



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI JUDICIAL REVIEW NO. 218 OF 2017

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26

LAWS OF KENYA SECTIONS 8 AND 9

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 47

AND

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

AND

NON-GOVERNMENTAL ORGANIZATIONS &

CO-ORDINATION BOARD.....RESPONDENT

EX PARTE:

KALONZO MUSYOKA FOUNDATION

JUDGMENT

1. On 8 May 2017 this Honourable court issued orders allowing the ex-parte Applicant to institute Judicial Review Proceedings against the Respondent and also a stay of the decision of the Respondent made on 2nd May, 2017.

2. By a notice of motion dated 5th May, 2017 the ex parte applicant in this case **Kalonzo Musyoka Foundation**, a duly registered non-governmental charitable Organization seeks from this court judicial review orders of:

a. PROHIBITION, prohibiting the Respondent Non-Governmental Organizations and Coordination Board from freezing the Applicant's bank accounts or otherwise howsoever interfering with the applicant's day to day operations.

b. PROHIBITION, prohibiting the Respondent (NGOCB) from de-registering or in any way whatsoever interfering with the Applicant's operations;

c. PROHIBITION, prohibiting the Respondent (NGOCB) from breaching, abrogating and or in any way whatsoever infringing on the rights of the applicant's officials and officers under the pretext of investigating the Applicant.

3. The Notice of Motion is predicated on the grounds set out in the Verifying Affidavit sworn by **KENNEDY MUSYOKA KALONZO** on 5 May 2017, the grounds set out in the **Statutory Statement** accompanying the application for leave dated 5 May 2017 and on the exhibits and submissions and authorities filed canvassing the notice of motion.

4. The ex parte applicant's case is that it is a charitable and humanitarian foundation registered in the year 2005 under the Non-Governmental Organisations Coordination Act, (NGOC) Cap 134, with the primary objective of alleviating poverty and advancing education throughout the Republic of Kenya.

5. The Respondent is a statutory body established under Section 3(1) of the Non-Governmental Organisations Coordination Act, Cap 134.

6. It is averred that the Applicant has consistently filed its annual returns with the Respondent and has not been in default in any way whatsoever.

7. That on or about 1 March 2017, the Respondent, through its Executive Director one **Fazul Mohamed**, wrote a letter to the applicant alleging that:-

a) the applicant had opened and was operating an 'illegal' and unauthorised Kenya Shillings account with Investment & Mortgages Bank, 2nd Ngong Avenue Nairobi Branch.

b) the applicant had opened and was operating a secret and illegal foreign currency account which account was the principal recipient of all foreign currency;

c) the applicant's audited accounts did not reveal the identity of its foreign donors;

d) the applicant had been audited by one auditor since registration.

7. It is claimed that the Respondent then gave the applicant fourteen (14) days from 1 March 2017, within which to:

a) identify to it all bank accounts held under the applicant;

b) avail to the Respondent certified bank statements for all accounts operated by the applicant;

c) avail to the Respondent funding agreements, both foreign and local donors

8. It is further claimed that the Applicant complied with the Respondent's directive on 9th March 2017 and on 10 April 2017, the Respondent, while responding to the Applicant's response confirmed that the Applicant was compliant not only with the Non-Governmental Organizations Coordination Act, Cap 134,

but attendant regulations.

9. It was alleged by the ex parte applicant that to its surprise, on 2 May 2017, the respondent, citing a non-existent letter allegedly from the Applicant dated 20 March 2017, the Respondent purported that the Applicant had not accounted for Kshs.146 Million in its accounts.

10. Further, that by dint of its said letter of 2 May 2017, the Respondent purported to close the Applicant's bank accounts by directing the Central Bank of Kenya to '**preserve**' all the ex parte applicant's accounts until further notice.

11. The ex parte applicant claims that the Respondent's aforesaid conduct is irrational as three weeks before the impugned decision; it had certified the Applicant as having been compliant with the law in all respects hence there can be no justification for a turn around.

12. Further, that the Respondent's impugned decision was not preceded by a process where the Applicant received any form of accusation against it.

13. It is therefore claimed that the Respondent's impugned decision is malicious as the Respondent was not given a chance to be heard before the decision to freeze all its accounts was reached.

14. The ex parte applicant further claims that the Respondent's impugned decision is substantively *ultra vires* the Non-Governmental Organisations Coordination Act as the Respondent lacks powers to unilaterally freeze bank accounts without court orders.

