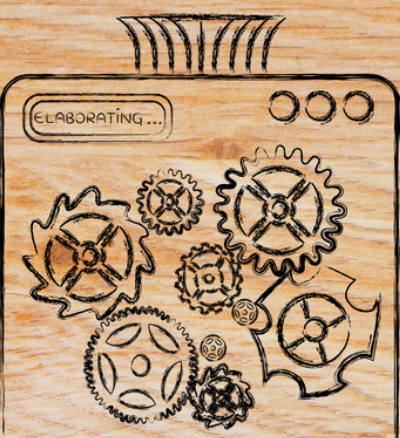




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COURT UPHOLDS THE COMPETENCY BASED CURRICULUM (CBC) SYSTEM OF EDUCATION

JUNE 2024

Court upholds the Competency Based Curriculum (CBC) system of Education

We are pleased to advise that our team comprising John Mbaluto, FCI Arb and Ajak Jok Ajak, successfully represented the Kenya National Union of Teachers (KNUT) as one of the Respondents in a case (High Court Constitutional and Human Rights Petition Number 371 of 2021 – Nelson Andayi Havi v. The Cabinet Secretary Responsible for Matters Relating to Basic Education and 7 Others) that challenged the roll out of the Competency Based Curriculum (CBC). In a landmark Judgment delivered yesterday, the 20th June 2024, by a bench of three (3) Judges comprising Hon. Mr. Justice Ndung'u, Hon. Lady Justice Ong'udi, and Hon. Mr. Justice Chigiti, SC, the Court dismissed a Petition presented by Nelson Havi seeking to quash the implementation of CBC on the contention that the education system was introduced in contravention of the Constitution and the relevant statutes that underpin education in Kenya.

In declining to grant the relief sought in the Petition, the Judges relied on the principles of granting injunctions and conservatory Orders as set out by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR*, in which the Court held that conservatory Orders portend a public function and should only be granted on the inherent merits of the case bearing in mind the public interest, the Constitutional values, the proportionate magnitude and the priority levels attributable to the relevant causes. The Court held as follows: -

“We have considered the prayer for injunction and the conservatory Order, and we find no evidence in support of either and therefore the legal threshold for injunction or conservatory Order has not been achieved. In any event, we have expressed ourselves on the great question of the great public interest and the likely prejudice that would be visited on the children of this country and the general disorder and disruption that would occur should the implementation of the CBC be stopped at this stage. On the flipside of the coin, the Petitioner has not demonstrated any prejudice he would suffer should the implementation continue.”

The Judges agreed with the arguments put forth by our

team, in addition to those of other Respondents, including, *inter alia*, held that:

- Regarding the best interest of a child and the principle of proportionality where there were competing rights: On the material available, it was evident that the CBC had already been rolled out and that millions of children were already learning under the new system and structure of education, with teachers having undergone fresh training, teaching materials and aids having been prepared and distributed, classrooms having been built to cater for the junior secondary school (JSS) learners, budgetary allocations made, and indeed funds having been spent on the program, with the children enrolled under the CBC system having advanced substantially in their studies. Notably, the Court found that CBC had been rolled out in all public schools in the country and stopping the implementation as sought by the Petitioner would only serve to wreak havoc and cause disorder in the country's education system. This would ultimately be prejudicial and have a disproportionate effect on the children and the parents and would offend the rights to education and the best interest of the child principle. Overall, stopping the CBC system of education would be against the public interest and the balance of convenience tilted in favour of maintaining the system.
- Whether the granting of the Orders sought would cause irreparable damage to the Respondents and 'Wanjiku' all together owing to the public resources already expended: The Court considered that billions of shillings had been expended for CBC implementation, including construction JSS facilities across the country. As such, granting the relief sought would lead to a significant wastage of public resources and taxpayers' money, which would lead to a colossal loss of public funds, and ultimately offend Article 232 of the Constitution on efficient, effective, and economic use of resources in public service.

In addition, the Teachers Service Commission

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(TSC), in a bid to further implement CBC, had advertised thousands of vacancies wherein it sought to employ JSS teachers, primary school teachers, and interns for both JSS and primary schools. In the circumstances, granting the Orders sought would amount to loss of employment as well as wastage of all the resources that the government had invested in rerouting, retooling, and retraining of teachers for CBC.

- **Whether the Petitioner was guilty of laches or delay:** The Court noted that the Petition herein was filed on 16th September 2021, while the CBC was rolled out in 2018 at a pilot phase, and in 2019 as the effective roll out date. A child enrolled in CBC on its pilot phase in 2018, had by the time of filing of the Petition spent about four (4) years in the system and for the child starting on the effective date had studied under CBC for three (3) years. The question that then arose was whether the delay in filing of the Petition was inordinate and inexcusable. The Court noted that given that the Orders sought would have far-reaching ramifications on the education system in the country as well as touching upon children's right to education, it behoved the Petitioner to move with speed when filing the Petition. The Court found that there was no attempt by the Petitioner to explain the delay in presenting the matter before Court, rendering such delay both inordinate and inexcusable.
- **Whether there was public participation on the implementation of the CBC system of education:** Public participation has been defined by Courts as the varying processes of engaging the public or a representative sector while developing the laws and formulating the policies that affect them, and that the processes may take different forms. Public participation in public affairs depends on the systemic issue and requires four (4) basic parameters as follows: (i) the public should have reasonable access to the information so as to provide their views on; (ii) the information should be clear and understood; (iii) the public should have sufficient time to interrogate the information and provide their

views; and (iv) there should be a defined process for the public or the stakeholders to respond to the matter. The Court noted that this approach ensures that the public has a clear understanding of the matter at hand, and the engagement should be more than a mere formality and should enable individuals to express their viewpoints. However, it did not require everyone to express their views.

The Court found that there was sufficient proof that the 1st Respondent (the Cabinet Secretary for Basic Education) had meaningful engagement with the relevant stakeholders including the unions of teachers (in both primary and secondary), the Kenya Institute of Curriculum Development (KICD), the TSC, the Kenya National Examination Council (KNEC), the general public and other stakeholders in the education sector prior to the roll out of CBC and as such had achieved the legal threshold for public participation as envisaged in law. The Petitioner's claim that there was lack of public participation was therefore dismissed as devoid of merit.

The upshot of the Court's Judgment is that the introduction of CBC as a system of education in Kenya was found to have passed Constitutional muster and is thus here to stay. The Court however directed the Cabinet Secretary for Basic Education to make regulations in respect of CBC's implementation and to seek the amendment of section 41 of the Basic Education Act (Cap. 211) Laws of Kenya so as to align it with CBC as implemented.

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Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCI Arb, Deputy Managing Partner, (john@oraro.co.ke) and Ajak Jok Ajak, Associate, (ajak@oraro.co.ke) or your usual contact at our firm, for legal advice.



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