REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Case 1731 of 2004

REPUBLIC…….……
APPLICANT

V E R S U S

THE NON-GOVERNMENTAL ORGANISATIONS COORDINATION BOARD……..…..
RESPONDENT

EX-PARTE

THE NORWEGIAN PEOPLE'S AID……..…..……
APPLICANT

AND

INTEGRATED PROGRAMME FOR HEALTH AND DEVELOPMENT……...
INTERESTED PARTY

R U L I N G

By a Notice of Motion dated 10-01-2005 and filed on 13-01-2005 the Applicant sought the following Orders:-

(1) *an order for Certiorari to remove into this court and quash the judgement of the Regulatory Committee of the National Council of Non-Governmental Organizations in Complaint No. REG/34/93/CI/97, Integrated Programme for Health and Development -Vs- Norwegian Peoples Aid,*

(2) *An Order of Prohibition to restrain the*

Regulatory Committee of the National Council of Non-governmental Organisations from further hearing the Complaint filed with it being Complaint No. REG/34/93/C1/97, Integrated Programme for Health and Development –Vs- Norwegian Peoples Aid, and making further adverse orders against the Applicant;

(3) *Costs of the Application;*

The Application was based upon the statutory statement, the Affidavit Verifying the facts and the following grounds:-

(1) The Regulatory Committee of the National Council of Non-Governmental Organisations on 12-08-2004 delivered a judgement ordering the Applicant herein to pay to the Integrated Programme for Health and Development (the Interested Party) the sum of US $ 27,596=00 as special damages with interest at the rate of 12% p.a from the date of the complaint was filed until payment in full.

(2) The Regulatory Committee also ordered the Applicant to pay to Integrated Programme for Health and Development its costs of the complaint to be taxed by the Regulatory Committee ;

(3) The Regulatory Committee had also threatened to make further punitive orders against the Applicant;

(4) The Regulatory Committee has no power to do either of the above acts under the Non-Governmental Organisations Co-ordination Act.

(5) The Judgement of the Regulatory Committee is by members who did not hear the complaint and the judgement was delivered after a lapse of two years. This was therefore unfair, unjust and inequitable as far as the Applicant was concerned.

By way of elaboration of the above ground, the Applicant also contends in the statement part C that:-

(a) the judgement by the Regulatory Committee delivered on 12-08-2004 was wrong, improper and goes beyond the jurisdiction of the Regulatory Committee (paragraph 1)

(b) *The Regulatory Committee has no jurisdiction to -*

(i) write a judgement

(ii) Order that the Applicant pay the First Interested Party US$27,596=00 or any sum whatsoever,

(iii) Order that the Applicant pay to the First Interested party interest on (ii) above at the rate of 12% p.a or at any rate of interest whatsoever,

(iv) Order the Applicant pay the First Interested Party costs of the Complaint,

To the Affidavit of Charles Amimo Aloo sworn on 15-12-2004, the Interested Party's Director, Joseph Kwaka filed on 19-05-2005, a Replying Affidavit sworn on 18-05-2005 in which said Deponent contends *inter alia* that:-

(a) the Applicant failed in its duty of good faith to disclose to the Court that it has the remedy of appeal available to it and neglecting to justify the necessity of the instant proceedings;

(b) having delivered its judgement in the matter, the Regulatory Committee of the National Council of NGO's has no further proceedings to undertake and is <u>functus</u> <u>officio</u> as all proceedings in the matter are now before the General Assembly for the hearing of the Appeal;

(c) *The Applicant is engaged in unwarranted gamble with the judicial process by appealing and also lodging an appeal before the General Assembly of the NGO.*

(d) The Application is fatally defective for being a challenge to the subject decision on its merits;

(e) the Applicant acquiesced in, and did not object to the jurisdiction of the Regulatory Committee;

(f) the Applicant's application is therefore Vexatious, frivolous, have no grounds, is an abuse of the process of the Court and solely intended to delay justice in this matter.

