



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 557 OF 2017

KATIBA INSTITUTE.....1ST PETITIONER

INUKA KENYA NI SISI LIMITED2ND PETITIONER

-VERSUS-

FAZUL ISMAIL MOHAMED1ST RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....2ND RESPONDENT

CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

THE PARTIES

1. The petitioners are companies limited by guarantee registered under the Companies Act, Cap 486 (now No. 17 of 2015) and were so registered on 13th and 26th June 2012 respectively. The petitioners state that they bring this petition on their own behalf and in public interest.
2. The 1st respondent is an agent of the 2nd respondent in employment as the Executive Director of the 2nd respondent pursuant to Section 5 of The Non-Governmental Organization Co-ordination Act Cap 134 Laws of Kenya.
3. The 2nd respondent is a Board (“the Board”) established under Section 3 of the Non- Governmental Organization Co-ordination Act, Cap 134 Laws of Kenya. Its functions include facilitation of co-ordination of the work of all national and international Non-Governmental Organizations’ operation in Kenya.
4. The 3rd respondent is the Cabinet Secretary appointed in accordance with Article 152 of the Constitution of Kenya 2010 and is in charge of the Ministry of Interior and Co-ordination of National Government. The 1st respondent fall under this ministry.
5. The 4th respondent is the Principal Legal Adviser to the national government and represents the government in court by virtue of Article 156 of the Constitution of Kenya 2010.

The petitioners’ case

6. Through their amended petition filed on 13th December 2017, the petitioners sought the following prayers against the respondents:

a) An order quashing the 1st respondent’s summons dated the 3rd day of November 2017 contained in the emails sent to them.

b) A permanent order of injunction restraining the respondents herein by themselves or their agents, assignees, and/or servants from requiring attendance of the Directors or staff of the petitioners to their offices for any query on account of the Email message dated the 3rd day of November 2017 or any other future instruction (s) the petitioners may receive from the 1st respondent regarding its activities.

c) An order permanently restraining the respondents herein either by their agents, assignees, and /or servants from acting on the Email message from the 1st respondent dated the 3rd day of November 2017.

d) An order compelling the 1st respondent to publish a notification in a newspaper of national circulation retracting all allegations made against the petitioners in its email dated 3rd day of November 2017.

e) An order compelling the 1st respondent to pay compensation for the damage suffered by the petitioner.

f) An order permanently restraining the respondents herein either by their agents, and/or servants from unlawfully interfering in any way with the operation of the petitioners.

7. The petitioners' case is that on 3rd November 2017 at 2.40 pm, the 1st respondent sent an email message to the petitioners summoning their officials to the Board's Offices claiming that they had received complaints against them to the effect that they were involved in activities bordering money laundering and engaging in activities that fall with the mandate of the NGOs Act, yet remain unregistered under the said Act. The email to the 1st petitioner further stated that under the "money Laundering Act" (probably referring to Proceeds of Crime and Anti- Money Laundering Act No. 9 of 2009), the Board was obligated to report this to the Financial Reporting Centre.

8. The petitioners claim that the email required them to confirm and clarify their legal status in the country and to avail all documents that would support their position and that as a consequence the 1st respondent purported to summon the petitioners' officials to the Board's Offices on the 6th day of November 2017 for a meeting that would include officials from the Department of Immigration, the Financial Reporting Centre and the Board.

9. They further state that 1st respondent proceeded to disseminate the said emails to the media, and on the 5th day of November 2017, the mainstream media, namely; the Sunday Standard Newspaper and the Sunday Nation Newspaper who in turn published the stories detailing why the petitioners, together with other civil society organizations had been summoned before the Board.

10. The petitioners further state that they are registered as a companies limited by guarantee under the Companies Act Cap 486 (now No. 17 of 2015) of the Laws of Kenya and that the 1st respondent has no power to summon such entities to its offices for any regulatory supervision as they are not non-government organizations registered under the Non-Governmental Organization Co-ordination Act Cap 134 of the Laws of Kenya.

11. The petitioners contend that as a public officer, the 1st respondent ought to have acted in good faith and in accordance with Section 8 of the Public Officer Ethics Act and further that the 1st respondent ought to have treated the petitioners with courtesy and respect as a public officer entrusted in public office and enjoined to treat members of the public with courtesy and dignity.

12. The petitioners further state that the actions of the 1st respondent in listing and or profiling the 1st petitioner as an organization operating unlawfully including engaging in money laundering and volunteering the same information to the media was malicious, in bad faith and was calculated to scare the petitioners or distract them from their work.

13. They further state that the 1st respondent's action of summoning them for a hearing without any legal authority, power or responsibility to regulate their activities was a violation of the provisions of Articles 47 and 50 of the Constitution and further, that by casting aspersions on the petitioners for allegedly engaging in criminal activities, the 1st respondent is in violation of Article 28 of the Constitution and further, that by releasing damaging information to the media without first clarifying the facts with the petitioners, the 1st respondent breached Article 31(c) of the Constitution.

