

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI



CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 495 OF 2015

BETWEEN

**KENYA HUMAN RIGHTS
COMMISSION.....PETITIONER**

AND

**NON-GOVERNMENTAL ORGANISATIONS
CO-ORDINATION BOARD.....RESPONDENT**

JUDGMENT

1. On 29 October 2015, the Respondent issued a press statement stating that it had carried out a forensic audit of the 10,015 Non-Governmental Organizations ("NGOs") registered under the Non-Governmental Organizations Co-ordination Act, 1990. According to the Respondent, the audit had established that some NGOs had failed, refused, neglected and/or declined to account for the funds they received despite numerous reminders issued to them by the Board.
2. The Respondent further stated that it had with immediate effect initiated the de-registration process of the non-compliant 957 NGOs;

forwarded the list of all deregistered NGOs to the Central Bank of Kenya and the Kenya Bankers Association to freeze bank accounts of the deregistered NGOs. The Respondent also forwarded the list to the Financial Reporting Centre and the Directorate of Criminal Investigations for further investigations and possible prosecutions.

3. Being among the 957 NGOs, the Petitioner contends that the Respondent's actions are unconstitutional and have adversely affected its operations.

The Petitioners' Case

4. The Petitioner is a body corporate registered under the Non-Governmental Organizations Co-ordination Act, 1990.
5. The Petitioner's case is set out in the Petition dated 5 November 2015 and filed in court on 12 November 2015. In support of the Petition, the Petitioner filed an affidavit sworn by Davis Malombe, the Petitioner's Deputy Executive Director on 5 November 2015.
6. The Petitioner contends that the allegations by the Respondent that it had been filing false reports with glaring discrepancies in its annual audited accounts showing a total income of Kshs. 1, 210, 961, 093/= and operating four illegal bank accounts were false and extremely adverse. According to the Petitioner, it was not given an opportunity to be heard. Neither was the Petitioner given an opportunity to give an explanation on any matter before the press statement was issued.

7. In this regard, the Petitioner states that the Respondent's actions have violated its rights to fair administrative action under Article 47 of the Constitution and to fair hearing under Article 50.
8. Further, the Petitioner avers that it has been subjected to arbitrary, harsh and oppressive treatment thereby violating its right to dignified and humane treatment as guaranteed under Articles 27 and 28 of the Constitution.
9. Accordingly, the Petitioner seeks the following orders ,that:
 - (a) *"A declaration that the adverse actions taken against itself by the Respondent in commencing its de-registration, in ordering the freezing of its bank accounts by the Central Bank of Kenya and the Kenya Bankers Association and ordering its investigation by the Directorate of Criminal Investigations and the Financial Reporting Centre are unconstitutional and therefore null and void ab initio.*
 - (b) *A conservatory order and/or an order of perpetual injunction restraining the Respondent by itself, its servants, agents and/or employees from de-registering the Petitioner, ordering the freezing of its bank accounts and ordering investigations against the Petitioner.*
 - (c) *General Damages*
 - (d) *Costs of this question and interest therefore on (c) above at court rate.*
 - (e) *Any other relief that this Honourable Court may deem fit and just to grant.'*

The Respondents' Case

10. The Respondent is established under the Non-Governmental Organizations Co-ordination Act, 1990. Its functions include receiving and discussing the annual reports of the NGOs: see Section 7 of the Non-Governmental Organizations Co-ordination Act, 1990.
11. In opposing the petition, the Respondent filed its grounds of opposition dated 11 January 2016.
12. It is the Respondent's case that it initiated the Petitioner's de-registration process for non-compliance with statutory provisions. After conducting investigations on the Petitioner, it discovered that it had been operating four illegal bank accounts and filing false reports.
13. The Respondent contends that the petition is a misguided attempt to arm twist the Respondent into halting investigations on the Petitioner's illegal activities. In the circumstances, the Respondent urges that the petition should be dismissed as it is incompetent, misplaced and an abuse of the court process.