To these contentions, the Applicant's Regional Human Resource and Administrative Manager, Mr Charles Amimo Aloo swore a further Affidavit on 27-05-2005, and had it filed on 31-05-2005. The essence of this further Affidavit was that:-

(i) despite constant enquiries as to when the NGO General Assembly would meet to consider the Applicant's appeal, the said Assembly would meet on 14-04-2005, and more importantly;

(ii) the General Assembly was to draw up concise Rules for the process of appeals, and

(iii) *to say that the Applicant could not wait for the*

process of appeal, as Section 9 (3) of the Law Reform Act requires that an application for judicial review be filed within six (6) months of the date of the decision/order being challenged;

and

(iv) reiterated that the Regulatory Committee of the National Council of NGO's had acted ultra vires the NGO Act;

Counsel for the applicant Mr. Gitonga and Mr. Kaluma for the Interested Party relied upon their respective pleadings as set out above. For the Applicant, Mr. Gitonga urged the Court to find that:-

(a) the Regulatory Committee has no power to enter a judgement or to award special damages, interest and costs, more so in the case of special damages, as no prayer was sought in the complaint by the Interested Party;

(b) the jurisdiction which the Committee enjoys is donated to it under Regulation 20 (4) of the NGO's Code of Conduct is restricted either to:-

(i) admonish the Defendant,

(ii) recommend to the General Assembly of the NGO Council the Organisation's Certificate of Registration be either cancelled or suspended under Section 16 of the NGO's Act,

(c) the decision of the Regulatory Committee was therefore Ultra Vires the NGO's Act and should be recalled to and quashed by this Court,

(d) that having written a judgement which is Ultra Vires, the Committee be prohibited from further proceedings herein for in so doing the Committee would be perpetuating its Ultra Vires without regard to the law or acting outside its authority ; And so also with regard to the order for costs,

(e) the Regulatory Committee's work was not functus, the last part of its purported judgement required the Applicant to observe the orders in the judgement, it retains the power to punish the Applicant;

(f) the Applicant had made disclosure of the fact of its appeal to the General Assembly.

For all these arguments, the Applicant relied upon the following cases:-

(i) <u>MURIUKI KIMONDO –VS- MAINA</u> [1977] K.L.R. 120, *at page 122 that "where upon the face of the proceedings themselves, it appears that the determination of the inferior court or tribunal is wrong in law, Certiorari to quash will be granted….."*

(2) <u>KENYA NATIONAL EXAMINATIONS COUNCIL –VS-</u> <u>REPUBLIC, EX-PARTE</u> Geoffrey Gathenji Njoroge & 9 Others, where the Court of Appeal, discussing the conditions under which the orders of Certiorari, prohibition and mandamus will issue – observed at page 16 – that <u>Certiorari</u> can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of

jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

And for an order of Prohibition, it will not issue, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against a decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. The Applicant's case here is the contemplated further punishment unless the Applicant obeys the order for payment of the Judgment of US$27,756=00, interest and costs.

For Mr. Kaluma, for the Interested Party submitted that the whole application was vexatious, frivolous, and a complete abuse of the court process. The Applicant had failed to disclose the fact that it had appealed to the NGO's General Assembly against the decision of the Regulatory Committee of the NGO Council's decision aforesaid, the Applicant was engaged in unwarranted gamble with the judicial process, that the Regulatory Committee acted within its powers, and within the law in making the decision in question, the Applicant admitted and acquiesced to the jurisdiction of the Committee, the delays in determination of the complaint was caused by the Applicant's tactics of changing its Advocates from time to time.

Mr. Kaluma also attacked the application on technical grounds, including:-

(a) the application is fundamentally incompetent because as drawn, it lacks a statement, within the contemplation of Order LIII, Rule 1 (2) which requires that the Statement be confined to three matters:-

(i) the name and description of the Applicant,

(ii) the relief sought,

(iii) the grounds upon which it is sought and affidavits verifying the facts relied on.

