



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 268 OF 2018

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS, INJUNCTION AND PROHIBITION.

REPUBLIC.....APPLICANT

VERSUS

MINISTRY OF EAST AFRICAN COMMUNITY, LABOUR

& SOCIAL PROTECTION.....1ST RESPONDENT

THE CABINET SECRETARY – MINISTRY OF EAST AFRICAN COMMUNITY,

LABOUR & SOCIAL PROTECTION.....2ND RESPONDENT

DR. NOAH SANGANYI- DIRECTOR, DEPARTMENT

OF CHILDREN SERVICES.....3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

EX PARTE:

1. UMOJA CHILDREN’S HOME

2. CATHY BOOTH

JUDGMENT

The Application

1. The 1st ex-parte Applicant herein is a Children’s Home based in Ukunda, while the 2nd ex-parte Applicant is the said Children’s Home’s founder and director. The said 1st and 2nd Applicants filed judicial review proceedings herein by way of a Notice of Motion Application dated 6th August 2018, seeking the following orders:

a) An order of Certiorari to remove into this Court for purposes of it being quashed an order and/or decision made by the Ministry of East African Community, Labour & Social Protection whereby it was ordered there shall be no registration of new Charitable Children Institutions on the 1st day of November 2017, and that all registration of new Charitable Children Institutions should cease including those in the process of registration

b) An order of Injunction to remove to this Court for purposes of it restraining the 1st, 2nd and 3rd Respondents whether by himself, his servants or agents or howsoever otherwise from closing down Umoja Children Home..

c) An order of Mandamus to remove to this Court for purposes of it compelling the 1st, 2nd and 3rd Respondents to register the 1st Applicant after meeting all the relevant provisions of the law.

d) An order of Prohibition, to remove to this Court for purposes of it prohibiting the 2nd and 3rd Respondents from closing down the Children's Home pending the hearing of this application.

e) The costs of the application be provided for.

2. The grounds for the application were set out in a statutory statement by the 1st and 2nd Applicants' Advocates dated 2nd July 2018, and a verifying affidavit sworn on the same date by the 2nd Applicant. The Applicant explained that the 1st Applicant is registered as a non-governmental organisation, and that it made an application for further registration as a Children's Home to the relevant Area Advisory Council in accordance with the Charitable Children's Institutions Regulations. Further, that it presented all the relevant documents required by the said regulations, copies of which the Applicants attached.

3. The Applicants also attached a letter dated 8th November 2016 and 7th July 2017 by the sub County Children's Officer in Msambweni, allowing and requesting it to admit and accommodate children to the Children's Home pending the process of registration, and stated that they have been doing so for a period of two years. Further, that there have been inspections of the Children's home by the Ministry of Health and Area Advisory Council inspection sub-committee which recommended that the Children's Home continues operations. The Applicants attached copies of the inspection reports dated 14th December 2017 and 28th February 2018 respectively.

4. According to the Applicants, the Children's Home has been running smoothly, has undertaken a financial audit and held an Annual General meeting for the year 2016-2017. That the Children's Home is only awaiting to be issued with a Certificate of Registration as a Charitable Children's Institution. However, that the Children Home in November 2017 received a letter dated 1st November 2017 from the office of the Cabinet Secretary, Ministry of East African Community, Labour & Social Protection, and a second letter dated 30th November 2017 from the State Department for Social Protection, both suspending the registration of new Charitable Children's Institutions.

5. The Applicant contends that these orders may render the children being held by the 1st Applicant homeless, and disregards the hard work and investment that has been expended to make the 1st Applicant operational. Further, that their request to have the Respondents consider and assess its case individually was not considered, and the same has been denied without them being given a fair hearing. In addition, that there is no legitimate reason to suspend the registration of the 1st Applicant as it has complied with all relevant provisions of the law.

6. The Applicants also stated that they had a legitimate expectation that the Children's Home would be registered since they had complied with all the legal requirements and followed due process. That the 1st Respondent conducted itself irrationally and acted in bad faith by not considering all relevant matters on the registration of the 1st Applicant, and ought to have acted reasonable by conducting independent audits or investigations of the Children Homes that were in the process of registration as opposed to arbitrarily suspending all such registration. Lastly, that the 1st Respondent acted outside the scope of powers granted to it by suspending the registration of charitable children's institutions.

The Response

7. The Respondent opposed the application through Grounds of Opposition dated 26th July 2018 filed by K. Odhiambo, a litigation counsel in the Attorney General's Chambers. According to the Respondents, the application offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules, and is an abuse of process of Court as the Applicants have filed another matter being Nairobi High Court Civil Case No. 20 of 2018.

