



**Ali v Cabinet Secretary, Ministry of Education, Science and Technology
& another (Petition E296 of 2022) [2024] KEHC 10539 (KLR)
(Constitutional and Human Rights) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E296 OF 2022

LN MUGAMBI, J

SEPTEMBER 3, 2024

BETWEEN

DR CHRISTOPHER GALGALO ALI PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE AND
TECHNOLOGY 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

The failure by the Cabinet Secretary, Ministry of Education, to establish the Education Standards and Quality Assurance Council (ESQAC) was an affront to the rule of law principle

The case challenged the 1st respondent (Cabinet Secretary, Ministry of Education, Science & Technology) failure to set up and operationalize the Education Standards and Quality Assurance Council (ESQAC) in compliance with sections 66 and 67 of the Basic Education Act which mandated the Council to uphold quality assurance in basic education in Kenya. The court ordered the 1st respondent to establish, in accordance with section 64 of the Basic Education Act, the Education Standards and Quality Assurance Council (ESQAC) and to appoint relevant officers as by law envisaged and to prescribe such regulations necessary to give effect to the terms of ESQAC as spelt out in Basic Education Act within 60 days from the date of the judgement.

Reported by Robai Nasike

Constitutional Law – fundamental rights and freedom – rights of children – best interest of the children – where the Cabinet Secretary Ministry of Education omitted to establish a quality assurance body provided by statute - whether the Cabinet Secretary’s (Ministry of Education) omission to appoint the Education Standards and Quality Assurance Council (ESQAC) and Quality Assurance Officers violated the rights of children under Article 53 of the Constitution – Constitution of Kenya, 2010, article 53.

Constitutional Law – national values and principles of governance – rule of law – upholding the rule of by the Executive – where the Cabinet Secretary Ministry of Education omitted to establish a quality assurance body



provided by statute – whether the Cabinet Secretary’s (Ministry of Education) omission to appoint the Education Standards and Quality Assurance Council (ESQAC) and Quality Assurance Officers undermined the principle of rule of law and violated the rights of children under Article 53 of the Constitution – Constitution of Kenya, 2010, articles 10 and 53; Basic Education Act, section 64.

Brief facts

The petition was filed, alleging that the 1st respondent had failed to set up and operationalize the Education Standards and Quality Assurance Council (ESQAC) in compliance with sections 66 and 67 of the Basic Education Act which mandated the Council to uphold quality assurance in basic education in Kenya. It was contended that the continued non-operationalization of the ESQAC and the non-appointment of the quality assurance officers amounted to psychological torture on the teachers and students. Inevitably, the respondents had violated the children’s right to access basic education as envisaged under article 53(1)(b) of the Constitution.

Issues

Whether the Cabinet Secretary’s (Ministry of Education) omission to appoint the Education Standards and Quality Assurance Council (ESQAC) and Quality Assurance Officers undermined the principle of rule of law and violated the rights of children under Article 53 of the Constitution.

Relevant provisions of the Law

Basic Education Act, Section 64

Section 64

- 1) *There shall be established an Education Standards and Quality Assurance Council.*
- (2) *The Education Standards and Quality Assurance Council shall—*
 - (a) *ensure standards and maintain quality in institutions of basic education;*
 - (b) *administer policies and guidelines set for basic education;*
 - (c) *supervise and oversee curriculum implementation and delivery;*
 - (d) *in cooperation with county education, monitor the conduct of assessments and examinations in institutions of basic education;*
 - (e) *monitor and evaluate standards and quality in basic education.*
- (3) *The Cabinet Secretary shall by regulations prescribe the composition, appointment and terms of service of the members of Education Standards and Quality Assurance*

Held

1. The word ‘shall’ was used in Section 64 of the Basic Education Act which provided for the establishment of the Education Standards and the Quality Assurance Council (ESQAC). Unlike situations where the Executive may have been given a discretion to exercise, Parliament did not leave any room for maneuver by the Executive in regard to the establishment of the Education Standards and Quality Assurance Advisory Council (ESQAC). It had not given the Executive (the Respondents) the latitude to fail to act, delay or implement section 64 in piecemeal manner. That was why section 64 was couched in the mandatory word ‘shall’. To allow the respondent to act as it wished would be to diminish the authority law and by extent that of Parliament against the Constitutional doctrine of separation of powers.
2. Section 64 of the Basic Education Act should be read alongside Article 10 (2) (a) which incorporated the rule of law principle as part and parcel of values and principles of governance. To allow the respondents to abdicate a compulsory statutory obligation was to condone arbitrariness which offended the rule of law. Besides, it would be denying the Children the benefit of getting quality education standards which was the objective behind that provision in the Basic Education Act that was geared toward ensuring that quality education standards were maintained through that structure.