15. In addition, the applicant alleges that the Respondent's decision is in breach of the Applicant's legitimate expectation founded on the Respondent's promise only three weeks before the impugned decision was made that the Applicant was compliant with the law and attendant regulations.

16. The applicant further alleges that the Respondent's decision is disproportionate to the alleged transgression.

17. The above facts are contained both in the statutory statement and verifying affidavit sworn by Kennedy Musyoka, the ex parte applicant's Secretary, wherein he also annexed the impugned decision and letters referred to in the affidavit as exhibits.

The Respondent's reply

18. The respondent filed replying affidavit sworn by Lindon Nicholas, the respondent's Executive Director, deposing that he was aware that a team of compliance officers was constituted and conducted a review of the applicant's file and various compliance issues were brought up and the applicant was provided with the particulars of the same vide a letter dated 1st March 2017 annexed.

19. It was further deposed in contention that there were issues noted by the team of compliance officers namely:

i. The NGO began operations in January, 2006 by opening and operating Bank Account at I&M Bank and it was identified that some of the bank accounts, one amongst them being a possible foreign currency (USD) account is operated in contravention of Section 12(4) of the NGO's Co-ordination Act No. 19 of 1990 and clause 10 of the terms and conditions attached to the certificate of registration.

ii. The applicant receives donations both in kind and cash and that the audited accounts are silent on the names of the donors in as much as they have given the proportions and though in the annual return form 14, the names of donors are declared, the Organizations, including Cyprus Association for Famine Relief do not seem to exist.

iii. The applicant collaborated with China Youth Development Foundation(CYDF) to construct and furnish classrooms but that the donations given to the applicant, were not captured in the annual returns and audited accounts to the NGOs Board and that CYDF seemed not to have a known legal status in Kenya.

iv. The applicant has been audited by one auditor for over 10 years now since its registration in 2006 and the situation creates familiarity risks which directly affects the independence of the auditor.

20. The respondents also contended that they wrote to the applicant and asked it to comply with certain directives amongst them to identify all bank accounts held under the Kalonzo Musyoka Foundation, as shown by annexed copy of the letter dated 1st March, 2017.

21. That upon receipt of the response from the applicant the respondents again sought to review the documents furnished to them and found it not to be satisfactory as the applicant indicated that most of the documents required had been archived and there was no way to substantiate the facts at hand beyond a certain time lime.

22. It was further deposed that pursuant to the above, the respondent issued a compliance letter to the applicant confirming compliance with the request for documents pending review as the nature and quantity of the accounting documents furnished required much time and keen review to establish accountability and transparency by the applicant, as shown by the annexed copy of the letter dated 10th April, 2017.

23. Further, that there were several inconsistencies that were raised prompting the respondent to again write to the applicant outlining the same and a suspension letter was issued on the operations of the organization to ensure preservation and maintenance of the status quo to enable investigations, as shown by the annexed copy of the letter dated 2nd May 2017.

24. That the nature of the inconsistencies cannot be wished away and the copies of the said letter was sent to all the relevant parties to ensure that the required support was given.

25. That the exparte applicant has not demonstrated any reason(s) why any of the orders sought should be granted. And finally that this application is an abuse of the court processes, bad in law and against the public interest and thus ought to be dismissed with costs.

SUBMISSIONS

THE EX-PARTE APPLICANT'S SUBMISSIONS.

26. The parties' advocates filed written submissions which they relied on entirely by adoption for the court to render its decision.

27. The exparte applicant framed three issues for determination namely:

- 1. Whether the Respondent acted Ultra Vires.**
- 2. Whether the Respondent was malicious, oppressive and in abuse of its powers.**
- 3. Whether this matter is properly before this court.**
- 4. Who should bear the costs?**

28. On the first issue of whether the Respondent acted Ultra Vires, it was submitted that the functions and powers of the Respondent are provided for under section 7 and 8 of the Non- Governmental Organizations Coordination Act Chapter 134 Laws of Kenya which states as follows;

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

Sec 8. *The Board shall have power—*

- (a) to establish such subsidiary organs as may be necessary for the performance of its functions under this Act; and*
- (b) subject to this Act, to appoint such officers as may be necessary for the performance of its functions.*

29. It was therefore submitted that that the Act has not given the Respondent powers to freeze accounts of NGO's and therefore the attempt to freeze the ex-parte Applicant's Accounts was ultra vires. Further, that the Respondent did not obtain any court order to freeze the bank accounts but that instead, it purported to, *suo moto*, freeze the accounts without recourse to due process.

