

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTION PETITION NO E002 OF 2025

DR CHRIS GALGALLO ALI.....1st
PETITIONER

ARTHUR TOPOS.....2nd
PETITIONER

VERSUS

CABINET SECRETARY FOR EDUCATION.....
.....1st RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY AND
ECONOMIC DEVELOPMENT.....2nd
RESPONDENT

ATTORNEY GENERAL.....3rd
RESPONDENT

AND

PASTORALIST PARLIAMENTARY GROUP (PPG)
..... INTERESTED
PARTY

JUDGMENT

A.BACKGROUND OF THE PETITION

1. The Petition filed before this court for determination is the one dated 03.02. 2025, where the petitioners seeks for the following orders;

a.A declaration does issue that the cabinet resolution to dissolve the national council for Nomadic Education in Kenya violates Article 10 on public participation and further violates Articles 21,24,27,53, 55, and 56 on the protection of marginalized hence unconstitutional. The decision also violates Article 43 of the constitution, Articles 28 of the convention on the rights of children and Article 13 of the international covenant on Economic, social and cultural rights on the right to education. Besides the said decision is retrogressive and violates Article 21 of the constitution of Kenya, 2010.

b.A declaration does issue that the cabinet resolution to dissolve the National council for Nomadic education in Kenya is an unpermitted retrogressive measure that is indirectly discriminatory for

reversing an affirmative action measure without justification, contrary to Articles 21 and 27 of the Constitution. The decision was also directly discriminatory because NACONEK and its stakeholders were excluded from the public engagements

c. A declaration does issue that the 2024 decision to effect a 100% budget cut on NACONEK and the 2025 decision to dissolve the National council for Nomadic Education was not preceded by any child rights impact assessments to ascertain the effect of the decision on all children at the national and sub national levels, especially children in vulnerable situations with special needs. Thus, the decision violates Article 53 of the constitution, Section 8 of the Children's Act, and the child rights convention.

d. A prohibitory order does issue barring the respondents and their agents from dissolving or acting on the decision of 21st January 2025, to dissolve the

National Council for nomadic Education in Kenya.

e. An order of Mandamus do issue directing the respondents to take legislative, policy and other affirmative action measures identified in the Presidential working party report on Education Reforms.

f. An order do issue restoring NACONEK'S budget.

2. The said petition is supported by the grounds stated on the face of the petition and the supporting Affidavit of the petitioner **Dr Chris Galgallo Ali** dated 3rd February 2025, where he depones that both petitioners are members of minority/ pastoral communities and had filed this petition on their own behalf and in public interest for and on behalf of Hunter and gatherer-Forum of Kenya (HUGAFO-K) which drew its membership from a geographic spread in fourteen ASAL counties.

3. The 1st and 2nd respondents were sued in their capacity as cabinet secretaries responsible for education, finance policy formulation and also for being responsible for implementing and monitoring

macroeconomic policies on expenditure and revenue concerning the education and finance sector. The 3rd respondent is the chief government legal representative, while the interested party consisted of all elected and nominated members of parliament and Senate from the pastoralist counties regardless of their ethnicity or political party affiliation. In the 13th parliament (2022 - 2027) the said group had 101 members from 10 political parties representing about 9,787,730 people from the 15 ASAL counties.

4. The petitioners further affirmed that National Council for Nomadic Education in Kenya (NACONEK) is a body established by **Section 94(1) of the Basic Education Act, 2013**, as an affirmative action institution to facilitate and promote nomadic education in Kenya.

B. PLEADINGS

5. It was the petitioner's contention that on 27th March 2024, the National treasury did issue a circular on measures to enhance revenue generation and expenditure rationalization in state corporations and as a follow up to the said circular

did on 9th May 2024, and 13th May 2024, invite representatives of various state corporations, regulatory authorities and commercial entities targeted for reform to stakeholders engagement meeting but conveniently failed to invite NACONEK representatives to the said meetings . All went quiet, until on 21st January 2025, when the cabinet did issue a circular proposing to scrap NACONEK (with no alternative proposal) alongside nine entities, while proposing to merge 42 parastatals which had overlapping mandates into 20 entities. In the same cabinet circular 6 other entities were to be restructured and would be required to self-fund.

