



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 351 OF 2015**

**BETWEEN**

**TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER**

**AND**

**CABINET SECRETARY DEVOLUTION AND**

**PLANNING .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**CENTRE FOR HUMAN RIGHTS AND**

**CIVIC EDUCATION.....1<sup>ST</sup> INTERESTED PARTY**

**NJONJO MUE.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**KENYA NATIONAL COMMISSION FOR**

**HUMAN RIGHTS.....AMICUS CURIAE**

**JUDGMENT**

**Introduction**

1. The Petitioner, a non-governmental organization with its registered offices domiciled at Nakuru, filed the instant Petition on 24<sup>th</sup> August 2015. The Petitioner, who was registered under the Non-Governmental Organizations Coordination Act 1990 (“the NGO Act”) on 18<sup>th</sup> November 2011, faulted the Respondents for having failed to trigger or cause the commencement of the provisions of the Public Benefit

Organizations Act, No. 18 of 2013 for a period of over two and half years, that is the period preceding the filing of the Petition. The Petitioner alleged that the Respondents have contravened the Constitution and consequently prayed for an array of reliefs.

2. The reliefs sought by the Petitioner specifically read as follows:

- a) A declaration be and is hereby issued that the 1<sup>st</sup> Respondent's failure to appoint a date for the coming into operation of the Public Benefit Organizations Act, 2013 is in violation of Articles 1, 10, 73, 94, 95, 116(2), 129 and 153(4) of the Constitution of Kenya, 2010;
- b) An order of mandamus to compel the 1<sup>st</sup> Respondent to forthwith appoint and gazette a date for the coming into operation of the Public Benefits Organisations Act, 2013 (Act No. 18 of 2013) or within such reasonable time or period as the Honourable Court shall determine and stipulate;
- c) In the alternative, a declaration that the Public Benefits Organizations Act, 2013 be and is hereby deemed to have come into operation on the fourteenth day after its publication in the Gazette;
- d) A declaration be and is hereby issued that the decision of the 1<sup>st</sup> Respondent to appoint a Task Force to amend and/or propose amendments to the Public Benefits Organizations Act, 2013 before bringing the Act into operation is illegal and ultra vires and otherwise in contravention of Articles 10, 73, 94, 95, 116(2), 129 and 153(4) of the Constitution of Kenya, 2010.
- e) *A declaration that any recommendations or proposals to amend the Public Benefits Organisations Act, 2013 before the Act has come into operation are unlawful, illegal and unprocedural and otherwise null and void ab initio;*
- f) A declaration that since March 2015 there has been no NGO's Co-ordination Board and/or the NGO Co-ordination Board has been improperly and/or illegally constituted therefore any acts performed by or decisions taken by and/or alleged to be performed by or on behalf of the NGO Co-ordination Board are illegal and null and void ab initio;
- g) An order restraining the Respondents jointly or severally from proposing and/ or forwarding any amendments to the Public Benefits Organisations Act, 2013 to Parliament before the PBO Act comes into operation;
- h) *An order be and is hereby issued restraining the 2<sup>nd</sup> Respondent from forwarding to the Clerk of the National Assembly, publishing and/or otherwise acting upon, dealing with or presenting amendments proposed to the Public Benefits Organisations Act, 2013 by the 1<sup>st</sup> Respondent or "the NGO Co-ordination Board" pending the hearing and determination of this Petition.*
- i) An order be and is hereby issued setting aside, staying, stopping or restraining any decisions, acts or performances done or conducted or carried out by the "NGO Co-ordination Board" or in the name of the NGO Co-ordination Board since March 2015;
- j) An order be and is hereby issued restraining the Executive Director of the NGO Co-ordination Board and/or any person from carrying out, performing any acts or functions, exercising any powers or taking decisions reserved to be performed, carried out, conducted or decided by the NGO Co-ordination Board.
- k) Any other relief or such other orders as this Honourable Court shall deem fit and just to grant to the Petitioner.
- l) *Costs of the Petition.*

3. The Petitioner received support from the Interested Parties and to an extent from the sole Amicus

Curiae. The Respondents however opposed the Petition.

### **Background facts & Litigation history**

4. The facts leading to the Petition are largely not in contest but the litigation was riddled with dots of controversy.

5. The facts may be retrieved largely from the Petitioner's Supporting Affidavit sworn by Elijah Kinyamal Sikona on 24<sup>th</sup> August 2015 and filed in court on the same day. The affidavit was largely not negated.

6. On 14<sup>th</sup> January 2013 having been presented with the Public Benefit Organizations Act ("the PBO Act"), the President pursuant to Article 115 of the Constitution assented to the PBO Act. The President had not made any reservations to the PBO Act.

7. Under Section 70 of the PBO Act, provision was made for the repeal of the NGO Act. The PBO Act also additionally provided that it was an "*Act of Parliament to provide for the establishment and operation of public benefit organizations; to provide for their registration; to establish an administrative and regulatory framework within which public benefit organizations can conduct their affairs and for connected purposes*".