30. The exparte applicant relied on the case of **REPUBLIC VS NON-GOVERNMENTAL ORGANISATIONS CORDINATION BOARD EX-PARTE RESEARCH CARE & TRAINING PROGRAMME, FAMILY AIDS CARE AND EDUCATION SERVICES 9 RCTP- FACES) [2016] eKLR** where Justice Weldon Korir observed at page 5 of the decision:

“The power to order the freezing of a bank account is a very powerful tool indeed. It leaves the account holder at the mercy of the authority directing freezing. In my view such power can only be expressly granted by the law. Even where crime is involved, investigative authorities such as the police and the Ethics and Anti-Corruption Commission do not exercise such power of their own motion. In order to access somebody's account, an investigator has to obtain orders of the court. Under the Proceeds of Crime and Anti-Money Laundering Act, 2009, freezing a bank account can only be done upon obtaining a court order.”

31. It was further submitted that the Respondent not only acted *ultra vires* but was also in contravention of Sections 68 and 82 of the Proceeds of Crime and Anti- Money Laundering Act, 2009 by usurping powers vested only in a court of law.

32. On the second issue of whether the Respondent was malicious, oppressive and in abuse of its power, it was submitted that the Verifying Affidavit of Kennedy Musyoka Kalonzo sworn on 5 May 2017 clearly demonstrates that the decision of the Respondent was an afterthought to frustrate the ex-parte Applicant. That the Respondent having issued a letter dated 10 April 2017 informing the ex-parte Applicant that the applicant had complied with all the procedural and operational requirements, if any inconsistencies were identified after issuance of the compliance notice, the ex-parte Applicant should have been notified.

33. Further, that the circumstances surrounding the deregistration of the ex-parte Applicant and unlawfully freezing of its account is a mystery and a clear case of misuse and overreach of power deliberately informed by secrecy and hoarding of information. Reliance was placed on the case of **Republic v Kenya Revenue Authority ex-parte Amsco Kenya Limited [2014] eKLR** where it was held by G.V Odunga, *inter alia*:

“In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute. Where one’s right or fundamental freedom is likely to be affected by an administrative action, that person has a right to be given written reason for the action. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held: “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

34. It was therefore the ex-parte applicant’s humble submission that the Respondent did not follow due process and that there is clearly nothing to show or indeed demonstrate that there was a change in circumstances between 10 April 2017 when the ex-parte applicant was cleared of any wrong doing and 2 May 2017 when there was a conclusive finding without any form of hearing that the ex-parte applicant was operating irregularly.

35. On the issue of whether this matter is properly before this Honourable Court, the applicant submitted that the Respondent relied on provisions of Section 19 of the Non-Governmental Organizations Coordination Act Chapter 134 Laws of Kenya to justify its actions. It was therefore submitted that the said section does not affect this case because the Respondent was not acting within the confines of the said Act. The ex-parte submitted that indeed the nature of these proceedings is to challenge the process and not the merits of the decision.

36. Further, that it is a well-known principle in law that where statute has provided for other mechanisms of resolving a dispute, a party can only come to court after exhausting the said alternative mechanisms. The applicant relied on the case of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where the three bench judges at paragraph 50 of the decision stated:

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.”

37. The ex-parte Applicant submitted that it could not have audience before the Minister as contemplated under Section 19 because the acts of the Respondent are not within the confines of the Statutory powers conferred on it, and that the Minister does not have powers to adjudicate disputes that relate to authority to freeze bank accounts; nor does the minister have authority to determine if the Respondent had acted in bad faith, in breach of rules of natural justice and maliciously as is cited in the above case.

38. On the issue of who should bear the costs of these proceedings, it was submitted that the costs of this litigation should be borne by the Respondent.

39. The exparte applicant concluded that this court should consider and uphold the provisions of Article 50(1) and 47 of the Constitution of Kenya 2010 on the right to fair administrative action and the right to a fair hearing and allow the Notice of Motion Application dated 15 May 2017 and grant the judicial review orders as prayed.

THE RESPONDENT'S SUBMISSIONS

40. The respondent's counsel filed written submissions on 10th October 2017 reiterating the contents of the replying affidavit and contending that in making the impugned decision the respondent was acting within its purview of initiating the de-registration process of such Non-governmental Organization found to be non-compliant with statutory provisions of the Non-Governmental Organizations Co-ordination Act. Further, that the instant application therefore is just but a misguided attempt to arm twist the respondent into halting investigations on the applicant's illegal activities.

41. That the respondent, as indicated in its replying affidavit deposed by Lindon Nicholas and dated 9th October 2017, had constituted a team of compliance officers who conducted a review of the applicant's file whereupon various compliance issues had been brought forth, particulars of which had been provided to the applicant vide a letter dated 1st March 2017.

42. That the applicant in an attempt to comply with the directives issued by the respondent furnished the respondent with documents which were eventually found to be unsatisfactory as most documents required had been archived and as such there was no certain way to substantiate the facts at hand beyond a certain timeline. That the respondent subsequently issued a compliance letter with the request pending review of the nature and quantity of the accounting documents.

43. That on 2nd May, 2017, the respondent issued a suspension letter on the applicant's operations to ensure preservation and maintenance of status quo to enable investigations into the same.

44. The respondent's counsel submitted that parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanisms established by an Act of Parliament and which is efficacious. Thus, that if the exparte applicant was dissatisfied with the issuance of a suspension letter on its operations to ensure preservation and maintenance of status quo to enable investigations into the same, then it ought to have exhausted any other avenues available to it before seeking Judicial Review remedies herein.

45. Reliance was placed on Section 19 of the Non-Governmental Organizations Co-ordination Act which stipulate the mechanisms and procedure of such an aggrieved party as follows:

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

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

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

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

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

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

46. It was submitted that That is it is now settled law and judicial opinion that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law, and that that is the effect of Article 50(1) and 159(2) of the Constitution which stipulates that:

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”

47. That Under Article 159(2) of the Constitution,-

“159(2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(c) alternative forms of dispute resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to Clause (3);

48. Reliance was placed on the decision in the case of **Samson Chembe Vuko v Nelson Kilumo & 2 Others [2016] e KLR**, where the Court of Appeal cited with approval the decision in **Speaker of the National Assembly vs Karume[2008] 1 KLR 425** where the Court of Appeal held inter alia:

“where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”

49. Further reliance was placed on the case of **International Centre of Policy and Conflict & 5 Others vs The Attorney General & 4 Others[2013] e KLR** as was cited in the case of **Diana Kethi Kilonzo & Another v IEBC & 10 Others [2013] e KLR** where it was stated:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state of organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrarily to the institutional independence of IEBC granted by Article 249 of the Constitution.” Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....”

50. The respondent’s counsel submitted that the duty of the judicial review court is to check the respondent’s impugned decision for any illegalities, unreasonableness or procedural improprieties, and that in non-compliance with the rules of natural justice, a view that was reiterated by the Court of Appeal in **Aluoch Dan Pwino & 3 Others v Kenyatta University [2014] e KLR** where the court relied on the finding in **Civil Appeal No. 180 of 2013- Isaack Osman Sheik –vs-IEBC & Others** that:

“ A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction

flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.”

51. The respondents further submitted that the applicant’s claim that the impugned decision was not preceded by any form of accusation fails as by dint of the provisions of Section 19(2) of the Non-Governmental Organization Co-ordination Act, 1990 the respondent does not have to give an explanation or provide reasons for its decision except where such an aggrieved NGO appeals as such can only be given on request from the Minister. That the section provides:

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

52. The respondent’s counsel submitted that the instant application should be dismissed as it is incompetent, misplaced and an abuse of the court process as the respondent is bound to obey the law, and that the respondent is guided by and thus acted according to the provisions of the No- Governmental Organizations Co-ordination Act, 1990 in issuing a suspension letter on the applicant’s operations to ensure preservation and maintenance of status quo to enable investigations into the same.

DETERMINATION

53. I have considered all the foregoing and in my humble view, the main issues for determination in this matter are:

a. whether the exparte applicant had an alternative internal review or appeal mechanism to revert to before invoking the judicial review jurisdiction;

b. Whether the applicant is entitled to the judicial review orders of prohibition sought in the motion dated 15th May, 2017.

c. What orders should this court make and

d. Who should bear costs of these proceedings?

