of the child, public interest, balance of convenience and prejudice are applicable in this matter.

282. The first main issue which is very critical is the best interest of the child. What would be the effect of invalidating the implementation of CBC altogether on the child who since grade 2 and is now in grade 8 has only known this system? How will it affect the child psychologically? Will it be in the best interest of the child to expect the child to completely forget and adopt a new curriculum all together?

283. The Constitution of Kenya under article 53(2), provides as follows:

“A child's best interests are of paramount importance in every matter concerning the child.”

284. Section 8 of the *Children Act*, 2022 echos this constitutional imperative as follows: -

“Best interests of the child

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.



- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.
- (4) The Cabinet Secretary shall issue guidelines to give effect to this Section.

285. The Supreme Court in the case of *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment) held as follows:

- “6. The children’s rights legal regime (the Constitution, Children Act (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasized the centrality of the best interest of the child. The best interest of the child was determined by the circumstances of the case as they specifically related to the child. That comprised the principles that prime the child’s right to survival, protection, participation, and development above other considerations and included the rights contemplated under article 53(1) of the Constitution. The focus had to be on the child and what was best for the child.”
7. There was no hierarchy in the children’s rights provided for under the Constitution. All the rights provided under Article 53 were in the child’s best interest. The ‘best interests’ concept was further strengthened by being the paramount consideration. The best interests of the child were to be the determining factor when making a decision on the child. It was against that aspect that parental rights ought to be balanced. No right should be compromised by a negative interpretation of a child’s best interest. The record did not provide any cogent evidence of the English Court balancing between parental rights and the best interest of the child.”

286. In the persuasive case of *LNM v Attorney General & another* [2021] eKLR, the court cited with approval the case of *MAA vs ABS* Civil Appeal No 32 of 2017 where the court held as follows:

“The interest of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children. It therefore follows that the best interest of the children is the first and paramount consideration of the child a court must do everything to safeguard, conserve and promote the rights and welfare of the minor herein”



287. On the material available on record it is evident that the CBC has already been rolled out and over eight (8) million children are undergoing the new system. Teachers have undergone retooling and teaching materials and aids have been prepared and distributed. Classrooms have been built to cater for Junior Secondary School learners. The government has made budgetary allocations, and indeed, funds have so far been spent on the programme.
288. The children already enrolled in the CBC system have advanced substantially in their study as well as age.
289. Notably CBC has been rolled out in all public schools in the country. Stopping implementation as sought by the petitioner would only serve to wreak havoc and cause disorder in the country's education system. This will ultimately be very prejudicial and have a disproportionate effect on the children and the parents. It will offend the right to education and the best interest of the child principle. Overall, this would be against public interest and the balance of convenience tilts towards maintaining the system.
290. The presenting circumstances demonstrate the relevance of the doctrine of proportionality. This doctrine is a legal method used by courts, typically constitutional courts, to decide hard cases, which are cases where two or more legitimate rights collide. In such cases a decision necessarily leads to one right prevailing at the expense of another. In order to decide such cases correctly, the court must balance the satisfaction of some rights and the damage to other rights resulting from a judgment.
291. The next issue would be whether the grant of the orders sought would cause irreparable damage to the respondents and Wanjiku all together owing to the public resources already used. Specifically, as at 11th November, 2021 Ksh 77,163,487,960/= had been appropriated for CBC implementation and Ksh 8 billion had been used to construct Junior Secondary classrooms in each public secondary school. Granting the orders as sought will lead to a wastage of Government resources and taxpayers' money which will lead to a colossal loss of public funds. This will ultimately offend article 232 of the Constitution.
292. In addition, the 4th respondent in a bid to further implement the CBC advertised thousands of vacancies in its advert of December 22, 2022 where it sought to employ 9000 secondary school teachers, 1000 primary school teachers, 21,550 teacher interns for junior secondary schools, and 4,000 teacher interns for primary schools. Granting the orders as sought in the circumstances will amount to loss of employment as well as a wastage of all the resources that the government has invested in the retooling/training of the teachers.

Whether the 1st respondent acted contrary to the law by relying on Basic Education Curriculum Framework 2017 and Sessional Paper No. 1 of 2019 without amendment to Section 41 of the Basic Education Act.