8. Further, the PBO Act provided, under Section 1, that it would come into operation on such date as the Cabinet Secretary, being the 1<sup>st</sup> Respondent would by notice in the Kenya Gazette, appoint.

9. Pursuant to Article 116(1) of the Constitution, the PBO Act was published in the Kenya Gazette on 25<sup>th</sup> January 2013, some four days beyond the constitutional time line. The 1<sup>st</sup> Respondent did not however gazette the time for commencement of the PBO Act, ultimately prompting the Petitioner to move to court.

10. In the meantime, the 1<sup>st</sup> Respondent on 30<sup>th</sup> October 2014 appointed a task force to receive views from stakeholders on proposed amendments to the PBO Act, which proposed amendments the 1<sup>st</sup> Respondent had invited and collated. The 1<sup>st</sup> Respondent also tasked the task force with the powers to monitor the legislative process of amending the PBO Act and also of advising the 1<sup>st</sup> Respondent on the implementation of the PBO Act. The task force, which was a committee of eleven persons, presented its report to the 1<sup>st</sup> Respondent on 15<sup>th</sup> May 2015. All the while, the 1<sup>st</sup> Respondent still withheld gazetting the commencement of the PBO Act, prompting the Petitioner to move to court.

11. The Petition was originally filed by the law firm of Soweto & Co. Advocates. Mid-stream the proceedings however, the Petitioner retained Gordon Ogolla, Kipkoech & Co Advocates. Then the Interested Parties applied to be enjoined to the proceedings through Soweto & Co. Advocates. The Petitioner contested the joinder. After a brief contest, the Interested Parties were vide a ruling rendered by the court on 24 November 2015 enjoined to the proceedings.

12. The Amicus Curiae also joined the fray on 24 November 2015. With directions given that the Petition be disposed of by way of submissions, all the parties filed their written submission and highlighted the same before me on 30 May 2016.

### **The Petitioner's case**

13. The Petitioner's case is relatively straight forward.

14. It is the Petitioner's case that Parliament having legislated and the President having assented to the PBO Act 2013, the Respondents in failing or neglecting to gazette the commencement date of the PBO Act 2013 are in violation of the Constitution. The Petitioner also contends that the delay in gazetting the commencement date is inordinate unreasonable and inexplicable and the Respondents are consequently

guilty of abuse of their offices and duties expressly extended to them by statute being the PBO Act itself. Specifically, the Petitioner points to Articles 1,10,73,94,95,129(2) and 153 (4) as the provisions of the Constitution violated by the Respondents decision to inordinately and indefinitely delay the appointment of the date for the coming into operation of the PBO Act.

15. The Petitioner further contends that the Respondents inaction is pursuant to an improper motive and ultra vires. The effect of the inaction, adds the Petitioner, has led to anomaly in the non-governmental organizations sector which ought to be governed by the PBO Act. The Petitioner, for completeness, contends that the Respondents cannot and have no powers to decide the suitability or lack thereof of an Act of Parliament.

16. Mr. Gordon Ogolla, counsel for the Petitioner's urged the Petitioner's case.

17. Mr. Ogolla submitted that the 1<sup>st</sup> Respondent is enjoined by the Constitution to serve and not rule the people of the Republic of Kenya. Instead counsel added the 1<sup>st</sup> Respondent in violation of Articles 1 and 73 of the Constitution has arbitrarily decided not to appoint a date for the commencement of the PBO Act. This, stated counsel, was contrary to the public's legitimate expectation. The 1<sup>st</sup> Respondent according to the Petitioner's counsel has simply abused his discretion to the detriment of the public. Counsel intensified his arguments by stating that where the discretion was being abused or not being exercised the court could intervene and order the 1<sup>st</sup> Respondent to comply with the law or act as appropriate.

18. Mr. Ogolla submitted further that the ordinary expectation was that the 1<sup>st</sup> Respondent would act within a reasonable period of time but the 1<sup>st</sup> Respondent had simply failed to act without any good reason.

19. The effect of the 1<sup>st</sup> Respondent's inaction, concluded counsel , was that the entire non-governmental organizations world was now a 'jungle' as there was no clear guidance on how they would be regulated.

20. In support of the proposition that where discretion is not properly exercised or not exercised at all then the court may intervene, counsel referred to the case of **Highway Furniture Mart Ltd vs. Commission of Value Added Tax & Another [2015]eKLR** where the court pointed out that exercise of discretion or non-exercise of discretion will be interfered with where the executive authority fails to take into consideration relevant factors or takes into account irrelevant factors or where the discretion is exercised in an unreasonable manner resulting in abuse of power. Counsel also referred the court to **Halsbury's Laws of England 4<sup>th</sup> Ed Vol. 1 para 89** and the case of **Estate of Harun Irungu Wakaba vs. Attorney General & another [2015]eKLR** for the proposition that the Respondents has little discretion which was only to appoint a commencement date within a reasonable period of time and no more.

