REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 141"B" OF 2016

REPUBLIC…………………….……………………………….APPLICANT

VERSUS

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD …………………………….….. RESPONDENT

EX-PARTE

RESEARCH, CARE AND TRAINING PROGRAMME

FAMILY AIDS CARE AND EDUCATION SERVICES (RCTP-FACES)

JUDGEMENT

1. The Applicant, Research, Care and Training Programme Family Aids Care and Education Services (RCTP-FACES) is a non-governmental organisation (NGO) registered under the Non-Governmental Organisations Coordination Act of 1990 ("the Act"). The Respondent, the Non-Governmental Organisations Co-ordination Board ("the Board") is a creature of Section 3 of the Act.
2. These proceedings are the outcome of a letter dated 21st March, 2016 addressed to the Applicant by its bankers, Co-operative Bank of Kenya Ltd as follows:

"RE: NOTICE FOR BLOCKING OF ACCOUNTS HELD WITH US

Reference is made to the letter addressed to ourselves from NGO's Co-ordination Board and received on 26th February, 2016, which was forwarded to you on 1st March, 2016. We hereby notify you that we have proceeded to block all your accounts on the request from the NGO's Co-ordination Board, who is your primary regulator.

We request that you pursue to resolve the matter with the Board, after which we will be pleased to operationalize your accounts.

This letter is issued without prejudice and should not be construed otherwise. The information given herein does not constitute a commitment by the Bank or any of its officers. The Bank or any of its officers are not liable for the information given, as it is provided for the purpose of information only."

3. Upon receipt of the said letter, the Applicant moved this Court through the notice of motion application dated 23rd March, 2016 seeking orders as follows:

“1.THAT this Application be certified urgent and be heard *ex parte* in the first instance.

2.THAT this Honourable Court be pleased to exempt the Applicant from compliance with the obligation under Section 9(2) of the Fair Administrative Action Act on account of the adverse effect of the impugned order and urgency of the matter.

3. THAT pending the *inter partes* hearing of this Application, this Honourbale Court be pleased to stay the decision of the Respondent directing Co-operative Bank of Kenya to freeze the Applicant’s Bank accounts.

4. THAT pending the hearing and determination of this matter, this Honourable Court be pleased to stay the decision of the Respondent directing Co-operative Bank of Kenya to freeze the Applicant’s Bank accounts.

5. THAT this Honourable Court be pleased to issue a declaration that the decision of the Respondent directing Co-operative Bank of Kenya to freeze the Applicant’s Bank accounts is in breach the Applicant’s Constitutional and statutory right to fair administrative action enshrined under Articles 47 of the Constitution as read together Sections 4 and 5 of the Fair Administrative Action Act Cap 4 of 2015.

6. THAT this Honourable Court be pleased to issue an order of certiorari to quash the decision of the Respondent set out in the letter dated 19th February 2016 addressed to Co-operative Bank of Kenya and any resultant decision or action.

7.THAT this Honourable Court be pleased to issue an order of prohibition restraining the Respondent from freezing or in any other manner whatsoever interfering with the Applicant’s operations including operation of its Bank Accounts held at Co-operative Bank of Kenya on the basis of the letter of 19th February 2016.

8. THAT this Honourable Court be pleased to award the Applicant damages for breach of its Constitutional rights.

9. THAT this Honourable Court be pleased to issue such other orders as it may deem just and expedient to grant.

10. THAT costs of this matter be awarded to the Applicant.”

4. The application is supported by the grounds on its face, a supporting affidavit sworn on 23rd March, 2016 by the Applicant’s Chief Executive Officer, Dr. Patrick Oyaro and a further affidavit sworn by the same Chief Executive Officer on 11th April, 2016.
5. A perusal of the papers filed by the Applicant discloses its case as follows. The Applicant runs programmes in the Republic of Kenya which have enrolled over 160,000 people living with AIDs into care. Over 80,000 of these people are currently being followed up for treatment.
6. The Applicant has employed 328 people who assist in the implementation of its programmes including providing care to people living with HIV and AIDs. The Applicant further supports the work of an additional 1160 people employed by its collaborating partners.
7. It is the Applicant’s case that by a letter dated 19th February, 2016 the Respondent directed its bankers, Co-operative Bank of Kenya to freeze its accounts operated at the bank’s Ngong Road branch. According to the Applicant, in issuing the impugned directive, the Respondent failed to follow the procedure provided under the Fair Administrative Action Act, 2015 and did not give the Applicant an opportunity to be heard.
8. It is also the Applicant’s case that the Respondent deprived it of its right to natural justice and

equal protection and benefit of the law guaranteed under Article 27(1) of the Constitution.

9. It is the Applicant's averment that the impugned decision was made in excess of the Respondent's jurisdiction and powers under the Act. According to the Applicant, the Respondent does not have powers under the Act to order freezing of its accounts and the Respondent's decision is therefore *ultra vires* its powers.
10. Other grounds upon which the Applicant faults the Respondent's action are that the same was taken with an ulterior motive or purpose intended to prejudice the Applicant's legal rights and paralyze its operations; the decision amounts to abuse of power, the actions are unfair and Wednesbury unreasonable; the action is not proportionate to the interests of the Applicant and the beneficiaries of its programmes; the decision was taken in error of law; and the decision contravened Article 47 of the Constitution and the Applicant's legitimate expectation.
11. The Applicant asserts that the impugned decision would affect its programmes and the beneficiaries of the programmes. Further, that the decision would also lead to withdrawal of donor support thus leading to irreparable loss.
12. The Respondent opposed the application through a replying affidavit sworn by Lindon Nicolas Otieno, the Head of Operations, Compliance and Research and Legal Manager.
13. The Respondent's case is that it received complaints from an employee of Kenya Medical Research Institute (KEMRI) relating to impropriety on the part of the Applicant. The allegations made were to the effect that:

(i) The Applicant was in the process of stealing the assets of KEMRI which is the state research agency of the Government of Kenya;

ii. Certain employees of KEMRI were employees of the Applicant thus resulting in breach of Chapter Six of the Constitution and the Leadership and Integrity Act;
iii. The Deputy Director of KEMRI was also a director or official or had controlling interest in the Applicant.

14. The Respondent avers that upon receipt of the information, and in order to safeguard public resources, it moved and froze the Applicant's bank account on 19th February, 2016. According to the Respondent, the action was taken in accordance with Section 12(4) of the Act as read with Regulation 13 of the Non-Governmental Organisations Coordination Regulations and Clause 10 of the Terms and Conditions issued thereunder and acceded to by the Applicant.

15. It is the Respondent's case that on 29th February, 2016, it informed the Applicant of its desire to undertake a comprehensive compliance audit which was aimed at investigating the allegations. Further, that a representative of the Applicant visited the Respondent and was fully apprised of the intended compliance audit and development of the case. The representative was also specifically informed of the intended audit and dates thereof.

16. It is the Respondent's averment that during the same period it received requests for information on the allegations by the Directorate of Criminal Investigations and the relevant Parliamentary House Committee

17. It is the Respondent's case that the Applicant has not been cooperative in respect to the compliance audit. Nevertheless it established that:

(i) some of the employees of the Applicant were also employees of KEMRI thus breaching Chapter Six of the Constitution and the Leadership and Integrity Act;

(ii) KEMRI had a programme that was in existence by the name Research, Care and Training Programme;

iii. the Deputy Director of KEMRI was also the founding member of the Applicant;
iv. monies received by the Applicant were as a result of the Deputy Director of KEMRI who had a controlling interest in the Applicant;

v. the Applicant had an arrangement with KEMRI where all the funds received are banked into a KEMRI account and KEMRI takes a percentage as an administrative fee and the balance is disbursed to the Applicant;
vi. all employees of the Applicant are paid by KEMRI, notwithstanding that not all of them are in the service of KEMRI; and
vii. over the years, through joint effort between the Applicant and KEMRI, certain assets have been acquired by KEMRI and the applicant with most of them being registered under the name of KEMRI.

18. It is the Respondent's position that allowing the application may result in movement of the funds by the Applicant. Further, that the Applicant has not been candid with the court.

19. Lindon Nicolas Otieno swore a supplementary affidavit on 6th April, 2016. In that affidavit, he averred that through the compliance audit conducted between 7th March, 2016 and 9th March, 2016 it emerged that the Applicant had failed to comply with the Act. Among the material breaches noted were operating without a substantive board which was in breach of Clause 2(a) of the Terms and Conditions attached to the certificate of registration; irregular changes of officers in breach of Section 22 of the Act and Clause 4 of the Terms and Conditions attached to the certificate of registration; conflict of interest between management and board in breach of Clause 2 (x) of the Terms and Conditions; conflict of interest between the Applicant and KEMRI; weak financial structures; operating unauthorised bank accounts; and irregular financial reporting.

20. In a case like this where time is of essence, the court has to zero in on the key issues and give the parties a determination. In my view the issues for the determination of this court are:

(a) whether the Respondent had power to order the freezing of the Applicant's bank account;

(b) whether the Respondent's decision complied with the requirement of Article 47 of the Constitution and the FAA Act, 2015; and

(c) costs.

21. The Applicant's case is that the Respondent had no powers to direct its bankers to freeze its account. The Respondent's position is that it has such power.

22. The Respondent's case is that its power to give the directive to the Applicant's bankers is derived from the provisions of the Act and the Regulations made thereunder.

23. It is the Respondent's case that Section 12 of the Act provides that every NGO registered under the Act shall be issued with a certificate of Registration. As per Section 12(4), such certificate may contain terms and conditions as the Respondent may prescribe. It is the Respondent's case that Clause 10 of the Terms and Conditions attached to the certificate of registration requires every NGO to obtain a letter of authorization from the Respondent before opening a bank account.

24. The Respondent asserts that clause 4 (e) of the Terms and Conditions attached to the certificate of registration requires every NGO to seek its approval before making changes to the banks and signatories to their accounts. Further, that Section 3(2) (e) of the Act provides that the Respondent may do or perform all such other things or acts necessary for the proper performance of its functions.

25. It is the Respondent's case that it has power to authorize the opening and closing of all bank accounts of every NGO and its approval must be obtained before any changes regarding the bank accounts are effected.

26. It is the Respondent's position that the existence of 25 unauthorised bank accounts would entitle it to block the same as the Applicant is operating them without its authority.

27. 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, the freezing a bank account can only be done upon obtaining a court order.

28. The Respondent suggests that the power to freeze accounts should be implied. A power that paralyses the activities of an organisation cannot be implied. It must be expressly donated by the law-makers.

29. Even if the Respondent did indeed have power to order the bank to freeze the Applicant's bank account, I do not think that such power would have been exercisable in the circumstances of this particular case.

30. Initially, the Respondent's position was that it ordered the freezing of the Applicant's accounts because of complaints of serious malpractices. At the time of making submissions (see submissions dated 11th April, 2006) the case had changed into one of operating unauthorised accounts. The Respondent's case against the Applicant is therefore not based on firm ground.

31. The Respondent received serious allegations concerning the operations of the Applicant and without even a pretext of investigations proceeded to write the letter dated 19th February, 2016 asking the Applicant's bankers to freeze the Applicant's accounts. The credibility of the information received had not been tested. There was thus no basis for writing to the bank to close the Applicant's accounts at that point in time.

32. The Applicant claims that the Respondent's action were in breach of Article 47 and the Fair Administrative Action Act, 2015. The Respondent asserts that owing to the seriousness of the allegations, it acted correctly in taking pre-emptive action.

33. In my view both the Applicant and Respondent are correct in their arguments.

34. The right to notice and opportunity to be heard commonly known as *audi alteram partem* principle was explained at page 238 (paragraph 105) by the learned authors of Halsbury's Laws of England, 4th Edition as follows:

> **"The rule that no man is to be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract an implied duty to comply with this rule.**
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> **The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded. However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirt if its outcome is likely to expose a person to a legal hazard or other substantial prejudice.**
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> **The circumstances in which the rule will apply cannot be exhaustively defined, but they**

embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. In a particular context, the presumption in favour of the rule may be partly or wholly displaced where compliance with it would be inconsistent with a paramount need for taking urgent preventive or remedial action; or with the interests of national security; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available or where a hearing would clearly serve no useful purpose; or, in some cases, where Parliament has evinced an intention to exclude the operation of the rule either by conferring on the competent authority unfettered discretionary power, or by expressly providing for notice and opportunity to be heard for one purpose but omitting to make any such provision for another purpose. Where, however, a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard should be afforded.

….

Whether, and if so the extent to which, the rule is to be applied in such situations will depend on the consideration and balancing of a variety of factors. These will include the impact of any procedure expressly prescribed for making the decision, the range of considerations that the decision maker is entitled to take into account, the nature of the sanction, if any, to be imposed, whether the decision impacts upon any direct personal or proprietary interest, and if so, the extent of the potential impact, and the effect of the application of the rule on the decision making process."

35. I do not think that Article 47 of the Constitution and the Fair Administrative Action Act, 2015 makes it mandatory that a person has to be notified of any allegations before action is taken. Such a position would render a law like Proceeds of Crime and Anti-Money Laundering Act, 2009 in-operational. Where there is need to take preventive or remedial action, such action should be taken and notice and opportunity to be heard availed so soon thereafter.

36. In the case at hand, the Respondent was dealing with a registered organisation whose officials were well known. If indeed there were credible concerns about the safety of the Applicant's assets, then the Respondent ought to have liaised with the police and other agencies. It is also clear that whatever the Respondent uses to justify its actions came after the act of closing the bank accounts. The inquiries by the Directorate of Criminal Investigations and a Parliamentary House Committee were likely triggered by the Respondent's actions.

37. The commencement of a compliance audit was also done later. All along, the Respondent had not informed the Applicant that it had ordered the freezing of its accounts. The information about the freezing of accounts came from the Applicant's bankers.

38. In this case, the Respondent had alleged that the Applicant committed serious breaches of the law. Those breaches, if true, could either result in the commencement of criminal proceedings against those responsible or deregistration of the Applicant. The Respondent instead took the shortcut of writing to the bank to freeze the Applicant's accounts. That shortcut was not available in the circumstances of this case.

40. Before I conclude, I must say something about the procedure adopted by the Applicant in approaching this Court. The Applicant approached the Court by way of the notice of motion application dated 23rd March, 2016 which is said to be brought under Articles 23, 27 and 47 of the Constitution of Kenya; Section 7(1)(a), 9 and 11 of the Fair Administrative Actions Act Cap 4 of 2015 and all other enabling provisions of the law.

41. There is something wanting about the Applicant's approach. There are rules establishing the procedure under which a party should approach the Court. The procedural edicts set down the rules for engagement. There are no rules as yet under the Fair Administrative Action Act, 2015 but there are rules for filing constitutional petitions and judicial review applications. The Applicant ought to have taken one of those options instead of approaching the Court in the manner it has done. Nevertheless, the approach cannot overshadow the Respondent's illegal activities and remedy should be provided to the Applicant.

42. In light of what I have stated, I find that the Applicant's case has merit. The same succeeds and an order of certiorari is issued calling into this Court and quashing the Respondent's letter dated 19th February, 2016 addressed to the Applicant's bankers, Cooperative Bank of Kenya directing the said bank to freeze the Applicant's accounts. Any action resulting from that letter is therefore quashed. In view of the said order, I no longer need to make a declaration as sought in prayer No. 5 of the application. An order of prohibition as asked for in prayer No. 7 prohibiting the Respondent from in "any other manner whatsoever interfering with the Applicant's operations" cannot issue as that would amount to stopping the Respondent from executing its statutory mandate.

43. No evidence was tendered in support of the claim for award of damages for breach of constitutional rights. Prayer No. 8 is therefore dismissed.

44. Considering the outcome of the application, I direct each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 24th day of May, 2016

W. KORIR,

JUDGE OF THE HIGH COURT