8. Further, that other than writing to the Respondents' the Applicants have not demonstrated having engaged the intergovernmental relations secretariat, and that the application thus offends the statutory provisions of section 9(2) and (3) of the Fair Administrative Actions Act on exhaustion of alternative dispute resolution mechanisms. The Respondents also cited various judicial decisions on exhaustion of alternative methods of dispute resolution.

The Determination

9. The Application was canvassed by way of written submissions. Atsieno Ngunya & Associates filed submissions dated 25th October 2018 on behalf of the Applicant, in which the above grounds were reiterated. The Applicants also filed an affidavit on the same date sworn by their Advocate John Mukuna, which annexed a Notice of Withdrawal of Suit filed in Nairobi High Court Civil Case No. 20 of 2018, dated and served on the Respondents on 24th September 2018. The Respondents did not file any submissions on the application.

10. I have considered the pleadings, submissions and arguments made by the parties, and note that the Respondents did not elaborate on or demonstrate the alleged impropriety of the Applicant's application under Order 53 Rule 2 of the Civil Procedure Rules, or on the alleged applicable alternative dispute resolution method provided by law to address the issues raised by the Applicants. In addition, since there was evidence provided by the Applicants that the pending suit in Nairobi High Court Civil Case No. 20 of 2018 was withdrawn, the only outstanding substantive issues arising for determination are as follows:

a) Whether the 2nd Respondent acted illegally in making the decision dated 1st November 2017.

b) Whether the Respondents failed to accord the Applicants a fair hearing in making the decision dated 1st November 2017.

c) Whether the Respondents failed to take into account relevant considerations in making the decision dated 1st November 2017.

d) Whether the Respondents violated the Applicant's legitimate expectations.

e) Whether the Applicants merits the prayers sought .

11. The Applicants relied on section 7 of the Fair Administrative Actions Act on the powers of this Court to review an administrative action or decision which is made in excess of jurisdiction or power conferred under any law, which violates the legitimate expectations of the person to whom it relates, and which fails to take into account relevant considerations. They submitted that under the Children Act and the Children (Charitable Children's Institutions) Regulations, 2005, the Director of Children Service under section 38 has no power to order the suspension of registration of Charitable Children's Institutions.

12. The Applicants also relied on the decision in **Re Kisumu Muslim Association. (2008) e KLR** that an officer exercising statutory power must direct himself or herself properly in law and procedure and consider all matters that are relevant and avoid extraneous matters.

13. Further reliance was placed on the provisions of Article 47 of the Constitution and the decision in **Kenya Human Rights Commission & Another vs Non-Governmental Organizations Co-ordination Board & Another, (2018) e KLR** that an administrator must give a person affected by his or her decision prior and adequate notice of the action, and the reasons for the decision. The Applicant also relied on section 5 of the Fair Administrative Action Act in this regard.

14. Lastly, the decision in **Republic vs Institute of Certified Public Accountants of Kenya ex parte Vipinchandra Bhatt T/A JV Bhatt & Company, Nairobi HCMA 285 of 2006** was cited by the Applicants for the position that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith. This Court's findings on the various issues raised by the Applicants is as follows.

On whether the Respondents acted illegally

15. In determining whether or not the Respondents acted outside their powers, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce held as follows on when a public body may lack jurisdiction:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

16. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the impugned decision by the Respondents in the letter dated 1st November 2017 was as follows:

“1st November, 2017

The Chairperson

National Council for Children Services

NAIROBI

RE: SUSPENSION OF REGISTRATION OF NEW CHARITABLE CHILDREN INSTITUTIONS (CCI'S)

As you are aware, the Expert/Steering Committee on Child Adoption in Kenya submitted its Phase One Progress Report.

Among the findings/observations of the Committee are:-

(ii) Many children are inappropriately placed in CCI's yet they could desirably be placed for Foster Care, Guardianship or Local Adoption with Kenyan families. In this respect, it is evident that such children are put in the institutions under circumstances that are not in their best interest and are accordingly denied the opportunity to be raised within families.

(ii) It was evident that some of the Children's Homes were involved in unscrupulous practices which may include Child Trafficking.

In view of the above circumstances, this is to give instructions that there shall be no further registration of new Charitable Children's Institutions until the current situation is streamlined to ensure proper care and protection of vulnerable children.

Please acknowledge receipt of these instructions and confirm action taken.