54. There are ancillary questions that the court would endeavour to resolve in the process of answering to the above main issues.

55. On the first issue whether the exparte applicant had an alternative internal review mechanism of resolving the issue before resorting to this court for judicial review, the exparte applicant in its statutory statement and verifying affidavit challenges the respondent’s decision made vide letter dated 2nd May, 2017 wherein the respondent purported to freeze all the applicant’s bank accounts and which freezing and threat to investigate and deregister the applicant foundation is said to have been done without giving the applicant an opportunity to be heard on the allegations since the respondent had given the applicant a clean bill of health vide its letter of April 2017 stating that the applicant’s operations were in compliance with the law and regulations.

56. In the chamber summons for leave, the exparte applicant, besides seeking judicial review orders of prohibition, also sought for certiorari to bring into this court and quash the respondent’s decision made vide letter dated 2nd May, 2017 on account that the said letter was made ***ultra vires*** and laced with bad faith and illegality. Further, that the decision by the respondent breached the applicant’s legitimate expectation that having been informed of its compliance with the laws in its operations, in the event of change of circumstances, it would be notified of the same and given an opportunity to be heard before such a drastic decision to freeze its bank accounts was reached by the respondent.

57. The parameters of judicial review and more specifically for the remedy of prohibition were set out

by the Court of Appeal in the case of **Republic v KNEC exparte Geoffrey Gathenji & others** CA No. 266 of 1996 where the Court stated:

“Prohibition looks at 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 lie, however, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.....like an order of prohibition, mandamus cannot quash what has already been done.....only 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.”

58. Article 47 of the Constitution stipulates that:

1. every person has the right to administrative action which 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.

3.

59. The respondent raised a very important issue that section 19 of the NGOs Coordination Act stipulates that any NGO which is aggrieved by the decision of the Board may appeal to the Minister and an appeal from the decision of the Minister lies to the High Court and such appeal to the High Court is final.

60. Indeed, Section 9 of the Fair Administrative Action Act, 2015 stipulates that the High Court **shall not consider** judicial review application unless the parties to the judicial review have exhausted the internal review or appeal mechanisms where provided by law. Further, that in exceptional circumstances, the court can, on application, exempt the applicant from exhausting alternative remedies or internal review mechanisms. In this case, the applicants have neither applied to set aside or quash the decision of the respondent nor applied to be excused from appealing to the Minister challenging the decision of the Board.

61. In **Samson Chembe Vuko V Nelson Kilumo & 2 others & 2 others [2016] e KLR** the Court of Appeal, citing other decisions with approval, among them: **Speaker of the National Assembly Vs Karume [2008] 1 KLR 425** where the Court of Appeal held, inter alia:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.”

62. In **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015] e KLR** the Court of Appeal reiterated the foregoing as follows:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed.... And further held as follows.....

“.....this court has in the past emphasized the need for aggrieved parties to strictly follow

any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution.”

63. In granting the order, the court made the often quoted statement :

“ where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.(See also Kones v Republic & Another exparte Kimani Wanyoike & 4 Others[2008] e KLR (ER) 296.”

It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first, that Article 159 (2) (e) of the Constitution has expressly recognized alternative forms of alternatives forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reaching of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.....

.....We are therefore satisfied that the learned judge did not err by striking out the appellant’s suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d’etre of the mechanisms provided under the two Acts.....”

64. 38. In *Revital Healthcare (EPZ) Ltd & Another Vs Ministry of Health & 5 Others [2015] Emukule J*, citing with approval the case of *Damian Belforite V the Attorney General of Trinidad & Tobago CA 84/2004* held:

“ where there is a parallel remedy, constitutional relief should not be made unless the circumstances of which the complaint is made include some feature which made it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate to seek constitutional relief in the absence of such feature would be misuse, abuse of the court process.”

65. The applicant is challenging a decision made by the respondent administrative body. The court acknowledges that indeed, a party seeking to invoke judicial review jurisdiction of this court must first and foremost resort to and exhaust all the available remedies as stipulated in section 9(2) of the Fair Administrative Action Act, 2015 and section 19 of the NGOs Coordination Act, 1990. The latter Act

provides for an appeal to the Minister. However, where there are special circumstances, and on application, the applicant may seek to be exempted from resorting to the alternative internal review or appeal mechanisms. There is no such application before this court for exemption from appealing to the Minister as stipulated in section 19 of the Act.

66. However, in this case, and on the material placed before me, the respondent did write to the applicant confirming unconditionally and without any reservations that the applicant had complied with all the requirements for its operations. Three weeks later, the respondent purported to freeze the applicant's accounts and threatened to deregister the applicant without giving it notice of the change of circumstances.

67. This court acknowledges that what is before this court is not an application seeking for the judicial review remedy of certiorari hence I am not inclined to make any orders quashing the decisions made by the respondent.

68. However, where it is apparently clear that the orders made by an administrative body are illegal and or as it is in this case, are outside the powers of the respondent Board, an appeal to the Minister can only be effective if the decision made by the Board was within its statutory powers and not in excess of its powers; and it is for that reason that this court would not hesitate to prohibit the Board from implementing illegal orders made ultra vires its powers.

69. Section 16 of the NGOs Coordination Act provides that:

“(1) The Board may cancel or suspend a certificate issued under this Part, if it is satisfied that –

(a) the terms or conditions attached to the certificate have been violated;

(b) the organization has breached this Act;

(c) the Council has submitted a satisfactory recommendation for the cancellation of the certificate.

(2) Notice of the cancellation or suspension shall be served on the Organization in respect of whom such cancellation or suspension relates and shall take effect within fourteen days after the date of that notice.[emphasis added].

70. The respondent Board is given the power to cancel or suspend operations of an Organization but only if the conditions stipulated under the Act are fulfilled and the onus is on the respondent to demonstrate that those conditions existed to warrant such suspension or cancellation of operations of the organization in question. Moreso, the Board under subsection 2 above can only cancel the certificate of the organization after giving a 14 days' Notice of cancellation or suspension.

71. There is no power given to the Board to dissolve the Board of Directors of the organization or to suspend operations before giving a 14 days' Notice duly served upon the organization, giving reasons for the intended action. This is in accordance with Article 47 of the Constitution. That requirement of notice is in recognition of the right to a fair administrative action so that the affected organization can make representations to the Board or to appeal to the relevant Cabinet Secretary for review of the decision to cancel or suspend the organization's operations.

72. In this case the respondent never gave any notice of suspension to the exparte applicant. It simply suspended and dissolved the operations of the applicant with immediate effect. That is not what the Act under section 16 above contemplates hence it cannot be said that the applicant did not exhaust the internal appeal mechanisms contemplated in section 19 of the NGOs Coordination Act and in section 9 of the Fair Administrative Action Act, 2015.

73. Had the respondent given notice as required under the Act, then the applicant would be expected to

challenge that notice as a lawful decision made under the Act.

74. I reiterate that there is no lawful decision made by the respondent pursuant to the Act, capable of appeal before the Cabinet Secretary for consideration. An unlawful decision cannot be allowed to be implemented in the name of exhaustion of alternative remedies. Such a decision is amenable to be reviewed by this court through judicial review.

75. In addition, the freezing of the exparte applicant's bank accounts held with various banks and asking Central bank of Kenya to 'preserve' all the accounts of the applicant is an administrative action taken by the respondent which was likely to adversely affect the exparte applicant's operations as a humanitarian charitable organization set up to improve the livelihoods of the people of Kenya. Therefore, before such a drastic action is taken, it was expected that the respondent examines the extent of its powers under the Act and that the applicant is given the opportunity by way of a notice in writing and reasons for the intended action and given an opportunity to present its side of the story before a freezing order is made. In addition, no freezing order can be made without first seeking an order from a court of competent jurisdiction.

76. In Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR the three bench judges at paragraph 50 of the decision stated:

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.”

77. Section 19 of the NGOS Coordination Act stipulates that:

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

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

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

(4) If the Council is satisfied that the organization has ceased to exist, its recommendation to the Board shall include suggestions of how the assets and liabilities of the organization should be distributed and the reasons thereon.

78. I have perused the provisions of Part III of the Act on **REGISTRATION AND LICENSING OF NON-GOVERNMENTAL ORGANIZATIONS** and I see no provision which empowers the respondent to freeze the accounts of Non- Governmental Organizations.

79. The Court of Appeal in the case of **Kenya National Examinations Council v Geoffrey Gathenji and others Civil Appeal No. 266 of 1996** recognized that before proceeding to prohibit any other further action, the court would only do so if it was demonstrated that the proposed or intended action or further proceeding would be contrary to law.

