REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 164 OF 2014

REPUBLIC ....APPLICANT

VERSUS

ATTORNEY GENERAL...1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF

LABOUR, SOCIAL SECURITY & SERVICES........................2ND RESPONDENT

AND

LAW SOCIETY OF KENYA ....1ST INTERESTED PARTY

KENYAN TO KENYANS PEACE

INITIATIVE ADOPTION SOCIETY ....2ND INTERESTED PARTY

LITTLE ANGELS NETWORK...................................3RD INTERESTED PARTY

KENYA CHILDREN'S HOME

ADOPTION SOCIETY..4TH INTERESTED PARTY

BUCKNER KENYA ADOPTION SERVICES................5TH INTERESTED PARTY

CHILD WELFARE SOCIETY OF KENYA ....6TH INTERESTED PARTY

BENEAH OTIENO ONYANGO...................................7TH INTERESTED PARTY

JENNIFER WANJIKU KANUSU..................................8TH INTERESTED PARTY

ANNE NUNGARI THAIRU..9TH INTERESTED PARTY

BABY J & 219 OTHERS (SUING THROUGH

TITUS NYORO AS NEXT FRIEND) ....10TH INTERESTED PARTY

EX-PARTE

CHILD IN FAMILY FOCUS

JUDGEMENT

The subject of this judicial review application is **Legal Notice No. 206** found in the Special Issue of the Kenya Gazette dated 25th October, 2013. The said Notice is framed as follows:

> **"THE CHILDREN ACT (No. 8 of 2001)**
>
> **IN EXERCISE of the powers conferred by section 198 of the Children Act, 2001, the Cabinet Secretary for Labour, Social Security and Services makes the following Order:-**
>
> **THE CHILDREN (EXEMPTION) ORDER, 2013**
>
> 1. **This Order may be cited as the Children (Exemption) Order, 2013.**
> 2. **The provisions of section 177(1), (2), (3), (4), (5), (9), (10), (11) and (12) of the Act shall not apply to the organization specified in the Schedule with effect from the date of the commencement of the Act.**
>
> **SCHEDULE**
>
> **THE CHILD WELFARE SOCIETY OF KENYA**
>
> **Dated the 17th October, 2013**
>
> **SAMWEL KAZUNGU KAMBI**
>
> **Cabinet Secretary,**
>
> **Labour, Social Security and Services."**

The ex-parte Applicant (the Applicant), Child in Family Focus–Kenya through the notice of motion application dated 8th May, 2014 and brought under **sections 8(2) and 9 of the Law Reform Act; Order 53 Rule 3(1) of the Civil Procedure Rules, 2010** and **sections 3 and 3A of the Civil Procedure Act** prays for:

> **"1. AN ORDER OF CERTIORARI to bring into the High Court and to quash Legal Notice No. 206 of 2013, The Children (Exemption) Order 2013, issued by the 2nd Respondent in favour of the 6th Interested Party.**
>
> **2. AN ORDER OF PROHIBITION to prohibit the 2nd Respondent from issuing and implementing Legal Notice No. 206 of 2013, The Children (Exemption) Order, 2013 and subsequently issuing similar legal notices without legal justification.**
>
> **3. Any other order the Honourable Court may deem fit and just to grant.**

4. The costs of this Application be provided for."

The Applicant named the Attorney General of the Republic of Kenya as the 1st Respondent and the Cabinet Secretary who issued the Children (Exemption) Order, 2013 as the 2nd Respondent.

The Applicant also named the Law Society of Kenya, Kenyans to Kenyans Peace Initiative Adoption Society (KKPT), Little Angels Network, Kenya Children's Home Adoption Society, Buckner Kenya

Adoption Services and Child Welfare Society of Kenya (CWSK) as the 1st to 6th interested parties respectively.

Beneah Onyango, Jennifer Wanjiku Kanusu and Anne Nungari Thairu were later allowed to join these proceedings as the 7th, 8th and 9th interested parties respectively. Titus Nyoro suing as the next friend of Baby J and 219 other children joined the proceedings as the 10th Interested Party.

According to the statutory statement filed together with the application for leave on 25th April, 2014 the Applicant faults the issuance of the exemption order on the following grounds:

> **"1. The 2nd Respondent acted *ultra vires* by issuing the Exemption Order while he did not have the power to grant such an exemption under the Children Act.**

2. **The 2nd Respondent acted *ultra vires* by arbitrarily and without regard to due process issuing the Exemption Order in favour of the 6th Interested Party to deal with child adoption matters without being registered as an Adoption Society as required under the Children Act.**
3. **The 2nd Respondent acted *ultra vires* by allowing the 6th Interested Party to carry out the functions of an Adoption Society without any supervision by or accountability to the Adoption Committee as envisaged by law.**
4. **The 2nd Respondent acted *ultra vires* by issuing the Exemption Order to an organization that is not registered as an Adoption Society as required by law or at all.**
5. **The 2nd Respondent acted *ultra vires* by exempting the 6th Interested Party from criminal liability under section 177 (9), (10), (11) and (12) of the Children Act, a power that the 2nd Respondent does not have by law or otherwise.**
6. **The subject Legal Notice is unconstitutional because it is direct violation of Article 53(2) of the Constitution of Kenya which expressly provides that "a child's best interests are of paramount importance in every matter concerning the child."**
7. **The subject Legal Notice is unconstitutional because it is not keeping with the principles of good governance enshrined in Article 10 of the Constitution of Kenya which include accountability, public participation and transparency.**
8. **The 2nd Respondent through the Legal Notice No. 206 of 2013 discriminated against other adoption societies since only the 6th Interested Party was granted such exemption from supervision by and accountability to the Adoption Committee.**
9. **The Respondents are subject to supervisory powers of the High Court."**

Apart from the statutory statement, the application is also supported by an affidavit sworn by the Applicant's director Peter Kamau Muthumi on 24th April, 2014.

From the pleadings filed in this matter and the submissions of the advocates for the parties, it is clear that the 1st to 5th interested parties are in support of the Applicant's claim for judicial review whereas the 6th to 10th interested parties are with the respondents who oppose the application.

The respondents opposed the application through two affidavits sworn by Samwel Kazungu Kambi, the 2nd Respondent. The first affidavit was sworn on 20th May, 2014 and the second one is a further replying affidavit sworn on 28th July, 2014.

The respondents informed the Court that the 2nd Respondent is responsible for the administration and implementation of various legislations including the **Children Act, 2001 (the Act).** It is their case that in issuing the exemption order, the 2nd Respondent was exercising the powers granted to him by the **Act**.

The respondents commenced their case by giving the background of the CWSK. They stated that the CWSK was first gazetted as a government agency for the care, protection and control of children vide **Gazette Notice No. 1768 of 27th December, 1955.** Through **Gazette Notice No. 1536 of 4th November,**

1955 the CWSK was exempted from registration through **exemption certificate No. 455 of 25th October, 1955.** It is important to note at this point that the exemption referred to was granted under the **Societies Ordinance (No 52 of 1952)** and not the **Prevention of Cruelty to and Neglect of Children Ordinance (No. 12 of 1955)** under which the CWSK had been approved **"as a society working for the purpose of the care, protection and control of children."**

The respondents stated that it was through **Legal Notice No. 1356 dated 28th April, 1969** that the CWSK became an adoption society. The gazettement was done under the repealed **Adoption Act, Cap 143.** It is the respondents' case that by virtue of **Section 9(1) of the Act** the CWSK continued being an adoption society even after the repeal of the **Adoption Act, Cap 143.**

The respondents contend that the CWSK carries out free adoption arrangements on behalf of the government and for the benefit of financially disadvantaged Kenyans and other well-wishers who intend to adopt and give care to abandoned or homeless children. The respondents therefore assert that the need for a government sponsored adoption agency is a matter of great public interest and of utmost necessity in view of the fact that adoption services are expensive under private adoption societies thus making the exemption of the CWSK necessary. The respondents state that apart from the CWSK, all the other adoption societies are private and the crucial function and obligation of the Government to protect children should not be left to private societies alone.

The respondents argue that the Applicant and other adoption societies will not be disadvantaged by the exemption of the CWSK as the CWSK is not a profit making agency but is instead complementing the adoption services for free.

At paragraphs 15 to 18 of his replying affidavit sworn of 20th May, 2014 the 2nd Respondent continues to reply to the application as follows:

> **"15. THAT the Cabinet Secretary has powers under section 198 of the Children Act to exclude from the operation of the Act any race, tribe, religious group or sect in Kenya or part of such groups or to whom the Cabinet Secretary may consider impracticable or inexpedient to apply such provisions including the Child Welfare Society which is different from private adoption societies.**
>
> **16. THAT as an Adoption Society, the Child Welfare Society is neither exempted from registration and supervision by the Adoption Committee nor does it exempt the Society from application for the provisions regarding quality assurance by the National Council for Children's Services under section 32 but exemption is limited only to procedural matters regarding registration.**
>
> **17. THAT I am advised by counsel on record which advice I believe to be true that Government institutions operate differently from private organizations and the different treatment of the Child Welfare Society of Kenya from private adoption societies does not amount to discrimination against private adoption societies and in any case no such private society has applied for exemption and has been denied the chance to be considered.**
>
> **18. THAT any Court order stopping Child Welfare Society of Kenya from processing child adoption matters would not be in the best interests of the children as it would greatly disadvantage children from poor background who are in need of adoption services, who may remain institutionalized and may amount to a violation of their right to grow up in a family."**

In the further replying affidavit sworn on 28th July, 2017 the 2nd Respondent revealed that the CWSK had subsequent to the filing of these proceedings been made a state corporation vide the **Child Welfare Society Order, 2014** and that the purpose of doing so was necessitated by the Government's intention to secure the welfare of the increasing number of children in need of care and protection. He disclosed that

the Children Department is overwhelmed by the increasing cases of children in need of care and protection and the CWSK will assist in ensuring that child protection services are available and accessible to all Kenyans as required by the Constitution.

The respondents faulted the viability of the Applicant's application by stating that the same is fatally defective and incompetent for non-compliance with the substantive previsions of the **Law Reform Act, Cap 26** and **Order 53 of the Civil Procedure Rules, 2010 (CPR).**

The respondents also filed a notice of preliminary objection dated 19th May, 2014. Although the said notice was in response to the application for leave to operate as stay, I find that the grounds of objection are also relevant to the main notice of motion. The two grounds of objection are:

> **"1. That the orders sought are statutory and procedurally barred by dint of the mandatory provisions of Section 9(3) of the Law Reform Act, Cap 26 laws of Kenya and Order 53 Rule 1 and 2 of the Civil Procedure Rules.**
>
> **2. That the Applicant's relief lies elsewhere and not within the judicial review proceedings."**

I will therefore consider these grounds of objection together with the responses found in the affidavits of the 2nd Respondent.

The 1st Interested Party replied to the application through the affidavits of its Secretary Apollo Mboya and its member Faith Waigwa. The two affidavits were sworn on 12th June, 2014. In summary, their response is that the 1st Interested Party nominates a representative to the Adoption Committee by virtue of **paragraph (e) of the 9th Schedule of the Children Act.** In exercise of that power the 1st Interested Party nominated Faith Waigwa to the Adoption Committee for a period of three years with effect from 28th October, 2011. Upon her nomination she was elected as the chairperson of the Adoption Committee by the other members. However, her appointment was revoked, without any explanation by the 2nd Respondent vide **Gazette Notice No. 15638 dated 27th December, 2013.**

In reference to the CWSK, the 1st Interested Party's case is that the CWSK held a valid adoption licence up to 7th March, 2012. As required by the **Adoption Regulations, 2005 (the Regulations),** adoption societies are required to apply for renewal of their licences every twelve months. The CWSK did not apply for renewal of its licence and the Adoption Committee asked the Director of Children Services to issue a circular to the High Court of Kenya bringing to the attention of the Court the fact that the CWSK had not complied with the law and regulations relating to the renewal of its adoption licence.

Consequently the CWSK applied for the renewal of its registration on 16th August, 2013. The Adoption Committee considered the application and deferred it on the grounds that the audited accounts and balance sheet were missing; a registration instrument as a non-profit making organization had not been availed; and that there were gaps in the submitted annual report. The CWSK did not respond to the issues raised in the Adoption Committee's letter.

The 1st Interested Party contends that the CWSK's claim that it appealed against the decision of the Adoption Committee under **sections 195 and 198 of the Act** does not make sense as appeals against the decisions of the Adoption Committee can only be made under **Section 177(6) of the Act** and there was no decision to be appealed under **Section 195 of the Act.** Further that the CWSK's appeal dated 4th October, 2013 did not disclose what was considered impractical or inexpedient to warrant exemption more so when the CWSK had complied in the previous years.

On the CWSK's claim that its accounts were audited by the Kenya National Audit Office, the 1st Interested Party wondered why the CWSK did not exhibit those accounts.

It is the 1st Interested Party's position that Kenya is a signatory to the **Hague Convention on Inter-Country Adoption (the Convention)** and pursuant to **Article 6 of the Convention,** the Adoption Committee has been designated as the central authority whose mandate is to discharge the duties which are imposed by the **Convention** on Kenya. The 1st Interested Party contends that the roles and duties of the designated central authority cannot be carried out by any other person, body or authority without express authority of the central authority.

It is this central authority which accredits adoption agencies and it is important that all agencies accredited to offer adoption services must meet the criteria for registration as stipulated in the **Act** and **the regulations** made thereunder. Further, that the **Convention** specifically requires that accredited adoption societies must be supervised especially on the area of its composition, operation and finances and this is achieved through compliance with the provisions of **Section 177 of the Act.** The 1st Interested Party therefore submits that the exemption of the CWSK amounts to a breach of the **Convention** and this will work against international adoption of Kenyan children.

The 2nd Interested Party's response is through the replying affidavit sworn on 12th June, 2014 by its founding director Gaciku Kangari. What comes out of the affidavit is that the 2nd Interested Party is a registered adoption society and has renewed its registration from time to time. In order to renew its licence, it must comply with the provisions of the **Act** and **the regulations** made thereunder.

The 2nd Interested Party informed the Court that it received Kshs.4 million in 2012, Kshs.2.25million in 2013 and Kshs.1.575 million in 2014 from the Government in order to facilitate creation of awareness and increase the prevalence of local adoption. It is the 2nd Interested Party's case that the funding from the Government does not make it a Government agency and it has an obligation to account for all the monies received. The 2nd Interested Party stated that it is not a profit-making organization and fees charged are only meant to facilitate the adoption process where its input is required.

The 3rd Interested Party supported the application through an affidavit sworn on 9th June, 2014 by its Chief Executive Officer, Susan Otuoma. Susan Otuoma informed the Court that her organization was registered in 2002 to conduct local and international adoptions. In compliance with **Rule 12 of the Regulations,** it renews its licence annually. The Adoption Committee carries out regular supervisory meetings and visits to its offices where it checks (a) the adequacy and appropriateness of office space to ensure the adopting families enjoy privacy; (b) staff policy with an emphasis on employees; (c) record management to ensure confidentially; (d) composition and functioning of the case committee that declares children free for adoption; (e) inspection of accounts to confirm how government grants are utilized; (f) governance issues; (g) compliance with the advised ratio of local adoptions to international adoptions being 70:30 respectively; (h) inspection of accounts; and (i) challenges faced by the society in the conduct of its operations.

It is the 3rd Interested Party's case that the exemption granted to the CWSK will result in the CWSK not being required to register as an adoption society or renew its licence annually.

Further that the exemption grants immunity to the CWSK from liability for various offences. It is the 3rd Interested Party's case that the exemption will completely take the CWSK out of the purview of the law and regulations providing for supervision of adoptions by the Adoption Committee.

It is the 3rd Interested Party's case that although the repealed **Adoption Act, Cap 143** had provided for transition to the **Act,** the transition period ended in 2005 when the **Regulations** came into force and the entities, including the CWSK, which had been allowed to operate under the repealed **Adoption Act,** were required to comply with the provisions of the **Act** and the **Regulations.**

It is the 3rd Interested Party's case that the exemption made in 1955 was an exemption from registration as a society and the same cannot amount to an exemption from registration under the **Regulations.** Further, that the registration of the CWSK as an adoption society in 1969 under the repealed **Adoption**

Act, Cap 143 came to an end in 2005 after **the Regulations** were unveiled.

The 3rd Interested Party asserts that **the Act** and **the Regulations** makes all adoption societies equal and there are no 'government sponsored adoption agencies' or 'private adoption agencies' as implied by the 2nd Respondent. The 3rd Interested Party protested that the **Act** does not recognise an entity known as a 'government sponsored adoption agency' and all adoption agencies are treated equally.

The 3rd Interested Party submits that the exemption of the CWSK by the 2nd Respondent contravened the governance principles found in the **Constitution** and was biased as the grounds for the exemption and the reasons for the exemption have not been stated. Further, that no reason has been given as to why it was impracticable and inexpedient for the CWSK to comply with the registration requirements.

The 3rd Interested Party contends that the 2nd Respondent has no authority to grant an exemption to the CWSK under **Section 198 of the Act** as that section was only applicable to natural persons and not a body corporate. Further that the *ejusdem generis* rule excluded the CWSK from the provisions of the section as the Minister was empowered to only exempt members who fell in the categories related to race, tribe, religious group or sect. The CWSK being an inanimate legal person cannot therefore fall into any of these groups.

The 3rd Interested Party asserts that the exemption goes against the 'principle of the best interests of the child' found in **Article 53 (2) of the Constitution** and **Section 4 (2) of the Act** as it means that the Adoption Committee cannot review the CWSK annually thereby allowing it to conduct adoptions without accountability, transparency and regulation. Further that the CWSK can easily breach the law as the exemption has shielded it from criminal liability for the offences under **Section 177 sub-sections (9)-(12) of the Act.**

The 3rd Interested Party rests its case by submitting that it is not in the adoption practice for profit and any fees charged is only meant to facilitate adoptions. Further, that it receives funding from the Government but the amount received is insufficient to effectively run the agency hence the provision by the law that the Adoption Committee will regulate fees charged by adoption societies.

Agnes Wanjiru Kiraithe the Chief Administrator of the 4th Interested Party brought out the 4th Interested Party's position through an affidavit sworn on 12th June, 2014. From the affidavit it emerges that the 4th Interested Party is a registered adoption society whose registration has been renewed from time to time. In a bid to boost local adoptions the Government has funded it from 2012 but that has not changed its status. It is the 4th Interested Party's case that the funding does not meet the costs for carrying out adoptions.

The 4th Interested Party also discloses that it runs children homes and children centres which cater for abandoned, lost, vulnerable and rescued children and also receives children from children officers, Government hospitals and the police but it has never been treated as a government agency.

Dickson Masindano the Chief Executive Officer of the 5th Interested Party replied to the application through an affidavit sworn on 9th June, 2014. Perhaps because the 5th Interested Party and the 3rd Interested Party are represented by the same firm of advocates, the affidavit of the 5th Interested Party is a replica of the affidavit of the 3rd Interested Party. I therefore need not reproduce the contents of the affidavit of Dickson Masindano.

The CWSK opposed the application through an affidavit sworn on 26th May, 2014 by its Executive Director, Irene Mureithi. She started by stating that the CWSK is a legally constituted government agency for the purpose of care, protection and control of children. She confirmed the history of the CWSK as already stated by the 2nd Respondent.

Coming to the genesis of the dispute before the Court, Irene Mureithi avers that through a letter dated 4th October, 2013, it requested the 2nd Respondent to exercise the power granted to him under **Section 198 of the Act** and exempt it from the requirements of registration. In a letter dated 16th October, 2013 the 2nd Respondent allowed the CWSK to make adoption arrangements pursuant to its appeal against the decision by the Adoption Committee to defer its registration to undertake adoptions. Thereafter the 2nd Respondent issued the **Legal Notice dated 17th October, 2013** and carried in the **Kenya Gazette of 25th October, 2013** exempting the CWSK from the provisions of **Section 177 sub-sections 1, 2, 3 , 4, 5, 9, 10, 11 and 12 of the Act.**

The CWSK refutes the Applicant's claims that the exemption is likely to affect the best interests of the child and result in trafficking and other forms of abuse of children. It is the CWSK's case that these allegations are baseless and unsubstantiated.

The CWSK asserts that under **Section 198 of the Act,** the 2nd Respondent can issue an order excluding from the operation of any or all the provisions of **the Act** anyone to whom he considers impracticable or inexpedient to apply the provisions to.

The CWSK contends that the exemption shields it from criminal liability in regard to registration only but it does not preclude criminal liability for other offences under **the Act** or any other laws.

The CWSK asserts that it is subject to regular audits by the Government and this demonstrates that it does not operate in a legal vacuum. The CWSK cites the fact that the President of the Republic of Kenya, Hon. Uhuru Kenyatta is its patron to demonstrate that it has both the trust and direct supervision of the highest office in the land.

The CWSK submits that it is funded by the National Treasury and this demonstrates the unique significant role it plays in the provision of services to children. For example, in the financial year 2013-2014 it had been allocated Kshs.261 million for recurrent expenditure and Kshs.300 million for capital expenditure.

The CWSK contends that it is the only public interest national organization with the competence, structure, geographical coverage and capacity to provide effective welfare and care services to children in Kenya. That apart from adoption services, the CWSK provides other services including rescue of children in emergencies, paying school fees for children across the country, providing care and protection services and tracing and reuniting children with their families. The CWSK also sensitizes chiefs and their assistants on child adoption, child rights, child abuse, child protection and child welfare. The CWSK therefore identifies itself as a human rights compliant organization with particular interest in the rights of the child.

In support of its case the CWSK referred the Court to its Child Protection Policy, Ethical Guidelines and Code of Conduct. It is the CWSK's case that if the orders sought are granted its operations will be brought to a halt to the detriment of vulnerable and disadvantaged children under its care and protection. Further, it asserts that allowing the application will result in the loss of livelihoods for over 500 personnel.

It is therefore CWSK's case that the welfare and protection of children is at the heart of its operations and there should be no fear that its exemption from provisions of **Section 177 of the Act** will prejudice or disadvantage children.

The CWSK asserts that it plays a critical role in adoptions and more so local adoptions unlike the Applicant and some of the interested parties who are driven by profit interests and more so international adoptions which is a lucrative business in which adoption of children is a source of big money. The CWSK provided statistics which it alleged confirmed its claim. It argues that the best interest of the child will be taken care of by allowing the exemption to remain in force.

The CWSK asserts that it has adhered to the principle of subsidiarity under the **Convention** and the

United Nations Convention on the Rights of the Child which requires State Parties, Kenya being one of them, to recognize that a child should be raised by his or her birth family or extended family whenever possible. Where this is not possible or practicable, other forms of permanent family care in the country of origin should be considered. Only after due consideration has been given to national solutions should inter-country adoption be considered, and this should only be done if it is the child's best interests.

Further, that CWSK has adhered to the requirement by the **African Charter on the Rights and Welfare of the Child** that when considering alternative family care of the child, due regard shall be paid to the desirability of the continuity in a child's up-bringing within the child's ethnic, religious or linguistic background.

The 7th, 8th and 9th interested parties opposed the application through the replying affidavit sworn on 21st May, 2010 by the 7th Interested Party, Beneah Otieno Onyango. The gist of their opposition to the application is that they have filed adoption petitions in which the CWSK is their adoption society. They therefore argue that their said petitions will collapse if this application succeeds. They also argue that the application is not tenable in law as it was filed outside six months after the making of the impugned decision and this contravenes **Section 9(3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the CPR.**

Titus Nyoro, the next friend of Baby J and 219 others, swore affidavits on 26th May, 2014 and 13th June, 2014 in opposition to the application. The position of the 10th Interested Party is that the application has been brought in bad faith and the same is not in the best interests of the child.

It is the 10th Interested Party's case that the 2nd Respondent took into consideration the best interests of the child by taking cognizance of the work of the CWSK since the pre-independence period when the Applicant was non-existent. The 10th Interested Party submitted that the CWSK was a government agency as per **Legal Notice No. 58** found in **Legislative Supplement No. 23 of 23rd May, 2014.** The 10th Interested Party asserts that the CWSK has followed the law by giving priority to adoption by local families and not foreign families.

The Applicant's response was by way of a replying affidavit sworn by its director on 26th May, 2014. He averred that among the Applicant's objectives is advocacy for the protection and promotion of family based care options for disadvantaged children, protection of children rights and best practices relating to children matters.

In response to the claim that the application is statute barred, the Applicant contended that under **Section 23 of the Statutory Instruments Act, 2013,** a statutory instrument can only come into force at the time of its publication. It is the Applicant's case that although **Legal Notice No. 206** is dated 17th October, 2013, its publication/gazettement was done on 25th October, 2013 which means that this application was filed within six months.

The advocates for the parties also filed detailed written submissions and lists of authorities to buttress their positions. I appreciate the good work done by each advocate and although I will not be able to cite each and every authority provided, the advocates can rest assured that I will bear them in mind in arriving at my decision.

After careful consideration of the material placed before the Court, I am of the view that the issues are:

1. Whether the application before this Court is statute barred;
2. Whether the 2nd Respondent had power to exempt the CWSK from the provisions of **Section 177 of the Act;**
3. If the 2nd Respondent had power to exempt the CWSK, the next question would be whether he exercised his discretion properly; and
4. Who should have the costs of the application?

Although there are other issues which I would have liked to address before delving into the identified issues, I have no option but to address one of the substantive issues before doing anything else. This is the issue of jurisdiction.

The respondents and the 6th to 10th interested parties submitted that the application before this Court is statute-barred. Their argument is premised on **Section 9(3) of the Law Reform Act, Cap 26** and **Rule 2 of Order 53 CPR.**

Order 53 Rule 2 CPR states:

> **"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

There appears to be no dispute that an application for an order of certiorari should be made within six months from the date of the making of an impugned decision. The arguments in this matter revolve around the date of the exemption order.

The Applicant and the 1st to 5th interested parties submit that the date of the publication of the exemption order in the Kenya Gazette i.e. 25th October, 2013 is the date of the decision. On their part, the respondents and the 6th to 10th interested parties argue that the exemption order came into force on the date it was issued namely 17th October, 2013.

The law governing the commencement of a statutory instrument is found in **Section 23 of the Statutory Instruments Act, 2013** which provides:

> **"23. Commencement of statutory instrument**
>
> **(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.**
>
> **(2) If a statutory instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the statutory instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation.**
>
> **(3) A statutory instrument may be made to operate retrospectively to any date not being earlier than the commencement of the enactment under which it is made but no person shall be liable to a penalty in respect of any contravention of a provision in an statutory instrument required to be published in the Gazette where the alleged contravention occurred before the publication unless the court is satisfied that before the alleged contravention the purport of the statutory instrument had been brought to that person's notice."**

The Section is drafted in a language similar to that found in **Section 9 of the Interpretation and General Provisions Act, Cap 2** which states:

> **"9. Commencement of Acts**

(1) **Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the *Gazette*.**

(2)………

(3) **If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly."**

A reading of the two sections reveals that a statutory instrument's commencement date is **"on the date specified in that behalf in the statutory instrument"** or if no date is so specified, **"it shall come into operation on the date of its publication in the Gazette."**

Counsel for the Applicant submitted that a statutory instrument can only come into force upon publication in the Kenya Gazette. In support of his argument he cited the decision of the Court of Appeal in **HASSAN JOHO & ANOTHER v SULEIMAN SAID SHAHBAL & 2 OTHERS, Malindi Civil Appeal No. 12 of 2013** in which the Court stated that:

> **"Clearly the gazette is the medium of communication between the government and its citizens. A declaration or notice as contained in the Gazette is to the whole world and gives notice to the general public. It can also be seen from the provisions of Section 60 of the Evidence Act, that the gazette has the full force of the law."**

Although the decision of the Court of Appeal was later overturned by the Supreme Court, I agree with counsel for the Applicant that the decision of the Court of Appeal remains good law as concerns the purpose of the Kenya Gazette.

The respondents and the 6th to 10th interested parties appear to take the view that there is a date specified in the exemption order to wit 17th October, 2013 and time started running from that date. In their view, six months had lapsed from that date by the time the Applicant sought and obtained leave on 28th April, 2014.

After going through the submissions of the parties I get the impression that they are all agreed that if the date of the exemption order is 17th October, 2013 then the application is time barred but if the date is 25th October, 2013 then the application was filed within six months. The decision of the Court will therefore be determined by its interpretation of **Section 23 of the Statutory Instruments Act, 2013** and **Section 9 of the Interpretation and General Provisions Act, Cap 2.**

The date of publication of a statutory instrument in the Kenya Gazette is simple and clear. It is the date the Kenya Gazette or supplement is issued. In this case it is 25th October, 2013. The date that calls for closer scrutiny is **"the date specified in that behalf in the statutory instrument."**

In the case before me, the exemption order is dated 17th October, 2013. Is this the date envisaged by **Section 23(1) of the Statutory Instruments Act, 2013** as the date for the commencement of the exemption order? I do not think so.

In the first place the 2nd Respondent does not categorically state that "with effect from 17th October, 2013" the CWSK is exempted from certain sub-sections of **Section 177 of the Act.** In my view the exemption order has no commencement date and the only commencement date is 25th October, 2013 when it was published in the Kenya Gazette. 17th October, 2013 is the date the Cabinet Secretary made

the decision and appended his signature to the exemption order. It is not the commencement date of the exemption order.

I may be wrong in my conclusion that the date of the exemption order is 25th October, 2013 and not 17th October, 2013. I will therefore explore my second reason for holding that the commencement date is 25th October, 2013. This finding is based on common sense. There is no evidence that the 2nd Respondent notified the Applicant and the other adoption societies about his decision to exempt the CWSK from the provisions of **Section 177 of the Act.** The Applicant can only be deemed to have had knowledge of the exemption order on 25th October, 2013 when it was published in the Kenya Gazette. Time started running from that date.

The basis for this reasoning is that even Parliament was aware that knowledge of a statutory instrument can only be gained through the Kenya Gazette and that is why it specified that no criminal liability would arise where a statutory instrument has not been published in the Kenya Gazette even where the statutory instrument provides a commencement date which precedes the date of publication in the Kenya Gazette.

For the reasons stated above I conclude that although the application before this Court was not filed promptly the same was nevertheless filed within the statutory period. The argument that the application is time barred therefore fails.

Before proceeding to make determinations on the remaining issues, I must state that this is one case in which the 1st to 5th interested parties ran off with the Applicant's application. They canvassed some issues which the Applicant did not raise. The danger arising from such a situation is that the Applicant's case may be submerged in the deluge of the issues raised by the interested parties.

It will not cost anything to once again remind ourselves that judicial review remedies are only available within stringent rules. Any party opting for judicial review should be prepared to operate within the provisions of **sections 8 and 9 of the Law Reform Act, Cap 26 and Order 53 of the CPR.** The respondents and any interested parties invited to the playing field through a judicial review application should also play within the same rules.

In judicial review applications, the grounds and relief set out in the statutory statement are the ones to be relied upon by an applicant at the hearing of the application. In that regard **Order 53 Rule 4 (1) CPR** provides that:

> **"Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."**

By virtue of the said rule, the hearing should be confined to the contents of the application and replies thereto. I do not think that interested parties who are not the core parties to the proceedings can be allowed to introduce new issues. Allowing interested parties to introduce new issues will side-track an applicant's case. It should always be remembered that a judicial review application belongs to the applicant and even interested parties who support an applicant's case should not be seen to be propping the applicant's case. They only come in as supporting actors and where an applicant has presented a weak case, no amount of panel beating by the interested parties will aid such a case.

I have identified one issue that was brought up by the 1st to 5th interested parties either through their replies or submissions. The issue is that the exemption order which is the subject of these proceedings was not tabled before Parliament for ratification as required by **Section 11 of the Statutory Instruments Act, 2013.**

Although counsel for the CWSK responded to this issue, by way of submissions, I do not see any of the

parties having raised the issue in their pleadings. Whether the exemption order was tabled or not tabled before Parliament is an issue of fact. Once it was not addressed through pleadings, then the same could not be addressed through submissions. Submissions are not pleadings-see the decision of the Court of Appeal in **CMC MOTORS LTD & ANOTHER v EVANS KAGECHE BORO Civil Appeal No 295 of 2001**. With respect to the learned counsel, I decline to address this particular issue.

There is another matter that I need to get out of the way before proceeding to tackle the other identified issues. In reply to the application, the respondents indicated that the CWSK had filed an appeal against the decision of the Adoption Committee and the said appeal had been allowed by the 2nd Respondent.

Arguments were made on this issue and it is not necessary to reproduce them. Two sections of **the Act** are pertinent. One of them is **Section 177 (6)** which states:

> **"An appeal against the decision of the Adoption Committee in refusing or cancelling the registration of an adoption society shall be made in the prescribed manner to the Minister whose decision upon the hearing and determination of the appeal shall be final."**

The other section which provides for appeals to the Minister (read Cabinet Secretary) is **Section 195** and it states:

> **"(1) A person aggrieved by any act of the Director or an authorised officer in exercise of powers conferred by this Act may appeal to the Minister within fourteen days.**
>
> **(2) An appeal under subsection (1) shall be made in the prescribed manner.**
>
> **(3) The Minister shall make regulations prescribing the procedure of appeal under this section."**

In the case at hand the decision to defer the CWSK's application for renewal of its registration was the decision of the Adoption Committee. The applicable Section is therefore **177 (6).** No appeal under **Section 195** could have been made in respect of a decision of the Adoption Committee.

Section 177(6) is limited to a decision of the Adoption Committee **"refusing or cancelling registration of an adoption society."** In the case at hand a decision to refuse or cancel the registration of the CWSK had not been made. The CWSK had been told to go and fulfil certain requirements. Whether the CWSK was in a position to fulfil these requirements is a different matter altogether.

Once the CWSK was asked to meet certain requirements, it ought to have gone back to the Adoption Committee having met the requirements or with an explanation as to why the conditions could not be met. At that point the Adoption Committee would have made a decision as to whether to renew the registration or to cancel it. The purported appeal to the 2nd Respondent was therefore premature as the kind of decision envisaged by **Section 177 (6)** had not been made. In essence no decision had been made which could have attracted an appeal.

However, it is important to remind the Adoption Committee that its duty is to facilitate the operations of adoption societies and not to cause obstruction. Where an adoption society is faced with challenges, the Adoption Committee should provide guidance so as to assist the society in overcoming the difficulties.

The 2nd Respondent allowed an appeal in a situation in which there was no decision to be appealed. Although the issue of the appeal was not taken up by the Applicant, the respondents preferred it as a defence to the actions of the 2nd Respondent. It cannot, however, form the basis of allowing the application since the Applicant did not cite it as one of the grounds in support of its application.

The second issue identified for the determination of this Court is whether the 2nd Respondent had power to exempt the CWSK. It was argued by the Applicant and its supporters that the 2nd Respondent had no

power to exempt the CWSK on the ground that it did not fall under the class of persons contemplated by **Section 198 of the Act.**

The Applicant's take on this issue is that the *ejusdem generis* rule is the tool to be used in interpreting **Section 198.** The Applicant submits that if this rule is applied the CWSK will be excluded from the persons who can benefit from an exemption.

In arguing that the 2nd Respondent had power to exempt the CWSK, the respondents stated that apart from the power to exempt members of a race, tribe, religious group or sect or a section of any of the groups from the provisions of the **Act,** the 2nd Respondent is also granted power to exempt any other person from the provisions of the **Act.** This is on condition that the Cabinet Secretary considers it impracticable or inexpedient to apply the provisions of the **Act** to such person.

On this issue, the CWSK's counsel argued that **Section 198** is not restricted to members or part of the members of a race, tribe, religion or sect. He submitted that the section covers everybody including adoption societies. He argued that the use of the word "or" before the words "to whom" is meant to express an alternative to the words already stated thereby creating an entirely new class or category. According to him, the scope of the words "or to whom" which are preceded by a comma is very wide as to cover anyone whom the Cabinet Secretary has certified as deserving of an exemption. He argued that the intention of Parliament in including **Section 198** in the **Act** was to give the Cabinet Secretary the necessary leeway to allow him/her to ensure that the application of various provisions of the **Act,** when the need arose, did not jeopardize the best interests of the child. Counsel for the CWSK submitted that this provision was not unique to the **Act** as similar powers of exemption are granted to other cabinet secretaries under various laws.

Section 198 of the Act provides:

> **"198. The Minister may, from time to time, by order, either retrospectively from the passing of this Act or prospectively, exclude from the operation of all or any of the provisions of this Act the members of any race, tribe, religious group or sect in Kenya, or any part of such race, tribe, religious group or sect, or to whom the Minister may consider it impracticable or inexpedient to apply such provisions, and may also from time to time revoke any such order, but not so that the revocation shall have any retrospective effect."**

If one is to apply the *ejusdem generis* rule to this section, it would mean that only members of a race, tribe, religious group or sect can benefit from exemption. With such an interpretation the CWSK by whatever elastic description cannot benefit from any exemption. The Court therefore needs to determine whether the *ejusdem generis* rule is applicable when one is interpreting **Section 198.**

What does the *ejusdem generis* rule entail? *Ejusdem generis* is the Latin words for "of the same kind." It is a tool used to interpret written statutes so that where a law gives specific classes of persons or things and then refers to them in general the general statements only apply to the same kind of persons or things specifically stated.

The 9th Edition of **BLACK'S LAW DICTIONARY** at page 594 defines and expounds the rule thus:

> **"A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. ?For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals,* the general language *or any other farm animals* – despite its seeming breath – would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chicken."**

The Applicant's case is that the Section should only be interpreted in a manner which does not allow any person not falling in the class of a particular race, tribe, religious group or sect to benefit from an

exemption.

The respondents argue that three distinct groups have been created by the Section. The first group is a race, tribe, religious group or sect in its entirety. The second group is part of a race, tribe, religious group or sect. The third group opens up the benefit of exemption to any other person whom the Cabinet Secretary considers it impracticable or inexpedient to apply all or given provisions of the **Act.**

Having carefully looked at the way **Section 198** is crafted, I am convinced that the interpretation suggested by the respondents is the correct interpretation. If Parliament had no intention of opening the benefit of exemption to other persons outside the classes of race, tribe, religious group or sect, then nothing would have been easier than for Parliament to state in respect of the third group thus: "or any member of the said groups." In using the terms "to whom", Parliament opened up the exemption benefit to all legal persons. There is only one condition which applies to the three categories; the Cabinet Secretary must satisfy himself/herself that it is impracticable or inexpedient to apply the provisions of the **Act** to the beneficiary of the exemption. That is to say that when the Cabinet Secretary decides to grant an exemption to a race, tribe, religion or sect or part thereof, he/she must be satisfied that it is inexpedient or impracticable to apply the provisions of the **Act** to the beneficiary of the exemption. The same condition applies to any other legal person who may benefit from the exemption.

What amounts to impracticable or inexpedient is left to the Cabinet Secretary's good judgement. It was argued by those in support of the application that since the CWSK had in the past complied with application for renewal of its registration, then there was nothing that made it impracticable or inexpedient for it to apply for renewal of its registration at the time it was given exemption.

On the part of those opposed to the application, it was submitted that the conditions that the CWSK was asked to meet had made it impracticable or inexpedient for it to successfully apply for renewal of its registration.

My view is that the fact that an adoption society has previously successfully renewed its licence does not mean that a situation will not arise which will make it impracticable or inexpedient for such a society to comply with the requirements for renewal of registration.

The decision as to whether it is impracticable or inexpedient to comply with a certain provision of the **Act** should be left to the Cabinet Secretary otherwise the power of exemption granted to him/her will not serve any purpose. Public administrators should be given the leeway to exercise their lawful powers and the courts should not be seen to be breathing down the neck of the executive. The courts should be cautious in exercising its supervisory power so as to avoid causing paralysis in the operations of the Government.

This does not mean that the Court should entirely abdicate its supervisory jurisdiction. As we say in this part of the world, power can sometimes go into the head. This, sometimes, results in abuse of power and this must be checked.

The third and final substantive question is whether the 2nd Respondent exercised his discretion properly and lawfully. Under what circumstances can a court, in its supervisory jurisdiction, intervene with the exercise of discretion? G. V. Odunga, J correctly answered this question in **REPUBLIC v CHIEF MAGISTRATE'S COURT & 2 OTHERS EX-PARTE SAFARICOM LIMITED, Nairobi High Court, Misc. Civil Application No. 299 of 2012** when he stated:

> **"When then do courts of law interfere with exercise of discretion? The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8)**

> **where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

In the case of **REPUBLIC v MINISTER OF HOME AFFAIRS & 2 OTHERS EX-PARTE LEONARD SITAMZE [2008] eKLR** it was noted that the Court can intervene with discretion "**where the decision maker acts in a manner to frustrate the purpose of the Act donating the power."**

This principle was clearly propounded by Lord Reid in **PADFIELD v MINISTER OF AGRICULTURE, FISHERIES & FOOD [1968] AC 997, 1030 B.D.** when he opined that:

> **"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court."**

The Applicant's contention is that the Cabinet Secretary abused his discretion. It is not enough for an Applicant to state that the Cabinet Secretary abused his powers. The Applicant must demonstrate that there was indeed abuse of power. Has the Applicant demonstrated this?

The starting point is to understand the role of the Adoption Committee in the adoption process. What is this creature known as the Adoption Committee? The Adoption Committee is established by the Cabinet Secretary under powers donated by **Section 155(1) of the Act.** According to the **9th Schedule of the Act** the members of the Adoption Committee are:

> **"MEMBERS OF THE ADOPTION COMMITTEE**
>
> **(a) The Director.**
>
> **(b) Four representatives from charitable children's institutions and organizations engaged in child welfare activities, appointed by the Minister.**
>
> **(c) One representative from Kenyatta National Hospital.**
>
> **(d) One representative from private hospitals dealing primarily with children, appointed by the Kenya Medical Association.**
>
> **(e) One representative of the Law Society of Kenya knowledgeable in the rights and welfare of children.**
>
> **(f) A representative of the Ministry of Foreign Affairs.**
>
> **(g) The Attorney-General."**

The functions of the Adoption Committee as per **Section 155 (2)** are:

> **"The functions of the Committee shall be—**
>
> **(a) formulating the governing policy in matters of adoption;**
>
> **(b) effecting liaison between adoption societies, the Government and Non-Governmental Organisations;**
>
> **(c) considering and proposing names of officers who may serve as guardians ad litem;**
>
> **(d) monitoring adoption activities in the country; and**

(e) such other functions as are conferred on the Committee by this Act."

In order to facilitate adoption, adoption societies have been created by the **Act.** An adoption society must comply with the provisions of **Section 177 of the Act** in order to legally operate. **Section 177** also provides for registration of and functions of adoption societies. It also creates offences relating to operating as an adoption society without compliance with the rules.

In order to facilitate adoptions, **the Regulations** were promulgated by the Cabinet Secretary. A full part of **the Act,** namely **Part XII** is committed to matters of adoption. It is clear from this that Parliament did not take the issue of adoption lightly.

Internationally we have **the Convention. Article 6** provides that a Contracting State shall designate a Central Authority to discharge the duties which are imposed by **the Convention** upon such states. The Central Authority, the Applicant has submitted, and correctly so, is the Adoption Committee. It has been given a key role of managing inter-country adoptions.

The Convention also provides for accreditation of bodies to facilitate the adoption process. In our case the accredited bodies are the adoption societies.

By dint of **Article 11** of the **Convention:**

"An accredited body shall-

a. **pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the state of accreditation;**
b. **be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of inter-country adoption; and**
c. **be subject to supervision by competent authorities of that state as to its composition, operation and financial situation."**

In the preamble of **the Convention** it is stated, *inter alia:*

"The States signatory to the present Convention,

....

Convinced of the necessity to take measures to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

......."

The Convention therefore dovetails with **Article 53(2) of the Kenyan Constitution** that the "**child's best interests are of paramount importance in every matter concerning the child."**

Even though **the Act** was passed in 2001 almost a decade before the promulgation of the **Kenyan Constitution, 2010,** it put forth the rights of the child by providing in **Section 4** that:

"4. Survival and best interests of the child

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for

the welfare of the child and in the public interest.

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.'

I have made all the above statements in order to demonstrate that the adoption process needs close supervision as it is likely to be subjected to abuse if not checked. In this country, Parliament gave the supervisory role to the Adoption Committee.

The only way the Adoption Committee can successfully supervise adoption societies is through registration and renewal of registration. In the case before me, the exercise of discretion by the 2nd Respondent has resulted in distorting the purpose for which **the Act** was enacted. If the decision of the Minister is allowed to remain in force it will mean that the CWSK will operate outside the radar of the law and beyond the reach of the Adoption Committee. That would defeat one of the purposes, to wit regulation of adoptions, for which **the Act** was enacted. In exercising powers granted under the law, a public officer must ensure that the powers are exercised so as to promote the objectives of the law and fulfil the intentions of the lawmaker. In the case before me it is clear that Parliament desired to have close supervision of the adoption process. The responsibility of ensuring compliance with the rules governing adoption was given to the Adoption Committee. Any attempt to remove any adoption society from the superintendence of the Adoption Committee will end up defeating the intentions of the legislature.

The 2nd Respondent appears to have belatedly realised this fact and that is why he averred in paragraph 16 of his affidavit sworn on 20th May, 2014 that:

> **"16. THAT as an Adoption Society, the Child Welfare Society is neither exempted from registration and supervision by the Adoption Committee nor does it exempt the Society from application for the provisions regarding quality assurance by the National Council for Children's Services under section 32 but exemption is limited only to procedural matters regarding registration."**

Sometimes, some powers are better left unexercised. The exercise of power by the 2nd Respondent has even befuddled his mind. He does not even know the effect and extent of the exemption order.

Much was said about the good work and reputation of the CWSK. The CWSK stated that the President of the Republic of Kenya His Excellency Hon. Uhuru Kenyatta who is its patron will ensure that it complies with the law. Aspersions were made about the motives of the Applicant and the 1st to 5th interested parties. It was alleged that the CWSK is the only national adoption society and is now a state corporation. All these, do not amount to much. The basic fact is that the CWSK is in the adoption arena and there is need for it to be supervised. It may find difficulty in meeting some of the registration conditions imposed by **the Regulations** but that is a matter to be addressed by the Adoption Committee and where the Adoption Committee becomes obstinate then the Cabinet Secretary can always step in and exempt the CWSK from meeting particular conditions before being registered. The Cabinet Secretary

cannot, however, purport to remove any adoption society from the supervision of the Adoption Committee. He/she cannot purport to grant a blanket exemption from the provisions of **Section 177** of the **Act** and **the Regulations.**

What I am saying is that the exercise of power by the 2nd Respondent was improper. I only need to add that the same was exercised in bad faith. That is why the Cabinet Secretary allowed an appeal where there was no decision to appeal. He also went ahead and disbanded the Adoption Committee after it presumably stuck to its guns. Those actions confirm the Applicant's allegation that the discretion was exercised in bad faith. Something done in bad faith is an abuse of power. Abuse of power is often remedied by issuance of judicial review orders.

In conclusion, I find that the application before this Court succeeds and an order of certiorari will issue to quash the **Children (Exemption Order) 2013** contained in **Legal Notice No. 206 of 25th October, 2013.** Having issued an order of certiorari, I find the issuance of an order of prohibition a superfluous act. Therefore, an order of prohibition will not issue.

Good things have been said about the CWSK. Its good work in the adoption field cannot be overlooked or ignored. In order to give it time to come back to the fold by seeking renewal of its registration, I will suspend the order of certiorari for a period of three months from the date of this judgment.

On the issue of costs, I find that these proceedings were indeed necessary for the enforcement of law and order. It is assumed that the Applicant brought the application in good faith. This being a public interest litigation, I find that the appropriate order is to ask each party to meet own costs and it is so ordered.

Dated, signed and delivered at Nairobi this 25th day of September , 2014

W. KORIR,

JUDGE OF THE HIGH COURT