



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GITHINJI & KANTAI, J.J.A.)

CIVIL APPEAL NO. 104 OF 2016

BETWEEN

KENYA NATIONAL PARENTS ASSOCIATION (*THROUGH THE SECRETARY*

GENERAL-MUSAU NDUNDA).....**APPELLANT**

AND

THE CABINET SECRETARY, MINISTRY

EDUCATION PROF. JACOB KAIMENYI.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF EDUCATION, SCIENCE & TECHNOLOGY

(DR. BELIO KIPSANG).....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from the judgment and decree of the High Court at Nairobi (M. Ngugi, J.) dated 5th February 2016

in

H.C. Petition No. 424 of 2014

JUDGMENT OF THE COURT

This dispute appears to have been precipitated by the decision of the 1st and 2nd 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. It was however the appellant’s position that it had the exclusive mandate to organize and conduct such elections. It also objected to the guidelines issued by the 1st respondent to regulate the conduct of those elections, as well as an email from the Ministry of Education that sought to stop elections that were

being undertaken by the appellant. Aggrieved by these actions by the 1st respondent, the appellant petitioned the High Court for declaratory, injunctive and prerogative orders that;

“1. That the Honourable Court issues a declaratory order that the 1st and 2nd 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 1st and 2nd 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 1st and 2nd 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 1st and 2nd 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 1st and 2nd 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 1st and 2nd 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 1st and 2nd respondents to appoint the petitioner’s nominees to the county education boards in compliance with section 20(h) of the Basic Education Act 2013”.

In support of the petition Mr. Musau Ndunda who is described in the pleadings as the Secretary-General and Executive Director of the appellant, has sworn three affidavits in which he explained as the objectives of the appellant the advancement, protection and safeguarding of the interests of Kenyan parents and children on all matters relating to basic education and training. The deponent also clarified that he brought the petition on his own behalf and on behalf of the members of the appellant for breaches of their constitutional rights; that on or around May 2013 and pursuant to authority granted by the 1st respondent on 21st February 2013, he and other officials of the appellant commenced elections for office bearers of parents at the school, sub-county and county levels; and that those elections were set to culminate with national elections in December 2014.

The appellant however learnt of the existence of a document developed by

the 1st and 2nd respondent entitled **“Operational Guidelines for Parents Associations for Pre-Primary, Primary and Secondary Schools”** which had been emailed to all County Directors of Education countrywide to circulate to all schools within their counties. Among other things, the Guidelines provided rules for holding elections which were in conflict with those of the appellant thereby undermining the appellant’s powers, functions and mandate to conduct the election of its members, at least at the school level; that the Guidelines were never published in the Kenya Gazette in accordance with the provisions of the Statutory Instruments Act and are therefore illegal.

The offending Guidelines and the email, the appellant insisted, amounted to violation of the constitutional right of its members to elect office bearers of their choice to parents associations at the school level.

The appellant also complained that it had incurred financial obligations in printing of ballot papers for the elections when the respondents issued the new guidelines; that while the 1st and 2nd respondents appointed to the County Education Boards across the country nominees of 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) the appellant was left out. This, it submitted amounted to discrimination and unequal treatment; that contrary to **section 4(1)** of the Basic

Education Act, there was no public participation before the guidelines were promulgated.

Regarding its legal status the appellant contended that it was registered under the Societies Act on 20th August, 2014 and issued with a certificate of registration number 19345; its nominees were appointed by the 2nd respondent as council members to the Education Standards and Quality Assurance and as members of the National Council for Nomadic Education in Kenya (NACONEK); that by a letter dated 21st February, 2013 the former Minister for Education, the late Mutula Kilonzo recognized the role of the appellant in the education sector but encouraged it to align its activities with the provisions of the Basic Education Act; buoyed by this support the appellant held elections at the 1st Annual General Meeting and subsequently the National Delegates Conference; and that for a period of 15 years, the appellant has been in correspondence with the 1st and 2nd respondents.