Petitioners' submissions

14. At the hearing of the petition Mr Mboya, learned counsel for the 2nd petitioner submitted that even though the email sent to the petitioner summoning them to appear before the 1st respondent did not have particulars of the allegation made against them, the petitioners were surprised to read from the newspapers that they had been summoned to answer to the allegations in respect to engagement in money laundering, employing foreigners without work permits and engaging in activities of an NGO whilst not registered as such.

15. Counsel submitted that the said allegations are criminal in nature and ought to have been dealt with by the Financial Reporting Centre (FRC) and that the 1st and 2nd respondents have no jurisdiction over the petitioners who are registered companies and not NGOS.

16. Counsel argued that the action by the 1st respondent, to inform the media/press of the said allegations before hearing the petitioner's response was malicious and violated the petitioners right to fair administrative action as the said allegations were damaging.

17. For this argument, counsel cited the decision in the case of **Olga Tellis & ORS vs Bombay Municipal Corporation 1986 AIR 180, 1985, SCR Supl(2) 51** where the Supreme Court of India held:

“The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

18. Mr. Lempaa, learned counsel for the 1st petitioner, submitted that because the facts stated by the petitioners in the petition and supporting affidavit had not been controverted by the respondents through a replying affidavit the court should find that the said facts are true. Counsel argued that the case has not been overtaken by events as alleged by the respondents as it was not known if the petitioners will receive further summons.

Respondent’s response

19. The respondents opposed the petition through the Grounds of Opposition filed on 15th March 2018 in which they set out the following grounds;

1) That the petition is bad in law, inept and an abuse of the process of the court and should be dismissed in limine as it is full of mere allegations and misapprehension.

2) That the petition does not precisely disclose any violation or threat to the Constitution or the fundamental rights and freedoms of the petitioner.

3) That the petitioner’s social and economic rights have not been denied in any way as the purported letter was only inviting them to present proof of their legibility to work in Kenya.

4) That the petition adversely mentions two media groups, Nation Newspapers and Standard Newspaper and the petitioner has, for reasons best known to itself, decided to leave them out of the petition while they should have been enjoined in the petition as respondents.

5) That there are no triable issues arising in the petition to warrant judicial intervention by this Honourable Court.

6) That the petition has since been overtaken by events and misplaced before this court as the dates for summons have lapsed as of today.

7) That the petition is an attempt by the petitioner to evade and interfere with a lawful constitutional process.

20. At the hearing of the petition, Mr Sekwe, learned counsel for the respondents, submitted that the petitioners had not discharged the burden of proof that is expected in a constitutional petition and added that the petition is speculative, devoid of facts and does not meet the constitutional threshold laid down in the case of **Anarita Karimi Njeru vs Republic [1979] eKLR**.

21. The respondents’ case was that the petitioners did not demonstrate that any of their rights under the constitution were violated or threatened with violation.

Analysis and determination.

22. I have considered the petition filed herein, the respondents’ response and the parties’ respective submissions. I find that the main issue for determination is whether the petitioners have proved that the 1st respondent’s summons dated 3rd November 2017 amounted to a violation of their constitutional rights and whether the petitioners are entitled to the orders sought in the petition.

23. The petitioners claimed that by summoning them for a purported hearing without any legal authority, power or responsibility to regulate their activities, the 1st respondent violated their rights under Articles 28, 31(c), 47 and 50 of the Constitution. The said Articles stipulate as follows:

Article 28:

“Every person has inherent dignity and the right to have that dignity respected and protected.

Article 31 (c): ***Every person has the right to privacy, which includes the right not to have-***

“Information relating to their family or private affairs unnecessarily required or revealed:

Article 47 (1) and (2):

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.

Article 50(1):

1) Every person has the right to have any dispute that can be resolved by the application in law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

24. I note that the main issue in contention in this petition is the claim that the 1st respondent sent an email to the petitioners summoning them to appear before it on claims that they had received complaints against them revolving around money laundering, and employment of foreigners.

25. I have perused the said email sent to the petitioners on Friday 3rd November 2017 and I note that it was worded as follows;

Dear Sir/Madam,

The NGOs Board is in receipt of complaints against your organization to the effect that you could be involved in activities that border on money laundering. Under the Money Laundering Act, the Board is obligated to report such cases to the Financial Reporting.

We have further noted that you have foreigners in your service without valid work permits.

You are therefore summoned to come to the NGOs Board's offices with any documentation that can support your case. The meeting that will be held on Monday 12.00pm will include officers from the Immigration, F.R.C and the Board.

With regards.

Compliance and Enforcement Department

26. The petitioners challenged the summons contained in the email on 3 accounts, firstly; that the allegations contained therein were made maliciously and in bad faith and that the act of summoning the petitioners officials for a meeting that would include officials from the Department of Immigration, the Financial Reporting Centre lacks logic or comprehensible justification secondly; that by disseminating the said email to the media houses, the respondents acted maliciously unreasonably and in bad faith and lastly; that the respondent has no power to summon the petitioner to its offices for any regulatory supervision as the petitioners are not NGOs but registered companies limited b guaranteed and are this regulated under the Companies Act No. 17 of 2015.

27. I have perused the petitioners' respective certificates of incorporation that were attached, as annexures, to their pleading and I note that indeed they indicate that the petitioners are companies incorporated under the Companies Act, and are limited by guarantee.