80. In this case, as there is no legal provision empowering the Respondent to freeze the applicant's bank accounts to preserve the status quo, and as there is no power vested in the respondent Board to dissolve the applicant's Board of directors and or to suspend its operations without giving 14 days' notice to the applicant, I find and hold that the decision taken by the respondent is contrary to law and therefore the Minister would have no jurisdiction to hear and determine an appeal where there was no exercise of powers within the stipulations under the Act. And as was held in the persuasive case of **REPUBLIC VS NON-GOVERNMENTAL ORGANISATIONS COORDINATION BOARD EX-PARTE RESEARCH CARE & TRAINING PROGRAMME, FAMILY AIDS CARE AND EDUCATION SERVICES 9 RCTP- FACES) [2016] eKLR** Justice Weldon Korir observed at page 5 of the decision stated:

“The power to order the freezing of a bank account is a very powerful tool indeed. It leaves the account holder at the mercy of the authority directing freezing. In my view such power can only be expressly granted by the law. Even where crime is involved, investigative authorities such as the police and the Ethics and Anti-Corruption Commission do not exercise such power of their own motion. In order to access somebody's account, an investigator has to obtain orders of the court. Under the Proceeds of Crime and Anti-Money Laundering Act, 2009, freezing a bank account can only be done upon obtaining a court order.”

81. It follows that if the respondent was suspicious that the applicant was holding foreign currency accounts or held accounts whose sources of funding were not disclosed or non-existent, or that the foundation's accounts were operated by strangers, the respondent should have sought a court order to investigate and temporarily freeze those accounts pending investigations and not just leap into the accounts in an ambush.

82. The persons who registered the applicant NGO are known persons in this country. It has not been alleged that they are foreigners or likely to leave this jurisdiction. They are the former vice president of this country Hon Stephen Kalonzo Musyoka and his immediate family members namely, his spouse Mrs Pauline Musyoka and his son Kennedy Musyoka who is now the East African Legislative Assembly member.

83. Considering that the respondent unreservedly gave the applicant a compliant letter just weeks before the freezing order, I find the explanation given by the respondent in its replying affidavit that the compliance was pending verification dishonest and an afterthought since the letter of compliance was unequivocal on the areas of compliance.

84. Nonetheless, in the decision made and communicated by the letter of 2nd May 2017, the respondent provided reasons for the freezing of the exparte applicant's bank accounts, which, however, was a surprise move to the applicant because only three weeks earlier, the applicant had been notified that it had complied with all the relevant law in its operations.

85. Failure to accord the applicant an opportunity to be heard on the reasons for suspension of operations and or freezing of bank accounts and prohibiting the officials of the foundation from transacting is breach of the rules of natural justice as stipulated in the Fair Administrative Action Act, 2015 which implements Article 47 of the Constitution on the right to a fair administrative action and to be given reasons in writing for the decision where such decision was likely to affect a person's rights. The respondents' act of freezing the applicant's bank accounts was therefore not only illegal but also unconstitutional and taken in bad faith.

86. Such illegal and unconstitutional acts call for prohibition by this court and although the respondent cannot be prohibited from taking appropriate legal steps with regard to its mandate to regulate Non-governmental Organizations, where in the course of such regulation, the respondent acts outside the law or against the law, then this court would not hesitate to prohibit the implementation of such illegal actions, in order to promote and protect the rule of law.

87. Prohibition issues to a subordinate court, body or tribunal mandating an inferior body to cease any

action over a case or doing any act because the action may exceed the jurisdiction of the inferior body or court or where the inferior court or body is acting ultra vires the law or rules of natural justice and procedures or where the inferior court or body is headed towards defeating a legal right.

88. In this case, the applicant in its chamber summons for leave sought for certiorari and prohibition but on being granted leave, opted to apply for prohibition only, without seeking an order to quash the impugned decision. Therefore, as the impugned decision would not be disturbed force, a prohibition would not undo that which has already been done. However, such a decision which is out rightly contrary to law cannot be allowed to be implemented as that would be allowing persons to abuse legal process. This court has the power to prohibit implementation of an illegal decision, act or order, in exercise of its supervisory jurisdiction stipulated in Article 165(6) and (7) of the Constitution.

89. It would, accordingly, not be, in my humble view, an exercise in futility if this court were to issue an order of prohibition without first quashing the decision which is impugned. The effect would be that there is a decision but that decision cannot be implemented for reasons of being illegal and having been made without and on excess of jurisdiction.

90. The respondent has not claimed that it had already implemented the decision made by its CEO. The applicant came to court expeditiously upon receipt of the decision and this court did issue an order of stay of implementation of the impugned decision. Albeit the respondent claims that the decision ought to have been appealed against to the Minister under section 19 of the Act, and that therefore the provisions of section 9 of the Fair Administrative Action Act, 2015 come into play, I am of the view that the alternative remedy is only available where there is jurisdiction in the making of the decision which is appealable to the available mechanism and not where there was no such jurisdiction.

91. I have read the provisions of the NGOs Coordination Act but I do not find any provision that allows the respondent to freeze accounts of the NGOs. It is for that reason that I concur with the decision of this court in **REPUBLIC VS NON-GOVERNMENTAL ORGANISATIONS COORDINATION BOARD EX-PARTE RESEARCH CARE & TRAINING PROGRAMME, FAMILY AIDS CARE AND EDUCATION SERVICES 9 RCTP- FACES) [supra]**

92. Examining the impugned letter, it appears that the applicant is alleged to be hoarding money in secret accounts and that it has failed to disclose the sources thereof. If that be the case then it is expected that investigations into that conduct be carried out by relevant competent enforcement agencies wherein the respondent will be the complainant, before the act of freezing the applicant's accounts and suspension of the operations of the applicant organization can be undertaken. The respondent can only be a witness to the investigations and not be the one freezing suspicious accounts before notifying the enforcement agencies to do their work. Failure to do so is tantamount to usurping of powers of the other statutory or constitutional bodies and which usurpation of power can be prohibited by this court.

93. A three Judge Bench decision in the matter of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where the three bench judges at paragraph 50 of the decision stated:

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.”

94. In addition, the respondent having written to the ex parte applicant only three weeks earlier and

assuring it that the applicant had complied with all the law in its operations, the question is what circumstances had changed and if there were any, what was so difficult in communicating to the exparte applicant by way of a warning letter that the circumstances had changed and that there was need for the applicant to address the new issues raised. The respondent created in the applicant a legitimate expectation that the latter had complied with the law in carrying out its operations. The exparte applicant was therefore entitled to be heard on any new or fresh allegations emerging after the April letter.

95. Moreso, in the replying affidavit filed by the respondent, it never attached any evidence of the alleged hidden bank accounts including foreign accounts allegedly opened by the applicant and not disclosed. The issue only emerged in the submissions which submissions cannot be taken to be evidence.

96. The respondent being a statutory body cannot be allowed to act on rumours or imaginations. It must act within the law and where it fails to do so, this court in the exercise of its supervisory jurisdiction will interfere with the decisions made without lawful authority or shrouded in mystery.

97. I agree with the decision in **Republic v Kenya Revenue Authority ex-parte Amsco Kenya Limited [2014] eKLR** where Odunga J held, *inter alia*:

“In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute. Where one’s right or fundamental freedom is likely to be affected by an administrative action, that person has a right to be given written reason for the action. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held: “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

98. I reiterate that the respondent never accorded the applicant nay hearing on the allegations levelled against it which violates the applicants’ right to fair administrative action Act as espoused in Article 47 of the Constitution.

99. Accordingly, I find the applicant’s notice of motion merited and grant the orders sought namely:

a. PROHIBITION, prohibiting the Respondent Non-Governmental Organizations and Coordination Board from freezing the Applicant’s bank accounts or otherwise howsoever interfering with the applicant’s day to day operations.

b. PROHIBITION, prohibiting the Respondent (NGOCB) from de-registering or in any way whatsoever interfering with the Applicant’s operations;

c. PROHIBITION, prohibiting the Respondent (NGOCB) from breaching, abrogating and or in any way whatsoever infringing on the rights of the applicant’s officials and officers under the pretext of investigating the Applicant. Any investigations must be undertaken in accordance with the law.

100. I order that each party shall bear their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2018.

R.E ABURILI

JUDGE

In the presence of:

Miss Gathua h/b for Mr Simiyu for the exparte applicant

N/A for the Respondent

CA: Kombo