Mr. Kaluma submitted that although there is a Statement of Facts, that document does not pass for a Statement within the prescription of Order LIII Rule 1 (2) aforesaid in consequence therefore there is no statement as is required by the said rule, and that therefore it renders the whole application irredeemably incompetent and not meriting the Court's consideration on substance.

Counsel relied upon the cases of the *COMMISSIONER GENERAL KRA Through REPUBLIC –VS- SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION (Civil Appeal No. 45 of 2000)* that it is the Affidavit, and not the statement which is of evidential value in judicial review.

And also in *PAUL IMISON –VS- ATTORNEY GENERAL* and 4 Others H.C. Misc. Application No. 1604 of 2003), a decision of my brother Hon. Nyamu J. that a statement should confine itself to:-

(i) the name and description of the applicant,

(ii) the relief sought,

(iii) the grounds on which the relief is sought and the facts relied on the Verifying Affidavit not in the statement.

Mr. Kaluma's second technical point was that the application as drawn though seeking orders against the Regulatory Committee of the NGO, the Applicant has not joined the Committee in this Application.

Counsel submitted that in seeking judicial review orders the target is the party making the decision being challenged, the party engaging in the actions sought to be judicially reviewed. The Committee having been established under Regulation 15 of the Non-Governmental Organisation's Council Code of Conduct, 1995 (L.N. No. 306) (hereinafter referred to as the "Code") is not a body corporate, but it consists of designated persons. Those persons in terms of the decision making process under attack ought

to have been enjoined as parties to these proceedings.

Counsel therefore submitted that it is erroneous and inappropriate to challenge the decision of the Regulatory Committee by seeking orders against the NGO Board which consists of various other committees both prescribed in law and others created by the Board for expediency purposes.

Further, Counsel submitted that the manner, in which the application is drawn, and the title thereto affects the application in a fundamental way. In the case of JOTHAM MULATI WELAMONDI –VS- CHAIRMAN ELECTORAL COMMISSION OF KENYA (H.C. Misc Application No. 81 of 2002) the court stated that judicial review orders are issued in the name of the Crown prior to Kenya's independence, and applications for such orders must consequently be correctly entitled. On Kenya's assumption of Republican status on 12th December, 1964, the Crown was replaced by the Republic. So orders of Certiorari, Mandamus or Prohibition now issue in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the actions or omissions in issue.

This application is not properly entitled and according to the decision in the Wellamondi case it ought not stand. Their application for leave having been sought in the *Matter of the Applicant NORWIGIAN PEOPLES AID*, rather than in the name of the Republic as Applicant Vs *NON-GOVERNMENTAL ORGANISATIONS COUNCIL.*

In conclusion, Counsel submitted on the basis of these technical objections alone, that the application ought not stand; and should be struck out.

Besides these technical challenges, the Respondent also attacked the application on the grounds that the Applicant had challenged the decision of the Committee on its merits

whereas the concern of the judicial review court is the legality of the decision impugned and not the merits of those decisions, that the power to impugn decisions of the inferior tribunals rests with the appellate courts. Provided the body is exercising its powers within the limits of its jurisdiction whether right or wrong, such decisions are not open to challenge. Counsel relied on the case of *ANISMINIC LTD –VS- FOREIGN COMPENSATION COMMISSION & ANOTHER [1969] 2 A.C. 147*, discussing the powers of Tribunals, Lord Reid said at page 171, paragraph C E said:-

"*It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "Jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question but there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature, that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have in good faith thus construed the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. I do not intend the list to be exhaustive. BUT if it does decide a question remitted to it for decision without committing any of these errors, it is as much entitled to decide that question wrongly as it is to decide rightly."*

Mr. Kaluma also raised objection to the applications on the grounds of alternative remedy of appeal as opposed to judicial review, that in administrative law, a committee of members of a committee can hear a matter, but the decision becomes that of the whole committee *ARLIDGE –VS- LOCAL GOVERNMENT BOARD.*

I will consider all these points in my following analyses of the arguments of the opposing parties. The starting point is perhaps whether the application herein has been brought in a manner contemplated by the provisions of the Law Reform Act, (*Cap 26, Laws of Kenya*) Sections 8 and 9) and Order LIII, Rule 1 (2) of the Civil Procedure Rules.