Mrs. Phyllis J. K. Kandie, EGH

Cabinet Secretary

Copy to: Principal Secretary,

State Department for Social Protection

Ministry of EAC, Labour and Social Protection

NAIROBI

Director for Children's Services

State Department for Social Protection

Ministry of EAC, Labour and Social Protection

NAIROBI

17. Section 58 of the Children Act defines a Charitable Children's Institution to mean "a home or institution which has been established by a person, corporate or unincorporate, a religious organisation or a non-governmental organisation and has been granted approval by the Council to manage a programme for the care, protection, rehabilitation or control of children". The Council referred to in the section is the National Council for Children's Services established by section 30 of the Act, and whose proceedings are regulated as provided for by the First Schedule to the Act.

18. Under section 72 of the Act, the Minister in charge of administration of the Children Act may, in consultation with the Council, make regulations for the better carrying out of the provisions on Charitable Children's Institutions that are in the Act. The Children (Charitable Children's Institutions) Regulations, 2005 were accordingly enacted, and provide the powers of the Respondents as regards the registration of Charitable Children's Institutions as follows in Regulation 3:

"(1) Any person or body of persons that intends to operate an institution shall apply for registration of the institution to the Council through the Area Advisory Council operating in their area in the form set out in the First Schedule, and where such a person or body of persons wish to operate more than one institution, it shall present separate applications for each institution.

(2) An application for registration shall be accompanied by the following—

(a) in the case of an unincorporated body of persons, a list of trustees of that body;

(b) in the case of a body corporate or any other body which is by law required to be registered, a certificate of registration;

(c) copy of the proposed mission or policy statement of the institution, which shall comprise of matters set out in the Ninth Schedule.

(3) The Area Advisory Council shall acknowledge receipt of every application for registration in the form set out in the Second Schedule, within thirty days after the date of receipt, and shall indicate the date (which shall not be later than thirty days from the date of receipt) when the Area Advisory Council shall inspect the premises of the institution to ascertain whether it meets the requirement set out in the Third Schedule.

(4) The Area Advisory Council shall—

(a) if it finds that the requirements of the Third Schedule have been complied with after inspection, place the application for registration before the Director, together with its recommendations, within fourteen days from the date of inspection;

(b) if after inspection it finds that the requirements of the Third Schedule have not been complied with, undertake the following—

(i) make recommendations for improvement to the administering authority, for implementation before the next inspection, if the continued operation of the institution does not pose a danger to the welfare of the children; or

(ii) recommend to the Director for the immediate closure of the institution and make arrangements for placing the children accommodated in the institution in other institutions:

Provided that if a decision is made under subparagraph (ii), the administering authority may within thirty days from the date of closure, appeal to the Minister.

(5) The appeal to the Minister shall be made in the form set out in the Fourth Schedule.

(6) The Director shall, when all the requirements for registration have been complied with and after consultation with the Council recommend to the Minister to issue a Certificate of Registration to the successful applicant.

(7) The form set out in the Fifth Schedule is prescribed as the form of Certificate of Registration for the purposes of sub regulation (6).

(8) No organisation shall operate as an institution unless it has been registered under these Regulations.

(9) Without prejudice to the generality of the foregoing, every institution that had been registered under the Children and Young Persons Act (Cap. 141) (now repealed) shall be deemed to continue as if it had been registered under these Regulations but shall be required to comply with the Regulations and renew its registration accordingly within one year of coming into force of the Regulations.”

19. Regulation 3B of the said regulations provides for cancellation of registration of a Charitable Children’s Institution as follows:

“(1) The Minister may, upon recommendation of the Council, cancel the registration of an institution—

(a) if a programme undertaken by such institution is cancelled in accordance with section 71 of the Act;

(b) when there is manifest failure or refusal to comply with the provisions of the Act or these Regulations;

(c) in any other case where it becomes reasonably expedient for the better carrying out of the objects of the Act and Regulations made thereunder.

(2) An institution shall not have its registration cancelled under subregulation (1)(b) or (c) unless it has been accorded a reasonable opportunity to make representations to the Council on the intended cancellation of registration.

(3) The Council shall give to an institution a written notice of its intention to have the registration of such an institution cancelled, and shall accordingly invite the institution to make its representations within thirty days from the date of such notice.

(4) The Director shall give to an institution a written notice of cancellation of registration within fourteen days from the date of cancellation.

(5) An institution whose registration has been cancelled under this regulation may make a fresh application for registration in accordance with regulation 3.”

20. Regulation 3A on the other hand specifies the period of registration to be three years, and provides for applications for renewal of registration after expiry. No specific statutory provisions however exist or provide for the suspension of registration of Charitable Children’s Institutions by the Minister, whose functions were being exercised by the 2nd Respondent herein. Therefore, the decision in the letter dated 1st November 2017 was substantively *ultra vires*, as the 2nd Respondent purported to exercise a power not provided by law. The law only expressly provides for powers to register or cancel the registration of Charitable Children’s Institutions by the 2nd Respondent, and does not give any powers to the 2nd Respondent to indefinitely suspend all such registration.