SUBMISSIONS

Petitioner's Submissions

14. Mr. Nzamba Kitonga, SC submitted on behalf of the Petitioner.
15. Counsel submitted that the Petition was uncontested as there was no replying affidavit on record.

16. Further, counsel submitted that the Petitioner was never given Form 9 as required under the First Schedule to the Non-Governmental Organizations Co-ordination Act, 1990.
17. The Petitioner submitted that it ought to have been given notice before the adverse measures were taken by the Respondent. It was contended that, the principles of natural justice advert that no person shall be condemned unheard. According to the Petitioner, despite writing to the Respondent seeking an explanation and particulars, the Respondent has maintained studious silence and refused to give such explanation. Such inaction, it was submitted was unconstitutional. On this assertion, the Petitioner relied on the cases of **Royal Media Services Limited -v- The Commissioner of Customs and Excise (2002) E.A. 579** and **Muslims for Human Rights (MUHURI) & another v The Inspector- General of Police & 5 others [2015]eKLR**.
18. The Petitioner also asserted that it was entitled to damages. In support of the case for general damages, it was submitted that, the Respondent callously and without regard for the consequences branded the Petitioner as associated with terrorism, money laundering, theft, embezzlement and diversion of donor funds. Accordingly, the Petitioner seeks for general damages in the sum of Kshs. 80,000,000/-. In this regard, the Petitioner relied on the case of **Biwott v Clays Limited [2000] 2 EA 334 (HCK)**.

Respondent's Submissions

19. Mr. Obura submitted on behalf of the Respondent.
20. Citing the Non-Governmental Organizations Co-ordination Act, 1990, Counsel submitted that the actions taken by the Respondent were in accordance with section 7 thereof and in public interest.
21. The Respondent contended that the Petitioner was issued with Form 9 as provided under Regulation 17(1) of the Non-Governmental Organizations Co-ordination Act, 1990, requiring the Petitioner to show cause why the Petitioner could not be deregistered. Further, that the Petitioner was given an opportunity to visit the Respondent's offices to show cause why the Petitioner's certificate could not be canceled. However, it was submitted that the Petitioner failed, declined and/or refused to appear. Accordingly, it was the Respondent's submission that the Petitioner cannot allege infringement of rights under Article 47 and 50 as they opted not to respond to the Notice to Show Cause issued by the Respondent.
22. With regard to the claim for damages, the Respondent submitted that damages in constitutional matters are not meant to restore a person and/or organization to the state they were in before.
23. It was the Respondent's submission that its actions were within the law and informed by the need to protect the public. On this assertion,

the Respondent sought to rely on the case of **R v Kenya National Commission on Human Rights Ex p Uhuru Kenyatta (2010)e KLR.**

24.The Respondent concluded by urging the court to dismiss the petition.

DISCUSSION

25.Core in the Petition is the question whether, the Respondent, in cancelling the Petitioner's certificate violated the Petitioner's rights under Articles 47 and 50 of the Constitution.

26. The Respondent as well as the Petitioner are regulated by the Non-Governmental Organizations Co-ordination Act, 1990. The preamble to the aforesaid Act states that it is '*an Act of Parliament to make provision for the registration and co-ordination of Non- Governmental Organizations in Kenya and for connected purposes.*' The Act establishes the Non- Governmental Organizations Co-ordination Board which is *inter alia* tasked with issuance of certificates of registration as well as the cancellation of such certificates. The Act provides that where an NGO is aggrieved by the decision of the Board on particular issues, an appeals' process provided for under section 19 of the Act ought to be followed.

27. Having set out as above, does this court have jurisdiction to entertain this matter?

28. This court derives its jurisdiction from the Constitution and in particular, Article 165. It is vested with jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
29. The Petitioner contends that the decision by the Respondent violated its right to fair administrative action under Article 47 and fair hearing under Article 50 of the Constitution. Flowing from 165 (3) (b) and on the face of the facts of this Petition it would appear that this Court has jurisdiction to determine this matter.
30. Further, it is to be construed that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid: See Article 2 of the Constitution. The transitional provisions under the Sixth Schedule and in particular, section 7 provides that,
- 'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'*
31. Thus, all law must conform to the Constitutional edifice. Section 19 of the Non-Governmental Organizations Co-ordination Act, 1990 must be read to conform to the Constitution.