6. The petitioners faulted the said cabinet circular and averred that it was unconstitutional on the basis that it violated;

a) **Article 53(1), (2), 55 & 56 of the constitution of Kenya, 2010** which provided that every child has a right to free and compulsory basic education, basic nutrition, shelter and health care, and that affirmative action programs be put in place to ensure children got access to relevant education and training, opportunities to

associate, and to be protected from harmful cultural practices and exploitation.

b) **Section 5 and 8 of the Children's Act 2022**, which demands measures to be put in place to realize the child's rights progressively whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, which were to ensure that the best interest of the child would be the primary consideration in order to safeguard and promote the rights and welfare of the child.

c) **Fair Administrative Action Act, 2015**, which provided that every person had a right to lawful, reasonable and procedurally fair administrative action and where the said action is likely to affect materially or adversely the legal rights or interest of any person or group to be given notice of the same and finally be given reasons for the said administrative action.

d) **Article 2 of the African Charter on Human Rights and People's rights (Banjul charter)**, which provided every individual was entitled to enjoy the rights and

freedoms recognized in the charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, or other status.

e) **Articles 2, 4 and 28 of the Convention on the rights of the child**, which also provided that state parties must respect and ensure the rights of children within their jurisdiction are respected and must undertake all appropriate legislative, administrative and other measures to implement the said rights.

f) **General comments No. 19 (2016) on public budgeting for realization of children's rights (Article 4)** which calls for the realization of children's rights. Specifically, Para 18, and 27, explained that state parties had no option but to put in place appropriate legislation, budget policies, programs to promote and implement children's rights. Further at para 46 and 47 it is emphasized that the state party must also conduct, child rights impact assessment at each stage of the budget process to ascertain the effects on legislation, policies and programmes on all children.

g) ***International covenant on Economic, Social and cultural Rights***, which at Article 13 provides that state parties recognize everyone's right to education and that to achieve full realization of the right to education the state parties would provide free primary education, and make accessible secondary education in its different forms including technical and vocational secondary education.

7. The petitioners further faulted the said cabinet circular as it was made without any public participation and/ or consultation with key stakeholders. The decision contained therein was irrational, unreasonable as it directly discriminated against NACONEK and its stakeholder's, yet the said institution was not a state corporation and had been created as a semi-autonomous agency to specifically promote affirmative action and address systemic inequalities in the education sector amongst the marginalized and minority groups. The petitioners thus pressed the court to find that the said cabinet decision detailed in their circular dated 21st January 2025 was irrational unjustified and thus be pleased to grant the prayers sought.

8. The respondents were severally served but did not enter appearance, nor did they file any response to the said petition.

B. ANALYSIS & DETERMINATION

9. This court has considered the Petition, the affidavits filed in support of the said petition, and given due consideration to the submissions filed by the petitioners Counsel. The respondents did not file their responses as stipulated under **Rule 15 of the Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules, 2013** and this court will therefore proceed to determine this petition on its merits as provided for under **Rule 16** of the said rules.

10. The petitioners have approached this court and seek several reliefs on the basis that the constitutional right to education of students studying in ASAL areas remained threatened by the arbitrary and unconstitutional manner in which the government proposes to scrap NACONEK.

11. As regards interpretation of the constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted.

Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. While **Article 259(1)** command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. See **Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti v Public Service Commission & 73 Others [2021] eKLR & David Ndi & others v Attorney General & others [2021] eKLR**

12. The Key issues which arise for determination herein are;

a. Whether the impugned Cabinet decision contained in the cabinet memo circular to dissolve NACONEK is unconstitutional, null and void ab initio.

b. Whether the declaratory conservatory mandatory orders sought should be issued as prayed for in the petition.

c. Who should bear the costs of this suit?

(i) Whether the impugned Cabinet decision contained in the cabinet memo circular to dissolve NACONEK is unconstitutional, null and void ab initio,

13. ***Section 94(1) of the Basic Education Act, 2013 creates National Council for Nomadic Education in Kenya (NACONEK) as an affirmative action institution to facilitate nomadic education in Kenya and the sixth schedule of the said Act mandates the said council to;***

a) Imitate the development, implementation, and review of policies on all matters relating to education in the ASAL regions, pockets of poverty areas, and urban informal settlements of Kenya.

b) Mobilize funds and other resources from various sources to develop nomadic education to support the council's relevant activities.

c) Institutionalize mechanisms for effective coordination, monitoring, and evaluation of

the activities of agencies involved in providing education in the ASAL regions, pocket of poverty areas, and urban informal settlements of Kenya.

d) Implement guidelines and ensure the geographical spread of education activities and targets of the ASAL regions, pockets of poverty areas, and urban informal settlements of Kenya.

e) Establish appropriate linkages and partnerships with other participating departments and agencies.

f) Determine standards and skills to be attained in s schools and instructions of learning within ASAL regions, Pockets of poverty areas and urban informal settlements of Kenya and review such standards from time to time; and

g) Collate, analyze and publish information on education activities in the ASAL regions, Pockets of poverty areas, and urban informal settlements of Kenya.

14. Like all other human rights facets, the right to education is sacred and imposes three types or levels of

obligations on the state; ***the obligation to respect, protect and fulfil. In turn the obligation to fulfil incorporates an obligation to facilitate and provide.*** It is with this in mind that ***Article 43(1), (f), 53(1), (b) and 56 (b) of the constitution of Kenya, 2010***, were crafted and provide that every person has a right to education, every child has a right to ***“free and compulsory basic education”*** and that the ***state would put in place affirmative action programmes designed to ensure that minorities and marginalized groups are provided with special opportunities in educational and economic fields.***

15. The Importance of this right to education in shaping people's lives is also captured by the committee on Social, Economic and Cultural rights in General comment No. 13 on the right to education guarantee ***under Article 13 of the ICESCR*** in the following terms; -

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift

themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labor and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investment's states can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence".

16. Finally, the ***African Charter on the rights and welfare of the child (ACRWA)***, to which Kenya is a signatory at Article 11(3), (e) imposes an obligation on the state to, ***"take special measures"*** in respect of female, gifted and ***disadvantaged children*** to ensure that they get equal access to education".
17. The respondents did not file any response to this petition and it remains uncontroverted that NACONEK

was never invited to attend and give its view on the National treasury circular dated 27th March 2024, on measures to enhance revenue generation and expenditure rationalization in state corporation, regulatory authorities and commercial enterprise targeted for reforms, which was a precursor to the final policy statement issued by the cabinet through its memo dated 21st January 2025 scaping NACONEK . In short by an administrative fiat, the respondents have dismantled a statutory creature, which act violates the law as and executive cabinet circular cannot trump over an Act of parliament that created the said organ.

18. In the case of **George Bala V Attorney Genral (2017) Eklr, Hon Justice G.V Odunga** (As he was then) did hold that the court has the power to enquire into the constitutionality of the actions of the executive notwithstanding the doctrine of separation of powers. This finding is fortified under the principle that the constitution is the supreme law of the country and that the executive must function within the limits prescribed by the constitution and where they parliament or executive overstepped its mandate; the constitutional court was free to intervene and rectify the said breach.

19. The decision made was in breach of **Article 10 of the constitution** as no participation was carried out to determine, whether abolishing NACONEK would save the government money, whether it was necessary considering less restrictive options such as rationalization or merger and most importantly balancing the rights of over 1.5 million school going children which would be affected by scaping of NACONEK. **Article 73 of the Constitution** also empowered state officers to use their donated powers in such a manner that it aligns with the goals and objective of the constitution and to be accountable for the decisions made.

20. It is clear that the impugned decision did fail the said test as the net effect of the said decision would result in removing a constitutionally protected affirmative action programme specifically designated to provide opportunities' to the marginalized in the education and economic field under **Article 56 of the constitution**. See **Republic V Kenya Revenue Authority, Exparte Shake Distributors Ltd (2017) Eklr & Narok Government & Another V Richard Bwogo Birir & Another, (2015) eklr, Kiarie V Attorney General & 2 others (Petition 19 Of 2024),**

(2016) KEHC 2274, in Githunguri Residence Association V Cabinet Secretary, Ministry of Education & 6 others (2015) ekr and in H.O.O (a child suing through his father and next friend) P.O.O V Board of Management N school & 2 others (2018) ekr where it has been severally held that children’s right to education was realizable and was not subject to the **“progressive realization”** qualifier that attaches to many other social economic rights, which had to be implemented gradually.

21. Finally, in **Center for Rights Education & Awareness (CREAW) & Others V Attorney General & Another (2015) ekr** , It was held that providing affirmative action for children from marginalized areas to access education was, “non optional” and in a separate case filed at the **African Commission** in the **Center for Minority Rights Development (Endorois) V Kenya (Comm 276/2003,)2010** it was underscored that development initiatives affecting minorities require free, prior and informed consent and therefore the same could not be abolished without consulting the beneficiaries.

22. For the foregoing reasons, I do find that a prima facie case had been made, establishing that the cabinet

decision contained in the cabinet circular dated 21st January 2025 to scrap NACONEK fails the proportionality test as it infringes on the rights of nomadic school children, children from areas with pockets of poverty and children from urban informal settlements. To the said extent the said circular is irrational, and unconstitutional.