3. The respondents' argument that the petitioner did not demonstrate by way of evidence that educational standards had fallen due to non-establishment of the ESQAC Council was untenable. What was in issue was the arbitrary refusal to implement an express statutory provision for which it had no discretion to exercise. The conscious failure to appoint the ESQAC Council against an express statutory provision entitled the Court to review the inaction of the respondents on the basis of the rule of law principle which was the hallmark of Kenya's Constitutional democracy. The Executive did not have the Constitutional power to disregard specific duty imposed by the Statute. It was thus not a question of evidence per se but the duty to respect and uphold the law and constitutionalism that was in issue.
4. Deliberate failure to enforce a specific statutory provision whose objective was clear amounted to undermining the achievement of the stated purpose to the detriment of the public. The petitioner's duty ended at establishing that the 1st respondent had failed to enforce an express legal duty to promote education standards by appointing an oversight body (ESQAC). Despite the mandatory nature of Section 64 of the Basic Education Act, the 1st respondent could not explain why it failed to execute the mandatory duty imposed by the Basic Education Act to establish the ESQAC Council.
5. The establishment of ESQAC was a legal command that was not subject to the 1st respondent's discretion. The failure by the 1st respondent to establish the ESQAC against the requirement of section 64 was an affront to the rule of law principle under article 10(2)(a) on values and principles of governance and was invalid and unconstitutional. Fundamentally, under the separation of powers principle, Parliament which was vested with law making authority directed how the law shall be implemented and where it decided Executive shall have no discretion and shall act as directed, then it would be allowing the executive to overreach by giving it the latitude to disregard or suspend the law yet it did not have such powers under the Constitution.

Petition allowed.

Orders

- i. *A declaration was issued that the 1st respondent's (Cabinet Secretary Ministry of Education) default in establishing the Education Standards and Quality Assurance Council against the express provisions of Section 64 of the Basic Education Act was against the rule of law principle which formed part of values and principles of governance under Article 10 (2) (a) and further undermined the objective to attain quality education under Article 53 of the Constitution hence the omission to implement that specific legal provision was invalid and unconstitutional.*
- ii. *An order of Mandamus was issued compelling the 1st respondent to establish in accordance with Section 64 of the Basic Education Act, the Education Standards and Quality Assurance Council (ESQAC) and to appoint relevant officers as by law envisaged and to prescribe such regulations necessary to give effect to the terms of ESQAC as spelt out in Basic Education Act within 60 days from the date thereof.*
- iii. *Being a public interest litigation, there were no orders as to costs.*

Citations

Cases

Kenya

1. *Aluvaala, Daniel Ingida & Juliet Komagum Adong v Council of Legal Education & Kenya School of Law* (Petition 254 of 2017; [2017] KEHC 2775 (KLR) — (Explained)
2. *Anarita Karimi Njeru v Republic* (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) — (Followed)
3. *Gulleid v Registrar of Persons & another* (Petition E007 of 2021; [2021] KEHC 110 (KLR) — (Applied)
4. *Judicial Service Commission v Mbalu Mutava & another* (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) — (Explained)



5. *Kiriro Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office* (Petition 254 of 2019; [2020] KEHC 8819 (KLR) — (Followed)
6. *Magare, Calvin Ouma & 18 others v Director of Public Prosecutions, Attorney General, Inspector General of Police, Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & Ibrahim Wesonga Herese* (Constitutional Petition E004 of 2021; [2022] KEHC 1460 (KLR) — (Explained)
7. *Matiba v Attorney General* ([1990] KLR 666) — (Mentioned)
8. *Mburu, Susan Wangari & 5 others v Eldoret Water & Sanitation Company Limited & Uasin Gishu County Government* (Constitutional Petition 3 of 2020; [2021] KEELC 1429 (KLR)) — (Explained)
9. *Mutuku, Ndambuki Matingi v Rafiki Microfinance Bank Limited* (Constitutional Petition 10 of 2021; [2021] KEHC 9059 (KLR) — (Explained)
10. *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) — (Explained)
11. *Nyakundi, Peter O & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another* (Petition 24 of 2015; [2016] KEHC 467 (KLR) — (Explained)
12. *Wabome, Jesse Waweru & 42 others v Kenya Engineers Registration Board & 3 others* (Petition 149 & 207 of 2011; [2012] KEHC 1634 (KLR)) — (Explained)

Canada

Apotex Inc v Canada (Attorney General) [1994] 3 SCR 1100 — (Explained)

United States

Heckler v Chaney, 470 US 821 (1985) — (Explained)

Statutes

Kenya

1. Basic Education Act (cap 211) sections 64(3); 65; 66; 67; 69; part IX — (Interpreted)
2. Basic Education (Education Standards and Quality Assurance Council) Regulations (cap 211 Sub Leg) regulation 9 — (Interpreted)
3. Constitution of Kenya articles 10(2)(a),(b);28; 29(d);43(1)(f); 47(1); 53(1)(b) — (Interpreted)
4. Statutory Instruments Act (cap 2A) section 11(1) — (Interpreted)

Advocates

Mr Harrison Kinyanjui for the petitioner

Mr Christopher Marwa State Counsel, for the respondents

JUDGMENT

1. The Petition dated June 7, 2022 alleges that the 1st respondent has failed to set up and operationalize the Education Standards and Quality Assurance Council (ESQAC) in compliance with sections 66 and 67 of the [Basic Education Act](#) which mandates the Council to uphold quality assurance in basic education in Kenya.
2. The Petition is supported by the petitioner's affidavit in support of similar date and a supplementary affidavit dated November 7, 2023. Consequently, the petitioner is seeking the following relief:
 - a. A declaration do issue that the 1st respondent's (Cabinet Secretary, Ministry of Education) default in appointing the Education Standards and Quality Assurance Council and Quality Assurance Officers as envisaged under sections 66 and 67 of the [Basic Education Act](#)



contravenes and grossly violates the right to quality education guaranteed under article 53 of the Constitution and as enumerated in the Petition herein.

- b. A declaration do issue that pursuant to article 10(2)(a) and (b) of the Constitution, the 1st respondent is bound by the Principles of Patriotism, Public Participation, Transparency, Fairness, Human rights, and Good Governance in the execution of the terms of his portfolio and duties appurtenant to the Education sector in Kenya as spelt out in the applicable statutory regimes, and his failure to appoint the Education Standards and Quality Assurance Council and Quality Assurance Officers to date is a violation of these Principles and Values.
- c. An Order of *mandamus* do issue, to compel the 1st respondent to forthwith (and not later than 14 days from the date of this demand) set up the Education Standards and Quality Assurance Council (ESQAC), to be headed by the petitioner herein (as already appointed) and to appoint and Gazette the relevant officers to work under the petitioner as by law envisaged, and prescribe such of the requisite Regulations necessary to give effect to the terms of ESQAC as spelt out in the Basic Education Act.
- d. An order of *mandamus* do issue, to compel the 1st respondent to forthwith that he forthwith (and not later than 14 days from the date of this demand) authorize the payment of honoraria and applicable allowances to the petitioner for the period he has remained appointed as Chair of the Education Standards and Quality Assurance Council ESQAC, to date, according to the guidelines applicable in that respect under the Salaries and Remuneration Commission.
- e. The Costs of this Petition be awarded to the petitioner.

Petitioner's Case

3. For context, Part IX of the Basic Education Act establishes the Education and Quality Assurance Council (ESQAC) to administer policies and guidelines for quality basic education. The Council's terms of engagement are stipulated under section 66 of the Act.
4. The petitioner depones that on February 4, 2019, the 1st respondent (then Hon. Amina Mohammed) appointed him as the Chairman of the ESQAC. This appointment was to be a term of 4 years, commencing on February 18, 2019. He asserts that as at the time of filing this Petition his appointment had not been varied or revoked and was set to lapse on February 18, 2023.
5. He avers that the honoraria for the position was Ksh 80, 000. He informs that his predecessor, one Kiragu wa Magochi appointed on September 4, 2014 had been paid this sum for his service throughout his term. Furthermore, that the honoraria was equally affirmed and approved by the Salaries and Remuneration Commission vide a letter Ref: SRC/TS/CBT/3/3 VOL II (56). It is his assertion thus that the 1st respondent owes him this payment for the term he served.
6. Following a Cabinet reshuffle in government, the petitioner vide a letter dated April 17, 2019, informed the newly appointed 1st respondent (at the time Prof George Magoha) of his employment details. In addition, he indicated the need to retain him as the Chairperson while seeking guidance for the future of the ESQAC. He asserts that this communication was not responded to.
7. The petitioner proceeded to send a follow up letter on 1 October 7, 2019. In addition to this, he attempted to have a physical meeting with the 1st respondent however this was also futile. Distressed by the lack of response, the petitioner on January 10, 2020 wrote to the Head of Public Service seeking his intervention. Similarly, he sent out a further follow up letter on March 16, 2020 which was also not responded to.