It is accepted that the up to the 18th December, 1956 when prerogative orders were abolished, by the coming into force of the Law Reform Act, (*Cap 26*), all applications for those orders came in the name of the "*Crown*". They still do so in England as there is Queen (*meaning the Crown*) though even there the orders are not since 1938, called "*prerogative orders*" when the Administration of Justice Act, was enacted and abolished the prerogative orders and referred to them as "*judicial review*" orders because they are granted by the High Court and not the Crown. In Kenya the applications for judicial review are brought in the name of the Republic because it is the ***Republic*** which is challenging and righting the decisions of its officers or agencies, in the interest of the aggrieved applicants who come to the High Court ex-parte (*alone at first*) and ensuring that the affected parties (Interested Parties) are enjoined.

Unfortunately there is no form drawn for such applications unlike in ordinary civil actions under the Civil Procedure Rules, which have large number of forms in the Addenda to the Civil Procedure Rules. So when an applicant misses slightly the form of these judicial review applications the Court should not come hard on the applicant by striking out the application as was done in the Jotham Mulati Welamondi – vs- Chairman Electoral Commission case *(supra)* The point made by Mr. Kaluma following Welamondi decision of my brother Ringera J. (*as he then was)* that the application was not drawn and brought in the name of the Republic only applies to the Chamber Summons dated 15th December, 2004 where reference to the Republic was omitted. Leave having however, been given, to bring judicial review proceedings, that point of the Interested Party's argument is now stale and of no consequence.

I do however observe that in the subsequent substantive application, Notice of Motion, the ***Republic*** is introduced as the Applicant. There is still however reference to "*In the matter of an Application for Judicial Review,"* and *In the Matter of NGO Act*." This is not the usual and common form But in the absence of a prescribed form *(and perhaps there should be one*), I am unable to say that it makes the application incompetent. It does not. It is not *calculated to mislead* either the parties or the court as is provided under Section 72 of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya – deviation from forms). I therefore reject Mr. Kaluma's argument on this point.

Mr. Kaluma raised other points upon which I wish to make a few observations. I have already dwelled on one namely the form of an application for judicial review.

The Applicants had their application in the form of a Petition like in Petitions under the Companies' Act, *In the matter of* , followed by Republic –Vs- AB ….. Respondent later joined interested parties. In the Jotham Welamondi –Vs- ECK Case Ringera J (*as he then was*) suggested a form devoid of words such as "*In the matter of."* Judicial Review is a new and developing area of law. I would suggest the following as a Practice Note.

"H.C. Misc. Application No……. 200 –

REPUBLIC …….. APPLICANT

V E R S U S

KENYA MATATU CORPORATION ……RESPONDENT

……. Interested Party

"Ex –Parte Kijana Matata"`

Closely connected with this issue, Mr. Kaluma also raised the issue as to who should be the proper respondent where a decision was made by a Committee established under an Act of Parliament, or pursuant to such law. According to Mr. Kaluma, the proper Respondent should be the Committee or members of that committee and not the body corporate on whose behalf the decision was made. Mr. Gitonga learned Counsel for the Applicant urged that the proper party or as it was in this case, was the body corporate on whose behalf the decision was made.

The proper response to both views really depends upon the nature of the Committee in question, not merely its composition, but rather its legal status. In institutional decision making many issues are determined by say a board, a committee of the board, or in the public service by ministerial committees, and ultimately the decision made is that of the board, or the department of government concerned. In such a situation the decision to be challenged is that not of the Board or the Department concerned but of the company (the legal entity), or the department or government or simply the government represented in judicial review by either the Minister if it was a Minister's decision, or the Permanent (Principal) Secretary if the decision was ministerial i.e of the ministry.