(ii) Whether the court should issue conservatory mandatory orders prayed for.

23. The Bill of Rights at **Article 20(3)** provides that:

2) In applying a provision of the Bill of Rights, a Court shall;-

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a Court, tribunal or other authority shall promote;-

- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and**
- (b) the spirit, purport and objects of the Bill of Rights.**

24. Further **Article 23(3)** allows the court to grant **APPROPRIATE RELIEF**, including;

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

25. What amounts to **appropriate relief** has been the subject of discussions in Constitutional litigation. From my reading of the numerous authorities, appropriate relief must be a relief that is not only suitable to address the Constitutional infringement

but is just in the circumstances of the cases. The relief must uphold the Constitution and ultimately must uphold the human rights of those involved and the rule of law. The relief must also bear in mind that our Constitution is a living document whose life is dependent on the realities of the Kenya people. It is a transformative document carrying in its veins, and its spirit, the transformative power to transform those who interpret it, the Court.

26. Our jurisprudence in this regard has also borrowed heavily from South Africa. For instance, in **Hoffmann -vs- South African Airways (CCT17/00) [2000] ZACC 17**; the Judge while discussing the issue of appropriate relief and citing another case **Fose -vs- Minister of Safety and Security (CCT 14/96) [1997] ZACC 6** stated;

[45] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to

make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.” [40] (emphasis added)

27. The Supreme Court, in **Communications Commission of Kenya & 5 others -vs- Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)**, cited at paragraph [359] the famous United States Supreme Court case of **Marbury v. Madison, 5 U.S. 137 (1803)** on *inter alia* the key place of the Courts in the upholding of the U.S. Constitution. The Supreme Court affirmed that the principle, that the Courts have the jurisdiction to uphold our Constitution, is enshrined in our Constitution at **Articles 23(3)(d)** and **165(3)(d)**, and that these provisions show that our Constitution

requires us to go even further than the U.S. Supreme Court did in Marbury because by contrast, Article 23(3) in granting the High Court powers to grant the list of appropriate relief uses the term ‘including’ to mean that that list is not an exhaustive list out of the known reliefs which include ... ***Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the Courts,[for as long as they are] ‘ specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.’***

DISPOSITION

28. The Respondents did not file any responses to the Petition and they are deemed to have conceded the Petition. Judgement is therefore entered, in favour of the Petitioners on the following terms;

a. A declaration be and is hereby issue that the cabinet resolution to dissolve the national council for Nomadic Education in Kenya(NACONEK) as contained in the circular dated 21st

January 2025 violates provisions Article 10 21,24,27, 28, 43,53, 55, and 56 of the Constitution of Kenya, 2010, Articles 28 of the convention on the rights of children and Article 13 of the international covenant on Economic, social and cultural rights on the right to education.

b.A declaration be and is hereby issued that the cabinet resolution to dissolve the National council for Nomadic education in Kenya(NACONEK) as contained in their circular dated 21st January 2025, is a retrogressive measure that discriminatory for reversing the affirmative action measure already in place, without justification, and thus runs contrary to the provisions of Articles 21 and 27 of the Constitution of the constitution of Kenya 2010.

c.A declaration be and is hereby issued that the 2024 decision to effect a 100% budget cut on NACONEK and the 2025 decision to dissolve the National council

for Nomadic Education was not preceded by any child rights impact assessments to ascertain the effect of the decision on all children at the national and sub national levels, especially children in vulnerable situations with special needs. Thus, the said decision's violates Article 53, and 56 of the constitution, Section 8 of the Children's Act, and the child rights convention.

d. A prohibitory order is hereby issued barring the respondents and their agents from dissolving or acting on the decision of 21st January 2025, to dissolve the National Council for nomadic Education in Kenya (NACONEK).

e. An order of Mandamus is hereby issued directing the respondents to take legislative, policy and other affirmative action measures identified in the Presidential working party report on Education Reforms.

f. A mandatory order be and is hereby issued restoring NACONEK'S budget.

29. Since this is a public interest litigation, each party will bear their own costs.

Dated, signed, and delivered in open court at **MARSABIT** this **20th** day of **NOVEMBER, 2025**.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **20th** day of **NOVEMBER, 2025**

In the presence of: -

Mr. OjalloAppellant
N/A Respondent
Mr. Jarso Court Assistant