8. The petitioner is aggrieved since he asserts that the 1st respondent is in breach of sections 64 and 65 of the *Basic Education Act*. That is, failure to give effect to the statutory intention of a functional and operational Council as stipulated therein. Considering this, he emphasizes that the dictates of section 66 of the Act have not been met. As a consequence, he claims that there is no oversight authority to monitor and regulate the quality of education in Kenya.
9. He makes known that the Department of Education obtains Kshs 40,000,000 yearly for operationalization of the ESQAC, however this has not been possible or beneficial as the Council remains unfunctional.
10. The petitioner as well contends that the 1st respondent's omission is in violation of the constitutional right to quality education and dignity. Moreover, that the continued non-operationalization of the Council violates the right against psychological torture occasioned on the teachers and students. This is since the curriculum being utilized lacks assessment of quality assurance as required by law. In like manner, he proclaims that the respondents' failure to respond to his correspondence violated his right to a fair and expeditious fair administrative action.

1st Respondent's Case

11. The 1st respondent vide a replying affidavit sworn by Dr Belio R Kipsang on October 18, 2023, asserts that the petitioner's appointment as the ESQAC Chairman was null and void ab initio.
12. The 1st respondent informs that section 64(3) of the *Basic Education Act* empowers the Cabinet Secretary to formulate Regulation with regard to the composition, appointment and terms of service of the Council's membership.
13. It is noted however that the 2019 Regulations were invalid. The 1st respondent makes known that these Regulations were never forwarded to the National Assembly for approval as dictated under section 11(1) of the *Statutory Instruments Act*.
14. For this reason, the 1st respondent claims that since the appointment was null and void ab initio, the petitioner did not render any service or perform any function so as to justify payment of honoraria and the applicable allowances.
15. Equally, the 1st respondent refuted the allegation of lack of quality in basic education terming it as speculative and without a legal basis.

2nd Respondent's Case

16. In response, the 2nd respondent filed its grounds of opposition dated September 28, 2023 on the basis that:
 - i. The Petition is frivolous, vexatious, misconceived, devoid of merit and an abuse of the court process.
 - ii. The appointment of members of ESQAC was based on the 2019 Regulations, (enacted pursuant to section 64(3) of the *Basic Education Act*) which were invalid. This is because the Regulations were never forwarded to the National Assembly for approval as required under section 11(1) of the *Statutory Instruments Act* No. 23 of 2013. As such, they ceased to have any force of law.



- iii. Accordingly, the appointment of the petitioner as the Chairman of the Education Standard and Quality Assurance Council was null and void ab initio. Considering this, the petitioner was not entitled to payment of honoraria and applicable allowances for the period.
- iv. The petitioner has failed to demonstrate the basis for the alleged honoraria payment and neither is it anchored on any known legislation or regulations.
- v. For the foregoing reasons, the relief sought by the petitioner is improper, and therefore incapable of being granted by this court.

petitioner's Submissions

- 17. J. Harrison Kinyanjui and Company Advocates for the petitioner filed submissions dated September 29, 2023. Counsel begun by affirming that the Petition was pleaded with precision and specificity on the violated constitutional provisions thus satisfying the threshold set out in Anarita Karimi Nieru v Attorney General [1979] KLR 54 and Matiba v Attorney General [1990] KLR 666).
- 18. The petitioner as well took issue with the respondents' failure to make its response in a replying affidavit. Reliance was placed in Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning & Ministry of Devolution and Planning & another [2016] eKLR where it was held that:

“As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law.”
- 19. Like dependence was placed in Gulleid v Registrar of Persons & another (Petition E007 of 2021,) [2021] KEHC I 10 (KLR) (27 September 2021) (Judgment). It is worthy to note that the respondents' went on to file their replying affidavit sworn on October 18, 2023.
- 20. Turning to the substantive issue, counsel maintained that the 1st respondent's actions and omissions constituted a violation of the petitioner's and affected Children's right to dignity under article 28 of the Constitution. Reliance was placed in Jesse Waweru Wabome & 42 others v Kenya Engineers Registration Board & 3 others [2012] eKLR where it was held that:

“(c) I hereby declare that the Engineers Registration Board has violated the petitioners right to fair administrative action protected by article 47 (I) of the Constitution and the petitioners right to human dignity protected by article 28 of the Constitution as read with article 55(a) and (c) of the Constitution.”
- 21. Similar dependence was placed in MWK v another v Attorney General & 3 others [2017] eKLR.
- 22. Counsel additionally on violation of article 29 (d) of the Constitution claimed that the continued non-operationalization of the ESQAC and the non-appointment of the quality assurance officers amounts to psychological torture on the teachers and students. Especially now with the new untested Competence Based Curriculum (CBC).
- 23. Counsel avowed likewise that 1st respondent's failure to respond to the petitioner's inquiry constituted a violation of the petitioner's right to fair, expeditious, efficient, lawful, reasonable, and procedurally fair administrative action as enshrined under article 47 (1) of the Constitution.



24. In support counselcited the case of *Judicial Service Commission v Mbalu Mutava Musyimi* [2015] eKLR where it was held that:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a Constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article IO such as the rule of law, human dignity, social justice, good governance, transparency, and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of Constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

25. Inevitably, counselclaimed that the respondents’ had violated the children’s right to access basic education as envisaged under article 53(1)(b) of the *Constitution*. This is since the lack of ESQAC has affected the quality of basic education and hence students are graduating from school without any form of quality assurance putting their credentials into question.

26. Congruently, counselasserted that the petitioner had been treated unfairly in view of the respondents’ conduct following his appointment. Reliance was placed in *Mutuku Ndambuki Matinii v Rafiki Microfinance Bank Limited* [2021] eKLR where it was held that:

“ 50. As regards the right to dignity, in *Ahmed Issack Hassan v Auditor General* [2015] the court held that:

“ ... the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights ... put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”.

Respondents’ Submissions

27. State Counsel, Christopher Marwa for the respondents’, filed submissions dated December 14, 2023where he outlined the issue for determination as whether the petitioner’s constitutional rights had been violated by the respondents.

28. To commence with, Counsel submitted that the petitioner’s requisition to be retained as the Chairperson for the Council was in violation of the 1st respondent’s discretionary power to appoint. Nevertheless, it was noted that Regulation 9 of the *Basic Education (Education Standards and Quality Assurance Council) Regulations*, stipulates the term of office as 4 years. As such the petitioner’s appointment lawfully lapsed on February 18, 2023.In essence, Counsel argued that Prayers (c) and (d) as outlined in the Petition had been overtaken by events.

29. Counsel further argued that the allegation that failure to constitute the ESQAC had compromised the quality of basic education in Kenya was false. This is because section 69 of the *Basic Education Act* makes it clear that the 1st respondent shall in consultation with the relevant departments or agencies and stakeholders through regulations and appropriate measures continuously review, evaluate and monitor policies on standards and relevance in education and training to assure and ensure standards, quality and relevance.



30. For this reason, it was asserted that the respondents' had upheld their mandate to provide the right to education as safeguarded under article 43(1)(f) of the Constitution. Even so, Counsel submitted that the petitioner had not demonstrated how the respondents' had violated this right and neither had the Petition been pleaded with precision in this regard.
31. Reliance was placed in Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR where it was held that:
- “It is trite law that the burden of proving violation or threat of violation is upon the petitioners as was established in *Anarita Karimi Njeru (supra)* and reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. In addition, it is also settled that the petitioners must patently express the manner in which the respondents have violated their rights.”
32. Similar reliance was also placed in Susan Wangari Mburu & 5 others v Eldoret Water & Sanitation Company Limited & another [2021] eKLR.
33. On issuance of the order of *mandamus*, counsel submitted that the petitioner had not met the threshold for grant of this order as set out in Apotex Inc v Canada (Attorney General), [1994] 3 SCR 1100. The court held as follows:
- “i) There must be a public legal duty to act;
 - (ii) The duty must be owed to the applicants;
 - (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - I. A prior demand for performance;
 - II. A reasonable time to comply with the demand, unless there was outright refusal; and
 - III. An express refusal, or an implied refusal through unreasonable delay;
 - (iv) No other adequate remedy is available to the Applicants;
 - (v) The Order sought must be of some practical value or effect;
 - (vi) There is no equitable bar to the relief sought;
 - (vii) On a balance of convenience, mandamus should lie.”
34. Counsel in light of this contended that the prayers sought had been overtaken by events for the reason that the term of office had lapsed, thus issuing the same would be in vain. Additionally, it was noted that the impugned function under section 69 of the Basic Education Act, is ably performed by the 1st respondent.
35. In like manner, it was maintained that the petitioner had failed to show, how the quality of education had been compromised and the legal basis for the alleged honoraria payment. To this end, Counsel



reasoned that the petitioner had failed to sustain his case against the respondents and hence the Petition should be dismissed.

Analysis and Determination

36. From the foregoing account, the issues that arise for determination in my view are:
- i. Whether the respondents' violated the petitioner's rights under articles 28, 29(d), 47 (1) and 53(1)(b) of the Constitution;
 - ii. Whether the respondents' are in breach of their statutory mandate as envisaged under section 64-67 of the Basic Education Act and
 - iii. Whether the petitioner is entitled to the reliefs sought.
37. I will however confine myself to issue No 2 and 3 only in view of the last-minute amendment of the Petition on 24/1/2024 when the matter came up for highlighting of submissions. The Advocate for the petitioner, Mr Harrison Kinyanjui dropped the prayer for *mandamus* on appointment of the petitioner as the Chairman of the Education Standards and Quality Assurance Council (ESQAC) instead adopted a more general relief. The essence of that was that individual claims of violation were extinguished. By the same token, out goes prayer (d) as it cannot stand alone and thus the only viable issue to consider is the issue of the failure to establish the Education Standards and Quality Assurance Council (ESQAC) in line with the provisions of the Basic Education Act. In orally moving this particular amendment, Mr. Harrison Kinyanjui, the petitioner's Advocate explained:
- “Before I commence, I wish to have prayer (c) of the Petition amended due to effluxion of time between lodging of the Petition and now, the petitioner is no longer the person supposed to Head the Education and Standards Quality Assurance Council because his appointment lapsed on 18/2/2023. Second reason, it is proper that the Court issues such expedient orders in line with prevailing circumstances as opposed to state of facts not supported by prevailing circumstances. I have contextually laid the basis of that proposition. Prayer no. (c) we will delete line 3, 4 & 5 ‘... the entire prayer will now read:
- ‘An order of mandamus do issue to compel the 1st respondent Cabinet Secretary Ministry of Education and Technology to formally and not later than 14 days of this order to set up the Education Standards and Quality Assurance Council (ESQAC) and to appoint and gazette the relevant officers as by law envisaged and to prescribe the requisite regulations necessary to give effect to the terms of ESQAC as spelt out in the Basic Education Act.”
38. As such I will thus turn go straight to issue number 2, which is:
- Whether the respondents are in breach of their statutory mandate as envisaged under section 64-67 of the Basic Education Act
39. The respondents' mandate is provided for under the Basic Education Act. It is necessary to set out the relevant Constitutional and statutory provisions relied upon by the petitioner in challenging the respondents non-enforcement decision.
40. Article 53 of the Constitution provides:
- Every Child has the right-
- a) ...



- b) to free and compulsory basic education.
41. On the other hand, the *Basic Education Act* provides as follows in Part IX:

“Standards, Quality Assurance And Relevance.”

section

64. Establishment of the Education Standards and Quality Assurance Council.
- (1) There shall be established an Education Standards and Quality Assurance Council.
 - (2) The Education Standards and Quality Assurance Council shall —
 - (a) ensure standards and maintain quality in institutions of basic education;
 - (b) administer policies and guidelines set for basic education;
 - (c) supervise and oversee curriculum implementation and delivery;
 - (d) in cooperation with county education, monitor the conduct of assessments and examinations in institutions of basic education;
 - (e) monitor and evaluate standards and quality in basic education.
 - (3) The Cabinet Secretary shall by regulations prescribe the composition, appointment and terms of service of the members of Education Standards and Quality Assurance Council in accordance with the *Constitution* and this Act
65. Composition and staff at Education Standards and Quality Assurance Council.
- (1) The Council shall appoint quality assurance and standards officers for the purposes of this Act.
 - (2) The Cabinet Secretary shall by regulation prescribe the following with respect to Education Standards and Quality Assurance Council (ESQAC):
 - (a) the relationship between the Cabinet Secretary and the Director-General;
 - (b) the composition of Education Standards and Quality Assurance Council;
 - (c) functions of key officers of Education Standards and Quality Assurance Council;



