



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. JR 275 OF 2016**

**IN THE MATTER OF AN APPLICATION BY INTERNATIONAL NGO SAFETY ORGANIZATION (INSO) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATIONS ACT, 1990**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NON-GOVERNMENTAL ORGANISATIONS**

**CO-ORDINATIONS BOARD.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL (ON BEHALF OF THE PRINCIPAL SECRETARY**

**MINISTRY OF INTERIOR & CO-ORDINATION**

**OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**THE CENTRAL BANK OF KENYA.....3<sup>RD</sup> RESPONDENT**

**BARCLAYS BANK OF KENYA LTD**

**(MUTHAIGA BRANCH).....4<sup>TH</sup> RESPONDENT**

**STANDARD CHARTERED BANK LIMITED**

**(WESTLANDS BRANCH).....5<sup>TH</sup> RESPONDENT**

**EX PARTE: INTERNATIONAL NGO SAFETY ORGANISATION (INSO)**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 4<sup>th</sup> July, 2016 the *ex parte* applicant herein, **International NGO Safety Organisation (INSO)**, seeks the following orders:

1. That an order of certiorari be granted to remove into the high court for the purpose of being quashed the decision of the 1<sup>st</sup> Respondent contained in its letter dated 16<sup>th</sup> June 2016 addressed to the applicant, suspending its registration certificate and all of the applicant's operations within the Republic of Kenya

2. That an order of certiorari be granted to remove into the High Court for the purpose of being quashed the decision of the 1<sup>st</sup> Respondent contained in its letter dated 16<sup>th</sup> June 2016 addressed to the applicant purporting to suspend and/or freeze the applicant's bank accounts with the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

3. That an order of prohibition be granted to prohibit the 1<sup>st</sup> respondent from directly or indirectly and/or unlawfully, maliciously and arbitrarily directing itself, or alternatively directing the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from unnecessarily interfering with the lawful mandate and smooth operations of the applicant as a registered Non- Governmental Organisation.

4. That cost of this application be provided for.

2. The grounds upon which the application is based are as follows:

1. Abuse of power and Excess of power:-

The 1<sup>st</sup> Respondent gravely abused and exceeded its powers when it not only failed to serve or give any notice at all to the applicant on the impending suspension of its certificate of registration and suspension of its bank accounts, but proceeded to purport to revoke a certificate of registration which had properly been granted to the applicant and also direct that the applicant's bank accounts be suspended and/ frozen.

2. Legitimate Expectation:-

The applicant is entitled to invoke judicial review remedy because the 1<sup>st</sup> respondent, which is a public authority, has made decisions which have affected the core business and operations of the applicant, depriving it of the benefit and right to discharge its humanitarian functions.

3. Breach of Duty to Act Fairly:-

The 1<sup>st</sup> respondent not only breached the duty it owed to the applicant to act fairly by it also shut out the applicant without a hearing or notice of the impending action, and from the available evidence, the 1<sup>st</sup> respondent purported to suspend the applicant's certificate of registration and bank accounts without following due process.

Failure by the 1<sup>st</sup> respondent to act as is mandated under the law can only be remedied by this honourable court invoking its judicial review jurisdiction to grant the reliefs sought by the applicant.

4. Unreasonable, Capricious and Oppressive decisions:-

**The 1<sup>st</sup> respondent's decision to purport to suspend the applicant's certificate of registration and further to purport to order the suspension of the applicant's bank account was not only unreasonable and capricious for being grounded on no good reason in law, but also oppressive because the appellant, who is a duly registered organization was never heard in the matter.**

**The clear violation of the rules of natural justice renders the 1<sup>st</sup> respondent's decisions and actions null and void *ab initio*.**

### **Applicant's Case**

3. According to the applicant, it is a Registered Non-Governmental Organisation pursuant to the provisions of the ***Non-Governmental Organisations Co-Ordinations Act*** (hereinafter referred to as "the Act") and bearer of certificate of registration number OP.218/051/12-0439/8165. According to the applicant, it has been in operation since 3<sup>rd</sup> July 2012 and has been complying with all the requirements of the Act and also with the requirements of its constitution.