32. Additionally, it would not be appropriate to argue that the Non-Governmental Organizations Co-ordination Act, 1990 has a mechanism to address the Petitioner's grievances. Section 19 of the Act provides for appeals to the Cabinet Secretary where any particular decision has been made by the Board under Part III of the Act which affects a non-governmental organization. Part III of the Act deals with the process and requirements of registration of non-governmental organizations. It also provides for the cancellation of any registration certificates by the Respondent. It however does not provide for issues and decisions which are part of the daily management or regulation of NGOs same bodies like oversight over bank accounts and funds.

33. Section 19 of The Non-Governmental Organizations Co-ordination Act, 1990 provides that:

'(1) Any organization which is aggrieved by [the] decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.

(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the written decision of the Minister, appeal to the High Court against that decision and in the case of such appeal-

(a) The High Court may give such direction and orders as it deems fit; and

(b) The decision of the High Court shall be final. '

34. The Section is evidently not couched in mandatory terms. It is also to be noted that the challenges laid by the Petitioner have not only to do with the intent to deregister it but also the decision by the Respondent to have the Petitioner's bank accounts frozen and further the decision to have the Petitioner investigated by the Directorate of Criminal Investigations.

35. In my view, one of the decisions impugned would fall under Part III of the Non- Governmental Organizations Co-ordination Act, 1990 and consequently under Section 19 of the Act. An appeal to the Cabinet Secretary would lie from such a decision. The decision concerns the alleged deregistration of the Petitioner or cancellation of the registration certificate. The other two decisions by the Respondent as to the freezing of the Petitioner's bank accounts and prompting investigations by the criminal investigations department would not fall under Part III of the Act.

36. There is evidently no internal mechanism availed by the Non- Governmental Organizations Co-ordination Act for an NGO to pursue an appeal over other matters and decisions not within Part III. Consequently, I would not shut out the Petitioner in the circumstances.

37. Besides, it would also be inappropriate to adopt a separationalist approach and split some of the claims by the Petitioner to be settled by this court and let the Cabinet Secretary settle the other. Finally as well, the Petitioner claims a breach of a guaranteed constitutional right. That can only be dealt with and determined by the court and not a Cabinet Secretary.

38. It would consequently be flawed to reason that the Petitioner ought to have appealed to the Cabinet Secretary first.

39. On the Petitioner's alleged violation of its right under Article 47, it is provided therein that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. These constitutional provisions have been echoed in the Fair Administrative Action Act, 2015 particularly under section 4(1) and (2).

40. Section 4(3) of the Fair Administrative Action Act, 2015 provides that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard;

notice of a right to a review or internal appeal against an administrative decision, where applicable; a statement of reasons pursuant to section 6.

41. As to what constitutes fair administrative action, the court in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, stated thus:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]

42. Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.

43. The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of the Constitution makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

44. The right to fair hearing is evidently closely intertwined with fair administrative action. The oft cited case of **Ridge v Baldwin [1964] AC 40** restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn

aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights.

45. Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

46. I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

47. It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a “reasonable” administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.

48. Turning to the case at hand it is important to consider whether the Respondent accorded the Petitioner a just hearing before cancelling its certificate therefore violating its right to fair administrative action.

