



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 424 OF 2014**

**KENYA NATIONAL PARENTS  
ASSOCIATION**

**(THROUGH THE SECRETARY GENERAL-MUSAU NDUNDA).....**  
**PETITIONER**

**VERSUS**

**THE CABINET SECRETARY MINISTRY OF  
EDUCATION**

**PROF. JACOB KAIMENYI.....1<sup>ST</sup>**  
**RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF  
EDUCATION**

**SCIENCE & TECHNOLOGY (DR. BELIO KIPSANG).....2<sup>ND</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner, suing through its Secretary-General, Mr. Musau Ndunda, has filed the present petition to challenge the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to carry out elections for parents’ associations for schools in Kenya. It alleges that by carrying out such elections, the respondents will violate its members’ right to elect officials of their own choice. It therefore seeks the following orders in its petition dated 25<sup>th</sup> August 2014:

**1. That the Honourable Court issues a declaratory order that the 1<sup>st</sup> and 2<sup>nd</sup> respondent by conducting parallel school parents Associations elections are will violate the petitioner’s members’ right to elect officials of their own choice.**

2. *That the Honourable Court issue a declaratory order that the petitioner either by themselves, their agents or servants have the exclusive right to levy and control charges imposed on parents at the school level countrywide and ensure that the funds so collected are deposited in reputable bank account(s) approved by the petitioner.*
3. *That the Honourable Court do issue an order of permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, their servants agents, or persons acting under their authority from conducting parallel elections of the school parents associations, suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees and or in any way whatsoever from interfering with petitioner right to conduct and supervise elections of the school parents associations, sub county parents association, county parents associations and National Parents Association.*
4. *That the Honourable Court do issue an order of permanent injunction to restraint the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, their servants, agents or persons acting under their authority from collecting and or receiving funds from parents or pupils without the petitioners approval*
5. *That the Honourable Court do issue an order of permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, their servants, agents or persons acting under their authority from including in the fee structure, imposing and charging any levy on parents and pupils in public schools without the approval of the petitioner.*
6. *That the Honourable Court do issue an order of mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to freeze all the parents teachers association bank accounts.*
7. *That the Honourable Court do issue an order of mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to deposit all funds held in the parents teachers association bank accounts to school parents association bank accounts.*
8. *That the Honourable Court by the way of order of CERTIORARI do call into court and quash the documents entitle “Operational Guidelines for Parents Association for pre-primary, primary and secondary schools” issued by the 1st and 2nd respondents.*
9. *That the Honourable Court do issue an order of mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to appoint the petitioner’s nominees to the county education boards in compliance with section 20(h) of the Basic Education Act 2013.*
10. *That costs be borne by the respondents.*
11. *That there be any other and further reliefs that this court may deem fit to grant.*

2. The petition is supported by an affidavit sworn on 25<sup>th</sup> August 2014 by Mr. Musau Ndunda. Mr. Ndunda has also sworn a further and a supplementary affidavit in response to the replying affidavits by the respondents. The petitioner also filed submissions in support of its case.
3. The respondents oppose the petition and have filed affidavits in reply sworn by Prof. Jacob Kaimenyi, then the Cabinet Secretary in charge of education, and by the Principal Secretary, Dr. Belio Kipsang. Submissions were also filed on their behalf by the office of the Attorney General.

## The Parties

4. While the petitioner does not directly describe its legal status in its pleadings, it appears from the documents annexed to the affidavit of Mr. Musau Ndunda sworn in support of the petition that it is a society registered under the provisions of the **Societies Act, Cap 108 Laws of Kenya**, on 20<sup>th</sup> August 2014. The petitioner's constitution, also annexed to the affidavit of Mr. Ndunda, indicates that it was revised in December 2012. Mr. Musau Ndunda is described in the pleadings as the Secretary-General and Executive Director of the petitioner. It is not clear from the pleadings who the other officials of the petitioner are as there are no signatories to the copy of its constitution annexed to the affidavit in support of the petition.
5. The petitioner has lodged its claim against the then Cabinet Secretary in the Ministry of Education, Science and Technology, Prof. Jacob Kaimenyi, the Principal Secretary in the State Department of Education in the Ministry, Dr. Belio Kipsang, and the office of the Attorney General as the chief legal advisor of the government of Kenya.
6. Pursuant to an application made in that regard, the **Kenya Secondary Schools Heads Association** was joined to the proceedings as an interested party. The interested party is an umbrella association of the principals or heads of secondary schools in Kenya. Its joinder was necessitated by the fact that some of the prayers sought in the petition are directed at school heads and would directly affect the members of the interested party.

