



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

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

**CONSTITUTIONAL PETITION NO. E371 OF 2021**

**- BETWEEN -**

**ESTHER AWUOR ADERO ANG'AWA.....PETITIONER**

**-VERSUS-**

**CABINET SECRETARY RESPONSIBLE FOR**

**MATTERS RELATING TO BASIC EDUCATION.....1<sup>ST</sup> RESPONDENT**

**KENYA INSTITUTE OF CURRICULUM DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATIONS COUNCIL.....3<sup>RD</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS.....5<sup>TH</sup> RESPONDENT**

**NATIONAL ASSEMBLY.....6<sup>TH</sup> RESPONDENT**

**DR FRED OKENGO MATIANG'I.....7<sup>TH</sup> RESPONDENT**

**PROF GEORGE ALBERT OMORE MAGOHA.....8<sup>TH</sup> RESPONDENT**

**-AND-**

**1. JOHN DIRO**

**2. THE KENYA NATIONAL UNION OF TEACHERS (KNUT)**

**3. THE KENYA PRIMARY SCHOOLS HEAD TEACHERS ASSOCIATION (KEPSHA)**

**4. THE KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)**

**5. THE NATIONAL PARENTS ASSOCIATION (NPA)**

**6. SHERIA MTAANI NA SHADRACK WAMBUI**

**7. KATIBA INSTITUTE.....INTENDED INTERESTED PARTIES**

## RULING NO. 1

### Introduction:

1. The Petition in this matter challenges the overhauling and replacement of the system and structure of basic education from early childhood running through to post-secondary commonly known as the 8-4-4 system.
2. Given the immense public interest generated by the Petition several parties showed interest in joining the proceedings.
3. A total of 7 joinder applications were filed by parties seeking to participate as interested parties.
4. This ruling is, hence, in respect of the said joinder applications.

### The Applications:

5. The applications are as follows: -

- (a) Notice of Motion dated 24<sup>th</sup> September, 2021 by John Diro.
- (b) Notice of Motion dated 22<sup>nd</sup> September, 2021 by Kenya Union of Post Primary Education Teachers (KUPPET).
- (c) Notice of Motion dated 21<sup>st</sup> September, 2021 by The Kenya Primary Schools Head Teachers Association (KEPSHA).
- (d) Notice of Motion dated 23<sup>rd</sup> September, 2021 by Katiba Institute.
- (e) Notice of Motion dated 24<sup>th</sup> September, 2021 by the Kenya National Union of Teachers (KNUT).
- (f) Chamber Summons dated 24<sup>th</sup> September, 2021 by National Parents Association.
- (g) Notice of Motion dated 23<sup>rd</sup> September, 2021 by Sheria Mtaani na Shadrack Wambui.

6. The applications were supported by various affidavits, written submissions and Lists of Authorities.
7. Three applications were vehemently opposed by the Respondents. They are the applications by John Diro, Katiba Institute and Sheria Mtaani na Shadrack Wambui.
8. In opposition to the three applications the Respondents filed grounds of opposition, written submissions, Lists of Authorities and a Case Digest.

### Analysis and Determinations:

9. From the reading of the applications, the responses, the submissions and the decisions referred to, whereas the applicants contended that the applications had met the threshold for joinder, the Respondents reiterated their position that the three applications by John Diro, Katiba Institute and Sheria Mtaani na Shadrack Wambui failed to meet the requisite legal threshold.
10. In view of the nature of the applications, the submissions on record and number of parties involved, this Court will not, at this point, necessarily reproduce *verbatim* the respective parties' dispositions and submissions. However, the Court has carefully perused all the documents so far filed in this matter and will take the contents thereof into account in the course of this discussion.

11. I will begin this engagement with a look at the law on joinder of interested parties.

12. The starting point is the Constitution. *Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '*the Mutunga Rules*') define an '**interested party**' to mean: -

***a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation;***

13. The Supreme Court in *Trusted Society of Human Rights v Mumo Matemu & 5 others [2014] eKLR* observed as follows: -

... an interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

14. Later, the Supreme Court further delimited the legal principles applicable in joinder applications. That was in *Petition No. 1 of 2017*

*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR and in Petition No. 15 as consolidated with Petition No. 16 of 2013 Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR.*

15. In **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** the Supreme Court identified the following applicable conditions, and, stated as follows: -

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(i) **The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough,** to stand apart from anything that is merely peripheral.

(ii) **The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**

(iii) **Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.**

16. Apart from the three principles developed by the Supreme Court, *Rule 2* of the Mutunga Rules clarifies that a party seeking to be enjoined as an interested party ought to demonstrate that he/she/it has an **identifiable stake or legal interest or duty** in the proceedings before the Court.

17. In this matter, submissions were made towards a further consideration. It was submitted that a party seeking to be enjoined as an interested party must also demonstrate *unique interest* in the matter. As I will render shortly, suffice to say that if a party who intends to be enjoined as an interested party ought to prove unique interest, then such a party is likely to be caught up in the web of attempting to expand the Petition. I believe a demonstration of an *identifiable stake or legal interest or duty* in the matter should suffice in such applications.