293. The petitioner's case is that CBC was implemented on the basis of Basic Education Curriculum Framework 2017 and Sessional Paper No 1 of 2019 without the necessary legislation. On that basis, he seeks reliefs, in particular in prayers (a), (c), (d), (e), (f) & (h) for declarations and orders by way of redress. It is his case that Section 41 of Basic Education Act ought to have been amended to introduce the new system.
294. From the responses, the chronology of events leading to the implementation of the CBC was as follows; The Ministry of Education formulated the Ministry of Education Sessional Paper No 1 of 2019 on a Policy Framework for Reforming Education and training for sustainable development in Kenya in order to address the long standing vision to reform the existing structure of basic education. The



Sessional Paper was tabled before the 6th respondent on the March 5, 2019 and thereafter committed to the Departmental Committee on Education and Research for consideration.

295. The Sessional Paper was withdrawn and another one tabled before the house on the April 25, 2019 and subsequently passed on September 17, 2019. We confirm from the record that no amendment to section 41 of the Act was passed to implement this policy.
296. While we acknowledge this omission on the part of the respondents, it is worth noting that the petitioner approached the court over 2 years after the implementation of CBC. No evidence has been tendered to explain the inordinate delay. As would be seen in our previous analysis, as at the time of the filing of the petition, CBC was already at an advanced stage. Therefore, despite the lapse on the part of the respondents acceding to the petitioner's plea would be tantamount to throwing the baby out with the bath water.
297. We are alive to our power and duty to remedy omissions like the one before us through the grant of appropriate reliefs outside article 23(3) or the reliefs sought in the petition by way of structural interdicts. This petition is a suitable case for such intervention.
298. The Report of the Presidential Working Party On Education Reform (PWPER) identifies the gap in section 41 of the *Basic Education Act* wherein they made a recommendation for the amendment of the said Section to provide for the system and structure of education in Kenya. Granting the orders as sought by the petitioner will offend public interest and prejudice children irreparably. In any event the petitioner did not tender any evidence to show any prejudice that he would suffer should the CBC continue being implemented in Kenya.

Whether the petitioner is guilty of Laches

299. The petition herein was filed on September, 16th 2021 while the CBC was rolled out in 2018 as pilot phase, and in 2019 as the effective rolling out date. A child who started CBC from the piloting stage [2018] had by the time of filing the petition spent about four (4) years in the system; and for the child who started CBC from its effective implementation [2019] had at the time of filing spent three (3) years in the system. The petitioner brought this petition about four (4) years after the pioneer class of CBC.
300. The question that arises then is whether the delay in filing of the petition is inordinate and inexcusable. It is not lost on the court that the issues raised in the petition and the remedies sought are of great public interest and would have far reaching ramifications on education in the country and children's constitutional right to education. It cannot be gainsaid that a timeous filing of the petition was necessary.
301. The Court of Appeal in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koeb & 4 others* [2018] eKLR defined laches as follows;
- “Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See Republic of Philippines v Court of Appeals, GR No 116111, January 21, 1999, 301 SCRA 366, 378-379).
302. While addressing the issue of whether or not the law provides for a time limit within which a party can file a claim for violation of constitutional rights the Court of Appeal in the case of *Peter N*



Kariuki v Attorney General [2014] eKLR, Civil Appeal No 79 of 2012, cited with approval the case of *Kamleshman Sukhlal Damji Pattni & another V Republic*, HC Misc App No 322 of 1999, (unreported) where the High Court noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. However, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court.

303. We have gone through the record and noted that there is no attempt on the part of the petitioner to explain the delay. In our considered view, and in the circumstances of this case, the delay herein is inordinate and inexcusable.

Whether there was public participation in the implementation of CBC.