In any case, the appellant averred that if it was not legitimate the respondents were at liberty to file a complaint with the police to question the authenticity of the letter addressed to it by the late Minister.

Responding to these assertions the respondents, first questioned the legal status of the appellant and submitted that it has not been established in accordance with **section 55** and the Third Schedule of the Basic Education Act; that its officials have never been elected in accordance

with that Act as an umbrella body to represent parents associations; that it has not presented sufficient evidence that it was elected by parents associations from various schools as their representative; that the evidence presented by way of a list of less than 1000 schools does not represent all the 21,302 primary schools and 7,711 public secondary schools countrywide.

For that reason, the respondents submitted that the appellant has no power to levy payments from parents and schools.

The respondents further argued that the registration of the appellant under the Societies Act was contrary to **section 55** and the Third Schedule of the Basic Education Act which provide the procedure for forming a national association; that under **section 2** of the Societies Act, a society does not include an organization recognized under a different law.

In the learned Judge's estimation the petition raised only two issues for her determination; whether the appellant was established in accordance with the law and if it was; whether its there has been any violation of the Constitution by the respondents with respect to it.

On the first question the Judge came to the conclusion that the appellant was not the national association of parents that was contemplated under **section 55** and the Third Schedule of the Basic Education Act; and that the appellant and Mr. Ndunda were busybodies. She went on to say that;

“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..... He was not elected in a school, nor at the sub-county or county elections for parents associations.

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.

..... 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”.

Regarding the validity of the Operational guidelines promulgated by the respondents for the election of members of parents associations the Judge found them to be a verbatim version of the Basic Education Act as well as the Third Schedule of the Act; that nothing in the Guidelines went outside the law; that therefore the allegation that their promulgation lacked public participation were without merit.

With that the learned Judge dismissed the petition and held ultimately that the appellant had failed to demonstrate that the rights and fundamental freedoms were violated by the guidelines and the email.

Naturally, aggrieved by this decision the appellant has lodged this appeal on 12 grounds summarized as follows that the learned Judge: misdirected herself in finding that the appellant lacked the *locus standi* to prosecute the petition; erred in holding that there was no evidence of elections of Parents Association within the intendment of provisions of the Basic Education Act; failed to weigh the evidence by the appellant against the respondent's evidence vis a vis the provisions of the Education Act; failed to consider and determine the issue of competence and sustainability of proceedings by John Awiti on behalf of the 4th respondent; misapprehended **Article 36** of the Constitution and the Basic Education Act by finding that the appellant association was not the association envisioned by the said Act; erred by failing to determine the issue of whether the Operational Guidelines constrained the parents to the will and control of the respondents contrary to **section 4** of the Third Schedule of the Basic Education Act; failed to determine the issue of whether Operational Guidelines were not instruments envisaged by provisions of Statutory Instruments Act requiring parliamentary approval and gazettelement; erred by finding that the appellant was a busy body and intermeddled with the respondent's enforcement and; erred by

finding that the appellant failed to plead how its constitutional right of association had been violated by the respondent.

Guided by **Selle V. Associated Motor Boat Company Ltd** [1968] EA 123, this Court, being the first appellate court must consider the evidence, oral or by affidavit as was the case here, evaluate it itself and draw its own independent conclusions.

The petition presented before the court below sought protection of the appellant's members for alleged violation of their rights guaranteed under **Article 36** of the Constitution, to elect officials of their choice. In part, under this Article;

“(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”.

Article 22 on the other hand grants every person whose right or fundamental freedom has been denied, violated or infringed, or is threatened to institute proceedings in a court of law. By **Article 22(2) (d)**, an association acting in the interest of one or more of its members may institute proceedings. The next necessary question is whether the appellant could move the High Court for protection of its “members”. Put differently, was the appellant the national parents’ association envisaged under **section 55** and the Third Schedule aforesaid to represent parents?