In this instance, Mr. Kaluma's attack was directed at the Applicant's contention that the Respondent was the Non-Governmental Organisations Co-ordination Board, (the legal entity), and not the Regulatory Committee which made the decision which was being challenged in these proceedings.

In the context of the provisions of the NGO Coordination Act, already referred to above, the proper Respondent was indeed the Regulatory Committee, because although not a body corporate, it is however a body established under regulations made pursuant to Section 24 of the enabling provision of the NGO Coordination Act. It has a membership and functions clearly established under the NGO Code of Conduct, already referred to above.

Mr. Kaluma contended that where the decision being challenged was made, not by the statutory body called the Non-Governmental Organisations Board (*the NGO Board*), but in fact by a statutory committee established pursuant to the enabling provisions of the NGO Coordination Act, the NGO Board was not a proper Respondent to the application for judicial review.

Although I agree with Mr. Kaluma's submission that strictly and technically speaking the Respondent in those proceedings ought not to be the NGO Board because the decision being challenged was not that of Board but rather of a Committee of the NGO Council, this is however a fine point which I think ought to have brought much earlier, and the Applicant could have responded to it by way of an amendment to the Notice of Motion. It does not now influence the decision made herein.

Allied to the issue of decision making Mr. Gitonga also raised the issue that the "*judgement"* arrived at by the Regulartory Committee was signed not by persons who heard the complaint, but rather by new persons who never heard the complaint, and that by that reason alone the "*judgement*" should be quashed.

Mr. Kaluma's answer, citing the case of *LOCAL GOVERNMENT BOARD –VS- ARLIDGE [1954] A.C. 121* that the "*judgment*" the subject of these proceedings was in order despite being signed by a person or persons who did not attend the hearing is not correct. That case is not at par with this case. In the *ARLIDGE* case the court was construing section 17 of the Housing Town Planning Act which authorizes and required a local authority to make *a closing order* in respect of any dwelling house in their District if it appears to them to be unfit for human habitation and to determine such order on being satisfied that each dwelling house has been rendered fit for human habitation and gave the owner of the dwelling house a right of appeal to the Local Government Board against the closing order and against the refusal to determine the same.

That case dealt with decision making at two levels. Firstly it is not necessary to identify the individual official in the Department who makes a decision in a given case; the Department concerned can deal with the matter in the usual manner in which it deals with any other administrative matter, Secondly one person can hold an inquiry or a hearing and another person can decide the matter. It is not necessary that the person who decides must himself have heard the person affected.

This process is essentially different from the judicial process in which the judge himself hears and decides; he is appointed to adjudicate upon disputes between parties and his decision is personal; he hears the evidence, watches the demeanour of witnesses, draws his won conclusions, and then decides. All materials which form the basis of the decisions are presented in open court so that every one knows them. There is one more point of difference between judicial and institutional decisions – the routine of departmental procedure, noting on the files etc. by various officials go on as usual before the final

decision later, and this may, to some extent even compromise the rule of natural justice that no material should be used against a person without giving him an opportunity to rebut the same. This is because much notings and views expressed on the file concerned as it moves from one official to another within the Department before it reaches the stage where the final decision is formally taken, may never come to the notice of the person affected.

So a decision taken by a department differs from the decision by a designated official, body or tribunal created exclusively for adjudication, for while in the latter case the discretion exercised and the view taken are that of the specified authority, in the former case, the decision is that of the department as a whole and represents the cumulative wisdom of a number of officials, and is in this sense institutional and not individual and can thus be signed by that final official according to the hierarchy and authority to take decisions.

Where a matter has been heard by the designated authority, a Committee lie in this case, only members of the Committee who heard the complaint could sign the final recommendations without the knowledge of the parties. Where persons who heard the complaint have been replaced, the proper procedure is for the Chief Executive Officer, to advise the parties of that fact, and secure a consensus on how to treat the evidence and information obtained. The new members cannot take upon themselves the duty of determining in effect, a matter they had not heard. A matter adjudicated between two contestants, does not call for an institutional decision but an adjudication by persons who heard the complaint. The fact that a decision called a ***judgment*** was taken and made by persons who never heard the complaint makes the decision itself untenable and incompetent and would for that reason alone be quashed. It is no defence to say that the Applicant acquiesced to the Committee's jurisdiction when the committee eventually made an unlawful decision.

I have gone into the substance of this Application and looked at and found that the real culprits in this matter is the Regulatory Committee whose illegal decision cannot be allowed to stand. The application might otherwise have been struck out as being incompetent for being directed at a wrong party-Respondent.

The other technical point raised by Mr. Kaluma that where an appeal procedure is provided for in the relevant proceedings giving rise to an application for judicial review, the aggrieved party should exhaust the appeal procedures before resorting to judicial review procedures.

I do not agree with this submission. Firstly, where there has been a case of excess or lack of jurisdiction, an appeal process would prolong and may legitimise by the delay, an illegal process or illegal orders. This case is one such example. Secondly Section 9 (3) of the Law Reform Act does contemplate a simultaneous process of appeal as well as judicial review. This provision donates to the judicial review court a discretion to stay the judicial review proceedings pending the outcome of the appeal in the matter in issue. In other words, an appeal or the existence of an appeal or an alternative remedy is no bar to judicial review.

The real and substantive issue herein is whether the Regulatory Committee of the Non-governmental Organisations Coordination Board had jurisdiction to hear and determine the complaint by the Interested Party against the Applicant. To determine this issue we need to look at the enabling legislation, namely the Non-Governmental Organisations Co-ordination Act, 1990 (No. 19 of 1990) and the relevant provisions for the purposes of this Ruling, namely Sections 23 and 24 of the said Act (*NGO Act).* We also need to look more importantly to the Non-Governmental Organisations Council Code of Conduct, 1995 (*L.N. No. 306).*

Section 23 of the NGO Act established the Kenya National Council of Voluntary Agencies, a collective forum for all the voluntary agencies registered under the Act. The said Council shall hereinafter be referred to as the "*NGO Council*."

Section 24 (1) of the NGO Act empowers the NGO Council to develop and adopt a Code of Conduct and such other regulations as may facilitate self-regulation by NGO's on matters of activities, funding

programmes, foreign affiliations, national security, the development of national manpower, institution building …. and such other matters as may be of national interest."

So by Legal Notice No. 306 of 1995, the NGO Council in exercise of the powers conferred upon it by the above-captioned Section 24 of the NGO Act, established the Non-Governmental Organisations Council Code of Conduct, 1995 *(the NGO Council Code of Conduct*). A committee called "*the Regulatory Committee"* was established by regulation 15 of the NGO Council Code of Conduct). The Regulation (15 (1)) provides both for the establishment, composition, and appointment of members. Regulation 16 provides for the meetings, and procedure of Committees. More importantly also, Regulation 17 of the said Code sets out the functions of the Regulatory Committee and for purposes of this Ruling Regulations 17 (e) and (f) and 20 are material:-

(e) compile reports for the General Assembly recommending cancellation or suspension of certificates of registration of organizations under Section 16 of the Act.

(f) Consider and determine any application, complaint or matter brought before it under this Code, the rules and Regulations or the Act.

The side note to Regulation 20 (procedure for dealing with complaints) captures the work of the Regulatory Committee in dealing with complaints. After dealing with the preliminaries as to giving of notice to organizations affected by the complaint, to be heard, and power to determine that a complaint does not *prima facie* disclose a breach of the Code, and therefore dismiss it, and unless a complaint is dismissed on that ground, (no prima facie case is disclosed), the Committee may refer the Complaint to the General Assembly, but otherwise, the complaint is heard in camera. Regulation 20 (4) and 7 set out the power of the Committee once it has heard a complaint. It says:-

(4) After hearing the complaint and the organization to whom it relates, if it wishes to be heard, and considering the evidence adduced, the committee may order that the complaint be dismissed or, if of the opinion that a breach of the Code on the part of the organization has been established the Committee may-

(a) order that the organization be admonished; or

(b) recommend to the Board that the certificate of registration of the organization be cancelled or suspended under Section 16 of the Act,

(5) - (6) relate to individuals who breach the code, and sanction against them as individuals, and therefore of no concern in this Ruling.