304. Public participation has been defined by courts as referring to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms.
305. Public participation in public affairs depends on the specific issue and requires four basic parameters. First, the public should have reasonable access to the information they are asked to provide their views on. Second, the information should be made clear and understood, with language being a crucial factor. Third, the public should have sufficient time to interrogate the information and provide their views. Fourth, there should be a defined process for the public or stakeholders to respond to the matter. This approach ensures that the public has a clear understanding of the matter at hand.
306. Public participation should be more than a mere formality; it should enable individuals to express their viewpoints, thereby guaranteeing the fulfillment of legal and constitutional obligations.
307. The same does not require everyone to share their views, as this would give a virtual veto power to each individual in the community. However, a program must show intentional inclusivity and diversity, avoiding attempts to exclude genuine stakeholders. The subsidiarity principle should be considered when designing a public participation regime, ensuring those most affected have a bigger say and their views are deliberately sought and considered.
308. The High Court in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR while referring to the South African decision in *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The *Black's Law Dictionary* 10th Edition defines ‘consultation’ as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.



121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected Section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the court addressed the concept of consultation in the following manner: -

...A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* while dealing with the aspect of public participation in lawmaking process stated as followed: -

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.

125. In *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT73/05A), the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. 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.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* referred to *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (supra)* the court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

- a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account



both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

- b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v Attorney General & another ex parte Hon Francis Chachu Ganya* (JR Misc App No 374 of 2012). In relevant portion, the court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”
- d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or



engaging in democratic theatre so as to tick the constitutional box.

- f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.”

309. It is borne out of record that the respondents and particularly the 1st respondent had serious engagements with major stakeholders including, the public, learners, Kenya National Union of Teachers, Kenya Union of Post Primary Teachers, field officers and faith-based organizations in the various steps towards the implementation of CBC. It is also confirmed that the 1st respondent worked closely with the 2nd, 3rd and 4th respondents as the latter executed their respective mandates under the law. The 1st respondent also actively engaged the 5th respondent, 2nd, 3rd and 4th interested parties, key stakeholders in the education sector.

310. Within this background therefore, the respondents in our considered view achieved the legal threshold for Public participation as envisaged in law. In the premises, the claim by the Petitioner that there was no engagement with the stakeholders and the public is devoid of merit and we so hold.

Whether the Doctrine of Avoidance is applicable

311. The constitutional avoidance doctrine was addressed by the Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Pet 14A, 14B & 14C of 2014 of [2014] eKLR where it held as follows:

“(105) We shall now turn to the constitutional-avoidance doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. *Black’s Law Dictionary*, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

(106) The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Pet 14A, 14B & 14C of 2014 of [2014] eKLR held:

(256) ...The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

312. From the materials placed before us we are satisfied that there were numerous stakeholder and public engagements that were held by the Respondents before the CBC was rolled out. These included consultative forums, training, seminars, validation workshops, meetings to develop curriculum, call for memoranda through the daily newspapers, consultative processes involving relevant government agencies and authorities, teachers’ unions, parents and pupils.

313. In view of the above the petitioner had a forum within which to agitate his concerns for consideration and possible redress.



314. In the case of *Erick Mugambi v Ministry of Education, State Department of Basic Education and Kenya Institute of Curriculum Development* Mombasa High Court Petition No 49 of 2017, Ogola J faced with similar issues and in dismissing the petition before him made the following remarks:

“Before ending this judgment this court has taken judicial notice that the implementation of new education curriculum has been delayed for a further one year to enable the outstanding issues to be thrashed out. The petitioner still has a window of time to persuade the respondents to adopt his views or his concerns before the full implementation of the new curriculum begins”

315. Unlike the petitioner in Petition No 49 of 2017 above who fully participated in the process which developed the new education curriculum, the petitioner herein did not attend any of the foregoing important engagements.

316. Further it is important to note that when the Presidential Working Party on Education Reform was set up on September 29, 2022, members of the public were invited to present their concerns on matters of education reforms. The petitioner has not indicated that he participated in said forum. When the report was finally released to the President on 9th of June, 2023 the said report was filed in court and parties herein were given an opportunity to comment or make submissions on the same. The Petitioner informed the court that he had no reactions to post.

317. The court had occasion to look at the report and among the many recommendations in the report, the court took note of the fact that there was a recommendation touching on matters around the *Basic Education Act* and in particular sections 41, 43 and regulation 79(b) of the *Basic Education Regulations* 2015. We shall be adverting to this report later in our judgment.

