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……..…….1ST RESPONDENT

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

MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT..…….2ND RESPONDENT

THE CENTRAL BANK OF KENYA…..……..…3RD RESPONDENT

BARCLAYS BANK OF KENYA LTD

(MUTHAIGA BRANCH)…….……..…..4TH RESPONDENT

STANDARD CHARTERED BANK LIMITED

(WESTLANDS BRANCH)..……..……..….5TH RESPONDENT

EX PARTE: INTERNATIONAL NGO SAFETY ORGANISATION (INSO)

RULING

Introduction

1. By a Notice of Motion dated the *ex parte* applicant herein 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 1st Respondent contained in its letter dated 16th June 2016 addressed to the applicant, suspending its registration certificate and all of the applicant's operations within the Republic of Kenya**
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> **2. That tan order of certiorari be granted to remove into the High Court for the purpose of being quashed the decision of the 1st Respondent contained in its letter dated 16th June 2016 addressed to the applicant purporting to suspend and/or freeze the applicant's bank accounts with the 4th and 5th Respondents.**
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> **3. That an order of prohibition be granted to prohibit the 1st respondent from directly or indirectly and/or unlawfully, maliciously and arbitrarily directing itself, or alternatively directing the 2nd, 3rd, 4th and 5th Respondents from unnecessarily interfering with the lawful mandate and smooth operations of the applicant as a registered Non- Governmental Organisation.**
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> **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:-**
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> **The 1st 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.**
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> **2. Legitimate Expectation:-**
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> **The applicant is entitled to invoke judicial review remedy because the 1st 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.**
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> **3. Breach of Duty to Act Fairly:-**
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> **The 1st 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 1st respondent purported to suspend the applicant's certificate of registration and bank accounts without following due process.**
>
> **Failure by the 1st 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 1st 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 1st respondent's decisions and actions null and void *ab initio.*

3. However before the matter could be heard, the 1st Respondent herein, the Non-Governmental Organisations Co-ordinations Board (hereinafter referred to as "the Board"), raised the following preliminary objections:

1. **That this honourable court lacks jurisdiction to hear and determine this mater pursuant to Section 19 of the Non-Governmental Co-ordination Act, 1990.**

2. **That this suit is otherwise an abuse of the court process.**

4. It is these objection as that are the subject of this ruling.

5. According to **Miss Soy**, learned counsel for the Board, the Board is the regulator of all Non-Governmental Organisations registered in Kenya and it derives its mandate from the ***Non-Governmental Organisations Co-ordinations Act***, Cap 134, Laws of Kenya (hereinafter referred to as "the Act"). The ex parte applicant, on the other hand, is a registered Non-Governmental Organisation (or NGO) by the Board in 2012 pursuant to section 10 of the Act.

6. It was submitted that the genesis of the preliminary objection is that in the process of carrying out its functions, the Board discovered irregularities in the activities of the applicant in respect of the applicant's main objective. This main objective, it was submitted is one of the factors which the Board considers in determining whether to register an NGO. In view of the aforesaid discovery, the Bard sought to suspend the applicant's registration pursuant to section 16 of the Act since clause 8 of the ***Terms and Conditions Attached to the Certificate of Registration*** requires the NGOs to abide by the law and those that deviate from other objectives or involve themselves in activities that threaten the security of the State may be registered.

7. To learned counsel the issues raised were grave in nature and in the 1st Respondent's view attracted deregistration or suspension of the applicant's certificate pending investigations.

8. It was submitted that section 19 of the Act provides the procedure to be followed by an aggrieved person and this requires that such a person appeals to the Minister concerned, in this case the Minister for Devolution, within 60 days and the decision thereon be made within 30 days. Any further grievances can then be addressed by this Court.

9. It was therefore submitted that this Court lacks jurisdiction to hear and determine this matter. The move by the applicant to file this suit, it was contended, was an abuse of the Court process as, based on section 19 of the Act, the jurisdiction to determine the issues raised in this suit rests with the 1st respondent. Although the section employs the word "may", it was the 1st Respondent's view that by ordering the applicant to approach the 1st Respondent the parties would get an opportunity of resolving their issues and deal with the results of the investigations.

10. According to learned counsel where jurisdiction is granted to other organs to handle specific grievances, the Court must respect and uphold the law and allow the said remedies to be exhausted. To support its case, the 1st respondent relied on **Joseph Njuguna Mwaura & Others vs. Republic Criminal Appeal No. 5 of 2008** in which it was held that:

"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function. In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act."

11. Learned counsel also relied on **Alice Mweru Ngai vs. Kenya Power & Lighting Co. Ltd [2015] eKLR** where it was held by **Olao, J** held that:

"Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the Courts must respect and up-hold the law… In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established. It is clear from the above that the Preliminary Objection on this Court's lack of jurisdiction to hear this dispute is well taken."

12. The objections were opposed by Mr Onyango, learned counsel for the ex parte applicant. According to Mr Onyango, on the authority of Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696, the preliminary objection as filed does not meet the threshold of a preliminary objection. It was learned counsel's view that though the preliminary objection is based on section 19 of the Act, the said section would only aply if the matter in issue was only based on the suspension or deregisttion of the certificate. In this case, however, the contention was that the 1st Respoent had overstepped its mandate by freezing the ex parte applicant's account, yet there is no legal provision permitting such an action. It was contended that the reliance on the decisions cited by the 1st respondent was misplaced as the matters the subject of the preliminary objections were dealt with in **Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board [2016] eKLR and Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR**.

13. In her rejoinder, Miss Soy submitted that section 7 of the Act permits the Board to freeze accounts. With respect to the ***Gitari Case***, learned counsel submitted that since the matter was on appeal, the same decision ought not to be relied upon.

Issues for Determination

14. In my view the issues that fall for determination in this ruling are as follows:

(i)Whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

(ii)The effect of purported limitation and/or restriction of the Court's jurisdiction.

(iii) Whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute.

(iv) Whether the Court has jurisdiction to entertain the issues raised herein.

Determinations

15. On the issue whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, under Article 2 of the Constitution, sovereign power which is delegated to inter alia, the judiciary, is to be exercised in accordance with the Constitution. In terms of administrative action, Article 47 as read with Article 165(6) donate to the High Court supervisory powers of the High Court with respect to decisions of the subordinate Courts and inferior tribunals or bodies. Pursuant to Article 47 Parliament enacted the ***Fair Administrative Action Act***, 2015. Section 9(2), (3) and (4) thereof provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
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> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

16. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the applicants have not shown why the Court ought to exempt them from the remedy provided under the Respondent's disciplinary procedure. In fact some of the applicants had resorted to the said procedure before instituting these proceedings. This position is not novel. In **Republic vs. National Environment Management Authority [2011] eKLR**, it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

> **" The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."**

17. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. NjengaKarume** (supra). In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. I therefore associate myself with the position adopted by **Emukule, J** in **Revital Healthcare (Epz) Limited & another v Ministry of Health & 5 others [2015] eKLR** at paragraph 10 where he cited with approval the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

"…where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes 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 a misuse, an abuse of the Court's process."

18. Therefore if there is a particular procedure provided under the Constitution or any written law the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom ought not to be invoked if the invocation would amount to contravention of the provisions of an Act of Parliament passed by the Legislature. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. I therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority** (supra) to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to.

19. I associate myself with **Majanja J's** views in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

20. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of

the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".

21. In the result I am of the view and I hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

22. However, the decision of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** ought to be taken note of. In that case, the learned Judge expressed himself as follows:

"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."

23. Therefore any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

24. In this respect in **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520, Visram, J** (as he then was) held, based on **Anisminic Ltd. vs. The Foreign Compensation Commission & Another [1969] 1 All ER 208**, that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction.

25. Finality clauses have the effect of purporting to oust the jurisdiction of the Court. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."

26. With respect to the employment of the word "may" in section 19 of the Act, it is my view the mere fact that an Act uses the word "may" rather than "shall" does not necessarily connote that the requirement is not mandatory. The intention of the legislature has to be examined before a determination is made as to whether the procedure is mandatory or merely directory. In **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438** it was held:

> **"Such expressions as "may", "shall be empowered", "may be exercised", in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises."**

27. It was my view that even in cases where the alternative remedy is in addition to the right to access the Court, to interpret the provisions in such a manner as to render the provision for alternative remedy illusory, would defeat the whole purpose of making provisions for alternative remedies. Therefore where the alternative route does not necessarily lock out judicial process, the alternative remedies being a route provided under the relevant Act ought to be adhered to unless circumstances militate against that route. That notwithstanding as was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 while citing **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. In my view, where a remedy provided is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's 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 and impartial tribunal or body is achieved. In appreciating this position the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109**, quoted **Smith vs. East Elloe Rural District Council [1956] AC 736 at 750-1** and **R vs. Port of London Authority Ex Parte Kynoch Ltd [1919] 1 KB 176 AT 188** and stated that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

28. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

29. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

30. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions.

31. That leads me to the issue of the effect of purported limitation and/or restriction of the Court's jurisdiction. Whereas the existence of the alternative remedy and procedure may not necessarily oust the jurisdiction of the Court, the Court is perfectly entitled to take into account the existence of such a remedy and its efficacy in deciding whether or not to entertain the dispute and may decline to do so not only on the ground of want of jurisdiction but also in order to avoid the abuse of its process where the process is being invoked to achieve some collateral purpose not recognized by the law as genuine. If therefore abuse of the Court process is shown to have happened, it would be wrong to allow the misuse of that process to continue. There is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. See **The King vs. the General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington Ex Parte Princess Edmond De Polignac [1917] KB 486 at 495.**

32. That leads me to whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute herein. Section 19 of the Act provides 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.***
>
> ***(3A) 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.***

33. This provision was interpreted by **Onguto, J** in **Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR** in which the learned Judge expressed himself inter alia as follows:

> **"Section 19 of the Act provides for appeals to the Cabinet Secretary where any particular decision has been made by the Board under Part III of the Act which affects a non-governmental organization. Part III of the Act deals with the process and requirements of registration of non-governmental organizations. It also provides for the cancellation of any registration certificates by the Respondent. It however does not provide for issues and decisions which are part of the daily management or regulation of NGOs same bodies like oversight over bank accounts and funds… The Section is evidently not couched in mandatory terms. It is also to be noted that the challenges laid by the Petitioner have not only to do with the intent to deregister it but also the decision by the Respondent to have the Petitioner's bank accounts frozen and further the decision to have the Petitioner investigated by the Directorate of Criminal Investigations. In my view, one of the decisions impugned would fall under Part III of the Non- Governmental Organizations Co-ordination Act,1990 and consequently under Section 19 of the Act. An appeal to the Cabinet Secretary would lie from such a decision. The decision concerns the alleged deregistration of the Petitioner or cancellation of the registration certificate. The other two decisions by the Respondent as to the freezing of the Petitioner's bank accounts and prompting investigations by the criminal investigations department would not fall under Part III of the Act.**

There is evidently no internal mechanism availed by the Non- Governmental Organizations Co-ordination Act for an NGO to pursue an appeal over other matters and decisions not within Part III. Consequently, I would not shut out the Petitioner in the circumstances. Besides, it would also be inappropriate to adopt a separationalist approach and split some of the claims by the Petitioner to be settled by this court and let the Cabinet Secretary settle the other. Finally as well, the Petitioner claims a breach of a guaranteed constitutional right. That can only be dealt with and determined by the court and not a Cabinet Secretary. It would consequently be flawed to reason that the Petitioner ought to have appealed to the Cabinet Secretary first."

34. A similar position was adopted by a three judge bench of this Court **(Lenaola, Mumbi Ngugi and Odunga JJ)** in **Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR** where the Court expressed itself as follows:

"In our view, this was not the decision contemplated in Section 19 of the NGO Act, on which appeal lies to the Minister. The decision is a purely administrative decision with regard to the name by which an organisation should be registered, and in our view, the intention of the law in Section 19 was for appeal to lie in respect of substantive decisions such as refusal of registration, or cancellation of registration. Section 19 of the Act is clear that an appeal only lies to the Minister when the Board has made a decision in terms of the Act. As the Board did not make the decision in terms of the Act, there is no appeal provided for the petitioner. Moreover, there is nothing in the Regulations that provides that an aggrieved applicant can appeal a decision made in terms of the Regulations to the Minister. As such, there is no statutory prescribed internal remedy, which was prescribed or available to the petitioner. It is our view that the Court cannot close its doors on the petitioner for failure to exhaust an internal remedy that does not apply to his circumstances."

35. That decision even if being appealed against, has not been set aside and this Court cannot assume that it will be set aside. Until that happens, the decision unless stayed is good law.

36. The 1st respondent was however of the view that it has the power to freeze the accounts of NGO's. That however is not an issue that can be determined in this preliminary objection as that is the crux of the applicant's case. Even if the 1st respondent has such powers, a reading of section 19 of the Act does not expressly provided that a decision to freeze the accounts of an NGO is one of the decisions that is subject of an appeal to the Minister. As to whether the jurisdiction to freeze the accounts exists, that is a matter which will have to await the hearing and determination of the substantive motion. For now it is clear based on authorities that a decision freezing the said accounts cannot be the subject of an appeal under section 19 the Act.

37. The other issue is with respect to violation of the rules of natural justice. The 1st respondent contends that the ex parte applicant was notified of the intended action before the same was taken. That however is a matter of evidence and the 1st respondent has not filed a replying affidavit. Accordingly there is no factual agreement on the issue. As held in **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd.** (supra)

"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".

38. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure

points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

39. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

40. Having considered the issues raised in these preliminary objections, I find no merit therein.

41. In the result the preliminary objections fail and the same are dismissed with costs to the ex parte applicant.

42. Orders accordingly.

Dated at Nairobi this day 15th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Onyango for the Applicant

Miss Twili for the 1st Respondent

Cc Mwangi