MMM (Suing Through JMM as Guardian and Next Friend) v Attorney General & 8 others; Moi Primary School Kabarak – Nakuru (Interested Party) (Petition E488 of 2023) [2024] KEHC 4010 (KLR) (Constitutional and Human Rights) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4010 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E488 OF 2023

LN MUGAMBI, J

APRIL 25, 2024

BETWEEN

MMM (SUING THROUGH JMM AS GUARDIAN AND NEXT FRIEND) ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA NATIONAL EXAMINATIONS COUNCIL ..... 2ND RESPONDENT

CABINET SECRETARY, EDUCATION SCIENCE & TECHNOLOGY .... 3RD RESPONDENT

MINISTRY OF LABOUR AND SOCIAL PROTECTION ..... 4TH RESPONDENT

DIRECTOR OF CHILDREN SERVICES ..... 5TH RESPONDENT

TEACHERS SERVICE COMMISSION ..... 6TH RESPONDENT

KENYA HUMAN RIGHTS AND EQUALITY COMMISSION .... 7TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 8TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 9TH RESPONDENT

AND

MOI PRIMARY SCHOOL KABARAK – NAKURU ..... INTERESTED PARTY

RULING

Background

1. The Notice of Preliminary objection was filed by the Kenya National Examinations Council in a series of related files. The files are: Petition No. E477 of 2023 and Petition No. E478 of 2023 all being heard together. A similar Preliminary Objection was also filed a single file Petition No. E475 of 2023.

2. The gist of all the above-mentioned Petitions is the credibility of the 2023 Kenya Certificate of Primary Education (KCPE) examination results and the integrity of the process in producing the said results.

3. The 2nd respondent (Kenya National Examinations Council-KNEC) filed the Notice of Preliminary objection dated 8th February 2024 which was subsequently amended on 14th February 2024. The objection is founded on the doctrine of exhaustion of remedies.

4. This 2nd Respondent contended that the petitioner has not exhausted the available alternative dispute settlement procedures for review of examination results as set out under Rules 26 and 27 of Legal Notice No.131 of 2015 - The Kenya National Examination Council (Marking of Examinations, Release of Results and Certification) Rules and Section 40J of the *Kenya National Examinations Council Act* Chapter 241A of the Laws of Kenya.

5. There were no responses and submissions by all the other respondents and interested party in respect of the preliminary objection in either the Court file or on the online Court Tracking System (CTS).

2nd Respondent's Submissions

6. On behalf of the 2nd respondent, OM and Company Advocates filed written submissions dated 7th March 2024 in support of the preliminary objection.

7. Citing the Court of Appeal decision of *Phoenix E.A Assurance Company Limited vs S. M. Thiga T/A Newspaper Service* (2019) eKLR Counsel emphasized the importance of jurisdiction by quoting the following passage:

> "Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself."

8. He also relied on the case of *Mukisa Biscuit Co. vs. West End Distributors Limited* (1969) EA 696 which spelt out the threshold for a preliminary objection in the following words:

> "A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any act has to be ascertained or if what is sought is the exercise of judicial discretion."

9. Counsel submitted that the petitions primarily raise concerns on the credibility of the 2023 KCPE examination results. Accordingly, counsel argued that this is a matter which should have been adjudicated under Rules 26 and 27 of the *Kenya National Examinations Council (Marking of*

Examinations, Release of Results and Certification) Rules and Section 40J (3) of the *Kenya National Examination Council Act* Chapter 2014A.

10. That, Rule 26 provides that a person may lodge a query with the 1st respondent on the examination results while Rule 27 provides that a candidate can apply to the 1st respondent for review of the decision in respect of the examination results. Section 40 J (3) of the Act provides that where a person is aggrieved by the decision of the 1st respondent, can lodge its appeal to the Tribunal in the prescribed form. This Section additionally states that under Section 40 J (3) that this appeal can also be lodged by a person through the County Director of Education.

11. Consequently, Counsel submitted that the petitioner ought to have first exhausted the mechanisms provided before filing the instant petition. Counsel noted that the lack of compliance with these provisions was evident from the fact that the petition was filed on 26th November 2023, 3 days after the release of the results on 23rd November 2023.

12. Further, that it was clear that despite the allegation that the interested party in its letter to the 2nd respondent sought review of the examinations under the *Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules*, the petitioner went ahead and filed the instant suit before the matter could be determined.

13. Reliance was placed in *Speaker Of National Assembly Versus Tames Karume* (1992) eKLR where the Court of Appeal held that:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed."

14. Analogous dependence was placed in *Cortec Mining Kenya Limited vs The Cabinet Secretary Ministry Of Mining and the Attorney General* (2017) eKLR, *Republic vs Sacco Societies Regulatory Authority, Ex Parte Joseph Kiprono Maiyo and Others* (2017) eKLR, *Republic vs The Ministry Of Interior and Coordination of National Government* (2014) eKLR, *Geoffrey Muthinja and Another vs Samuel Muguna Henry and Six Others* (2015) eKLR, *Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission and Three Others* (2019) eKLR and *Republic vs The Kenya National Examinations Council, Ex-Parte The Board of Management of Ortum Secondary School* (Kapenguria High Court Jr No.9 And 10 of 2018).