318. We are of the view that the petitioner, just like the petitioner in Petition No 49 of 2017 above, had available forum within which to have his issues resolved other than through this petition which includes the opportunity to present them to the Presidential Working Party on Education Reform.

Whether or not the CBC exposes children to child labour

319. The petitioner has pleaded that the introduction and implementation of CBC constructively designates children as recruits for casual labour and arbitrarily imposes vocational training approaches meant for adults on children in contravention of articles 21(3), 53(1)(b) and (d) and 53(2) of the *Constitution*.

320. In rejoinder, the 1st respondent asserts that CBC seeks to empower the child with life skills and is therefore not a tool for child labour. It is urged that the 2nd respondent has always been keen to ensure child labour prevention is anchored in the curriculum and curriculum support materials. Further, that CBC is keen on exposing children to hands on learning activities referred to as projects.

321. Section 2 of the *Children Act* defines child labour as follows:

“child labour” means work done by a child which— (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development;

322. Further, section 2 of the *Employment Act* 2007 defines worst form of child labour as follows:

“worst form of child labour” with respect to juveniles, means their employment, engagement or usage in any activity comprising of— (a) all forms of slavery or practices similar to



slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory recruitment of children for use in armed conflict;

323. The High Court in *JMA (minor suing through the uncle and next friend A A M) V Paul Njogo Kibara* [2005] eKLR at paragraph 5 observed as follows:

“5. I am of the belief that both parties are misconceived in this suit as to the real issues in question. This suit is really one concerning TORT under the common law. It is not a matter of whether the defendant had ordered the minor to work or not. To my mind there is nothing wrong for children to work to earn a vocation during their spare time in order that they become responsible citizens. A child who works does so as part of her or his education. Where, on the other hand, the work exceeds the children’s rights to education, to play and the rights to their basic rights then this becomes child labour and as such whoever is responsible should be compelled to stop and if they don’t are to be punished.” (Emphasis Added)

324. What the petitioner describes as child labour, in the court’s view, are activities that the CBC has adopted so as to enable the respondents to promote, protect and fulfil the right to education for the child towards the realization of articles 43 and 53 of the Constitution as well as the State obligations as set out in the Vision 2030 and the East African Treaty in so far as preparing the children for the labour market is concerned.

325. From the material placed before the court, we are satisfied that the shift to CBC is necessary in the evolving technological and industrial advancements to ensure that necessary relevant skills are imparted on learners.

326. It is this court’s finding, and we so hold, that no evidence has been placed before us to demonstrate that CBC constructively designates children as recruits for casual labour.

Whether the materials used in CBC are a threat to the Environment.

327. The petitioner accuses the respondents of introducing and implementing a system and structure of education under the CBC which require single use of course books per child per grade thereby increasing the risk of environmental degradation in contravention of articles 21(3), 42 and 69(1)(g) and (h) of the *constitution*.

328. On the part of the 1st respondent, it is deponed that heads of institutions are guided within the provisions of the instructional materials vote head on how to purchase appropriate covers which can protect the text books from wear and tear ensuring that they are covered until they attain the 4 years book shelf life and beyond.

329. It is urged that the books are biodegradable and that schools have been working with industries which collect old books and recycle them. Further, that environmental conservation is one of the areas that learners are being taught under CBC.

330. The burden of proof was on the petitioner to demonstrate that the course books were a threat to the environment. No evidence whatsoever was placed before us in this regard and the petitioner therefore fails to prove this limb.



Whether the CBC amounts to discrimination against children, subjects them to torture and takes away their freedom of expression.

331. Upon perusal of the documents before us, the court is invited to interrogate whether or not the vocational education and training adults in vocational approaches conceptualized for specific use in training adults in Kenya as introduced in the education system in the form of CBC amounts to discrimination against children, subjects them to torture and takes away their freedom of expression.
332. Besides making the above allegations the petitioner was expected to avail evidence in support, which he has not done. Therefore, the same remain bare allegations.

Whether Dr Fred Okengo Matiang’i and Prof George Albert Omore Magoha (Deceased) contravened Section 41 of the Basic Education Act and violated the Constitution.