18. Having said so, I will now deal with the objections to the three applications. One of the objections was that from the dispositions and submissions by Katiba Institute, it was evident that Katiba Institute intended to expand the Petition.

19. It was submitted that Katiba Institute raised issues of request for information which issues were not part of the Petition and as such should not be allowed to join the band wagon.

20. On its part, Katiba Institute contended that the issue of request for information was part of the Petition and that it was not in any way intending to expand the Petition. Katiba Institute posited that it was intent in joining the proceedings since the Petition challenges various provisions of the Constitution and the law and that the core mandate of Katiba Institute was to advance constitutionalism, hence it will aid the Court in the determination of the Petition.

21. The position that save for the main parties in a constitutional Petition, any other party is not permitted to in anyway expand the borders of the Constitution is good law and is binding on this Court.

22. The principle has been severally discussed by the Supreme Court. Some of the decisions were integrated by the High Court in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR as under: -

*44. The role of an interested party in proceedings is peripheral as was expressed in **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR**, where the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:*

*[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution...*

*[53] ... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in **Francis Kariuki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR**, as follows (paragraphs 41, 42):*

*Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.*

*Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of*

the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court...

[54] In like terms we thus observed in **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012** (paragraph 24):

A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.

45. Similarly, an attempt to introduce new issues was considered by the Supreme Court in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** viz:

The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.

46. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.

23. Returning to the matter at hand, I have carefully considered the rival submissions and also perused the Petition. Part B of the Petition is on the Legal foundation of the Petition. Paragraph 14(f) and (l) thereof states as follows: -

14. Chapter Four of the Constitution of Kenya entrenches the Bill of Rights as an integral part of Kenya democratic state and the framework for social, economic and cultural policies. Amongst the rights contained in the Bill of Rights are the following:

f. The right to freedom of expression, which includes freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research given under Article 33(1)(a), (b), and (c) of the Constitution of Kenya.

l. The right under Article 47(2) of the Constitution of Kenya to be given written reasons for any administrative action likely to adversely affect a right or fundamental freedom.

24. Further, the Petitioner sought for several prayers including: -

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)(f), 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 Omoro Magoha 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 1 and 2 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, in 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.*

25. The Petition, therefore, raises the issue of request for information in various ways.

26. Katiba Institute holds that it had sought for and received information on the overhauling and replacement of the 8-4-4 system from some of the Respondents. It intended to avail the information into the matter.

27. From the foregoing discourse, it is clear that the issue of request for information on the overhauling and replacement of the 8-4-4 system is part of the Petition. Therefore, any contention that a party seeking to be enjoined in order to avail such or part of the information sought in the Petition seeks to irregularly expand the Petition cannot hold.

28. There was another objection that the three Applicants whose applications were opposed had not demonstrated that they had any identifiable stake in the matter.

29. The Court has also considered the arguments on the issue. I will start with Katiba Institute. The Institute described its nature in the disposition. It also disclosed why it ought to be enjoined in these proceedings. One of the reasons was to avail the information it sought for and received on the subject of the Petition. Another reason was that the Institute fronts for constitutionalism and continues to aid the implementation of the Constitution.

30. This Court will not belabor this point in respect to the Institute. It is the finding of the Court that Katiba Institute has demonstrated an identifiable stake in the matters raised in this Petition.

31. Going by its involvement in the matter long before the Petition was filed, it is the finding of this Court that Katiba Institute has all along had legal interest in the matter. Further, having obtained some information relevant to the Petition, Katiba Institute has a duty to this Court to avail such information.

32. The other application is by one John Diro.

33. I have taken the liberty to reproduce the contents of the supporting Affidavit of the said Applicant, and as under: -

- 1. I am Kenyan parent sponsoring education of various children across Kenya duly conversant and affected by facts of this matter, hence competent to swear this Affidavit;*
- 2. I have seen, read and understood the contents of the Petition No. E371 OF 2021 which challenges the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's development and out of the Kenya Competence Based Curriculum for the basic education commonly known as CBC and the reliance thereupon to phase out and replace the 8-4-4 system and structure of education through the implementation of 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 instead of legislation, in contravention of Section 41 of the Basic Education Act No. 14 of 2013 and The Constitution of Kenya;*
- 3. The government's approach to re-imagine the education system and replace the 8-4-4 curriculum was defective, unprocedural and has consequently left many gaps in the country's curriculum reform process;*
- 4. The review of the current curriculum was not based on the current trends or societal needs, however, the government chose to make an overhaul of the entire education in spite being aware of the lack of proper mechanisms to roll out the new curriculum which has proven to be ineffective and troublesome to our society;*
- 5. Available data on 8-4-4 was deliberately ignored which would have aided the review of the curriculum and also inform on how teachers would interact with students, hence as at now, tutors are ill equipped to handle the curriculum as rolled out;*
- 6. The essence of curriculum review is to re-development is to enhance student, engagement, gain experience and boost outcomes which is meant to learning and teaching more meaningful, effective and rewarding;*
- 7. Experts have postulated that CBC stresses on skills and attitudes, ignoring other crucial components of education and further add that any curriculum which emphasises on competencies (skills) and ignores cognitive abilities such as analysis, evaluation, synthesis and values is not appropriate for basic education learners;*
- 8. Parents and teachers were also not sensitized before the curriculum was rolled hence are almost always surprised by its demands and has subsequently attracted a lot of resistance and criticism;*
- 9. The CBC was also rolled out without public participation which is a constitutional principle enshrined under Article 10(2)(a) of The Constitution of Kenya 2010;*

10. Its noteworthy that courts have without an iota of doubt frowned upon policies and/or legislations that have failed to meet the constitutional threshold and have proceeded to quash such policies and/or legislations;

11. The economic dynamics of CBC which entails the cost of implementation and the financial implication to the parents which has made it only affordable to the rich consequently causing inequality and discrimination which the Constitution abhors and the same is enshrined under Article 27 of the Constitution of Kenya, 2010;

12. From the above foregoing, implementation of CBC failed to consider the cultural demographics of our society hence public schools have already been segregated and are only spectators in this alien curriculum;

13. The CBC has been avoided even by the counties with developed economies and with the best GDP in the world in public schools because of its cost implications;

14. The Ministry of Education has admitted that there is inadequate infrastructure in schools in a taskforce adds that there is inadequate teaching and learning resources in public schools for effective roll out of the CBC, however the 1<sup>st</sup> to 4<sup>th</sup> Respondents being aware of this crucial information have proceeded to implement the curriculum at the detriment of learners in public schools;

15. The CBC curriculum is being imposed on Kenyans and its effect is manifested by the enormous confusion that has engulfed the education sector;

16. From the foregoing, the Applicant/ Intended Interested Party wishes to be enjoined in the instant suit Petition No. E371 of 2021;

17. The 1<sup>st</sup> to 8<sup>th</sup> Respondents' action to continue implementation of the CBC should be stopped forthwith and the initial curriculum being the 8-4-4 should revert;

18. I swear this affidavit in support of the instant Application as it is in the interest of justice that the same be allowed.

34. The Applicant's main standing in the matter is the position that he is a parent sponsoring education of several children across Kenya.

35. A look at the Applicant's disposition and the Petition reveals that all the issues the Applicant intended to raise are squarely raised by the Petitioner. In fact, the Petitioner raised many other issues.

36. As the issues intended to be raised by the Applicant are already before Court, the Applicant failed to demonstrate the prejudice it is likely to suffer if the application is not allowed.

37. As I come to the end of consideration of the application by John Diro, I recall one of his submission that the Court ought to enjoin him as a party since it may as well file a like Petition with the result of finding his way into this matter. I am afraid I do not agree with the Applicant for two reasons.

38. The first reason is that the possibility of a party filing a related Petition is not one of the settled principles in joinder applications. Secondly, if that argument is sustained then any person will have unhindered access into the matter. The result will be that the Court will not be able to make any meaningful progress towards the determination of the Petition.

39. This Court affirms the position that applications for joinder must attain the minimum required legal bar.

40. John Diro, therefore, did not attain the bar required for joinder.

41. Sheria Mtaani na Shadrack Wambui is also one of the Applicants seeking joinder.

42. It described itself as a Non- Governmental Organization fighting for the rights of the parents in informal settlements.

43. The Applicant asserted that it wished to raise the lack of public participation in the implementation of the impugned system.

44. The application, I believe, suffers a similar fate to that of John Diro. The issue is already ably raised by the Petitioner. The Applicant will, hence, not suffer any prejudice if not enjoined.

45. I believe I have covered the objections raised against the three applications.

**Disposition:**

46. Flowing from the above findings and conclusions, the following final orders do hereby issue: -

**(a) The Notice of Motion dated 23<sup>rd</sup> September, 2021 by Shadrack Wambui na Sheria Mtaani and the Notice of Motion dated 24<sup>th</sup> September, 2021 by John Diro are hereby dismissed with no orders as to costs since the Petition herein is a public interest litigation.**

**(b) The Kenya National Union of Teachers (KNUT), The Kenya Primary Schools Head Teachers Association (KEPSHA), The Kenya Union of Post Primary Education Teachers (KUPPET), The National Parents Association (NPA) and Katiba Institute are hereby enjoined in these proceedings as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties respectively.**

**(c) The Petitioner and the Respondents shall within 2 days serve all the documents filed upon the enjoined Interested Parties.**

**(d) The Interested Parties shall then file and serve their respective written submissions on the request for empanelment of an expanded bench in terms of prayers 2 and 3 of the Petitioner's Notice of Motion dated 16<sup>th</sup> September, 2021 within 3 days of service in (c) above.**

**(e) Highlighting of submissions on 22<sup>nd</sup> November, 2021.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2021**

**A. C. MRIMA**

**JUDGE**