Petitioner's case

15. The petitioner in response filed submissions dated 18th February 2024 through its Counsel, Danstan Omari and Associates Advocates. Counsel submitted that alternative remedies can only be applicable where the purported mechanisms are suitable. Nonetheless, it was argued that even then, those mechanisms cannot oust the original jurisdiction of the court to determine whether a right has been violated as in this petition. Consequently, Counsel argued that the purported alternative remedies are not suitable in this case. As such, these suit falls within the exceptional circumstances that excludes the petitioner from seeking redress from the purported forum.

16. Counsel anchored this argument in Article 47 of the *Constitution* that grants this Court jurisdiction to address issues of a violated right in an administrative action. Reliance was also placed in Muslims for Human Rights & 2 others vs (2020)eKLR where the Court held that:

> "In the instant case, the petitioners allege the violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that

> the claimed constitutional violations are not mere 'bootstraps' or merely framed in the Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

17. Similar reliance was placed in ELCEPJR no. E001 of 2023 *Northern Blocks Residents Limited V National Environment Management Authority & 2 others*.

18. Counsel additionally argued that the urgency of this matter necessitated filing of the instant suit. He noted that the petitioner as such could not wait for a response from the 2nd respondent with reference to his request for review of the 2023 KCPE results. Although the selection and placement of the Form 1's has already taken place, Counsel stressed that the issues raised herein are crucial in securing opportunities such as scholarships which lay emphasis on a student's results.

19. In his view, the related petitions raise pertinent issues that need to be deliberated on by the court as the students' permanent academic records are on the line. Further likely to affect their future admissions to other institutions of learning, a fact that the 2nd respondent fails to appreciate. In light of this, Counsel argued that the 2nd respondent's preliminary objection lacks merit and so should be dismissed.

Analysis and Determination

20. There is only one issue for determination in this ruling, that is, whether this Court's exercise of jurisdiction is barred by the doctrine of exhaustion of remedies from entertaining the issues raised in this Petition at this juncture.

21. In this case, there was no dispute as to whether the objection raised meets the legal threshold of a preliminary legal objection. In any case, my assessment is that the objection ticks all the boxes for a preliminary objection. It was argued based non-contest of facts pleaded by the Petitioner. Further, it raises a jurisdictional question that challenges the appropriateness of this Court as a primary forum for resolution of this dispute. It thus meets the test as defined in the celebrated case of *Mukisa Biscuits* (*supra*) that was subsequently been applied subsequent decisions including *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, where the Court elaborated:

> " A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
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> It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."
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> (see also *Oraro vs. Mbaja* [2005] 1 KLR).

Jurisdiction

22. Jurisdiction connotes the Court's general authority to adjudicate a legal dispute that is presented before it. In the words of *Blacks' Law Dictionary, Tenth Edition*- it refers to "A court's power to decide a case or issue a decree"

23. The Supreme Court of Kenya had the occasion to elaborate on this particular term *In the Matter of the Interim Independent Electoral Commission* (2011)eKLR when it stated thus:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step." *The Lillian 'S' case* establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*."

24. Likewise, the Court of Appeal in *Phoenix of E.A. Assurance Company Limited* (*supra*) noted as follows:

> " 19. ... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
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> > " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

25. The jurisdiction of the High Court is provided for under Article 165 (3) of the *Constitution* as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Const2010 *Constitution of Kenya, 2010* 72

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

The Doctrine of Exhaustion

26. The jurisdictional question raised in this case must be properly understood. Strictly speaking, it does not mean that the Court is incapable of dealing with the matter, rather, the argument is that given the an elaborate manner for the settlement of the dispute in question the primary forum of the dispute settlement is not this court and that process must be followed before the jurisdiction of this Court can be invoked.

27. In this matter, the 2nd Respondent's argument is that this is a matter should have been resolved in the manner provided for in Rules 26 and 27 of the *Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules* and Section 40J (3) of the *Kenya National Examination Council Act* Chapter 2014A instead of instituting of this Constitutional Petition before the Court.

28. On the other hand, the Petitioner countered that the alternative remedies principle only applies if the mechanisms provided are suitable. Further that existence of the mechanisms does oust the original jurisdiction of the court to determine whether a right has been violated. The Petitioner was thus submitted that that the purported alternative remedies are not suitable in this case and even if they exist, the exceptional circumstances of this case exclude their application as the petitioner may not get appropriate redress from the said alternative forum.

29. The doctrine of exhaustion of remedies has foundation in Article 159 (2) of the *Constitution* which requires Courts to promote the alternative dispute resolution mechanisms. Although the High Court enjoys unlimited original and civil jurisdiction as correctly observed by the Petitioner and expressly provided for in Article 165 of the *Constitution*, it is important to appreciate that the *Constitution* does not operate in a vacuum. There are equally other bodies or structures that are legally mandated to resolve disputes which the High Court must give deference to especially where primary jurisdiction is vested in them. *Blacks Law Dictionary* 10th Edition explains the doctrine of exhaustion of remedies as follows:

> " The doctrine that if an administrative remedy is provided by a Statute, a claimant must seek relief first from the administrative body before judicial relief. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure courts will not be burdened by cases in which judicial relief is unnecessary."