21. Finally counsel referred to the case of **Kenya Country Bus Owners Association vs. Cabinet Secretary for Transport & Infrastructure & 5 Others [2014]eKLR** for the proposition that under Article 153(4) of the Constitution Cabinet Secretaries are bound to act in accordance with the Constitution.

### **Respondents' case**

22. Mr. Mwangi Njoroge argued the Respondents' case.

23. The Respondents raised issue with the Petitioner's locus, contending that the Petitioner had been deregistered in December 2015 and thus the Petition could not subsist in the absence of a legal entity as the Petitioner.

24. Mr. Njoroge also contended that the Cabinet Secretary in exercising the statutory duties was not to operate under any persons' direction.

25. Counsel submitted that there were various factors to be considered by the 1<sup>st</sup> Respondent prior to appointing a commencement date for the PBO Act, and that is the sole reason Parliament had conferred the 1<sup>st</sup> Respondent with the discretion to appoint a date for operationalizing the PBO Act. According to the Respondents the decision by the 1<sup>st</sup> Respondent to delay the commencement date was perfectly constitutional.

26. Mr. Njoroge on behalf of the Respondents further contended that the court had no jurisdiction to appoint or even direct the appointment of a commencement date. Then defending the delay, Mr. Njoroge submitted that the appointment of a task force to receive views on the existing or new law relating to the Act was perfectly legal and constitutional as the same basically entailed public participation. Besides, added counsel, it is the executive that implements laws and there was no usurpation of Parliament's legislative powers.

27. Mr. Njoroge urged the court to dismiss the Petition.

### **The Interested Parties' Case**

28. The Interested Parties case was urged by Ms. Julie Soweto. The Interested Parties fully supported the Petition.

29. Ms. Soweto drove the court through history.

30. It was submitted that the sole reason the Petitioner and the Interested Parties were in court was because of the Respondents' conduct which was a mischief the Constitution 2010 had sought to arrest. History it was submitted, told of incidents where Parliament or the executive through the President stalled the operation of statutes. Ms. Soweto contended that the Cabinet Secretary was intent in revisiting history.

31. Ms. Soweto then submitted that it was never the intention of the drafters of the Constitution to have Parliament pass laws without commencement dates being stipulated and that where that was the case statute automatically came into operation on the fourteenth day after its publication. In these respects counsel faulted Parliament for having enacted an unconstitutional law. Counsel urged the court to give Article 116 of the Constitution a purposive interpretation which would also assist in breaking away from part of the past which was unacceptable in so far as Acts of Parliament were previously enacted and brought into operation. In these respects counsel referred to the South African decisions in **Shabalala vs. Attorney General of Transvaal [1996] 1SA 725** as well as **S vs. Makwanyane [1995] 3 SA 391**.

32. Ms. Soweto concluded, after a comparison between Section 46 of the retired Constitution with Article 116 of the Constitution 2010, that the drafters of the Constitution 2010 were keen in taking away the decision, as to when a statute came into force, from Parliament. This, submitted counsel, the drafters did and placed the decision on the Constitution itself. According to counsel, the executive's power to assent to and/or veto Bills had been trimmed by Article 115 (6) and the same applied to when Acts came into operation which was now taken care of by Article 116(2).

33. On the task force appointed by the 1<sup>st</sup> Respondent to look into the proposed amendments, counsel submitted that in the 1<sup>st</sup> Respondent purporting to re-engineer amendments to the PBO Act even before it was brought into operation, the 1<sup>st</sup> Respondent was acting ultra vires. In this regard counsel referred the court to Articles 94 and 95 of the Constitution as to the legislative authority of Parliament.

34. Counsel also referred to the case of **Republic vs. Somerset County Council ex p Fenwings and Others [1995] 1 All ER 513** for the proposition that a public servant has no other powers save those given to him by statute. In these respects, counsel looped in the role of Cabinet Secretaries and submitted that their duty was to implement, and not legislate, laws.

35. Ms. Soweto further contended that even if the 1<sup>st</sup> Respondent had powers to effect a commencement date to a statute, he was under a Constitutional obligation to act within a reasonable period of time. In this

case a delay of over 3 years was inordinate and the discretion was not being exercised judiciously. The delay counsel concluded had negatively affected the non-governmental organizations' world. As an example, counsel drew the court's attention to the fact that the Board that registers and regulates the non-governmental organisations was yet to be re-constituted.

36. Counsel urged the court to declare that the PBO Act had indeed come into force on the 14<sup>th</sup> day following its publication in the gazette.

### **Amicus curiae's brief**

37. The Amicus curiae's brief was presented by Victor Kamau.

38. Pointing out that the Petition raised important questions on the doctrine of separation of powers, Mr. Kamau stated that there existed the concept as far as Parliament, the executive and the judiciary were concerned. Due to the requisite checks and balances however even where Parliament was conferred with law making functions, the executive was also allowed to chip-in through the process of assent or memoranda.