28. I have perused the provisions of Section 3 of the Non Governmental Organizations Coordination Act, 1990 (hereinafter the "NGO Act") which establishes the Board and section 7 thereof which lists its functions as follows:

The functions of the Board 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 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 sand 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.

29. Having regard to the clear provisions of the Act governing the activities of the 1st respondent, I find that nowhere in the said Act are the 1st and 2nd respondents vested with the powers to control or oversee the activities of entities duly registered as companies under the

Companies Act. I therefore find that the 1st respondent therefore overstepped their mandate in purporting to summon the petitioners for allegedly engaging in undisclosed unspecified activities that fall within the mandate of the repealed NGO Act. My further finding is that the summons issued by the 1st respondent cannot be said to have been in tandem with the provisions of Article 47 of the Constitution, which I have already highlighted in this judgment as the action that the respondents intended to take against the petitioners, without the requisite mandate, cannot by that very fact be deemed to have been lawful, reasonable or procedural.

30. The right to Fair Administrative Action is a constitutional right was stated by the *Constitutional Court of South Africa* in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*. (CCT16/98) 2000 (1) SA 1, that;

“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...”

31. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated in the case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR; that;

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

32. And in the case of *Dry Associates Ltd v Capital Markets Authority and Another*, [2012] eKLR the Court observed;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

33. Taking the above jurisprudence into consideration, there is no doubt in my mind, that acting as they did, the respondents violated petitioners’ right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of **legality, reasonableness and procedural fairness**. I find that the moment the respondents purported to exercise powers over the petitioners without any legal mandate or backing is the moment the petitioners’ right to challenge such an action accrued as the petitioners did not have to await the outcome of such an illegal process before instituting the case.

34. Turning to the claim that the 1st respondent acted maliciously and in bad faith in summoning the petitioners to appear before it, I find the malice and bad faith can be discerned not only from the vague and sweeping allegations made against the petitioners but also from the fact that the 1st respondent chose to brazenly issue summons to the petitioners while knowing too well that it lacked the mandate to do so.

35. This court notes, with concern, that while the email raised very serious allegations against the petitioners revolving around employment of foreigners without valid work permits and engagement in activities falling within the mandate of the NGO Act, neither the particulars of the said activities nor foreigners were made known to the petitioners so as to enable them make an appropriate response to the said summons.

36. To my mind, therefore, it would appear that the 1st respondent was not only acting outside its mandate, but also chose to engage the petitioners in a wild goose chase or mind games whose ultimate goal was not clear. For the above reasons I find that the petitioners were justified to seek the protection of this court from the respondents’ interference with their operations and for violation of their rights under Articles 47 and 50 of the Constitution.

37. On the claim that the respondents disseminated the email to the media houses, I find that even though the contents of the email appear to have been published in the mainstream print media, no material was placed before this court to show that the respondents had a hand in relaying the said information to the media houses. Moreover, it is noteworthy that the said media houses were not included in this suit as parties so as to enable them shed light on the sources of their information.

38. Turning to the prayers sought in the petition, I find that in view of the fact that the impugned email required the petitioners to appear before the 1st respondent on 6th November 2017, one can say that the purpose and intent of the email has long been overtaken by events and that for that reason, the prayers to quash the summons dated 3rd November 2017 and to restrain the respondents from requiring the petitioners attendance on account of the said email have long been overtaken by events and I therefore decline to grant the said orders.

39. In the same breath, having found that no material was placed before the court to prove that the respondents were responsible for the publication of the impugned email in the newspapers, I find that an order compelling the 1st respondent to publish a notification in a newspaper of national circulation retracting allegations made against the petitioners in the email of 3rd November 2017, will not be merited

in the circumstances of this case.

40. Turning to the prayer for compensation in damages suffered by the petitioners, I find that even though Article 23 of the Constitution empowers this court to make any appropriate relief including an order for compensation in proceedings brought under Article 22. In this case, I note that no sooner had the petitioners received the email than they, on 7th November 2017, obtained conservatory orders from this court, differently constituted, to restrain the respondents from interfering with their operations pending the hearing and determination of the petition. In this regard, therefore, it is clear that the 1st respondents summons were nipped at the bud and stopped before they could be actualized through the anticipated hearing/meeting of 7th November 2017. I find that an award for compensation in damages will therefore be premature and unmerited in this case.

41. and that the said summons had been overtaken by events notwithstanding, I still find it necessary to address the issue raised by the petitioners that they were apprehensive that the respondents could still summon them in future for undisclosed crimes/illegal activities. Towards this end I will allow prayer (f) of the amended petition.

42. In conclusion, I allow the petition, in part, and issue an order permanently restraining the respondents herein, either by themselves, their agents, assignees, and/or servants from unlawfully interfering in any manner whatsoever with the petitioners' operations.

43. I make no order as to costs.

Dated, signed and delivered in open court at Nairobi this 27th day of February, 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Ochiel & Ochoo for the 1st petitioner and holding brief for Apollo for the 2nd petitioner.

Mr Sekwe for the respondent

Court Assistant – Kombo