30. The Supreme Court in *Sammy Ndung'u Waity* (*supra*) underscored the importance of this principle by stating thus:

> " (63) Where the *Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:
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> > " It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

31. Equally, the Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) eKLR stated as follows:

> " ... the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance.... The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the

Courts must exercise restraint in exercising their Jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance ...In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute... Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

32. Nevertheless, there are exceptional cases where despite the existence of alternative forum for dispute resolution, the Court may find its intervention necessary especially if it determines that such forums are inadequate to meet the ends of justice in a matter. The Court of Appeal in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR reasoned:

> " 22. For this proposition the appellant called in aid this Court's finding in the case of *Speaker of National Assembly vs Njenga Karume* (1990-1994) EA 546 where the Court expressed itself in relevant part as follows: -
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> > "...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."
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> 23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

33. In *Krystaline Salt Limited vs Kenya Revenue Authority* (2019)eKLR the Court observed:

> " What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.
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> ...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

34. Additionally, the Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020)eKLR outlined the exceptions to the rule as follows:

> " 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

35. Section 40 J of the *Kenya National Examinations Council Act* lists the types of disputes that could arise from the decisions of the Council in regard examinations. It also provides an appeal to the Tribunal for any person that may be dissatisfied with the decision of the Council. It provides:

Appeals from decisions of the Council

(1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.

(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.

(3) Notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant is resident.

(4) The County Director of Education shall transmit to the Tribunal any applications received under subsection (3) within five days of receipt.

(5) Where the person aggrieved by the decision of the Council is a minor, the application under subsection (1) shall be made by the parent or guardian of the minor.

(6) An appeal under subsection (1) shall be—

(a) in writing; and

(b) lodged with the Tribunal within a period of fourteen days from the date of the decision of the Council.

(7) The parties to an appeal lodged under subsection (1) may appear before the Tribunal in person or be represented by an advocate or any other person whom the Tribunal may permit to be heard on behalf of such party.

36. The Tribunal referred to in Section 40J is the National Examinations Appeals Tribunal established under Section 40B of the Act and its decisions are appealable to the High Court under Section 40 (O).

37. Additionally, the *National Examination Council Rules*, published pursuant to Legal Notice number 131 of 2015 provide thus:

26. ...

(1) A person may lodge a query to the Council on—

(a) a candidate's personal details; or

(b) examination results.

(2) In resolving queries lodged under paragraph (1), the Council shall be guided by, the Act, these Rules, written laws, Council policies, Council procedures and Council regulations.

(3) An applicant submitting any query to the Council for resolution shall ensure the applicant provides all the required evidence to enable the Council process and validate the query promptly.

27.

(1) A candidate may apply to the Council for review of the decision in respect to the candidate's examination results or data under the Act, these Rules or any other written law.

(2) A review under paragraph (1) shall be lodged to the Council by the candidate within thirty days from the date of release of the examination results.

(3) An application for review under paragraph (2) shall be made to the Council in writing.

(4) The Council shall upon receiving an application for review, consider the application and make a decision.

(5) In determining an application for review, the Council may—

(a) approve the request;

(b) approve part of the request; or (c) reject the request.

(6) A decision made in response to the review shall be in writing and shall be communicated to the applicant within ninety days from the date of receipt of the application.

(7) The decision of a review under these Rules shall be final.

38. In the instant Petition, the gravamen of the Petition is captured under what is titled in the petition as the "Violations Of the *Constitution*." The complaint against the 2nd Respondent is contained in paragraph 1 under that heading which states:

> " The 2nd Respondent has failed to respect, uphold and defend this Constitution by flagrantly putting the future of Kenyan kids in confusion and jeopardy. By releasing KCPE results that have massive errors yet the same are used to place students in Secondary schools, the 2nd Respondent fails to uphold the children's right to education by making a mockery of the same education. It is discriminatory to release results which do not reflect the ability of respective students of Kitengela International School..."

39. Going through the entire Petition, the fact is that this Petition was informed by 'massive errors in the examination results.' That is the overriding grievance.

40. Disputes over errors in the examination results are contemplated in rules and the Act which provide a clear procedure for the settlement as demonstrated in the foregoing. Under Rule 26 and 27 of the *Kenya National Examination Council Act*, the Petitioners should have raised the matter with the 2nd Respondent either as a query on the impugned examination results or by seeking a review of the said results on account the alleged errors before filing the instant Petition. The decision not to raise the issue directly with the 2nd Respondent was against the rules. The High Court was in fact the 3rd tier level, after the 2nd Respondent and the Tribunal in resolution of examination related grievances. The matter could be resolved on non-constitutional grounds.

41. The upshot therefore is that the preliminary objection succeeds. This Petition is thus struck out. I make no orders as to costs. The ruling affects mutatis mutandis Petition number E478/2023 and Petition E488/2023 which are similarly struck out.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL, 2024.

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L N MUGAMBI

JUDGE