## The Facts

7. What appears to have precipitated the filing of this petition is a decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to call for the election of members of schools parents' associations in accordance with the provisions of the **Basic Education Act, No. 14 of 2013**. The petitioner objected to the proposed elections, arguing that it has the exclusive mandate to carry out such elections. It also objected to certain guidelines issued by the Cabinet Secretary with regard to the conduct of the elections, as well as an email from the Ministry of Education seeking to stop elections then being undertaken by the petitioner. It therefore filed the present petition together with an application for conservatory orders challenging the decision of the respondents.
8. In his ruling dated 17<sup>th</sup> September 2014, Odunga J, while noting that no affidavits had then been filed to controvert the averments of fact by the petitioner, granted the order set out at paragraph 33 of the ruling as follows:

*[33.] "Accordingly I hereby grant a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves, their Servants, Agents or Persons acting under their authority from suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees at the school level and or in any way whatsoever from interfering with Applicant's right to Conduct and Supervise elections of the School Parents Associations, Sub-County Parents Association, County Parents Associations and National Parents Association pending the hearing and determination of this Petition."*

## The Petitioner's Case

9. The petitioner's case is contained in the affidavits sworn by Mr. Musau Ndunda and the submissions filed on its behalf, which were highlighted by its Learned Counsel, Mr. Wamwayi.
10. In his affidavit in support of the petition, Mr. Ndunda sets out the objectives of the petitioner as being to advance, protect and safeguard the interests of Kenyan parents and children on all matters relating to basic education and training in Kenya and more particularly as appertains to pre-primary, primary, secondary, adult education and middle level institutions of basic education.

He relies on the constitution of the 1<sup>st</sup> petitioner, as well as the certificate of registration under the Societies Act dated 20<sup>th</sup> August 2014.

11. Mr. Ndunda avers that he brings the petition on his own behalf and on behalf of the members of the Kenya National Parents Association for breaches of their constitutional rights. He alleges that on or around May 2013 and pursuant to authority granted by the 1<sup>st</sup> respondent on 21<sup>st</sup> February 2013, he and other officials of the petitioner started conducting elections for office bearers of parents associations. They have been conducting the elections at the school, sub county and county levels. The elections were set to culminate with national elections in December 2014.
12. Mr. Ndunda avers that around May 2014, he learnt of the existence of a document developed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent entitled “**Operational Guidelines for Parents Associations for Pre-Primary, Primary and Secondary Schools**” (hereafter “**the Operational Guidelines**”). The document had been emailed to all County Directors of Education countrywide to circulate to all schools within their areas of jurisdiction.
13. According to Mr. Ndunda, while the Operational Guidelines provide guidelines for holding elections at the school level, they are in conflict with the provisions guiding elections of parents associations as stipulated in the petitioner’s constitution. It is therefore his deposition that the Operational Guidelines undermine the petitioner’s powers, functions and mandate to conduct the election of its members at the school level countrywide.
14. Mr. Ndunda avers further that he came to learn of the existence of an email, which had also been circulated to all County Directors of Education across the country, by Mrs. Margaret Thiong’o, the Director of Field Services of the 1<sup>st</sup> respondent. The email made reference to the Operational Guidelines and called upon the County Directors of Education to suspend the petitioner’s elections on the basis that they were not recognized by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Ms. Thiong’o further directed schools that had conducted elections to carry out fresh elections to elect new officials of the schools’ parents associations immediately.
15. It is further deposed on behalf of the petitioner that the contents of the Operational Guidelines and the email amount to violation of the constitutional right of its members to elect office bearers of their choice to parents associations at the school level; that the actions of directing schools parents associations on how to hold elections have subjected the petitioner’s members to regulation and control and violated their constitutional right to freedom of association and freedom to conduct its own affairs without interference from any direction.
16. Mr. Ndunda averred that the petitioner had incurred financial obligations in printing of ballot papers for the elections, and he accused the 1<sup>st</sup> and 2<sup>nd</sup> respondents of abetting, promoting, and condoning illegal collections of funds from parents in public schools by illegal entities such as parents teachers associations, in violation of the petitioner’s right to good governance, integrity, transparency and accountability as enshrined in Article 10 and section 4(d) and (m) of the Basic Education Act.
17. Mr. Ndunda contends that he knows that under the provisions of the Basic Education Act, the petitioner is the only person entitled, through its agents, the schools’ parents associations, to discuss and recommend charges to be levied on pupils or parents, and to safeguard, protect and account for the funds so collected.
18. He asked the Court to issue a declaratory order that the petitioner and its agents or servants have the exclusive right to levy and control charges imposed on parents at the school level country wide, and to ensure that the funds so collected are deposited in reputable bank account(s) approved by the petitioner.
19. Mr. Ndunda further avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have refused to appoint the petitioner’s nominees to County Education Boards across the country while it has nominated persons from

- other stakeholders such as the Kenya National Union of Teachers (KNUT) the Kenya Secondary School Heads Associations (KSSHA) and the Kenya Primary School Heads Association (KPSHA). He accuses the 1<sup>st</sup> and 2<sup>nd</sup> respondent of subjecting members of the petitioner to discrimination and unequal treatment and thus violating their right to public participation in decision making under section 4(1) of the Basic Education Act.
20. Mr. Ndunda swore a further and supplementary affidavit in response to the affidavits sworn on behalf of the respondents by Prof. Kaimenyi and Dr. Belio Kipsang. In his further affidavit, Mr. Ndunda avers that letters dated 23<sup>rd</sup> April 2014 and 6<sup>th</sup> November 2014, which he relies on but are denied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, were properly addressed to the petitioner and were never retracted or recanted by the respondents; that the petitioner's nominees were appointed by the 2<sup>nd</sup> respondent as council members for the Education Standards and Quality Assurance and as members of the National Council for Nomadic Education in Kenya (NACONEK) respectively and consequently the respondents cannot be heard to say that the letters were released in error.
21. It is also Mr. Ndunda's averment that following authority given to the petitioner in a letter of authority from the late Minister for Education, Mr. Mutula Kilonzo, dated 21<sup>st</sup> February 2013, the petitioner held elections on 20<sup>th</sup> December 2013 at the 1<sup>st</sup> Annual General Meeting of the petitioner pending the National Delegates Conference, and he submitted a list of interim officials to the Registrar of Societies and paid for it. He also avers that he convened the 7<sup>th</sup> National Delegates Conference of the petitioner on 30<sup>th</sup> January 2015 and national office bearers of the petitioner were elected and returns forwarded to the Registrar of Societies.
22. Mr. Ndunda has annexed in evidence minutes of the National Delegates Conference, different sheets of delegates and the visitors' book sheets signed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. It is his further deposition that the petitioner's National Delegates Conference was attended by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who gave a key note address and offered words of wisdom and encouragement to the petitioner, which he avers confirms that the petitioner is operating legally.
23. With regard to the letter dated 21<sup>st</sup> February 2013 whose authenticity the respondents question, Mr. Ndunda maintains that the letter, allegedly written by the late Minister for Education, has the email address, telephone and fax numbers of the 1<sup>st</sup> respondent; was copied to the then Permanent Secretary Prof. George Godia who has not sworn an affidavit to deny the letter; and also has the undisputed signature of the late Minister for Education. It is his contention that the respondents have never filed any complaint with the police to question the authenticity of the said letter.
24. Mr. Ndunda contends that for a period of 15 years, the Kenya National Parents Association has been in correspondence with the 1<sup>st</sup> and 2<sup>nd</sup> respondents and has a file with them, being file reference number MOE.GEN/321/27/16.
25. In his supplementary affidavit, Mr. Ndunda impugns the validity of the Operational Guidelines issued by the 1<sup>st</sup> respondent. He avers that the Guidelines were not preceded by public participation as required by Article 118 of the Constitution and the provisions of the **Statutory Instruments Act** and are therefore invalid. He also avers that the Guidelines were not signed and are still in draft form. He also argues that the Guidelines were never published in the Kenya Gazette in accordance with the provisions of the Statutory Instruments Act and are therefore illegal.
26. Mr. Ndunda maintains that the petitioner is the only duly registered national association of parents that represents the interests of parents with children in public schools in Kenya.
27. In his submissions on behalf of the petitioner, Mr. Wamwayi stated that the issue in the petition is whether the existence of the petitioner is legal or lawful. His submission was that the existence of the petitioner can be traced back to **Sessional Paper No 6 of 1988**, specifically paragraphs 84 and

86 thereof. In the said Sessional Paper, the government had stated that it was encouraging the establishment of parents associations in public primary and secondary schools. Mr. Wamwayi submitted that pursuant to this paper, the petitioner was registered, under the provisions of the **Societies Act** as the **Kenya National Parents Association** on 20<sup>th</sup> August 2014 as evidenced by a certificate of registration number 19345.

28. The petitioner contends that when the **Basic Education Act No 14 of 2013** came into force on 25<sup>th</sup> January 2013, the then Minister for Education, Mr. Mutula Kilonzo, recognised the role played by the petitioner in his letter dated 21<sup>st</sup> February 2013, and asked the association to align itself with the provisions of the Basic Education Act.
29. Mr. Wamwayi submitted further that the powers of the Minister to make regulations are contained in section 95 of the Basic Education Act, while the Third Schedule of the Act provides that there shall be parents associations for every public or private school. This is what, according to the petitioner, the Minister of Education wanted the petitioner to align itself to by his letter of 21<sup>st</sup> February 2013. Accordingly, the petitioner submits that it embarked on the process of holding elections at schools at the county and sub-county level.
30. Mr. Wamwayi submitted that the petitioner's grievance stems from the Operational Guidelines issued in May 2014, advising schools to ignore the elections that were being coordinated by the petitioner. The respondents also stopped the on-going elections by way of an email sent to schools by a Ms. Margaret Thiong'o on the grounds that they were not recognised by the Ministry. It was his submission that the Operational Guidelines were invalid as parents, who are stakeholders in the education sector, were not party to their formulation.
31. It was also the petitioner's submissions that the Guidelines, which are legal instruments from the Ministry of Education, were not made in compliance with the Statutory Instruments Act.
32. With respect to the violation of the Constitution, it was submitted on behalf of the petitioner that by issuing the Guidelines while the elections were on-going, the respondents interfered with the petitioner's right to freedom of association under Article 36 of the Constitution. It was also its contention that there was a violation of Article 10 which requires inclusiveness, as well as section 4 of the Basic Education Act. The petitioner asked the Court to call for the Operational Guidelines and quash them.
33. At the start of the hearing of this matter, Mr. Wamwayi indicated that the petitioner had abandoned prayers 2, 4, 5, 6, 7 and 9 of his petition, and would only be seeking prayers 1, 3, 8, 10 and 11 of the petition which are as follows:

**1. That the Honourable Court issues a declaratory order that the 1<sup>st</sup> and 2<sup>nd</sup> respondent by conducting parallel school parents Associations elections will violate the petitioner's members right to elect officials of their own choice.**

2....

**3. That the Honourable Court do issue an order of permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves, their servants agents, or persons acting under their authority from conducting parallel elections of the school parents associations, suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees and or in any way whatsoever from interfering with petitioner right to conduct and supervise elections of the school parents associations, sub county parents association, county parents associations and National Parents Association.**

4....

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**8. That the Honourable court by the way of order of CERTIORARI do call into court and quash the documents entitle “Operational Guidelines for Parents Association for pre-primary, primary and secondary schools” issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

9....

**10. That costs be borne by the respondents**

**11. That there be any other and further reliefs that this court may deem fit to grant.**

### **The Respondents’ Case**

34. In response to the petition, Learned State Counsel, Ms Muchiri, relied on the replying affidavit sworn by Dr. Belio Kipsang on 3<sup>rd</sup> December 2014, the further affidavit of Prof. Jacob Kaimenyi sworn on 25<sup>th</sup> February 2015 and submissions dated 2<sup>nd</sup> March 2015.

35. The respondents question the legality of the petitioner, the Kenya National Parents Association. It is their submission that the petitioner has not been established in accordance with the Basic Education Act which, under section 55 and the Third Schedule, provides for the establishment of parents associations at the national, county and sub-county levels.

36. According to the respondents, the petitioner has not been established under the Basic Education Act, and its officials have never been elected in accordance with the Basic Education Act as an umbrella body to represent parents associations.

37. The respondents argue that while the petitioner presents, in its affidavit sworn on 20<sup>th</sup> April 2015, documents to show that it was elected by parents associations from various schools, the list attached contains less than a thousand schools which purportedly elected the petitioner. However, no evidence that the said schools have formed parents association in order to elect the petitioner’s association as their representative has been presented to the Court. It is also the respondents’ case that the list of schools attached by the petitioner is inadequate and does not represent all the schools countrywide, which currently stands at 21,302 public primary schools and 7,711 public secondary schools.

38. The respondents also question the petitioner’s power to levy payments from schools, noting that it has, without a legal basis, been levying various sums from parents and schools as conditions for participating in the elections and for membership of the petitioner.

39. The respondents note that the petitioner has been registered under the Societies Act, and it is their case that its establishment under that Act is contrary to section 55 and the Third Schedule of the Basic Education Act which provide the procedure for forming a national association. Ms. Muchiri submitted that under section 2 of the Societies Act, a society shall not include an organization recognized under a different law. Their case was that the petitioner, which was registered under the Societies Act, could not carry out a mandate under the Basic Education Act.

40. With respect to the letter dated 21<sup>st</sup> February 2013 allegedly written to the petitioner by the late Mutula Kilonzo, at the time the Minister for Education, the respondents take two positions. It is

their contention, first, that the letter is denied by the Ministry of Education as having originated from it. Secondly, it is their case that its contents are contrary to the provisions of the Basic Education Act with regard to function of parents associations.

41. As to the petitioner's challenge to the Operational Guidelines issued by the Ministry of Education, the respondents submit that the Cabinet Secretary has power under sections 95 and 101 of the Basic Education Act to formulate guidelines. The Operational Guidelines were accordingly formulated in line with these sections and were to act as guides to assist schools in forming parents' associations. They argue that if the petitioner is allowed to continue to operate, parents and parents' association would be denied the right to choose the members they want to represent them.
42. The respondents deny violation of the constitutional rights of the petitioner, noting that the petitioner has not demonstrated which rights have been violated. They rely on the decision in **R vs The Truth & Justice Reconciliation Commission Ex-parte Augustine Njeru Kathangu & 9 Others, Misc. App. 470 of 2009** with respect to the manner in which a person should demonstrate how their constitutional rights have been violated, and ask the Court to dismiss the petition with costs.

### **The Case of the Interested Party**

43. In presenting the case of the interested party, Mr. Wasuna relied on the affidavit sworn by Mr. John Awiti on 8<sup>th</sup> July 2015 and its submissions of the same date.
44. In his affidavit, Mr. Awiti, who is the Principal of St. Mary's School Yala in Siaya County and the Chairman of the interested party, avers that every school principal is the secretary of both the Board of Management of the secondary school that each one of them heads as well as the secretary of their respective parents associations as provided under sections 62(1) and paragraph 5 of the Third Schedule to the Basic Education Act as read with section 55(2) of the said Act.
45. Mr. Awiti terms the present petition a non-starter on the basis that the petitioner has no *locus standi* to institute the suit. He also contends that the petition does not disclose any constitutional violation perpetrated by the respondents against it.
46. It is also his averment that the petitioner has not disclosed that it has any known interest in law in respect of the Basic Education Act and the Operational Guidelines developed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The interested party bases this averment on the Third Schedule of the Basic Education Act with respect to the formation of the national parents association which requires the election of officials by parents associations from schools through a delegates system. It is his deposition that the formation of the petitioner does not meet the requirements of the Basic Education Act as no elections were legally held to elect the officials of the petitioner.
47. Mr. Awiti observes that by dint of section 5 of the Third Schedule, every Principal is the Secretary of the Parents' Association in the school each of them heads, but the petitioner has purported to exclude the principals from the activities of the parents associations. He further observes that despite this exclusion, the petitioner seeks orders to compel the Principals as agents of the 1<sup>st</sup> and 2<sup>nd</sup> respondents or the Teachers Service Commission to each pay to the petitioner a sum of Ksh2,000/- for every secondary school without stating the account or vote head from which the principals will draw the money from, and how they will account for the said amount to the government.
48. In submissions presented on its behalf by Mr. Wasuna, the interested party agrees with the position taken by the respondents that the petitioner was not established in accordance with the provisions of the Basic Education Act. Mr. Wasuna noted that the petitioner had placed reliance for its existence on paragraph 84 of Sessional Paper No 6 of 1988, which states that parents associations should be established in every school, a requirement that has informed the provisions

of paragraph 1(a) of the Third Schedule of the Act.

49. Mr. Wasuna pointed out various anomalies with respect to membership of the petitioner, which rendered its existence contrary to the provisions of the Basic Education Act. He observed that article 3 of the petitioner's constitution makes membership of the association conditional upon payment of a fee, which runs contrary to the provisions of the Third Schedule of the Basic Education Act. He also noted that article (b) of the petitioner's constitution allows a school to be a member of the association, again subject to payment of a fee. He notes, further, that the petitioner's constitution restricts membership to parents only, contrary to the Third Schedule of the Act which provides for representation of teachers in parents associations.
50. It was also the interested party's observation that membership to parents' associations under the Act is bottom up, from schools to national level, while the petitioner allows parents to belong to the national association without belonging at a school level. Mr. Wasuna submitted therefore that the petitioner is a busy body and not the national parents association envisaged under the Basic Education Act.
51. The interested party further observed that the petitioner had, under its constitution, powers that were contrary to the statutory mandate of parents association envisaged under paragraph 2(6)(a)-(h) of the Third Schedule of the Basic Education Act, which sets out eight mandates for the parents association. He noted that under article 2(3) of the petitioner's constitution, the petitioner has the mandate to invest and borrow, which the parents association has no power to do under the Basic Education Act.
52. The interested party also questioned the *locus standi* of the petitioner to lodge the present petition. Its submission was that its Secretary-General, Mr. Ndunda, does not purport to be a parent in any school, nor are there names of any person on whose behalf the petitioner is litigating and whose constitutional rights have allegedly been violated. According to the interested party, if there are breaches of any rights enjoyed by the petitioner, such rights are only those vested in parents under a statute as there is no constitutional right to form a parents association; that the right to form a parents association is a statutory right under the Basic Education Act, and further, it is not a fundamental right but a right designed to enhance and facilitate good management of schools and the upbringing of children.
53. Mr. Wasuna therefore prayed that the petition be dismissed with costs, noting that if there is any statutory breach, then the petitioner could only seek orders of judicial review to quash a decision or to compel the respondent to perform its statutory mandate.

### **Petitioner's Submissions in Response**

54. While dismissing the interested party as an entity unknown in law, Mr. Wamwayi submitted that under paragraph 5 of the Third Schedule, one of the functions of parents association was to oversee projects for parents association, so the petitioner was within its rights to invest as provided in its constitution.
55. To the submission that there is no fundamental right to form a parents association, his response was that it is a fundamental right to belong to an association, and for the respondents to state that they do not recognize the petitioner is tantamount to banning it.
56. With regard to whether or not Mr. Ndunda is a parent, Mr. Wamwayi's response was that paragraph 6(5) of the Third Schedule does not require one to be a parent of any particular pupil in order to be a member of a parents association. It was also his contention that the Basic Education Act does not provide any modalities for registration of a parents association, and the only mode of registration therefore is under the Societies Act whose provisions are not in conflict with the Basic Education Act.

## Determination

57. The petition before me alleges violation of the right of the members of the petitioner, guaranteed under Article 36 of the Constitution, to elect officials of their choice. It is premised on the allegation that the petitioner is the national parents association contemplated under section 55 and the Third Schedule of the Basic Education Act. It is the petitioner's contention that the Operational Guidelines promulgated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for the formation of parents associations and the election of their officials are in violation of the petitioner's members' rights, and are null and void *ab initio*.

58. As this is a constitutional petition, the burden on the petitioner is clear: it must establish, with a reasonable degree of precision, the provisions of the Constitution violated, and the manner in which they have been violated with respect to it, or to the persons on whose behalf it brings the petition – See **Trusted Society of Human Rights vs Mumo Matemo & Others High Court Petition No. 292 of 2012**.

59. The issues in contention—the formation and election of members of parents associations, are provided for and governed by the **Basic Education Act**. Consequently, before establishing its claim under the Constitution, the petitioner must show that it falls within the statutory regime of the Basic Education Act. In my view therefore, the first issue to consider is the status of the petitioner vis a vis the provisions of the Basic Education Act with regard to parents associations for schools.

## Parents Associations under the Basic Education Act

60. The parties are in agreement that the national parents associations which the petitioner purports to be is provided for under section 55 and the Third Schedule to the Act. The Act, which was enacted in 2013 is, according to its short title:

***“An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.”***

61. Section 2 of the Act defines a parent as “...***a mother, father or guardian of a child and includes any person who is responsible under the law to maintain a child or is entitled to a child's custody***” while a parents' association is defined to mean an association prescribed under subsection 53(2) of the Act.

62. Section 53(2) is contained in Part VIII of the Act which deals with the governance and management of education and training. The section places the overall responsibility for governance and management of schools in the Cabinet Secretary. However, under section 53(2), it allows the Cabinet Secretary, by way of regulations, to “***entrust the governance or management of any aspect of basic education and training to any agency, body, organ or institution as may be appropriate for the purposes of this Act.***”

63. Section 54 of the Act provides for the structure for management of basic education. It provides as follows:

***(1) For purposes of ensuring effective and efficient management of basic education in Kenya, the Cabinet Secretary shall by regulation establish such structures of governance and management at national and county levels as may be appropriate.***

(2)...

64. At section 55, the Act provides for a Board of Management in the following terms:

(1) *There shall be a Board of Management for every public—*

- (a) *pre-primary institution;*
- (b) *primary school;*
- (c) *secondary school;*
- (d) *adult and continuing education centre;*
- (e) *multipurpose development training institute; or*
- (f) *middle level institutions of basic education.*

(2) *Notwithstanding subsection (1) every school shall have a parents association which shall be constituted in the manner set out in the Third Schedule.*

(3) *Every private school shall establish a parents' teachers association.*  
(Emphasis added)

65. The Third Schedule to the Basic Education Act, which is titled “**Establishment and Functions of Parents Association**” provides as follows with respect to the establishment of parents associations provided for under section 55(2):

1. *There shall be a Parents Association for every public or private secondary school consisting of*  
—

- (a) *every parent with a pupil in the school;*
- (b) *a representative of the teachers in the school.* (Emphasis added)

66. Section 2 of the Third Schedule provides as follows:

- 1. *There shall be an Executive Committee consisting of representatives of each class and two teachers.*
- 2. *The members of the Executive Committee of Parents Association shall be elected during an annual general meeting of parents and teachers.*
- 3. *The Parents Association shall, at its first meeting, elect a Chairperson from amongst the persons elected under paragraph 2 of this Schedule.*
- 4. *The Chairperson and two members of the Association shall be co-opted to the Board of Management.*
- (5) *The Head or Principal shall be the Secretary to the Association.*

67. Section 2(6) of the Third Schedule sets out the functions of the parents association as follows:

(6) *The functions of the Parents Association shall be to—*

- (a) *promote quality care, nutritional and health status of the pupils;*
- (b) *maintain good working relationship between teachers and parents;*
- (c) *discuss, explore and advise the parents on ways to raise funds for the physical development and maintenance;*
- (d) *explore ways to motivate the teachers and pupils to improve their performance in academic and co-curricular activities;*
- (e) *discuss and recommend charges to be levied on pupils or parents;*
- (f) *undertake and oversee development projects on behalf of the whole Parents Association;*
- (g) *assist the school management in the monitoring, guidance, counselling and disciplining of pupils; and*
- (h) *discuss and recommend measures for the welfare of staff and pupils.*

68. Section 2(3) of the Third Schedule provides for the holding of meetings of the parents association, while section 2(4) provides that the parents association may regulate its own procedure.

69. Of particular relevance to the present petition is section 2(5) of the Third Schedule, which provides as follows:

(5) *There shall be established National Parents Associations, County Parents Associations and Sub-County Parents Associations elected by Parents Associations from schools through a delegate system.* (Emphasis added)

70. In my view therefore, the law with respect to associations of parents is fairly clear: that the formation of such associations shall start at the school level, with each school forming an association of all parents who have pupils at the school, as well as a representative of teachers at the school. Sub-county and county parents associations, as well as the national parents associations, shall be elected by delegates comprising members of parents associations from schools. I shall revert to these requirements later in the judgment.

### **Validity of the Operational Guidelines**

71. Before proceeding to consider the status of the petitioner, let me first dispense with the question of the Operational Guidelines. The petitioner has challenged the validity of the Operational guidelines promulgated by the respondents for the election of members of parents associations. I have carefully read and considered the said Guidelines, titled “**Operational Guidelines for Parents Associations for Primary and Secondary Schools**” issued by the Ministry of Education, Science and Technology which are impugned by the petitioner. In my view, the Guidelines echo, virtually verbatim, the provisions of the Basic Education Act as well as the Third Schedule thereto, which I have set out at some length above. I have not found anything in the Guidelines that goes outside the provisions of the parent Act. That being the case, the allegation that they are void *ab initio* for having not been enacted in consultation with stakeholders is, in my view, without merit.

72. In any event, even had the Guidelines not been made in accordance with the law, that would only have gone to the question of their application with respect to the elections for parents associations, but not to the issues that this petition raises.

73. In my view, what is crucial for the determination of the petition is first, whether the petitioner has been established in accordance with the provisions of the Basic Education Act set out above and if

it has, whether there has been any violation of the Constitution by the respondents with respect to it.

### **The Status of the Petitioner**

74. The petitioner has argued at some length that it is a legal entity that has been recognised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and that it has a file with these respondents. It relies also on a letter dated 21<sup>st</sup> February 2013 which it alleges was written to it by the then Minister for Education, the late Mutula Kilonzo, giving it authority to establish a parents association. It also places reliance on Sessional Paper No. 6 issued in 1988 which supported the establishment of parents associations in public schools.
75. The petitioner has also placed before the Court documents intended to show that the respondents had recognised it, and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents attended its meetings, made keynote addresses, and appointed some of its members to various bodies within the education sector. The intent behind this evidence, as I understand it, is to support the argument that the respondents cannot now turn around and deny the legality of the petitioner's existence.
76. I have considered the various documents relied on by the petitioner, and its submissions with regard to its position *vis a vis* the law on the formation and operation of parents association. Whatever its dealings with the respondents have been in the past, this Court can only be guided by the law in determining whether, as the petitioner alleges, there has been a violation of its rights by the respondents. Such violation can only arise, in my view, if the petitioner is the entity contemplated in the Basic Education Act, and has been formed in accordance with that Act.
77. From the evidence before me, it appears that the petitioner was registered as a society on 20<sup>th</sup> August 2014. The certificate of registration for the "**Kenya National Parents Association,**" has a notation that states "**Formerly Kenya National Association of Parents,**" but nothing to show that the certificate is in respect of a change of name, or when this latter society was registered. While Mr. Ndunda avers that the petitioner has been in existence for 15 years, there is nothing to bear that averment out.
78. The petitioner also traces its existence back to a Sessional Paper passed in 1988, but again, while the Sessional Paper does make reference to parents associations, there is nothing to indicate that the petitioner is the entity contemplated in the said paper which was formulated some 25 years prior to the enactment of the Basic Education Act 2013. The petitioner appears to have been the brainchild of Mr. Ndunda, with no connection whatsoever with the requirements for a parents association under the Basic Education Act.
79. It is conceded tacitly that Mr. Ndunda is not a parent of any child in any school, Mr. Wamwayi's submission in this regard being that the Third Schedule to the Basic Education Act does not require that one should be a parent in order to be a member of a parents association. He was not elected in a school, nor at the sub-county or county elections for parents associations.
80. What appears to have happened, and one must admire Mr. Ndunda's chutzpah and enterprise, is that he saw an opportunity, and seized it. He somehow appears to have convinced various parties, including parents, teachers and Ministry of Education officials, that his organisation is the national parents association provided for in the Third Schedule of the Basic Education Act, which may explain the letters and other documents he has produced and relies on to allege violation of the petitioner's rights. He even managed to get none other than the Cabinet Secretary for Education, Prof. Jacob Kaimenyi, during the pendency of these proceedings, to attend the National Delegates Conference of his organisation in January, 2015, and to give a keynote address. His position, however, is not supported by the law.
81. The law, as it emerges from the analysis of the provisions of the Basic Education Act set out above, is that:

**a. The overall management of schools under the Basic Education Act shall be the responsibility of the Cabinet Secretary in charge of Education, who may delegate the said management to various organs, including parents associations at various levels, and formulate regulations for the management of schools;**

**b. Parents associations are to be formed at the school level, and they shall comprise parents of every child in the school as well as a representative of teachers at the school;**

**c. Parents associations at the school level shall elect an executive committee comprising two parents from each class and teachers;**

**d. Members of sub-county, county and national parents associations are to be elected from among members of schools' parents associations through the delegates system.**

82. The correct position in law being as set out above, and the petitioner therefore not being the national parents association contemplated under section 55 and the Third Schedule to the Basic Education Act, one would have to agree with the respondents that the petitioner and Mr. Ndunda are busybodies who cannot claim to have a basis for purporting to manage the running of public schools in Kenya, and to, in essence, seek to usurp the powers of the Cabinet Secretary in charge of education in the running and management of schools.

83. That being the case, there is no basis for the allegation that there has been a violation of the petitioner's rights, or those of its alleged members.

84. However, I must ask a final question which was alluded to by the interested party: Is there a constitutional right to form a parents association, so that denying any person the right to do so amounts to violation of a fundamental right? Article 36 of the Constitution guarantees to everyone the right to freedom of association in the following terms:

**36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.**

**(2) A person shall not be compelled to join an association of any kind.**

**(3) Any legislation that requires registration of an association of any kind shall provide that—**

**(a) registration may not be withheld or withdrawn unreasonably; and**

**(b) there shall be a right to have a fair hearing before a registration is cancelled.”**

85. While Mr. Ndunda is at liberty to form and join any association, he is not, given the requirements of the Basic Education Act, entitled to form the national parents association contemplated under the Act. He can form any organization he wishes, but he does not have a right to insist that his organisation is the organisation contemplated by, and that is vested with various statutory mandates under, the Basic Education Act, and whose formation and election of members into is specifically provided for under the said statute.

86. Further, the levying of charges to parents and schools, which the petitioner has been doing for the last three years or so as is evident from its pleadings, is unsupported by the law and is, in a sense, a fraud on the public. Regrettably, it has been perpetrated under the watch of the Ministry of Education which seems totally unaware of its duties under the Basic Education Act and whose officials seem to have gone along with every demand by the petitioner, without making reference to the law or seeking to understand what the law vests in or requires from the Ministry.

87. In any event, and given the facts and circumstances detailed above, I find no merit in this petition, and it is therefore hereby dismissed with costs to the respondents.

**Dated, Delivered and Signed at Nairobi this 5<sup>th</sup> day of February 2016.**

**MUMBI NGUGI**

**JUDGE**

**Mr. Wamwayi instructed by the firm of Wamwayi & Co. Advocates for the petitioner.**

**Ms. Muchiri instructed by the State Law Office for the respondents.**

**Mr. Wasuna instructed by the firm of Wasuna & Co. Advocates for the interested party.**