



International Community of Women living with HIV registered trustees v Non-Governmental Organizations Co-ordination Board & 2 others; Otieno (Interested Party) (Petition 221 of 2018) [2023] KEHC 720 (KLR) (Constitutional and Human Rights) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 221 OF 2018
HI ONG'UDI, J
FEBRUARY 9, 2023**

BETWEEN

**INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV
REGISTERED TRUSTEES PETITIONER**

AND

**NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION BOARD 1ST
RESPONDENT**

NICHOLAS LINDON OTIENO 2ND RESPONDENT

**NATIONAL INDUSTRIAL CORPORATION (NIC) BANK LIMITED 3RD
RESPONDENT**

AND

TERESIA OTIENO INTERESTED PARTY

JUDGMENT

1. The petition dated 18th June 2018 was filed under Articles 19, 20,21, 22, 23, 24, 25, 258, 259 and 260 of the Constitution for the alleged contravention of the petitioner’s constitutional rights under Articles 10, 25, 36, 40, 47, 49 and 50 of the Constitution. Accordingly, the petitioner seeks the following orders:
 - a. A declaration that the adverse actions taken by the respondents in freezing the petitioner’s NIC Bank Accounts number: xxxxxxxxxx, xxxxxxxxxx, xxxxxxxxxx and xxxxxxxxxx and the purported directive for cancellation of work permit and deportation of the petitioner’s director are unconstitutional, null and void.



- b. A declaration that the 1st respondent acted ultra vires and in excess of its jurisdiction and/or statutory powers by purporting to direct other independent institutions on how to discharge their statutory mandate.
- c. A declaration that the 1st and 3rd respondents breached the petitioner's right to a fair administrative action by purporting to act based on undisclosed complaints and/or freezing the petitioner's bank accounts without any notice, court order and/or affording the petitioner a hearing.
- d. A declaration that the 2nd respondent acted illegally, arbitrarily and in contravention of Article 232(1)(a)(e) and Article 10 of the Constitution.
- e. An order do issue restraining the 2nd respondent from harassing and or contacting the directors, employees, sponsors, donors, agents and or servants of the petitioner through phone calls on his private or office phone number, sending emails to them through his private email addresses, or visiting the petitioner's offices and or the residences of the petitioner's directors, employees, sponsors, donors, servant and or agents and or disseminating disparaging information against the petitioner.
- f. A conservatory order be granted lifting the arbitrary freezing of the petitioner's bank accounts number xxxxxxxxxx, xxxxxxxxxx, xxxxxxxxxx and xxxxxxxxxxxx with the 3rd respondent.
- g. A conservatory order be granted prohibiting the 1st respondent, its servants agents and/ or employees from harassing, intimidating the petitioner and its employees, purporting to undertake inquiry , interrogation, investigations, seizing documents, freezing the petitioner's bank accounts, directing other independent institutions to cancel valid work permits of the petitioner's directors and/or deport the petitioner's global director, Ms. Rebecca Faith Matheson and/or direct deregistration of the petitioner as a trust, disseminating disparaging information against the petitioner herein or in any other manner interfering with the petitioner's operations.
- h. An order of this honourable court do issue quashing letters reference Nos. NGOB/218/051/15-003(14) addressed to the 3rd respondent and NGOB/218/051/15-003(15) addressed to the Registrar of Lands Ardhi House all dated 31st May 2018 and NGOB/218/051/15-003 dated 4th June 2018 addressed to the petitioner.
- i. An order do issue directed at the 1st respondent requiring it to consider the petitioner's application by the International Steering Committee of the International Community of Women Living with HIV to be de-registered as a non-governmental organization in accordance with Article 47 of the Constitution.
- j. The honourable Court be pleased to award the petitioner general damages against the 1st and 2nd respondent to be assessed by the Court for the unlawful freezing of the petitioner's bank account.
- k. Costs of this petition and interest.
- l. Any other further reliefs that this honourable court may deem fit and just to grant.

The Petitioner's Case

2. The petition was supported by Rebecca Faith Matheson, the global director's affidavit of even date. The crux of the petition revolves around the alleged illegal freezing of the petitioner's bank accounts.



Further the dual registration status of the petitioner as both a Trust under the Trustees (Perpetual Succession Act on 14th May 2016 on the one hand and a Non-Governmental Organization (NGO) on 16th August 2016.