333. The case against Prof George Albert Omore Magoha has since been withdrawn as the 8th respondent is now deceased.
334. It is the petitioner’s case that the 7th respondent was the Cabinet Secretary responsible for matters relating to Basic Education during the material time. It is contended that he has denied, violated, infringed and further contravened the Constitution of Kenya in so far as the rights of children to education and free and compulsory education is concerned, by his failure to comply with sections 39, 41, 73 and 74 of the Basic Education Act and, further, that he has contravened articles 2(1) & (2), 3(1), 10, 53(1)(c), 73, 75, 95(3), 153(4)(a), (b) and 232.
335. The 7th respondent in his reply maintained that he is wrongly enjoined in this petition as he has no personal interest and/or desire independent of the duties vested upon him and which were executed in his capacity as Cabinet Secretary and in compliance with the Constitution. He urges that the Basic Education Act does not purport to set out a specific and precise Education Structure which cannot be altered or changed. He denies any constitutional violations on his part.
336. Article 236 of the *Constitution* provides as follows on public officers;

“Protection of public officers.

A public officer shall not be—

- (a) victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

Similarly, section 22 of the National Government Co-ordination Act provides as follows;

22. Protection from personal liability

Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand.

337. It is clear from the constitutional edict that a public officer is not liable for anything done in execution of the functions of his office if done in good faith. We hasten to add that, where a statute expressly provides for a specific action by a Cabinet Secretary or any Public Officer, as the case maybe, the legal duty must be discharged in default of which censure or sanction may be decreed by court. We have



noted earlier in this judgement the inaction by the Cabinet Secretary to make regulations as required under section 73 of the *Basic Education Act*. This court takes judicial notice of the fact that despite the 7th respondent's involvement in the initial stages of transition to the CBC, by the time CBC was implemented, he had long left the Ministry of Education having moved ministries on January 26, 2018. In those circumstances, the alleged violations and extent of liability on his part as a person has not been established and/or proved to a degree of certainty and we would be reluctant to visit any censure or sanction on him.

Whether an injunction or conservatory order should issue restraining the 1st, 2nd, 3rd and 4th respondents from further implementing the CBC.

338. In his petition, the petitioner seeks for injunction and conservatory orders against further implementation of the CBC. The principles applicable in the issuance of conservatory orders and injunctions are well settled. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court rendered itself as follows:

- “(86) “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 the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “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 a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
- (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:
- (i) the appeal or intended appeal is arguable and not frivolous; and that
 - (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- (88) These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:
- (iii) that it is in the public interest that the order of stay be granted.
- (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution. This court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants



at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.”

Further in the case of *Independent Electoral and Boundaries Commission & 4 others v David Ndi & 312 others; Ojwang & 4 others (amicus curiae)* (Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated)) [2021] KECA 363 (KLR) (20 August 2021) (Judgment) (with dissent)

339. In addition, this court stated in *Obuya Bagaka vs. Kenya School of Government* (*supra*):

“There is, however, more to consider beyond the criteria in *Giella v Cassman Brown* when considering an application for conservatory orders. Applying the principles set by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*), considerations such as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.” (Emphasis added).

340. We have considered the prayer for injunction and conservatory order. We find no evidence in support of either and therefore the legal threshold for injunction or conservatory order has not been achieved. In any event, we have already expressed ourselves on the question of the great public interest and likely prejudice that will be visited on the children of this country and the general disruption and disorder that would occur should implementation of CBC be stopped at this stage. On the flip side of the coin, the petitioner has not demonstrated any prejudice he would suffer should the implementation continue.

What orders/reliefs should be granted?

341. On the basis of the material before us, and the findings made herein above, the question that now arises is what orders should issue? This being a constitutional petition we are alive to the powers of this court to grant reliefs outside the reliefs provided under article 23(3) of the Constitution or even outside the prayers in the petition.

342. We are guided by the decision of the Supreme Court in the case of *Mitu-Bell Welfare Society* (*supra*) where the court observed as follows;

“What is the place of Structural Interdicts (if any) as forms of relief in human rights litigation under the Constitution?”

In considering this issue, we regard article 23(1) and 23 (3) of the Constitution to be the launching pad of any analysis into the place and scope of interim orders in our human rights enforcement architecture. Article 23(1) of the Constitution provides that:

“The High Court has jurisdiction, in accordance with article 165, to hear and determine applications redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights” (Emphasis added).

Article 23(3) of the Constitution provides that:

“In any proceedings brought under article 22, a court may grant appropriate relief, including:

(a) a declaration of rights



- (b) an injunction
- (c) a conservatory order
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
- (e) an order for compensation
- (f) an order of judicial review

118. The Supreme Court had occasion to consider the scope of article 23(3) of the Constitution, as read with article 165(3)(d) of the Constitution in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); The court stated:

“... a close examination of these provisions (article 23(3) and 165(3)(d) of the Constitution) shows that the Constitution requires the court to go even further than the US Supreme Court did in the Marbury, and that article 23(3) grants the High Court powers to grant appropriate relief “including” meaning that this is not an exhaustive list.”

343. Further illumination on the matter is found in the case of *County Government of Kilifi v Ethics & Anti-Corruption Commission* where Odunga, J, (as he then was) observed the elements of a structural interdict as followed in five steps:

- i. The first step involves the court identifying how a particular right has been violated or how the government has failed to honour its obligation in regards to the right and making a declaration to that effect.
- ii. Second, the court compels the government to comply with its constitutional responsibilities.
- iii. Third involves ordering the government to submit a comprehensive report under oath, detailing the ways it will remedy the violations in question. The government tables the report before the court by a specified date. The plan itself should also bear timelines for achieving various milestones identified within it.
- iv. Fourth, the court evaluating the plan before it and weighing whether or not it adequately remedies the situation. This stage intertwines the judiciary and the other branches of government in the implementation of policies.
- v. The Fifth stage comes in when the government fails to adhere to the plan in place which amounts to contempt of court



344. In prayer (g) of the petition the petitioner sought the following:

“An order be and is hereby made directed to the 1st and 2nd respondents to draw regulations in respect to policy and guidelines on curricula in accordance with sections 73 and 74 of the Basic Education Act No 14 of 2013 and Section 4 of the Kenya Institute of Curriculum Development Act No 4 of 2013 respectively and table the same before the 6th respondent for approval within 90 days of the making of the order in that regard”.

345. On our part, recognizing that regulations under section 73 of the Basic Education Act have not been made, and in order to ensure standards, quality and relevance in curriculum development is continuously developed, reviewed, evaluated and monitored, the court holds the view that an order is necessary to ensure such regulations are in place.

346. Further, that we interacted with the report of the Presidential Working Party on Education Reform from where we noted that there were numerous recommendations on the Education Sector, with specific timelines for implementation. We are satisfied that the recommendations if implemented would impact positively on the CBC system and the education sector generally.

347. In that regard, we are minded that an order is necessary to ensure the implementation of the recommendations necessitating monitoring, evaluation and implementation of the report.

348. The court further notes the need for capacity building and awareness creation on the recommendations as generated by the report on The Presidential Working Party on Education Reform.

Disposition

349. From the material placed before the court, and for reasons above stated, it is our finding that the petitioner has not proven his case to the required degree and we so hold. The following orders shall issue.

1. The petition dated September 16, 2021 is hereby dismissed.
2. The 1st respondent shall initiate the process of amending section 41 of the Basic Education Act to align the structure of education with the CBC within 120 days.
3. The 1st respondent shall make regulations as demanded of him by section 73 of the Basic Education Act No 4 of 2013 within 120 days.
4. The 1st respondent shall set up a committee to ensure the implementation of the recommendations of the report of The Presidential Working Party on Education Reform dated June 9, 2023 within 90 days of today's date.
5. We make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JUNE, 2024

.....

LADY JUSTICE H. I. ONG'UDI

JUDGE

.....

JUSTICE A.K. NDUNG'U

JUDGE



.....

JUSTICE J. CHIGITI (SC)

JUDGE

In the presence of:

- for Petitioner
- for 1st Respondent
- for 3rd Respondent
- for 4th Respondent
- for 5th Respondent
- for 6th Respondent
- for 7th Respondent
- for 8th Respondent
- for 1st Interested Party
- for 2nd Interested Party
- for 3rd Interested Party
- for 4th Interested Party
- for 5th Interested Party