39. Mr. Kamau submitted that by delaying the operation of PBO Act for a period of over 2 years and engaging a task force to suggest amendments to the PBO Act the 1<sup>st</sup> Respondent could be said to have violated the Constitution's law making processes. Counsel relied on the U.S Supreme Court of **Clinton vs. City of New York 524 U.S 417 (1998)** where a statute which authorized the President of the U.S to himself effect the repeal of laws was held unconstitutional as it gave the President unilateral power to change the text of duly enacted statutes.

40. Counsel for the Amicus also stated that the court had to make a clear distinction between delegated legislation and where parliament effectively assigned plenary legislative power to another body, which was not constitutionally acceptable. In the instant case counsel faulted the 1<sup>st</sup> Respondent for arrogating itself power which was never delegated to him in purporting to prompt amendments to the PBO Act when all that was expected of the 1<sup>st</sup> Respondent was to gazette a commencement date for the PBO Act.

### *Constitutional indexation*

41. The parties referred to various provisions of the Constitution.

42. In particular, references were made to Articles 1,10,73(1)(b), 73(2)(b), 94, 95, 116, 129(2) and 153(4) of the Constitution. In my view these provisions of the Constitution are relevant to the issues raised by this Petition as are other provisions which I will refer to in subsequent paragraphs. I also hold the view that Section 46 of the retired Constitution is also relevant for historical and comparative purposes.

43. Article 1 of the Constitution in so far as it is relevant states that all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the Constitution.

44. Article 10 of the Constitution on the other hand details the national values and principles which bind state organs, state and public officers and all other persons applying or interpreting the Constitution or enacting applying or interpreting laws or who make or implement public policy decisions. The values include patriotism, national unity, sharing and devolution, the rule of law, democracy and participation of the people the values and principles invited also include transparency, good governance and accountability, amongst others.

45. In so far as it is relevant Articles 73(1) (b) and 73(2) (b) provide as follows:

**73(1)(b) Authority assigned to a state office**

....

*vests in the state officer the responsibility to serve the people, rather than the power to rule them.*

**73(2) (b) *The guiding principles of leadership and integrity include-***

*... Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism favouritism other improper motives or corrupt practices.*

46. Article 94 states as follows:

**94.**

***(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.***

***(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.***

***(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.***

***(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.***

***(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.***

***(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.***

47. While Article 95 deals with the role of the National assembly and reads, inter alia, as follows

**95.**

***(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.***

***(2) The National Assembly deliberates on and resolves issues of concern to the people.***

***(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.***

***(4) .....[emphasis]***

48. Article 115 deals with the legislative authority in so far as the executive participation is concerned through the President with specific timelines given, while also making it clear that the President's veto decision or recommendations are not binding on the legislature.

49. Article 116 stipulates when laws come into force. It states:

**116.**

***(1) A Bill passed by Parliament and assented to by the President shall be published in the Gazette as an Act of Parliament within seven days after assent.***

***(2) Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.***

***(3) An Act of Parliament that confers a direct pecuniary interest on members of Parliament shall not come into force until after the next general election of members of Parliament.***

***(4) Clause (3) does not apply to an interest that members of Parliament have as members of the public.***[emphasis]

50. While Article 129 dictates that executive authority be exercised in a manner compatible with the principle of service to the people, Article 153(4)(a) expressly enjoins Cabinet Secretaries to act in accordance with the Constitution, lending support to Articles 1(1) and 10.

51. Section 46 of the retired Constitution governed Parliament's exercise of legislative power. It provided that laws would come into operation when gazetted but Parliament could suspend the operation. There was no specific requirement as to stipulation of a date for commencement.

### **Discussion and Determination Issues**

52. The issues as identified by the parties may be crystallized into three core ones.

53. First, is whether the neglect or failure by the 1<sup>st</sup> Respondent to thus far appoint a date to bring into operation the PBO Act is a contravention or violation of the Constitution? Secondly, is whether by appointing a task force to bring, review and suggest amendments to be effected to the PBO Act prior to its amendments the 1<sup>st</sup> Respondent has acted in contravention or violation of the principle of separation of powers and thus inconsistent with the 1<sup>st</sup> Respondent's constitutional powers and obligations. Thirdly, is whether the non-governmental organisations Board has been properly constituted since 8<sup>th</sup> March 2015 and, if not whether its decisions are void.

#### *Some undisputed Facts*

54. It is not in controversy that the National Assembly duly passed the PBO Act and that on 14 Jan 2013 the President assented to it. It is also not disputed that the 1<sup>st</sup> Respondent is a state officer and a member of the executive arm of the government. It is beyond controversy as well that the 1<sup>st</sup> Respondent was mandated by the PBO Act to appoint such date by way of a notice in the Kenya Gazette for the coming into operation of the PBO Act. It is finally not in dispute that the 1<sup>st</sup> Respondent has not, since 2013, appointed the date for the commencement of the PBO Act.

55. Additionally, it is not in dispute that in October 2014 the 1<sup>st</sup> Respondent appointed, through a Gazette Notice a task force of eleven persons to receive and review views on the proposed amendments to the PBO Act, monitor the legislative process of amending the PBO Act and also advise the 1<sup>st</sup> Respondent on the implementation of the PBO Act.

56. It is further not disputed that the said task force presented its report to the 1<sup>st</sup> Respondent on or about 15 May 2015.

#### *The legislative process*

57. The legislative undertaking of the people of Kenya is donated to one organ of the State by the provisions of Articles 1(3)(a) and 94(5) as well as Article 95(3) of the Constitution. The legislature is empowered expressly to make the laws. The participation of the people of Kenya and the executive itself in the legislation process is however not to be gainsaid.

58. Article 118 as well as Article 119 of the Constitution grant access to the people of Kenya to participate in parliamentary matters. The people may participate in parliamentary process by petitioning parliament to enact, amend and repeal any law. The people are also entitled to be involved in the legislative process through public participation.

59. The executive is also donated with powers to veto or assent to Bills but within a specific period of time. The President must, under Article 115, assent to Bills within 14 days after receipt or (within the same period) refuse to assent to the Bill and communicate his reasons to Parliament. In all instances, though, the Parliament still has the final say. Parliament's is not bound by the President's reasons for refusing to assent to any Bill. Parliament is also not bound any views expressed by the public during public participation or the public petition for amendment or repeal. The executive it is apparent does not have an unchecked power to assent to or veto Bills.

60. Likewise, the judiciary as the third arm of government has a minimal role in legislation. The judiciary has power under Article 165(3) of the Constitution to interpret statute(s) but not amend statute(s). The judiciary will however check the legislative power and prowess of Parliament by ensuring that all unconstitutional statutes are pursuant to Articles 2(4) and 165(3) (d) of the Constitution declared void to the extent of any inconsistency with the Constitution.

61. Previously, Parliament's legislative powers were also curtailed by both the executive and the judiciary. The President had twenty one days to assent to or veto a Bill with reasons. The retired Constitution did not however provide for situations where the executive simply did nothing to the Bill. Where the President neither assented to or vetoed the Bill within the prescribed time, the law and by extension the people of Kenya simply had to wait.

62. There was, it can be said, separation of powers albeit with unchecked veto powers previously whilst the current constitutional dispensation makes it relatively different. Parliament's legislative powers are not absolutely exclusively. Parliamentary supremacy is subjected to the peoples power (Articles 118 & 119) as well as the executive prerogatives under Article 115. The executive's power to assent to or veto Bills is also placed under check.

63. In question, however, in the instant Petition is both the legislative sovereignty of Parliament and the question as to when Acts of Parliament come into effect or force.

64. Article 116 of the Constitution makes it relatively clear when a Bill once assented to ought to come into operation. Unless it is an Act of Parliament conferring direct pecuniary interest on Members of Parliament *qua* members of Parliament, Acts of Parliament come "*into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date or time at which it will come into force*".

65. The transformative nature of the Constitution dictates that history be considered even as one seeks to interpret the various provisions of the Constitution. History will reveal that the coming into force of statutes passed by Parliament prior to the 2010 Constitution was occasionally delayed by both Parliament and the executive. The executive would take a while to assent to and cause the Act to be gazetted. Parliament too would postpone the coming into operation of the law indefinitely. The retired Constitution under Section 46 seemed to condone such approaches and was then accordingly abused.

66. The Constitution under Article 116 sought specifically to address this mischief. It sought, by providing when Acts would come into force of law to ensure that the past was not repeated. It sought, in my view, to ensure that the legislative process once commenced followed the prescribed process to a reasonable and logical conclusion and within a reasonable period of time. That is the spirit of Article 116 of the Constitution. Indeed time was prescribed in all the processes: see Articles 115 and 116 of the Constitution.

67. Any interpretation of Article 116 of the Constitution would dictate that a purposive approach is adopted. And, in my view, the rather implicit purpose of Article 116 was to ensure that the legislative

process is completed sooner than later.

68. The Petitioner as well as the Interested Parties have urged that under Article 116, Bills assented to by the President come into force on the fourteenth day after its publication in the absence of any specific date stipulated in the Act. The Petitioner and the Interested Parties have urged that the court also adopts that literal interpretation.

69. The Constitution under Article 259 has expressly placed an edict on its interpretation. The Constitution is to be interpreted, inter alia, in a manner that promotes its purpose, values and principles. It is also to be interpreted in a manner that contributes to good governance.

70. I have already stated that the purpose of Article 116(2) of the Constitution is , in my view, to ensure that the legislative process is concluded with reasonable expedition and the people of Kenya, on whose behalf Parliament exercises legislative powers are not left in an indefinite suspension.

71. It is therefore necessary that as the Constitution is the supreme law of the land against which all law or conduct is to be tested, its provisions should always be examined with a view to extracting from it those principles or values against which such law or conduct can be measured. The Constitution itself provides such values and principles under Article 10 and they include good governance which is also referred to under Article 259. A simple literal approach may not necessarily assist in having the Constitution fulfil its purpose of nurturing certain values and principles for a future Kenya.

72. In the context of legislation and Parliament as well as legislation and the executive, there is adequate clarity that Parliament legislates and the executive implements, with a limited role on the legislative process. The relevant question would in the context of the instant Petition be when does the process of legislation come to an end for the implementation to commence?

73. While the presidential assent under Article 115 of the Constitution concludes the formal process by which Bills become law, it is not correct to assume that the assent also marks the end of the legislative process. Article 116 of the Constitution, clearly appears to express the fact that the legislative process will not end with the Presidential assent when Article 116 provides for gazettment of the Bill as an Act of Parliament.

74. Likewise, when Article 116 also allows for the suspension of the Act once assented to and gazetted by the stipulation of a date or time at which the Act is to come into force, it cannot be correctly argued that the process of legislation has come to an end. Where the operation is temporarily suspended there can be no implementation by the executive. The Act is still within the legislative powers of Parliament for as long as a date for its implementation is reserved.

75. Commonwealth parliamentary practice and tradition seems to indicate likewise. Thus in England, the Acts of Parliament (Commencement) Act 1793 and Interpretation Act 1978 at Section 4 is clear that Acts of Parliament will be deemed in force at the beginning of day on which the royal assent is given if no other provision is made. If provision is made for a commencement date then it still cannot be implemented.

76. It is Parliament that is enjoined to legislate. It is thus Parliament that is also enjoined, when a Bill does not automatically come into force pursuant to Article 116 (2) of the Constitution, to stipulate which date or time the Act will come into force after gazettment. Can Parliament delegate this role, the role of appointing a commencement date?

77. Where the power to legislate is delegated to the executive it cannot be said that the doctrine of separation of powers, which is evidently flexible, has been violated. There may be created a tension as to the supremacy of the Constitution which grants Parliament the power to legislate and parliament's autonomy in deciding to delegate but such tension must be treated in context to ensure that the Constitution is not subverted and that the integrity of the legislative process is protected and preserved. This is done by ensuring that unnecessary delegation is not allowed. The reason for the delegation, if it

can be discerned, would assist to baggy the tension.

78. For various reasons, delegated legislation is an inevitable feature of modern government. Pressure of Parliamentary time and technicality of subject matter of legislation are the most common and known reasons: see **Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa [1995] 4 SA 877** .

79. In **Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra)** it was also stated that the fact that it is very rare for Acts of Parliament to contain all provision which are essential for its implementation has also always led to or prompted delegated legislation. Of the competence of Parliament to delegate its legislative powers the court in **Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa (supra)** per Mahomed DP stated that delegation could not be determined in the abstract but depended

*“inter alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and practical necessities generally”*

80. In the context of implementation of statute, it is not uncommon to delegate to the executive the power to not only legislate various implementation provisions but also the commencement date as there may exist various practical reasons why a new Act should not come into effect as soon as the Presidential assent is given and the Bill is gazetted. Parliament, it must be stated, is also not expected to deal with all matters concerning implementation.

81. The texture of our Constitution contains nothing which expressly prohibits delegation of legislation to other bodies. Indeed, Article 94(5) of the Constitution allows provisions having the force of law to be made by persons other than Parliament where the Constitution or legislation expressly allows. Delegated legislation and powers are also themselves subject to judicial review especially where the delegatee has attempted to obtain from Parliament greater powers to legislate than should have been given.

82. In the instant case Parliament by virtue of Article 116(2) of the Constitution had the powers to legislate and state or stipulate the commencement date. Read purposively, Parliament can legislate and publish an Act and then in the Act itself also determine (legislate) that it comes into effect at a later date. Good governance would dictate that this method of enacting suspended legislation be applied when other preparatory work needs to be done before the Act comes into operation. What is however clear in such instances is that both Parliament and the people of Kenya, on whose behalf Parliament legislates, have an expectation that the Act will come into operation and such expectation must not be denied or defeated.

83. In my view, Parliament could stipulate an exact date for commencement of the PBO Act. Parliament could also delegate the stipulation of such date to another entity, as it did. It could do so to the Cabinet Secretary. There was nothing unconstitutional in such delegation and the 1<sup>st</sup> Respondent was now expected to exercise both administrative and politico-executive powers in determining and appointing the date and no more.

84. That leads me to the core question as to whether the failure thus far (at the time of arguments) by the 1<sup>st</sup> Respondent to appoint a commencement date for the PBO Act was and is a contravention and violation of the Constitution.

85. In legislating particularly a future date of commencement of an Act, Parliament is not expected to defeat the intention of legislation. It is expected under the Constitution to stipulate a date or time when an Act comes into Parliament. Legislation should not be suspended indefinitely as that is the mischief that Article 116(2) sought to cure. Likewise when such power is delegated it must be exercised lawfully and with the intention of putting the Act into operation when it is capable of being given effect. To act

otherwise would run contrary to the Constitution.

86. Powers to legislate when donated by Parliament are not conferred in the abstract. The purpose ordinarily ought to be discerned from the legislation that is the source of the power. In the instant case, the purpose of the legislature in conferring power to the 1<sup>st</sup> Respondent was to bring the PBO Act into force at an appropriate time. In my view, it was not Parliament's intention to indefinitely suspend the operation and commencement of the PBO Act. At the same time Parliament never intended to put the PBO Act into operation before it is capable of being given effect.

87. In my view, when such power is donated it must be exercised consistently with the Constitution. It cannot be exercised arbitrarily. It must also be objectively rational. That is what the rule of law which is provided for under Article 10 is all about. Decisions should never be arbitrary. They must always be made rationally and related to powers being exercised.

88. Parliament intended that the 1<sup>st</sup> Respondent brings the PBO Act into force at an appropriate time. It could not be prematurely brought into force; likewise it could also not be indefinitely delayed. I appreciate that the decision which was to be undertaken by the 1<sup>st</sup> Respondent was not exclusively administrative. It fell somewhere between the law making process in so far as the 1<sup>st</sup> Respondent had to legislate (determine) a commencement date and the administrative process in so far as the 1<sup>st</sup> Respondent had to consider relevant factors to help determine a date. The fact still however remains that Parliament and, indeed, every Kenyan including the Petitioner herein had a clear expectation that the PBO Act would come into operation. Essentially, the 1<sup>st</sup> Respondent had to act.

89. In **Republic –v- Home Secretary ex p Fire Brigades Union [1995] 2 AC 513** Parliament had passed a 1988 Act which provided for a new Criminal Injuries Compensation Scheme. The Home Secretary was delegated with powers to bring the Act into force. Instead of implementing the Act, the Home Secretary drew up a non-statutory scheme for a tariff based system by using prerogative powers. The claimants, whose members would have recourse to the scheme, sought an order that the Act should be implemented, or the non-statutory scheme declared unlawful. It was held that there was no power in the courts to compel the Home Secretary to bring the Act into effect, but his alternate scheme was unlawful. The court also held that while the Home Secretary is under no legally enforceable duty to bring the main provisions of the Act into force, he must consider when it is appropriate for him to do so and does not enjoy an absolute and unfettered discretion not to do so. Lord Browne-Wilkinson stated as follows:

*“In my judgment it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation.” and “There is a second consequence of the power in section 171(1) being conferred for the purpose of bringing the sections into force. As I have said, in my view the Secretary of State is entitled to decide not to bring the sections into force if events subsequently occur which render it undesirable to do so. But if the power is conferred on the Secretary of State with a view to bringing sections into force, in my judgment the Secretary of State cannot himself procure events to take place and rely on the occurrence of those events as the ground for not bringing the statutory scheme into force. In claiming that the introduction of the new tariff scheme renders it undesirable now to bring the statutory scheme into force, the Secretary of State is, in effect, claiming that the purpose of the statutory power has been frustrated by his own act in choosing to introduce a scheme inconsistent with the statutory scheme approved by Parliament.”*

90. The court in **Republic –v- Home Secretary ex p Fire Brigades Union [supra]** was dealing with a case of parliamentary supremacy and strict separation of powers.

91. In the context of our constitutional democracy and supremacy, the executive clearly does not enjoy absolute discretion when it comes to delegated legislation for purposes of implementing statute and in particular bringing it into force. That is the principle even where one is dealing with a situation of

parliamentary supremacy and an argument be advanced that delegated legislation is part of the legislature's work and the court should exercise deference. The point is that the executive cannot act or fail to act and frustrate the will of Parliament, which is that legislation be implemented sooner than later. Where the executive so acts or fails to act, the court may intervene in appropriate case as the Constitution enjoins the court to intervene.

92. In the instant case, the 1<sup>st</sup> Respondent has not appointed and gazetted the commencement date for the PBO Act. The delay runs over 1000 days. The 1<sup>st</sup> Respondent had the discretion to act and appoint a commencement date for the PBO Act. It is common knowledge that exercise of discretion entails and permits the application of abstract and general rules to specific and particular circumstances in a fair manner. Not much seems to have happened with a view to the 1<sup>st</sup> Respondent appointing a commencement date.

93. Firstly, having been donated with the power to appoint a commencement date and with the expectation that the PBO Act was to come into operation, the 1<sup>st</sup> Respondent, it would be expected should have exercised his discretion within a reasonable time, considered all the relevant factors and appointed a commencement date. These do not seem to have happened.

94. Secondly, the 1<sup>st</sup> Respondent, it would appear decided to consider irrelevant factors and sought to exercise greater power than had been donated to him by Parliament.

95. Parliament did not empower the 1<sup>st</sup> Respondent to modify or amend or engage in the process of modifying or amending the PBO Act. Parliament only empowered the 1<sup>st</sup> Respondent to stipulate a commencement date for the PBO Act. The 1<sup>st</sup> Respondent has however actively engaged in the process of prompting amendments to the PBO Act. Views on possible amendments to the PBO Act were invited by the 1<sup>st</sup> Respondent from the public. A task force was appointed by the 1<sup>st</sup> Respondent. Its terms of reference included overseeing the process of amendment of the PBO Act.

96. The 1<sup>st</sup> Respondent was however not empowered to make amend or repeal the PBO Act. He was only to appoint an appropriate commencement date. In my view such active engagement in legislation process would amount to a violation of the doctrine of separation of powers where the executive arm of the government has not been so empowered or annointed.

97. Curiously, the PBO Act which the 1<sup>st</sup> Respondent has actively engaged in the process of prompting amendments to is yet even to come into force. The 1<sup>st</sup> Respondent is consequently acting unlawfully and contrary to the spirit and tenor of Articles 94, 95 and 129 of the Constitution.

98. The 1<sup>st</sup> Respondent's reasons for not acting and deciding on a date for commencement of the PBO Act are untenable in the circumstances. To insist that a review of the PBO Act was being undertaken yet such power was never donated to the 1<sup>st</sup> Respondent is equivalent to superintending Parliament which the 1<sup>st</sup> Respondent cannot do. It amounts to second guessing Parliament as well. It also amounts to acting outside the statutory powers. It is unlawful and unconstitutional.

99. Additionally, the delay to act for over a period of 1000 days without good cause and indeed by reason of an irrelevant factor is also unreasonable, irrational and arbitrary. The Constitution under Article 73(2) expects objectivity on the part of state officers. I do not find that there has been any objectivity on the part of the 1<sup>st</sup> Respondent.

100. I consequently return the verdict that the 1<sup>st</sup> Respondent in failing to appoint a commencement date for the PBO Act within a reasonable time has not only been derelict in the duties of the 1<sup>st</sup> Respondent but has also acted in a manner inconsistent with the Constitution and contrary to the expectations of Parliament.

101. I also find and hold that as the 1<sup>st</sup> Respondent was not empowered to engage in the process of amending the PBO Act, the appointment of task force while was consistent with the 1<sup>st</sup> Respondents duties was inconsistent with the Constitution and the 1<sup>st</sup> Respondents powers in so far as the task force duties were also tied to the appointment of a commencement date. The 1<sup>st</sup> Respondent did not have power to amend the PBO Act prior to its commencement and the attempts to do so equate irrationality.

102. I now come to the final question as to the legality of the NGO Coordination Board and the effect of the Boards Acts.

103. I intend to address this question shortly as follows.

104. The PBO Act has never been operationalized. It is law but as long as the commencement date is not appointed yet, then all the provisions of the PBO Act, except the provision empowering the 1<sup>st</sup> Respondent to appoint a commencement date, remain suspended. Effectively, the NGO Board is still regulated by the Non Governmental Organizations Coordination Act. Any Board members appointed under the NGO Coordination Act are legally in office. Action and acts undertaken by the Board are not void unless specifically challenged and so found by a court of law.

## **Conclusion**

105. I find that the Petition has merit.

106. The 1<sup>st</sup> Respondent had a duty delegated by Parliament to appoint a commencement date for the PBO Act. For irrelevant factors taken into consideration, the 1<sup>st</sup> Respondent has failed to act. This is quite contrary to the aspirations values and principles of the Constitution. This must also be contrary to the wishes of Parliament. The PBO Act has a central role to play in the regulation of the NGO world in Kenya. The PBO Act may have defects, patent and latent, but the defects may only be addressed after the Act has been operationalised and only through Parliament. The 1<sup>st</sup> Respondent in failing to act has effectively abused its discretion and has not advanced any plausible reason for the failure to act.

107. I also conclude that in the circumstances of this case, it would be appropriate for the court to intervene and prompt the exercise of discretion on the part of the 1<sup>st</sup> Respondent.

## **Disposal**

108. The Petition succeeds.

109. I allow the Petition in the following terms.

*a) A declaration is hereby issued that the 1<sup>st</sup> Respondent's failure to appoint a date for the coming into operation of the Public Benefit Organizations Act, 2013 is in violation of Articles 1, 10, 73, 94, 116(2), 129 and 153(4) of the Constitution of Kenya, 2010*

*b) A declaration is hereby issued that the decision of the 1<sup>st</sup> Respondent to appoint a Task Force to amend and/or propose amendments to the Public Benefits Organizations Act, 2013 before bringing the Act into operation is illegal and ultra vires and otherwise in contravention of Articles 10, 94, 116(2), 129 and 153(4) of the Constitution of Kenya, 2010.*

*c) An order of mandamus is hereby issued compelling the 1<sup>st</sup> Respondent to within the next fourteen days appoint and gazette a date for the coming into operation of the Public Benefits Organisations Act, 2013 (Act No. 18 of 2013)*

*d) Each party shall bear its own costs of the Petition.*

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2016.**

***J.L.ONGUTO***

**JUDGE**