(6) On the termination of the hearing of a complaint, the Committee shall embody its findings and recommendations in the form of a report which shall be delivered to the Executive Committee, together with the record of evidence taken and the documents put in evidence.

Those are the relevant provisions of both the NGO Act, and the NGO Council Code of Conduct. What is puzzling is reference to an '*Executive Committee"* in the definitions to the NGO Code of Conduct Regulations, said to mean "*the Executive Committee of the Council established under the rules and Regulations"* and whose chairman is the chairman of the Regulatory Committee under Regulation 15 (1) (a), and to whom the Regulatory Committee delivers its report and findings and recommendations on the termination of the hearing of a complaint.

Under the rules of construction and interpretation of statutes and subsidiary legislation, this sub-regulation 7, would appear to suggest that the Regulatory Committee is not even required to exercise any of the powers of admonition, or recommend to the NGO Board the cancellation or suspension of registration of on NGO in breach of NGO Code of Conduct. It is perhaps the Executive Committee referred in regulation 20 (7) which is supposed to take that decision. But again, since the establishment of the Executive Committee appears to be in doubt, perhaps again operative power remains in Regulation 20

(4). In any event therefore the Regulatory Committee could not firstly write a judgement and make orders for payment of moneys when it does not have any such power in its own Regulations. Even the General Assembly of the NGO Council does not enjoy such power, either on appeal or of its own motion, under Regulation 22, where it may only impose a fine or recommend to the NGO Board that the certificate of the registration of the organization be suspended or cancelled.

It is important to observe that the Regulatory Committee had the jurisdiction to hear and determine the complaint of the Interested Party in terms of the NGO Council Code of Conduct. It had no power whatsoever to enter judgement with or without interest and costs to be taxed. That power is only reserved to the court. The Regulatory Committee is a minor tribunal, it is not even a subordinate court, and even if it were, there must be some law investing it with the power it purported to exercise. It did not have such power. It acted in excess of its authority. It acted ***ultra vires*** its enabling provisions. An order of ***Certiorari*** will issue where a tribunal by whatever name called, required to act according to law acts in excess of or outside such powers. The Committee did not merely decide wrongly, its decision is unlawful. It is contrary to law. There shall therefore issue, an order of certiorari that the "*judgement*" of the Regulatory Committee made on 12-08-2004 be brought into and quashed by this Court.

The Applicant also sought an order of Prohibition prohibiting the Regulatory Committee from further hearing the complaint in relation to the execution of the judgement purportedly entered against the Applicant.

An order of Prohibition will lie to prohibit the exercise of power or jurisdiction which a tribunal, a body or a committee does not have. From the analysis above the Regulatory Committee does not have any jurisdiction to enforce its so called judgement. The Applicant does also succeed on this leg of its application.

In summary therefore, while finding for the Applicant as stated in the foregoing passages of this Ruling, I would urge the NGO Board to urgently examine the provisions of the Non-Governmental Organizations Council Code of Conduct, 1995 (L.N. No. 306), and make appropriate provision for, firstly, the establishment of what it defines as the "Executive Committee" and referred to in Regulation 20 (7) of the Code of Conduct and say what the Committee is required to do with the findings, recommendations and record of the evidence of the Regulatory Committee. There is need to harmonise the powers of the Regulatory Committee under Regulation 20 (4), and what the Executive Committee is to do under Regulation 20 (7).

For those reasons, I grant the Applicant the orders sought as already stated above, and I direct that a copy of this Ruling be forwarded by Counsel for the Applicant to the NGO Board for information, and if found fit, to call a study to examine the regulations as observed above.

Considering the several lapses of law on the part of the Applicant, I direct that each party shall bear its own costs.

Dated and delivered at Nairobi this 10th day of July, 2006,

ANYARA EMUKULE

JUDGE.