Under the Basic Education Act at **section 53** the Cabinet Secretary for the time being responsible for matters relating to basic education and training is

responsible for the overall governance and management of basic education. In the discharge of that mandate he can delegate the governance or management of any aspect of basic education and training to any agency, body, organ or institution, and establish such structures of governance and management at national and county levels as may be appropriate. One of such structures of governance and management is a parents association for every school, public or private provided for in **section 55**. Since the answer to the entire dispute lies, partly in the construction of **section 55** and partly in the provisions of the Third Schedule we reproduce the latter first below;

“ 55. (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”. (Our emphasis).

It is in the Third Schedule that the constitution and functions of parents’ association are set out as follows;

“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.**

2. (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.

(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, counseling and disciplining of pupils; and

(h) discuss and recommend measures for the welfare of staff and pupils.

(3) The Parents Association shall hold such number of meetings at such places and at such times as the Association shall consider necessary for the proper discharge of its functions.

(4) Subject to the provisions of this Schedule, the Parents Association shall regulate its own procedure.

(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”.

The appellant is described as the Kenya National Parents Association. The burden was on the appellant to prove that it meets the criteria set out above by demonstrating that its formation started 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; that there were sub-county, county parents associations and national parents associations elected by delegates comprising members of parents associations from schools.

The appellant’s grievance arose from the Operational Guidelines for Parents Association issued in May, 2014 and an email of 16th June, 2014 bringing the contents of the guidelines to the attention of schools and Education Directors in the counties.

We have looked at the Operational Guidelines and the first thing we wish to point out is that under **section 53** the Cabinet Secretary is responsible for the overall governance and management of basic education and legally mandated to promulgate the guidelines.

Secondly, like the learned Judge, we find that the guidelines are based entirely on the Third Schedule, specifically providing for, among other things, the composition and functions of the association.

That ground must fail.

On the substance of the petition and even this appeal the appellant has relied on paragraphs 84 and 86 of Sessional Paper No 6 of 1988, in which the Government encouraged parents and schools to establish parents associations in public primary and secondary schools, the letter dated 21st February, 2013 which it is alleged the Minister for Education, the late Mutula Kilonzo gave authority to the appellant to establish a parents association, communication from the ministry from which the appellant argued that the respondents had recognised it, with the 1st and 2nd respondents attending its meetings, making keynote addresses at those meetings, and finally appointments of some of its members to various bodies within the education sector was also a demonstration that it was recognized.

An association whose formation is provided by law must be established and operated in accordance with the law. Only then will it get protection from the Constitution and the court.

“Sessional Paper No. 6 of 1988 on Education and Manpower Training for the Next Decade and Beyond” was the Government’s policy framework in

which it expressed the intentions of reducing the expenditure on formal education through what was called cost-sharing, a partnership policy. Cost-sharing was to involve the government, and, among others, communities, parents, religions and private organizations. In order to achieve this objective the paper made provision for association of parents in every public school.

It is this policy that has now been legislated in the Basic Education Act, which must now regulate the formation and operation of parents associations.

The letter of 21st February, 2013 which has been disowned by ministry as having been authored by the late Minister does not legitimize the appellant’s status and could not have purported to do so. It merely encouraged the appellant to **“formalize the establishment of school parents associations, sub-county parents associations, county parents associations and national parents association, which shall henceforth operate within the provisions of your constitution and the new Act”**.

The letter lays emphasis on adherence to the law. The letter, or attendance of meetings and making addresses, or appointments to various bodies within the education sector alone were not sufficient to confirm legal status on the appellant.

The appellant was expected, but failed to demonstrate that it had been elected by parent’s associations from schools through a delegate system. Indeed,

the appellant was not established in accordance with the procedure set out in the Third Schedule.

We cannot fault the learned Judge for her conclusion that the appellant was not entitled to the protection of the Constitution and the law.

For those reasons, we find no merit in the appeal. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 27th day of September, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR