



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 58 OF 2020

BETWEEN

JUDDY WAIRIMU MIRANGO.....APPLICANT

VERSUS

NON-GOVERNMENTAL ORGANIZATION

COORDINATION BOARD.....1<sup>ST</sup> RESPONDENT

ASSOCIATION FOR THE

PHYSICALLY DISABLED OF KENYA.....2<sup>ND</sup> RESPONDENT

RULING

**Introduction**

1. Juddy Wairimu Mirango (hereinafter referred to as “the Applicant”), filed a Chamber Summons Application dated 27<sup>th</sup> February 2020, in which she was seeking the following orders:

**a) An Order of Certiorari to move into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent to appoint a caretaker committee to govern and oversee the affairs of the 2<sup>nd</sup> Respondent.**

**b) An order of Prohibition to issue against the Respondents prohibiting the Respondents jointly and severally either by themselves and or their agents from interfering with the constitution of the 2<sup>nd</sup> Respondent by irregularly handing over governance of the 2<sup>nd</sup> Respondent to a caretaker committee.**

**c) That leave so granted do operate as stay in respect of the decision of the 1<sup>st</sup> Respondent to appoint a caretaker committee.**

2. The grounds for the application are stated in a statutory statement dated 27<sup>th</sup> February, 2020 and supported by a verifying affidavit sworn by the Applicant on the same date. The Applicant deposed that she is a life member of the Association for the Physically Disabled in Kenya, the 2<sup>nd</sup> Respondent herein, having been vetted and satisfied the requirements of section 5 of the 2<sup>nd</sup> Respondent’s constitution. She averred that on the 19<sup>th</sup> February, 2020, while on a visit to her branch office in Nakuru, she was informed that the Non-Governmental Organization Co-ordination Board, which she has sued as the 1<sup>st</sup> Respondent, had appointed a caretaker committee to govern and oversee the affairs of the 2<sup>nd</sup> Respondent. She contended that the aforesaid appointment of a caretaker committee is irregular as the 2<sup>nd</sup> Respondent’s constitution does not provide for appointment of a caretaker committee.

3. The Applicant further averred that the said appointment was done without consulting members of the 2<sup>nd</sup> Respondent and in complete secrecy, whereas the 2<sup>nd</sup> Respondent’s constitution provides for elaborate procedures in section 6 thereof for election and appointment of office-bearers. In particular, that section 6(a) of the said constitution provides that the Board of Directors shall be elected from amongst the members of the 2<sup>nd</sup> Respondent, and that the office-bearers shall hold office for three (3) years and be eligible for a final term of another (3) years. According to the Applicant, the current Board of Directors of the 2<sup>nd</sup> Respondent were elected and notified to the 1<sup>st</sup> Respondent on 10<sup>th</sup> July, 2018 and as such had not exhausted their term of office.

4. The Applicant alleges that the appointment of a caretaker committee was *ultra vires* and unreasonable, as well as an affront to her rights and those of all the members of the 2<sup>nd</sup> Respondent as enshrined in the 2<sup>nd</sup> Respondent’s Constitution. The Applicant annexed a copy of the

2<sup>nd</sup> Respondent's Constitution, and an undated memo from the Chair of the Caretaker Committee notifying of the appointment of the caretaker committee as from 20<sup>th</sup> November 2019.

5. This Court initially directed that the Applicant's Chamber Summons application be heard *inter partes*. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed replying affidavits to the said application sworn on 5<sup>th</sup> May 2020 and 19<sup>th</sup> May 2020 respectively, and the 1<sup>st</sup> Respondent has also filed submissions dated 5<sup>th</sup> May 2020, in which the Respondents detailed the legal basis for the appointment of the caretaker committee. The 2<sup>nd</sup> Respondent simultaneously with its replying affidavit also filed a Notice of Preliminary Objection dated 20<sup>th</sup> May 2020. This Court thereupon directed that the said Preliminary Objection be heard and determined first as it was challenging this Court's jurisdiction to hear the Applicant's Chamber Summons application.

6. The preliminary objection was accordingly heard by way of written submissions. The advocates for the 2<sup>nd</sup> Respondent did not file submissions, while Onsando Ogonji & Tiego filed submissions dated 6<sup>th</sup> July 2020 on behalf of the Applicant. This ruling is on the said preliminary objection, and the arguments thereon by the respective parties and determination by this Court are presented in the following sections.

### **The Preliminary Objection**

7. The 2<sup>nd</sup> Respondent's Notice of Preliminary Objection objects to the Court's jurisdiction to hear the matter in the first instance due to the following reasons:

a) The 2<sup>nd</sup> Respondent is governed by the 1<sup>st</sup> Respondent's rules and regulations including Non-Governmental Organizations Coordination Act, No. 19 of 1990 (NGO Act); Non-Governmental Organizations Coordination Regulations, 1992 and Non-Governmental Organizations Council Code of Conduct, 1995,

b) The Non-Governmental Organizations Council Code of Conduct provides that the Regulatory Committee handles all complaints pertaining to registered organizations under NGO Act in the first instance (Regulations 18-20). It also gives the right of appeal to the aggrieved party if dissatisfied with the Committee's decision (Regulation 21).

c) Once the aggrieved party has exhausted all the avenues set out by the Regulatory Committee, he/she can then proceed to Court.

8. The 2<sup>nd</sup> Respondent cited various decisions including the decision by Nambuye J.A in **Non-Governmental Organizations Board vs EG & 5 Others (2019) e KLR** for the position that parties have no mandate to confer jurisdiction on a court of law where non-exists, and the decision by Musinga J.A in the same case that section 9 (2) of the Fair Administration Action expressly bars the High Court or a subordinate court from reviewing an administrative action or decision under any Act until internal mechanisms of appeal or review and all remedies available are first exhausted.

9. The 2<sup>nd</sup> Respondent stated that the law is clear that where there is a procedure for redress of any particular grievance presented by the Constitution or an Act of Parliament, that procedure should be exhausted before resort may be had to the courts, as opined in **Speaker of the National Assembly vs Karume (2008) 1 KER 425** and reiterated in **Geoffrey Muthinja & Another vs Santiel Muguna Henry & 1756 Others [2015] eKLR**.

### **The Applicant's Reply**

10. The Applicant submitted in response that the Notice of Preliminary Objection was incompetent, improperly before court and should summarily be dismissed. This was for the reason that the firm of Omulele & Tollo Advocates entered appearance for 2<sup>nd</sup> Respondent on 13<sup>th</sup> March, 2020, and that the firm of Modi & Co. Advocates, which filed the Notice of Preliminary Objection on 20<sup>th</sup> May, 2020, has no locus to represent the 2<sup>nd</sup> Respondent or any other party in the suit. Reliance was placed on the decision in **Uasin Gishu District Cooperative Auditor vs Naomi Wangoi Gutu & 5 Others [2005] e KLR** in this respect.

11. In the alternative, the Applicant submitted that the Notice of Preliminary Objection should be dismissed for various substantive reasons. Firstly, that the understanding of the 2<sup>nd</sup> Respondent of Regulations 18 to 20 of the NGO Council Code of Conduct was erroneous. The Applicant submitted in this respect that Regulation 3 of the Non-Governmental Organizations Council Code of Conduct, 1995 (the Code of Conduct) provides that the Code is an expression of the ethos of every registered organization and shall apply and be observed by all registered organizations. Therefore, that the Code is an internal good-governance tool for NGOs.

12. However, that the matter before the Court was the appointment of a caretaker committee by the 1<sup>st</sup> Respondent, and not any acts of the 2<sup>nd</sup> Respondent. In addition, that the Applicant is seeking to enforce her constitutional rights through judicial review against the decision of the 1<sup>st</sup> Respondent, not the 2<sup>nd</sup> Respondent, and that the Applicant's constitutional rights cannot be ousted by any regulations which are inferior. It was also contended that the Applicant's grievance was not within the purview of the NGO Council Code of Conduct and therefore could not form the basis of a complaint to the Regulatory Committee as argued by the 2<sup>nd</sup> Respondent.

13. Secondly, it was submitted that Section 19(1) of the NGO Act is inapplicable to these proceedings as the matter before court is not pegged on registration of an NGO, and reliance was placed on the decision in **EG vs Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR** that the intention of the law in Section 19 was for appeal to lie in respect of substantive decisions such as refusal of registration, or cancellation of registration. The Applicant further averred that section 19 of the NGO Act, deals with appeals in matters arising from sections 10 to 18 of the Act that deal with registration and licensing of NGOs.

## The Determination

14. I have carefully considered the arguments made by the 2<sup>nd</sup> Respondent and the Applicant. The first question that this Court needs to answer is whether the 2<sup>nd</sup> Respondent's Preliminary Objection is properly on record. While there is a letter on record dated 28<sup>th</sup> July 2020 from of Omulele & Tollo Advocates intimating the 2<sup>nd</sup> Respondent's instructions to be represented by Modi & Company Advocates, there appears to be no notice of appointment having been filed by the firm of Modi & Company Advocates. However, this is a procedural technicality, and if there was any non-compliance he same is capable of being remedied, and is therefore not fatal to the Preliminary Objection.

15. The substantive grounds for determination are firstly, whether the 2<sup>nd</sup> Respondent's preliminary objection raises a pure point of law. It is only after determining this question, that this Court can proceed to answer the secondary question as to whether the said preliminary objection has merit and should be upheld.

16. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of 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.”***

17. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

18. It is in this respect evident that from the submissions made by the parties that the main ground raised by the 2<sup>nd</sup> Respondent is that this Court is divested of jurisdiction by the provisions on alternative dispute resolution in Regulations 18 to 21 of the Non-Governmental Organizations Council Code of Conduct.

19. I am in this respect guided by the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

***“I think 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

20. The Court of Appeal proceeded to define jurisdiction and its source as follows:

***“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”***

21. A Court's jurisdiction therefore flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent. It is thus a pure question of law.

22. In order to determine whether the 2<sup>nd</sup> Respondent's preliminary objection on this Court's jurisdiction is merited, it is important and necessary to clarify the dispute that is before this Court at the outset, and whether this Court has or does not have jurisdiction in relation thereto. It is not in dispute in this regard that the *ex parte* Applicant has commenced judicial review proceedings to quash the decision made by the 1<sup>st</sup> Respondent to appoint a caretaker Committee to manage the 2<sup>nd</sup> Respondent.

23. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

24. It is notable that in the present proceedings, this Court is being asked to exercise its supervisory jurisdiction, to review the lawfulness of the proceedings and decision of the 1<sup>st</sup> Respondent, which is a corporate body established under the Non-Governmental Organizations Co-ordination Act. The Respondent is therefore a statutory body that is amenable to this Court's supervisory jurisdiction.

25. Coming to the arguments made by the 2<sup>nd</sup> Respondent, it is the position that the exhaustion of alternative remedies is now a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution obliges this Court to observe the principle of alternative dispute resolution. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

**“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

26. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

**“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is 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. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”**

27. In the present application, Regulations 18 and 19 of the Non-Governmental Organizations Council Code of Conduct in this regard provides as follows:

**“18. Every registered organization shall be subject to the jurisdiction of the Committee.**

**19. (1) A complaint against a registered organization for breach of this Code may be made to the Committee by any person.**

**(2) A complaint under subparagraph (1) shall be in writing and shall set out in detail the particulars of the alleged breach.”**

28. The Committee referred to in the Regulations is the Regulatory Committee established under Regulation 15. Regulations 20 in turn provides for the procedure of hearing the complaint made against a registered organization, while Regulation 21 provides for appeals from the decision of the Committee to the General Assembly of the Non-Governmental Organizations Council.

29. An ordinary reading and interpretation of the Regulations 18 and 19 of the Non-Governmental Organizations Council Code of Conduct, shows that that the provisions on alternative dispute resolution therein only apply when a complaint is made against an organisation as regards the breach of the Code of Conduct. In addition, the provisions for appeal to the Minister in-charge under sections 19 and 34 of the Non-Governmental Organizations Co-ordination Act are with respect from decisions made on the registration and deregistration of a non-governmental organization.

30. The said provisions on alternative dispute resolution are therefore not applicable and available to the dispute in the present application, as the impugned decision by the 1<sup>st</sup> Respondent was not on a complaint made about the 2<sup>nd</sup> Respondent’s breach of the code of conduct, neither was it on the registration or deregistration of the 2<sup>nd</sup> Respondent.

### **The Orders**

31. Arising from the foregoing reasons, this Court finds that the Applicant’s Chamber Summons Application dated 27<sup>th</sup> February 2020 is competently and properly brought before this Court. In addition, as the appointment of a caretaker Committee by the 1<sup>st</sup> Respondent is not disputed, the Applicant has an arguable case, and the arguments made by the Respondents as regards the said appointment go to the substance of the dispute and cannot be considered at this stage.

32. This Court accordingly orders as follows:

**I. The 2<sup>nd</sup> Respondent’s Preliminary Objection dated 20<sup>th</sup> May 2020 is not merited, and is hereby dismissed with no order as to costs**

**II. The Applicant is granted leave to seek for an order of *Certiorari* to quash the decision of the 1<sup>st</sup> Respondent to appoint a caretaker committee to govern and oversee the affairs of the 2<sup>nd</sup> Respondent.**

III. The Applicant is granted leave to seek for an order of Prohibition to issue against the Respondents prohibiting the Respondents jointly and severally either by themselves and or their agents from interfering with the constitution of the 2<sup>nd</sup> Respondent by irregularly handing over governance of the 2<sup>nd</sup> Respondent to a caretaker committee.

IV. The prayer that the leave granted by the Court operates as stay of the decision by the 1<sup>st</sup> Respondent to appoint a caretaker committee is declined as there is evidence that the said decision has been fully implemented.

V. The costs of the Chamber Summons dated 27<sup>th</sup> February 2020 shall be in the cause.

VI. The Applicant shall file and serve the Respondents with the substantive Notice of Motion and a copy of this ruling within fourteen (14) days from today's date.

VII. The Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

VIII. This matter shall be mentioned on 30<sup>th</sup> November 2020 to confirm compliance and for further directions.

IX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and shall send copies thereof by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XI. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 30<sup>th</sup> November 2020.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant, Respondent and Interested Party by electronic mail by close of business on Thursday, 22nd October 2020.

XV. Parties shall be at liberty to apply.

33. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16<sup>th</sup> DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE