



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 221 OF 2018

IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS

AND FUNDAMENTAL FREEDOMS ARTICLES 19, 20, 21, 22,

23, 24, 25, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION

UNDER ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR

ADMINISTRATIVE ACTION ENSHRINED IN ARTICLE 47 AND ARTICLE 10 OF THE

CONSTITUTION OF KENYA, 2010 AND ACTING ULTRA VIRES THE ENABLING STATUTE

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF ARTICLES 23, 159, 165(3) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV

REGISTERED TRUSTEES.....PETITIONER

VERSUS

CO-ORDINATION BOARD.....1ST RESPONDENT

NICOLAS LINDON OTIENO.....2ND RESPONDENT

NATIONAL INDUSTRIAL

CORPORATION (NIC) BANK LIMITED.....3RD RESPONDENT

AND

TERESIA OTIENO.....INTERESTED PARTY

RULING

PETITION

1. The Petitioner through a Petition dated 18th June 2018 and filed on 19th June 2018 seeks the following reliefs:-

- a) *A declaration that the adverse actions taken by the Respondents in freezing the Petitioners NIC Bank Accounts number [xxxx], [xxxx] and [xxxx] and the purported directive for cancellation of work permit and deportation of the Petitioner's director are unconstitutional, null and void.*
- b) *A declaration that the 1st Respondents acted ultra vires and in excess of its jurisdiction and/or statutory powers by purporting to direct other independent institutions on how to discharge their statutory mandate.*
- c) *A declaration that the 1st and 3rd Respondents breached the Petitioner's right to a fair administrative action by purporting to act based on undisclosed complaints and / or freezing the Petitioner's bank accounts without any notice, court order and /or affording the Petitioner a hearing.*
- d) *A declaration that the 2nd Respondent acted illegally, arbitrarily and in contravention of Article 232(1)9a,(e) and Article 10 of the Constitution of Kenya, 2010.*
- e) *An order do issue restraining the 2nd Respondent, from harassing and or contacting the directors, employees, sponsors, donors, agents and or servants of the petitioner through phone calls on his private or office phone number, sending emails to them through his private email addresses; or visiting the petitioner's offices and or the residences of the petitioner's directors, employees, sponsors, donors, servant and or agents and / or disseminating disparaging information against the Petitioner.*
- f) *A conservatory order be granted lifting the arbitrary freezing of the Petitioners' bank Accounts Numbers [xxxx], [xxxx] and [xxxx] with the 3rd Respondent's institution.*
- g) *A conservatory order be granted prohibiting the 1st Respondent itself, its servants, agents and/or employees (including the 2nd Respondent) from harassing, intimidating the Petitioner and/or its employees; purporting to undertake inquiry, interrogation, investigations, seizing documents, freezing the Petitioner's Bank Accounts; directing other independent institutions to cancel valid work permit(s) of Petitioners directors and/or deport the Petitioner's Global director, Ms Rebecca Faith Matheson, and/or direct deregistration of the Petitioner as a trust; disseminating disparaging information against the Petitioner herein or in any other manner interfering with the Petitioner's operations.*
- h) *An order of this honourable court do issue quashing letters reference Nos. NGOB/218/051/15-003(14) addressed to the 3rd Respondent; and NGOB/218/051/15-003(15) addressed to the director of citizens and immigration department; NGOB/218/051/15-003(15) addressed to the Registrar of Lands Ardhi house all dated 31st May, 2018 and NGOB/218/051/15-003(18) dated 4th June, 2018 addressed to the Petitioner.*
- i) *An order do issue directed at the 1st Respondent requiring it to consider the Petitioners application by the International Steering Committee of the International Community of Women Living with HIV to be de-registered as a non-governmental organization in accordance with article 47 of the constitution of Kenya, 2010.*
- j) *That the honourable court be pleased to award the petitioner general damages against the 1st and 2nd Respondents to be assessed by the court for unlawful freezing of the Petitioner's bank account.*
- k) *The Petitioner prays for the costs of this Petition and interest.*
- l) *Any other further relief that this honourable court may deem fit and just to grant.*

THE 1ST AND 2ND RESPONDENTS PRELIMINARY OBJECTION

2. The 1st and 2nd Respondents filed Notice of Preliminary Objection dated 27th June 2018 on points of law against the Petition raising 5 grounds of objection being as follows:-

- a) *That the Petitioner suing and the Petitioner described in paragraph 1 of the Petition are different persons hence not one and the same.*
- b) *That the Petitioner has admitted in paragraph six (6) of the supporting affidavit that it was registered as a Non-Governmental Organisation on 16th August 2016.*
- c) *That in view of the undisputed fact in paragraph six (6) above, the suit herein is filed in gross contravention of Regulation 25 of the Non-Governmental organisations Co-ordination Act, Cap 134 laws of Kenya.*
- d) *That the Petitioner is a non-existent entity with no locus standi whatsoever and therefore unable to enforce the orders sought*

therein rendering the courts action in vain.

e) That this suit is otherwise an abuse of the court process.

THE PETITIONER'S RESPONSE

3. The Petitioner is opposed to the preliminary objection by the 1st and 2nd Respondents on the basis that the 1st and 2nd Respondents' preliminary objection is not a preliminary objection as the same does not raise any point of law and that all grounds raised are disputed and need to be ascertained in full trial on merits.

THE 3RD RESPONDENT'S RESPONSE

4. The 3rd Respondent supports the 1st and 2nd Respondents Preliminary Objection as well as the position taken by the Interested Party.

INTERESTED PARTY'S RESPONSE

5. The Interested Party fully associates herself with the 1st and 2nd Respondents Notice of Preliminary Objection.

ANALYSIS AND DETERMINATION

6. I have considered the 1st and 2nd Respondents Preliminary Objection dated 27th June 2018 and the Petitioner's, 3rd Respondent's and Interested Party's response and submission by all the parties and from the same the issues arising thereto for consideration can be summed up as follows:-

- a) Whether the 1st and 2nd Respondents Preliminary Objection raises pure point of law?*
- b) Whether the Petitioner is a Trust or Non-governmental organization?*
- c) Whether the Petitioner has locus standi to maintain the instant suit?*

A. WHETHER THE 1ST AND 2ND RESPONDENTS PRELIMINARY OBJECTION RAISES PURE POINT OF LAW?

7. The Petitioner's contention is that the 1st and 2nd Respondents' Preliminary Objection is not a Preliminary Objection as regards to definition of a preliminary objection as was stated by Sir Charles Newbold in the case of *Mukhisa Biscuits Manufacturing Company Limited v. West End Distributors Ltd (1969) E.A. 696* where it is stated:-

“A preliminary objection is what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

8. The Petitioner urges that the 1st and 2nd Respondents, grounds of objection are not points of law. That all the grounds of facts which are disputed hence the need for their ascertainment in a full trial based on merits.

9. The Petitioner further in support of their proposition sought reliance from the case of *Republic v Eldoret Water & Sanitation Co. Ltd Ex parte Booker Onyango & 2 others (2007) eKLR*, where Ibrahim J, as he then was, stated:-

“An objector cannot introduce any factual dispute or controversy and must stick to pure Point of Law.”

10. From my understanding of what preliminary objection is required to meet and upon considering the *Mukhisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A. 696* definition of a preliminary objection. I find a proper preliminary objection should meet the following thresholds:-

- a) Preliminary objection should raise a pure point of law.*
- b) A preliminary objection should be argued on assumption that all that facts pleaded by the other side are correct and cannot be raised if any facts has to be ascertained.*
- c) A Preliminary Objection cannot be raised if it is sought in the exercise of Judicial discretion.*

11. The 1st and 2nd Respondents contention is that the Preliminary Objection raises questions of law; being whether the Petitioner as described under paragraph 1 of the Petition and read together with paragraph 6 of the supporting Affidavit to the petition has the locus standi to institute this suit and secondly whether the description under paragraph 3 of the Petition is a true description of the 2nd Respondent.

12. From the pleadings the Petitioner describe itself as a trust; registered under the register of trusts in the Ministry of Lands. The Petition further states under paragraph 6 of the supporting affidavit that it is registered NGO under the NGO register and Regulations. As per Petitioner's admission it appears to be registered under two regimes of law and therefore raises a question of law as to which regime of the law do the Petitioner ascribe to. This is not a point to be determined by facts as it is a pure point of law. There is no dispute of facts as regards the issue herein as all facts relating to this issue is duly pleaded by the Petitioner and admitted as correct by the other side. I therefore find the preliminary objections as drawn and field raises a pure point of law and the preliminary objection is rightly before this Court.

B. WHETHER THE PETITIONER IS A TRUST OR NON-GOVERNMENTAL ORGANIZATION?

13. The Petitioner under paragraph 1 of the Petition describes itself as a body corporate, incorporated under the Trustees (Perpetual Succession Act). The Petitioner further under paragraph 6 of the supporting Affidavit sworn on 18th June 2018 state:-

That on 16th August, 2016 the Petitioner was again registered as an NGO under Section 10 of the Non-Governmental Coordination Act at the behest of the International Steering Committee of International Community of Women Living with HIV which operates separately from the Petitioner.

(Annexed thereto and marked "RFM2" is a copy of the entity's registration as a Non-Governmental Organization).

14. It is clear that the Petitioner admitted in its pleadings of being registered under two regimes of law at the same time or thereafter. The Petitioner was first registered as a Trust under the trustee (Perpetual) Succession Act as per attached Registration document dated 14th May 2016 and thereafter registered as Non-Governmental Organisation under the **Non-Governmental Coordination Act, 1990** on 16th August 2016.

15. **Section 25(2) of the Non-Governmental Organisation Co-ordination Regulation, 1992** provides:-

"(2) Upon registration under the Act, the Organization referred to shall cease to operate under any other written law in Kenya or based on any agreements with the Government as the case may be."

16. From the provision of the above-mentioned Section, it is apparently clear that upon an organization that was registered under another law undergoing a second registration as an NGO under the **NGO Act**, that organization loses its former identity under the previous Act/law it was registered under and its operations became fully governed by the **NGO Coordination Act, 1992** as clearly provide by the regulations thereto.

17. In view of the Petitioner herein on such second Registration under the **NGO Act** ceased to exist as a Trust upon its registration under the Non-Governmental Organization Coordination on 16th August 2016. The Petition herein as filed is bad in law on the basis that the Petitioner is not a trust as it represents itself. Its operations are now fully governed by the **NGO Coordination Act 1990** and is bound by the provisions of the aforesaid Act.

18. The Respondents, and Interested Party in support of their position that the Petitioner is an NGO and is bound by the relevant Act sought reliance from the case of **Maendeleo ya Wanawake Organization (MYWO) & 2 others vs. NGOs Co-ordination Board & 5 Others. Petition No. 9 of 2014 (unreported)** Justice Mumbi Ngugi aptly held as follows:-

"109. Secondly, the 1st petitioner is a Non-Governmental Organization registered and regulated under the Provisions of Non-Governmental Organization Coordination Act. Whatever its initial registration status, it is obliged to comply with the provisions of the Act with regard to its management and the holding of its property.

It cannot exist as an entity regulated by several pieces of registration, and in accordance with section 25 of the Act and Regulation 25(2) of the Regulations. It ceased to exist as a Society or Company upon its registration as a Non-Governmental Organization." (Emphasis Added).

19. In view of my holding herein above I am satisfied that the Petitioner herein is a Non-Governmental Organization and not a Trust; as per its own description in the Petition and accompanying pleadings.

C. WHETHER THE PETITIONER HAS LOCUS STANDI TO MAINTAIN THE INSTANT SUIT?

20. The 1st and 2nd Respondents as well as the 3rd Respondent and Interested Party contend that the Petitioner is not a trust as it represents itself and thus it has no **locus standi** before this Court as it is a non-existing entity. It is urged further that a Non-existent entity or person cannot maintain an action and the Petitioner having already transformed itself to an NGO, then. The present Petition falls because the petitioner's no longer a trust as it has alleged. It is urged the Petition would only have had life of the Petition had brought the same in its legal capacity as an NGO.

21. The Respondents further urge the Petitioner does not exist as a trust and in the Circumstances has no locus standi to sue or be sued and as such it is contended there is no lawful basis for maintaining the suit; which Rebecca Matheson can purport to act on its behalf. The Respondents rely in this regard in the case of **Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others [2014] eKLR** in which it was held as follows:

"Currently therefore there is no lawfully existing body on whose behalf the Plaintiffs can purport to act. It would therefore be an

abuse of the Court process to have a suit pending by or on behalf of a non-existent organization. It would defeat the entire overriding objective of civil litigation to apply both the court's time and resources not for the proper administration of justice, but on imaginary and illusory wrongs."

22. The Authority of Courts to uphold and enforce the Bill of Rights is unquestionably provided for under **Article 23(1) of the Constitution** in which it is clearly stated as follows:-

"23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

23. On the enforcement of the Bill of rights and or issue of locus standi the Constitution states that :-

"22 Enforcement of Bill of Rights

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a) a person acting on behalf of another person who cannot act in their own name;**
- b) a person acting as a member of, or in the interest of, a group or class of persons;**
- c) a person acting in the public interest; or**
- d) an association acting in the interest of one or more of its members."**

24. Further under **Article 258 of the Constitution** on enforcement of the Constitution it is stated:-

"258. Enforcement of this Constitution

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members."**

25. From the aforesaid Articles the Constitution is clear that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and further may do so claiming the constitution has been contravened or is threatened with contravention.

26. The Constitution gives guidance on who is the **"person"** referred to under **Article 22 and 258 of the Constitution** in its interpretation as defined in the Constitution under **Article 260 of the Constitution** where it is clearly stated, in this constitution, unless the context requiring otherwise; -**"person"** is defined as follows:-

"person" includes a company, association, or other body of persons whether incorporated or unincorporated."

27. Our constitution under **Article 22 and 258 of the Constitution** generously allows every person to institute proceedings subject to claims set out in the said Articles without requirement of incorporation. In the instant Petition the Petitioner whether described as an incorporated or unincorporated body or whether a Trust or an NGO meets the qualification of a person who has locus standi to institute suit under **Articles 22 and 258 of the Constitution** as defined under **Article 260 of the Constitution**. There is in my view no requirement for a Petitioner to be either a company, or an association or other body of person so long as the person as defined under **Article 260 of the Constitution** is seeking remedies vide **Article 22 and 258** as set out in the respective Articles. There is no requirement for incorporation. I find that it does not matter whether the petitioner is a Trust or an NGO but a association or body of persons instituting court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. I find and hold the Petitioner has locus standi to maintain the instant suit.

28. *To the extent of my findings, herein above I find the 1st and 2nd Respondents' Preliminary Objection dated 27th June 2018 to be without merits. I dismiss the Preliminary Objection by 1st and 2nd Respondents with costs to the Petitioner.*

Dated, Signed and Delivered at Nairobi on this 21st day of January, 2021.

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J. A. MAKAU

JUDGE