4. It was averred by the applicant that on or about the 20<sup>th</sup> June 2016, it was in the process of carrying out its normal operations and part of the operations were to process bank payments to various beneficiaries when it realized that its banking transactions had an unusual problem as a result of which its staff to visited the offices of the 4<sup>th</sup> Respondent, the **Barclays Bank of Kenya Limited** (hereinafter referred to as "Barclays") to enquire and establish the cause of the problem with the transactions. Upon arrival at Barclays's branch, it immediately came to the applicant as a surprise that the Applicant's Certificate of Registration had been suspended by the 1<sup>st</sup> Respondent, the **Non-Governmental Organisations Co-Ordinations Board** (hereinafter referred to as "the Board") and further, the Board vide a letter dated 16<sup>th</sup> June 2016, had directed the Barclays to suspend and/or freeze the Applicant's bank accounts held with them and the applicant was furnished by Barclays with a letter dated 20<sup>th</sup> June 2016 in which the contents stated that it had immediately suspended the Applicant's account numbers 2025829606 and 2025829622.

5. It was the applicant's case that the above decisions made by the Board were reached in breach of the law and are high handed, oppressive, excess of the Board's powers or authority and has violated the Applicant's rights to fair administrative action under Article 47 of the Constitution, and to fair hearing under Article 50 of the Constitution, by failing to give the Applicant a notice or according the applicant a hearing before ordering the cancellation of its Certificate of Registration and/or ordering the suspension the Applicant's activities and/ or freeze of the Applicant's bank accounts. To the applicant the said decision is null and void because:-

i) The Board has, without effecting service of a Notice of Cancellation of a Registration Certificate as is stipulated under section 16 (2) of the **Non-Governmental Organisations Co-ordinations Act, 1990**, and without observing the mandatory period of fourteen (14) days as is further stipulated in the aforesaid section of the Act prior to suspension, has with immediate effect proceeded to direct the suspension of the Applicant's Certificate of Registration.

ii) The Board has, without initially serving a Notice of intended cancellation of Registration Certificate (Form 9) upon the Applicant as is stipulated under Rule 17(1) of the **Non-Governmental Organisations Co-ordinations Regulations, 1990**, and without carefully considering the far reaching consequences, has with immediate effect ordered the ceasure of all the operations of the Applicant in violation of the law.

iii) The Board has never served a Notice of the suspension of the applicant's Certificate of Registration upon the Respondent. Instead, the Applicant was made to learn from a third party, the Barclays herein being the Applicant's bankers that its Certificate of Registration has been suspended and that its Bank accounts have been suspended and/or frozen in gross violation of the law.

iv) It is evident that the Board went out of its way to formally serve non-essential parties herein (for example the Barclays who formally acknowledged receipt of the Board letter by stamping on 17<sup>th</sup> June 2016), but deliberately ignored to serve a crucial party herein being the Applicant, who was to suffer directly and substantially from the consequences of the letter in contention.

v) Besides, the latest information published in the form of a notice available on the Board's website on the list of NGO's to be deregistered is the one dated 29<sup>th</sup> October 2015, and the list does not contain the name of the Applicant. Therefore, no information or notice on any impending de-registration or suspension of Certificate of Registration has ever been communicated nor served upon the applicant by the Board.

6. It was contended that the Board has, without assigning any reasons, or having any inherent power or authority vested upon it ordered the suspension and or/ freeze of the Applicant's Bank Accounts with Barclays and 5<sup>th</sup> Respondent, **Standard Chartered Bank Limited** (hereinafter referred to as "Standard"). The said decision is null and void because:-

i) The Board has violated the Applicant's right under Article 47, of the Constitution of Kenya that provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, 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. These constitutional provisions have been echoed under section 4 (1) and (2) of the **Fair Administrative Action Act, 2015**. Therefore the Applicant as a result has been affected adversely by administrative action of the Board.

ii) The Applicant contends that the principles of natural justice dictate that no person shall be condemned unheard. The Applicant has in the past received several compliance notices from the Board, and despite writing back to the Board and seeking an explanation and particulars, the Respondent has maintained studious silence and refused to give any explanation. Such inaction by the Board is unconstitutional.

7. It was the applicant's case that the Board has further subjected the applicant to arbitrary, harsh and oppressive treatment and has callously and without regard for the consequences violated the Applicant's right to dignified and humane treatment as guaranteed under Articles 27 and 28 of the Constitution of Kenya. This is so because the Board has in its letter dated 16<sup>th</sup> June 2016 made unfounded and alarming allegations by falsely reporting on the activities of the Applicant, and as a result unfairly exposing the Applicant to unnecessary and/or unwarranted attention, scrutiny, inquiry and investigations by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, which act is unconstitutional. Furthermore, the Applicant holds no bank account with Standard, and the action and decision of the Board to copy the letter under contention to Standard with the negative and alarming comments is in gross violation of the Applicant's right to a fair, dignified and humane treatment.

8. It was the applicant's case that the Board's letter dated 16<sup>th</sup> June 2016 in itself does not constitute a Notice as stipulated or contemplated under section 16(1) and (2) of the Act, which is capable of suspending the Applicant's Certificate of Registration, and which suspension can only be done through use of the statutorily approved forms (Form 9) contained in the **Non-Governmental Organisations Co-ordinations Regulations, 1990**.

9. The applicant's case was therefore that the administrative actions or decisions of the Board:-

i) were in excess of jurisdiction or power conferred under any written law.

ii) were biased or may reasonably be suspected of bias.

iii) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case

- iv) were procedurally unfair
- v) were materially influenced by an error of law
- vi) were not proportionate to the interests or rights affected;
- vii) were in violation of the legitimate expectations of the person to whom it relates
- viii) were taken or made in abuse of power

10. To the applicant, unless the Board's decision suspending the Applicant's Certificate of Registration is quashed and the decision to suspend and/or freeze the Applicant's bank accounts is similarly quashed, the Applicant stands to suffer prejudice, substantial loss and a gross violation of its rights guaranteed under the Constitution of Kenya. Further, unless the Board is prohibited from implementing its decision to suspend the Applicant's Certificate of Registration and similarly to suspend and/or freeze the Applicant's bank accounts, the Applicant will similarly suffer substantial loss.

11. It was therefore the applicant's case that this is a proper case for the grant of Judicial Review orders sought herein.

12. In support of its submissions the applicant relied on **Nairobi Constitutional Petition No. 495 of 2015 - Kenya Human Rights Commission -vs- Non Governmental Organisations Co-Ordinations Board** and contended that the Board simply lacked any valid or legal ground to punish the applicant by suspending/cancelling its certificate of registration, or suspending/freezing its bank accounts. No such power is vested upon the 1<sup>st</sup> Respondent by law and none has been demonstrated while the Board is.

### **1<sup>st</sup> Respondent's Case**

13. The 1<sup>st</sup> Respondent opposed the application.

14. According to the Board, the applicant is a registered Non-Governmental Organization pursuant to the provision of the ***Non-Governmental Organisations Co-ordinations Act 1990*** and bearer of certificate of registration number OP.218/051/12-0439/8165 while the 1<sup>st</sup> Respondent Boars is a stated corporation established under section 3 of the Act and is mandated to regulate all Non-Governmental Organisations registered in Kenya pursuant to section 7 thereof.

15. The Board asserted that the verifying affidavit is defective in substance and in form as **Marcos Ferreiro**, the deponent thereof is not the bona fide country director of the applicant as per the Board's records.

16. It was averred that it is a statutory requirement in the Act along with the terms and conditions attached to the registration certificate for Organisations to inform the Board of any changes of their officials.

17. The Board deposed that the main objective of the applicant is to provide relief and development of people in need who are victims of natural disasters, insecurity and crisis. It was averred that in 20<sup>th</sup> May 2016, the board through a comprehensive compliance letter and upon sufficient information from the applicant, wrote to the applicant advising it to cease any dealings in security matters and in particular relaying security information and alerts among other compliance issues.

18. The Board further averred that condition number 8 of the terms and conditions relates to the main objectives of organization's and in particular states that NGO's which deviate from the stated objectives or those that are involved in activities which may threaten the security of the state shall be deregistered by the NGOs Board. In its view, the act of sharing sensitive information on the National security of Kenya whilst disregarding the available government structures was *prima facie*, a deviation from the main objective hence the funds intended to be exhausted in order to achieve he main objective are not utilized

as intended.

19. It was contended that the mandate of the Board stretches to giving recommendations and authorization for NGOs to open and operate bank accounts. In addition, the letter dated 20<sup>th</sup> May 2016 warned the applicant to cease operating an illegal bank account and in particular with Standard. Further, the Board's letter instructing the 4<sup>th</sup> and 5<sup>th</sup> respondents to freeze the bank accounts were issued to the bank as this is the same mode applied where authority to operate the same is given.

20. It was the Board's contention that its letter dated 16<sup>th</sup> June, 2016 sought to serve as a suspension of the organisation's certificate of registration and not as a notice of deregistration. As such the contents of the paragraph 9 do not hold water as the notice referred to therein refers to cases of deregistration.

21. It was the Board's case that with regard to its mandate and in particular to safeguard the rights and interests of the beneficiaries of charitable causes and given the nature of financial involvement relating to immense donations and funds that NGOs receive, the actions of the Board therefore fall squarely within its mandate and authority. It was therefore its case that the instructions given to the 4<sup>th</sup> and 5<sup>th</sup> respondents to freeze the applicant's bank accounts were in no way to put the applicant in bad light, biased or procedurally unfair, but to safeguard that which belongs to the public and should the Board have failed to take the action it did, there would be no clear financial reporting as well as accountability and as such the Board would be failing in its mandate. In addition, the beneficiaries of the applicant may then suffer substantial loss.

22. It was therefore the Board's position that this is not a proper case to grant the judicial review orders given the nature and sensitivity of the issues raised herein and that further its actions were within the law, not influenced by an error of law in any way and thus proportionate to the interests and rights affected.

23. In its submissions the Board relied on In *Halsbury's Law of England* 4<sup>th</sup> volume II page 805 paragraph 1508 for the position that:

**“Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.”**

24. It was submitted that from the pleadings the ex-parte Applicant is not seriously challenging the jurisdiction of the Respondents but instead, challenging the merits of the decision. However this honourable court has no jurisdiction to interfere with the merits of the said decision by way of reviewing it or otherwise howsoever and in this respect the Board relied on **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** as well as **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where Majanja J. quoting with approval the decision of Githua J in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012]eKLR** held as follows:

**“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”**

25. It was the Board's case that the applicant failed to seriously prove illegality, impropriety of procedure and irrationality as far as the revocation and its implementation is concerned and urged the Court to dismiss this action with costs to the Respondents.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case**

26. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the following grounds of opposition were filed:

- 1. That matters of National Security are a preserve of The National government and its legally recognized agencies and ought to be taken seriously.**
- 2. That the ex-parte applicant has no role in sharing sensitive security information with foreign governments and organisations.**
- 3. That the ex-parte applicant has clearly gone beyond its acceptable scope of work in clear disregard and violation of the law as well as terms and conditions of its registration.**
- 4. That the 1<sup>st</sup> respondent as the regulator of the NGOs is best placed to regulate matters pertaining to NGOs and where necessary work together with relevant government departments and as such has discharged its duties and functions within the law.**
- 5. That the orders sought therein should not be granted.**
- 6. That the application does not meet the basic tenets of a judicial review application.**
- 7. That in the circumstances and based on the foregoing reasons, the notice of motion is therefore baseless, misconceived and devoid of any merit and the orders sought should not be granted.**

### **Determinations**

27. I have considered the issues raised in this application.

28. Section 16 of the *Non-Governmental Organisations Co-ordination Act* (repealed by section 70 of the *Public Benefits Organizations Act, No. 18 of 2013* which commenced on 9<sup>th</sup> September, 2016) provides for the cancellation of a certificate issued by the Board as hereunder:

***(i) The Board may cancel a certificate issued under this Part, if it is satisfied that—***

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

***(b) the organisation has breached this Act; or***

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

***(2) Notice of the cancellation of a certificate shall be served on the Organisation in respect of whom such cancellation relates and shall take effect within fourteen days after the date of that notice.***

29. This notice according to the Board was vide its letter dated 16<sup>th</sup> June, 2016. According to the said letter, the Board suspended the applicant's certificate of registration pursuant to section 16(1) and (2) of the said Act. In fact according to the Board, it did not deregister the applicant but simply suspended its certificate. It is however clear that section 16 of the Act deals with cancellation of the certificate and not the suspension thereof. Clearly therefore the Board took an action that is unknown to section 16 while

purporting to be acting thereunder.