- (d) qualifications of members and key staff;
 - (e) the relative autonomy of Education Standards and Quality Assurance Council; and
 - (f) the retention by the Cabinet Secretary of policy making and oversight.
66. Powers of the Quality Assurance and Standards Officers.
- (1) The Quality and Assurance officers shall facilitate compliance with standards by promoting a collegial and collective approach to quality assurance.
 - (2) Education Standards and Quality Assurance Council and Quality Assurance Officers shall provide appropriate incentives for voluntary compliance with the standards and quality assurance in basic education.
 - (3) Subject to subsections (1) and (2) a Quality Assurance and Standards Officers may—
 - (a) at any time enter any basic education and training institution with or without notice to ensure compliance with education standards and regulations
 - (b) require any person responsible for the management of a basic educational institution or teacher or employee—
 - (i) to produce for his or her quality review any time table syllabus, or record book, material or document;
 - (ii) to furnish the Quality Assurance and Standards Officer with such information relating to the teaching or the management of the basic education institution;
 - (c) require by order in writing, the attendance before him or her any person who appears to be acquainted with the facts or circumstances of the case.
 - (d) take such photographs or video recording as the Quality Assurance and Standards Officer deems necessary of the premises and persons reasonably believed to be acquainted with the fact or the circumstances of the case.
 - (4) An officer appointed under this section shall have power to recommend temporary suspension of operations of the



institutions to the County Education Board for a specific period until the basic standards are met.

- (5) A Quality Assurance and Standards Officer may make recommendations to the Teachers Service Commission and County Education Board for necessary action.
- (6) The head, institutional managers, directors, heads or principals shall allow access to all parts and records of the institution.
- (7) On being so requested by an officer appointed under this section, the head principal or any other person responsible for the school shall place at the disposal of the officer all the facilities, records, accounts, notebooks, examination scripts and other materials belonging to the school that the officer may reasonably require for the purpose of the inspection of the school or the inspection or audit of its accounts.
- (8) In this section, "school" shall include any part of the school and any building used in connection with the school, including workshops, dormitories, kitchens, sanatoria, hostels, ancillary buildings and any other buildings on the site of the school.

67. Cabinet Secretary and promoters to be responsible for maintenance of standards.

The Cabinet Secretary, the Teachers Service Commission, the Standards and Quality Assurance Council, the National Education Board, the national quality assurance bodies, and the County Education Boards shall ensure the maintenance of standards, quality and relevance of education and training as provided for under this Act or any other written law.

42. In *Daniel Ingida Aluvaala & another v Council of Legal Education & another* [2017] eKLR the court observed that:

“13. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

14. As such, the respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* and another where the court held as follows:

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law” [3]



15. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[4] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the respondent is constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing examinations offered at the Kenya School of Law.
16. The respondent has not only a statutory duty but also a moral duty to uphold the law and to ensure due compliance with the law and Regulations...”
43. Nevertheless, a 3- Judge bench in *Kiriwo Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR sounded a word of caution to the court reviewing the actions and/or inactions of other arms of government by stating thus:
- “97. A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine...
98. We shall commence with the political question doctrine. Black’s Law Dictionary, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:
- The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government.
99. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government....”
44. Consequently, the court concluded as follows in this respect:
100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government.
45. After rendering the above precaution, the bench proceeded to justify interference by the court in certain circumstances as follows:
- “102. In the *William Odhiambo Ramogi & 2 others v Attorney General & 6 others case [supra]*, the learned judges also dealt with the exceptions to the doctrine as follows:
- [89].. that there are constitutionally permissible situations where
... this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the *Constitution*, or in violation of other provisions of the *Constitution*. The necessity of vindicating constitutionally



secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches.”