21. The suspension of new registration of Charitable Children’s Institutions was in the circumstances also illegal for failing to satisfy statutory preconditions, as the applicable statutory provisions set out above are clear that when it comes to registration of or cancellation of registration of Charitable Children’s Institutions the Minister acts on recommendations of the Director of Children Services and the National Council for Children’s Services.

22. The 2nd Respondent in its letter of 1st November 2017 purports to act on the recommendation made in a report of an Expert/Steering Committee on Child Adoption in Kenya. There is no indication in the said letter of any recommendations on registration of given by the relevant statutory bodies, and on the contrary, the 2nd Respondent’s purports to instruct the National Council for Children’s Services on what requires to be done.

23. There is also a clear procedure provided by law that requires to be followed in the registration of or cancellation of the registration of Charitable Children’s Institutions as shown in Regulations 3 and 3B of the Children (Charitable Children’s Institutions) Regulations, 2005, and the Respondents did not provide any evidence that any such procedure was followed, rendering the decision of 1st November 2017 also procedurally *ultra vires*.

24. Lastly, the indefinite and blanket suspension of the registration of all Charitable Children’s Institutions is also illegal for reasons that the 2nd Respondent has used statutory powers to take measures or make a decision that is uncertain and unpredictable. A key rule of statutory construction and legal policy is that the law should be certain and predictable. The 2nd Respondent in the letter dated 1st November 2017

suspended further registration of new Charitable Children's Institutions "until the current situation is streamlined to ensure proper care and protection of vulnerable children". The specific circumstances and conditions that will bring the suspension to an end are not indicated, nor are the timelines specified, which uncertainty is compounded by the fact that the no such grounds for suspension are provided by law.

25. The certain operation of the law as regards registration of Charitable Children's Institutions is critical for the Applicants and other affected persons, so that they can know what rules apply to them as regards registration and to arrange their affairs accordingly, which is currently not the case in light of the 2nd Respondent's decision of 1st November 2017. Lord Diplock stated as follows on the need for predictability of the law in **Black Clawson International Ltd vs Papierwerke Waldhof-Aschaffenberg (1975) AC 591 at 638**:

"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by statute the source of that knowledge is what the statute says. In construing it the Court must give effect to what the words of the statute would be reasonably be understood to mean by those whose conduct it regulates".

26. In the present case, the Applicants expected that the provisions of the law explained in the foregoing as regards registration of Charitable Children's Institutions would be applied, and proceeded to comply, and the effect of the 2nd Respondent's decision of 1st November 2017 is to leave them in a state of limbo with no other recourse, contrary to the express provisions of the law.

On whether the Respondents failed to accord the Applicants a fair hearing

27. The Applicants' allegations in this regard are that their request to have the 1st Applicant's application for registration considered and assessed individually was denied without a fair hearing. Further, that no legitimate reasons was given to suspend the 1st Applicant's registration as it had complied with all relevant provisions of the law.

28. Article 47 of the Constitution provides as follows in this regard:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) 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."

29. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."

30. Fairness in decision making also incorporate the requirements of natural justice which are that firstly, a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the

hearing or making the decision.

31. The Applicants however did not provide any evidence of any request made to the Respondents for consideration and/or a reconsideration of the 1st Applicant's registration, or of any responses by the Respondent to their requests. It is in this respect provided in regulation 3 of the Children (Charitable Children's Institutions) Regulations, 2005 that an application for registration shall be made in a specified form that is provided in the Regulations, and the appeal to the Minister for reconsideration shall also be made in a specified form. The Applicants stated that they made the said applications, but did not provide evidence of the same in the specified format.

32. This Court is thus not in a position to make any specific findings as to violation of their rights to a fair hearing, over and above the findings made hereinabove as regards the illegality of the 2nd Respondent's decision.

On Whether the Respondents took into account relevant considerations

33. The general rule on this issue was stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223** that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The extent to which a public body inquires into a particular factor, and the weight to be attached to a factor, are however matters to be decided by the public body, provided its acts reasonably. In addition, the considerations to be taken into account will also depend on the circumstances of each case.

34. This Court has in this respect already found that the 2nd Respondent's decision was illegal for failing to take into account the requirements of the law as regards the registration of Charitable Children's Institutions, which are relevant considerations, and its decision was therefore also illegal in this respect.

On Whether the Respondents violated the Applicant's legitimate expectations.

35. A five judge bench of this Court in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal. The said bench observed as follows:

“207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”

36. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) eKLR** also explained the principle of legitimate expectation as follows:

“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

37. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

“[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

38. Applying these principles to the present case, this Court finds that a legitimate expectation was created by the representations made by the Respondents in the letters dated 8th November 2016 and 7th July 2017 by the sub County Children’s Officer in Msambweni, allowing and requesting the Applicants to admit and accommodate children to their Children’s Home pending the process of registration, and the inspection report by the Area Advisory Council inspection sub-committee dated 28th February 2018 which recommended that the Children’s Home continues operations, which were action within the law.

39. Section 37 of the Children in this regard provides for the appointment of the Director of Children Services and Children Officers as follows:

(1) “The Minister shall appoint a Director of Children’s Services and may also appoint one or more Deputy Directors of Children’s Services and such number of senior children’s officers and other officers as may be necessary to assist the Director in carrying out the purposes of this Act.

(2) The Director may, subject to any regulations made by the Minister to the contrary, delegate to a Deputy Director or any children’s officer appointed under subsection (1), or any person as the Minister shall deem fit, authority to exercise and perform any of the powers and duties conferred or imposed on the Director under this Act.

(3) Children’s officers shall perform the functions and exercise the powers conferred on them by this Act and shall, in addition, perform such duties as the Director may from time to time direct.”

40. The functions of the Director of Children Services are set out in section 38 of the Act, and include providing assistance to and procuring accommodation for any child not in proper custody, any child who is abandoned or any child who is in need of refuge or safety. To this extent the actions by the sub-County Children’s Officer in Msambweni in the letters dated 8th November 2016 and 7th July 2017 which were annexed to the 2nd Applicant’s verifying affidavit as Annexures “CB-12” and “CB-13” were within the law.

41. In addition, under Regulation 3(3) of the Children (Charitable Children’s Institutions) Regulations, 2005, upon an application for registration, the Area Advisory Council shall inspect the premises of the applicant institution to ascertain whether it meets the requirement set out in the Regulations, and the Msambweni District Area Advisory Committee in its inspection report of the inspection of 28th February 2018 which was annexed by the Applicants as Annexure “CB-15” did find that the Applicant had met the requirements for registration. It is thus this Court’s finding that in light of these representations, the 2nd Respondent’s decision of 1st November 2017 suspending all registration of Charitable Children’s Institutions did violate the Applicants’ legitimate expectations that the 1st Applicant would be registered upon compliance with the law.

On whether the Applicant merits the relief sought

42. The Applicant has *inter alia* sought orders of certiorari, mandamus and prohibition. The Court of Appeal held as follows in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 as regards the grant of the said orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

43. I find that as the 2nd Respondent has been found to have acted without jurisdiction and *ultra vires* section of regulation 3A and 3B of the Children (Charitable Children's Institutions) Regulations, 2005 and thereby violated the Applicants' legitimate expectations in making the decision in its letter dated 1st November 2017, the Applicants are entitled to the order sought of certiorari to quash the said decision.

44. The orders sought of mandamus and prohibition however cannot lie, for the reasons that there was no evidence of any application for registration in the specified formats having made by the Applicants, and of failure of consideration by the Respondents and it is therefore it has not been established that the Respondents acted in contravention of the law specifically with respect to the 1st Applicant's registration. In addition, this Court cannot direct the Respondents to undertake their duties in any particular manner, as sought in the terms of the prayers for mandamus. Lastly, the effect of quashing the decision of 1st November 2017 is that the Applicants will now be at liberty to pursue the registration of the 1st Applicant with the relevant authorities.

45. The Applicants also sought a final injunction seeking to restrain the Respondents from closing down the 1st Applicant. Section 11(1)(b) of the Fair Administrative Action Act grants this Court powers to restrain an administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant.

46. However, as Applicant did not bring evidence of any application of registration, and did not show aspects of non-compliance by the other actors involved in the 1st Applicant's registration, other than the illegality committed by the 2nd Respondent in its decision of 1st November 2017, the injunction sought is not warranted in the circumstances of this case, for the reason that sufficient grounds have not been demonstrated.

47. In the premises this Court finds that the Applicants' Notice of Motion dated 6th August 2018 is merited only to the extent of the following orders:

I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the decision and instructions of the Cabinet Secretary of East African Community, Labour & Social Protection contained in the letter dated 1st November 2017 that there shall be no further registration of new Charitable Children's Institutions.

II. The 2nd Respondent shall meet the Applicants' costs of the Notice of Motion dated 6th August 2018.

48. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2019

P. NYAMWEYA

JUDGE