49. Section 3 of The Non-Governmental Organizations Co-ordination Act, 1990 establishes a Board whose functions shall be-

“(a) to facilitate and co-ordinate the work of all national and international Non-Governmental Organizations operating in Kenya;

(b) to maintain the register of national and international Non-Governmental Organizations operating in Kenya, with the precise sectors, affiliations and locations of their activities;

(c) to receive and discuss the annual reports of the Non-Governmental Organizations;

- (d) to advise the Government on the activities of the Non-Governmental Organizations and their role in development within Kenya;*
- (e) to conduct a regular review of the register to determine the consistency with the reports submitted by the Non-Governmental Organizations and the Council;*
- (f) to provide policy guidelines to the Non-Governmental Organizations for harmonizing their activities to the national development plan for Kenya;*
- (g) to receive, discuss and approve the regular reports of the Council and to advise on strategies for efficient planning and co-ordination of the activities of the Non-Governmental Organizations in Kenya; and*
- (h) to develop and publish a code of conduct for the regulation of the Non-Governmental Organizations and their activities in Kenya."*

50. The Board is further vested with authority to cancel a certificate issued as provided under section 16 of the Non-Governmental Organizations Co-ordination Act, 1990 where it is satisfied that the terms and conditions attached the certificate have been violated; or the organization has breached the Non-Governmental Organizations Co-ordination Act, 1990; or the Council has submitted satisfactory recommendation for the cancellation of the certificate.

51. Rule 17 of the Non-Governmental Organizations Co-ordination Regulations, 1992, which makes provision for cancellation of registration *inter alia* states that:

'(1) Where under section 16(1) of the Act the Board is of the opinion that the registration of any Organization should be cancelled, it shall send to the Organization a notification of intended cancellation in Form 9 set out in the First Schedule taking every reasonable precaution to ensure fairness in the exercise of its discretion.

(1A) Paragraph (1) does not apply with respect to a cancellation by the Board under section 16 of the Act for a failure by the registered Organization to comply with regulation 24.

(2) Where the Board cancels the registration of an Organization, it shall send to the Organization a notification of cancellation in Form 10 set out in the Schedule.'

52. In the Respondent's press release dated 29th October 2015, the Petitioner is accused of:

"...the Board, following investigations has discovered that other than operating 4 illegal accounts, KENYA HUMAN RIGHTS COMMISSION has been filing false reports with the Board with glaring discrepancies in its annual returns and audited accounts with a total income of KES. 1,210,961,093."

53. As a result, the Respondent cancelled the Petitioner's certificate.

54. The Petitioner contends that it was not given an opportunity to be heard. Neither was it given an opportunity to give an explanation on any matter before the press statement was issued. Further, it had occasion to write to the Respondents seeking an explanation for the Respondent's unilateral decision but, unfortunately, none was given.

55. From the court records, there is a letter from the Petitioner to the Respondent of 29 September 2015 in reference to annual returns. In the said letter, the Petitioner states that it submitted the audited accounts on the same day the returns were made. The Petitioner further encloses '*Annual Report & Financial Statements for 2015*'. However, the annual report and financial statements for 2015 are not in the court record. It is important to point out that, the basis upon which the Respondent took the action of deregistration of the Petitioner is '*filing false reports with the Board with glaring discrepancies in its annual returns and audited accounts.*'

56. Section 19 of The Non-Governmental Organizations Co-ordination Act, 1990 partly provides that:

' (2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.'

57. From the above provision, it can be inferred that, the Board does not have to give an explanation for its decision except where an aggrieved NGO appeals. Thereafter, the Minister would then request from the Council written comments on which an appeal has been submitted. If an NGO does not appeal the decision to the Board, then no written comments will be given by the Board. Section 19(2) however cannot override the provisions of Article 47 which dictate that written reasons be availed.

58. It is important to note that the Petitioner also contends that it was never given the Form 9 as required under the First Schedule to the NGOs Act. Form 9 is with regard to notification of intended cancellation of registration. The duty is ordinarily on he who alleges to prove. However, it is always not possible to prove the negative. It was incumbent upon the Respondent to show on a balance of probabilities that it indeed served the Petitioner with Form 9 as all evidence of service, if any, could only have been with the Respondent. The Respondent did not.

59. Has the Respondent then infringed the Petitioner's right to fair administrative action and the right to fair hearing? As stated above, the Constitution under Article 47 requires that where a right or fundamental freedom of person has been or is likely to be adversely affected by administrative action, the person has to be given written reasons for the action.

60. The provisions under the Non-Governmental Organizations Coordination Act do not envisage reasons being given to an aggrieved NGO when a decision by the Board has been made. Such written reasons can only be given on request from the Minister.

61. As earlier established, all law in force immediately before the effective date continue in force. However, such law is to be construed with the alterations, adaptations, qualifications and exceptions

necessary to bring it into conformity with the Constitution. A law that is inconsistent with the constitution is void to the extent of the inconsistency.

62. The fact that the Petitioner cannot be given written reasons for the Board's decision, amount to violation of rights under Article 47.

63. Further, no person is to be condemned unheard unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard. I am of the considered view that in the circumstances of this case, the Petitioner's right to fair hearing as well as fair administrative action was infringed.

64. The Petitioner seeks general damages to the tune of Kshs. 80,000,000/- .The fundamental principle by which the Courts are guided in awarding damages is *restitutio in integrum*, which means, the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred: See

Dharamshi v Karsan [1974] E.A. 40

65. In principle, constitutional remedies should be forward-looking, community-oriented and structural. However, an award for damages is not a forward looking remedy. It requires the court to look back to the past in order to determine how to compensate the victim or even punish the violator. Further, there has to be a sense of justice in compensating a party. Such instances would, in my view, include where the administrative decision was taken in bad faith or under

corrupt circumstances or completely outside the legitimate scope of the empowering provision.

66. In the instant case, though the Respondent acted in accordance with the provisions under the Non-Governmental Organizations Coordination Act, 1990, I have found that its decision was reached against constitutional provisions. I am however not convinced that this warrants the Petitioner a relief in damages. As stated above, constitutional remedies should be forward-looking, community-oriented and structural.

67. I must also add that even where one alleges damage to his reputation an award of damages is not made *simpliciter*. The Petitioner has not adduced any evidence to warrant award of damages sought. In the circumstances, I am of the considered view that the prayer for damages should be dismissed.

Conclusion

68. In the circumstances and in conclusion, I return the verdict that in as far as the Respondent did not give the Petitioner any hearing prior to arriving at the decision to cancel the Petitioner's registration certificate and seek that the Petitioner's bank accounts be frozen, the Petitioner's rights under Article 47 of the Constitution were violated. This was compounded further when the Respondent failed to give written reasons for its decisions. In view of such finding, I do not find

it necessary to go into the merits of the decision as to whether it was legal and reasonable.

69. With regard to the decision taken by the Respondent to ask the the Directorate of Criminal Investigations to investigate the Petitioner for alleged criminal activities or acts, my view is that when one lodges a complaint with the National Police Service under whose jurisdiction the Directorate of Criminal Investigations operate there is certainly no need to give the person accused a hearing. The Complainant need not engage the suspect. The engagement is to be undertaken by the investigators. The fact of not having accorded the Petitioner a hearing before lodging a complaint with the criminal investigation department would thus not affect the decision to refer the matter to the National Police Service.

70. I come to the conclusion that that the decision by the Respondent to commence and or effect the process of deregistering the Petitioner as a non-governmental organizations under the Non-Governmental Organizations Co-ordination Act, 1990 was riddled with impropriety and procedural deficiencies contrary to Articles 47 and 50(1) of the Constitution. The same position applies to the decision to order or direct the freezing of the Petitioner's bank accounts.


71. I also conclude that the Petitioner has not established that it is entitled to any damages.

Disposition

72.I would consequently partially allow the Petition and make the following orders:

- a. There shall be issued a declaration that the adverse actions taken by the petitioner in commencing the deregistration of the Petitioner or deregistering the Petitioner and further in ordering the freezing of the Petitioner's bank accounts by or through the Central Bank of Kenya as well as through the Kenya Bankers Association is unconstitutional null and void
- b. The Petitioner shall have the costs of the Petition to be paid by the Respondent.

Dated, signed and delivered at Nairobi this ^{29th} day April, 2016


J.L. ONGUTO
JUDGE