46. In the United States case of *Heckler v Chaney* 470 US 821 death row inmates challenged the Food and Drugs Administration refusal to initiate the enforcement action to block the use of certain drugs in lethal injection. The Supreme Court did not agree with the case of the inmates on the grounds that the Drug Agencies decision was dependent on complicated balancing of many factors that were peculiarly within its expertise and was thus better endowed to evaluate those variables than the court would, hence was a matter within its discretion. The Supreme Court however went ahead and made a decision on the guiding standards that may be applied against the presumption of judicial review of an administrative non-enforcement decision based on discretionary deference. The Supreme Court identified specific situations such as where the statute has provided guidelines for the agency to follow in exercising its enforcement powers stating that in such cases, the court will have been supplied with the law to apply in reviewing the decision. The other would be when the administrative agency has adopted a general policy that is so extreme as to amount to abdication of statutory responsibilities.
47. In the present case, the petitioner contended that the 1st respondent's (Cabinet Secretary, Ministry of Education) omission to appoint the Education Standards and Quality Assurance Council (ESQAC) and Quality Assurance Officers provided for under sections 66 and 67 of the *Basic Education Act* undermines the principle of rule of law contained article 10(2)(a) and (b) of the *Constitution* in the execution of portfolio duties appurtenant to the Education Sector in Kenya which dilutes education standards and thus is a violation of article 53 of the *Constitution*.
48. The word ‘shall’ is used in section 64 of the *Basic Education Act* which provides for the establishment of the Education Standards and the Quality Assurance Council (ESQAC). Black’s Law Dictionary defines the word ‘shall’ as follows: “Has a duty to: more broadly, is required to. This is the mandatory sense that drafters typically intend and that Courts typically uphold.”
49. This means unlike situations where the Executive may have been given a discretion to exercise, Parliament which has the constitutional mandate to enact the law, did not leave any room for maneuver by the Executive in regard to the establishment of the Education Standards and Quality Assurance Advisory Council (ESQAC). It did not give the Executive (the respondents) the latitude to fail to act, delay or implement this particular provision in piecemeal manner and that is why it is coached in the mandatory word ‘shall’. To allow the Executive (read respondents) to act as it wishes in the circumstances will be to diminish the authority law and to that extent that of Parliament against the Constitutional doctrine of separation of powers.
50. This Statutory provision should be read alongside article 10(2)(a) which incorporates the rule of law principle as part and parcel of values and principles of governance. To allow the respondents to abdicate a compulsory statutory obligation is to condone arbitrariness which offends the rule of law. Besides, it will be denying the Children the benefit of getting quality education standards which is the objective behind that provision in the *Basic Education Act* that is geared toward ensuring that quality education standards are maintained through this structure.
51. The respondents argument that the petitioner did not demonstrate by way of evidence that educational standards have fallen due to non-establishment of the ESQAC Council is untenable as principally



what is in issue is the arbitrary refusal to implement an express statutory provision for which it has no discretion to exercise. In my view, the conscious failure to appoint the ESQAC Council against an express statutory provision entitles this Court to review the inaction of the respondents on the basis of the rule of law principle which is the hallmark of our Constitutional democracy as the Executive does not have the Constitutional power to disregard specific duty imposed by the Statute. It is thus not a question of evidence *per se* but the duty to respect and uphold the law and constitutionalism that is in issue here. In any event, I would hold that deliberate failure to enforce a specific statutory provision whose objective is clear amounts undermining the achievement of the stated purpose to the detriment of the public. The petitioner's duty ended at establishing the 1st respondent's had failed to enforce an express legal duty to promote education standards by appointing an oversight body (ESQAC). Despite the mandatory nature of section 64 of the [Basic Education Act](#), the 1st respondent could not explain why it has failed to execute the mandatory duty imposed by the [Basic Education Act](#) to establish the ESQAC Council. This in my view is breach of rule of law principle under article 10(2) (a) of the [Constitution](#). The establishment of the ESQAC is a legal command that is not subject to the 1st respondent's discretion. I thus find and hold that the failure by the 1st respondent to establish the ESQAC against the requirement of section 64 is an affront to the rule of law principle under article 10(2)(a) on values and principles of governance and is invalid and unconstitutional. Fundamentally, under the separation of powers principle, Parliament which is vested with law making authority directs how the law shall be implemented and where it decides Executive shall have no discretion and shall act as directed, then it would be allowing executive overreach by giving it the latitude to disregard or suspend the law yet it does not have such powers under the [Constitution](#).

52. Having reached this finding, the reliefs that commend themselves to this Petition are as follows:

- a. A declaration is hereby issued that the 1st respondent (Cabinet Secretary Ministry of Education) default in establishing the Education Standards and Quality Assurance Council against the express provisions of section 64 of the [Basic Education Act](#) is against the rule of law principle which forms part of values and principles of governance under article 10(2) (a) and further undermines the objective to attain quality education under article 53 of the [Constitution](#) hence this omission to implement this specific legal provision is invalid and unconstitutional.
- b. An order of *mandamus* is hereby issued compelling the 1st respondent to establish in accordance with section 64 of the [Basic Education Act](#), the Education Standards and Quality Assurance Council (ESQAC) and to appoint relevant officers as by law envisaged and to prescribe such regulations necessary to give effect to the terms of ESQAC as spelt out in [Basic Education Act](#) within 60 days from the date hereof.
- c. This being a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF SEPTEMBER, 2024.

.....

L N MUGAMBI

JUDGE