30. In **Republic vs. County Council of Murang'a Ex Parte Makuyu Transporters Self Help Group & Others Nyeri HCMCA No. 40 of 2009, Serгон, J** expressed himself as hereunder:

**“The main argument of the applicant is that the Respondent had no discretion to increase fees under section 18 of the Local Government Act. It is also stated that the Respondent did not consult the applicants as required under rules 8 and 9 of the Local Government (Single Business Permit) Rules, 2008. This submission is correct since the Respondent purported to exercise discretion under the wrong provisions of the law. The Respondent had no jurisdiction to do so under section 18 of the Local Government Act and therefore acted outside the law. The best thing the respondent could have done was to withdraw the gazette notice but it opted to soldier on. Consequently on this account alone the motion is found to be with merit.”**

Therefore even if the Board had the power to suspend the applicant's registration certificate it invoked the wrong provision in doing so. However in this case the Bard has not cited any legal provision that permitted it to suspend the applicant's certificate. As was held by **Nyamu, J** (as he then was) in **Midland Finance & Securities Globetel Inc vs. Attorney General and Another [2008] KLR 650:**

**“Whether the Ministry in entering in the PWC, is exercising executive power or assumed power or statutory power, judicial orders would lie if the power is non existent or being improperly exercised... [It] is clear from past decisions of this Court, that public officers have only the power granted to them by law or statute. They cannot act outside the granted power...[T]he judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. ..[F]or public bodies the rule is ... that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake at every turn, all of its dealings constitute the fulfillment of duties which it owes to others indeed it exists for no other purpose...The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.”**

31. It is trite that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734,** it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

32. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

33. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which

statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

34. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

35. In this case therefore the Board clearly misdirected itself in law by suspending the applicant's certificate when it clearly had no such powers under section 16 of the Act. It in effect exceeded its jurisdiction in so doing.

36. But even assuming that it had was acting under section 16, the said section clearly provides that the cancellation can only take effect fourteen days after a notice of the cancellation of a certificate is served on the Organisation in respect of whom such cancellation relates. This provision clearly captures the provisions of Article 47 of the Constitution which provides that:

***(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.***

54. The said Article was the subject of the Court of Appeal pronouncement in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 it held 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.”**

55. Article 47 has now been effectuated by the ***Fair Administrative Action Act, 2015*** under which section 4(3) provides 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.*

37. In interpreting the said provisions I associate myself with the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies ex parte Githungo [2001] KLR 299**, where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed. In **Egal Mohamed Osman v Inspector General of Police & 3 others [2015] eKLR** at page 7 the Court at the time referred to **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

**“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”**

38. Therefore by taking an action which clearly adversely affected the ex parte applicant without following the due process of the law, the Board’s decision was tainted with illegality and procedural impropriety.

39. Whereas, the Board’s decision may well be justified on merits, once it is found to violate the rules of natural justice it cannot be permitted to stand. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an**

investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio.*" [Emphasis mine].

40. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

**"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

41. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, Lord Reid expressed himself as follows:

**"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

42. It follows that the Notice of Motion dated 4<sup>th</sup> July, 2016 is merited

### **Orders**

43. In the result the orders which commend themselves to me and which I hereby grant are as follows:

**1. An order of certiorari removing into this Court for the purpose of being quashed the decision of the 1<sup>st</sup> Respondent contained in its letter dated 16<sup>th</sup> June 2016 addressed to the applicant, suspending its registration certificate and all of the applicant's operations within the Republic of Kenya which decision is hereby quashed.**

**2. An order of certiorari removing into this Court for the purpose of being quashed the decision of the 1<sup>st</sup> Respondent contained in its letter dated 16<sup>th</sup> June 2016 addressed to the applicant purporting to suspend and/or freeze the applicant's bank accounts with the 4<sup>th</sup> and 5<sup>th</sup> Respondents which decision is hereby quashed.**

**3. An order of prohibition prohibiting the 1<sup>st</sup> respondent from unlawfully interfering with the lawful mandate and smooth operations of the applicant as a registered Non-Governmental Organisation.**

**4. That cost of this application are awarded to the applicant to be borne by the 1<sup>st</sup> Respondent.**

44. Orders accordingly.

**Dated at Nairobi this 28<sup>th</sup> day of July, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Odhiambo for the Applicant**

**CA Mwangi**