3. It was deposed that since its inception the petitioner operated and was identified as a registered Trust which held three bank accounts under the 3rd respondent namely: Accounts No: xxxxxxxxxx, xxxxxxxxxx and xxxxxxxxxx. On or about 4th June 2018 it was made aware of the 1st respondent's email communication on its operation to its various donors such as UN Women, Robert Carr Network Fund and Ford Foundation. All this led to complaints from its donors on or about 6th June 2018 seeking an explanation on the said communication.
4. It was deposed that the 1st respondent vide a letter dated 4th June 2018 informed the petitioner that there had been a complaint of it engaging in regulatory mischief regarding its operations and its director's work permit. Further that the petitioner had changed addresses without informing it as required by the *Non-Governmental Organizations Co-Ordination Act* No. 19 of 1990. In view of this the 1st respondent made known that it would conduct an investigation on 12th June 2018.
5. Soon after receipt of this letter, the petitioner is said to have discovered on 7th June 2018 that its bank accounts under the 3rd respondent as listed above had been frozen without any prior notice to it. The freezing followed the 1st respondent's letter dated 31st May 2018 to the 3rd respondent Reference No. NGOB/218/051/15/- 003(15).
6. She further deposed that the 1st respondent also wrote to the director of citizens immigration department a letter dated 31st May 2018 Reference No. NGOB/218/051/15/- 003(14) directing that her work permit be cancelled as it had been irregularly acquired. Similarly, the 1st respondent through a letter Reference No. NGOB/218/051/15/- 003(15) of even date directed the Registrar of Lands to dissolve the registration of the petitioner. She averred that the petitioner was not given an opportunity to be heard on the said allegations which is unconstitutional.
7. It was further deposed that the interested party, who was a trustee of the petitioner had on or about May 2017 been expelled from the Trust pursuant to a grievance procedure. Following the dismissal she had indicated that she would bring the petitioner to its knees.
8. In view of these circumstances it is deposed that the petitioner through an agent applied to the 1st respondent to be deregistered as an NGO as it had never been active as such. The said application was rejected and the petitioner found that to be ultra vires, made in bad faith and a blatant abuse of power.

The 1st & 2nd Respondent's case

9. In response to the petition, the 1st and 2nd respondents filed their replying affidavit dated 22nd February 2022 sworn by Lindon Nicholas, 1st & 2nd respondents' and the 1st respondent's Legal Affairs Manager. It was deposed that the petitioner had initially been registered as a Trust under the Ministry of Lands but ceased to be a Trust upon registration as an NGO by virtue of Section 25 of the *NGO Act* as read together with Regulation 25(1) and (2).
10. He deposed that they wrote to the Registrar of Lands informing them of the petitioner's mischief of operating both as a Trust and an NGO. The Ministry in its response confirmed that the mandate of the *Trustees (Perpetual Succession) Act*, Cap 164 ceases to apply once a Trust is registered under any other legal regime. He deposed that the petitioner had continued to operate its bank accounts as a Trust without seeking authority of the 1st respondent to regularize the said accounts. This is by dint of Clause



10 of the Terms and Conditions of the NGO Certificate between it and the petitioner. Following this, the respondents sought to have the accounts frozen to preserve the funds which belong to the public.

11. Furthermore, he deposed that the 1st respondent continued to receive various complaints about the petitioner from its members. This prompted the communication dated 4th June 2018 which informed the petitioner of the intended site visit and investigation. It is noted that when the 1st respondent's investigations team arrived on site, the gateman informed them that the petitioner had moved offices. This was contrary to Regulation 20 of the *NGOs Co-ordination Regulations*, 1992 and Terms and Conditions which require that the 1st respondent be informed of changes of address.
12. In addition, they wrote to the Director of Citizens and Immigration Department notifying them on Rebecca Matherson's work permit status which had not complied with Regulation 28 of the *NGO Co-ordination Regulations*, 1992. He deposed that the 1st respondent's actions had been within the purview of its mandate and authority under the law, and *Constitution*.

The 3rd Respondent's case

13. The 3rd respondent's reply to the petition dated 18th July 2019 was not in the Court file, and was not availed on request.

The Interested Party's case

14. The interested party filed a replying affidavit dated 26th June 2019 where she averred that she was one of the founding directors of the petitioner. Moreover that contrary to the allegation in the petition she had resigned as a Board Member of the International Community of Women International Steering Committee in 2017 from the Trust and not dismissed, as alleged. She averred that she remained as a Trustee/Director of the petitioner and one of its bank signatories.
15. She deposed that the petitioner is a registered NGO under the *Non-Governmental Organization Co-ordination Act*, not a Trust. She stated that the resolution to convert the petitioner from an NGO was passed on 27th May 2018, but was rejected by the 1st respondent for being a sham, for two reasons. First was Regulation 25 of the *Non-Governmental Organizations Co-ordination Regulations*, 1992, secondly the list of persons purporting to pass the resolution were not those listed and registered with the 1st respondent.
16. She deposed that as one of the bank signatories and vide an email dated 6th June 2018 she requested the 3rd respondent to stop any transactions involving the petitioner's accounts as there was ongoing investigations on the mismanagement of funds by the 1st respondent. This was triggered by a complaint raised by the Trustees of the International Community of Women Living with HIV that necessitated an audit by the 1st respondent. Moreover there was a plan to move the petitioner's entire monies to an organization in Canada.
17. She further deposed that there was no Board resolution by the petitioner authorizing, Rebecca Matheson to institute the instant suit. It was noted that Rebecca Matheson had since resigned and relocated from Kenya. On this premise she averred that the petition does not raise constitutional issues and is just an attempt to avoid an audit of the petitioner's accounts by the 1st respondent.

The Petitioner's submissions

18. The petitioner through the firm of Onyango and Tarus Advocates filed written submissions dated 19th October 2020. Counsel raised four issues for determination. Counsel begun by submitting on the first issue stating that from the facts it was apparent that the respondents had violated the petitioner's



- rights. He pointed out that the 1st respondent and the interested party by directing the 3rd respondent to freeze the petitioner's bank accounts violated its right to be presumed innocent under Article 50 of the Constitution. Further that the 3rd respondent by acting on the said directions, blatantly breached the rules of natural justice by disregarding the dictates of Articles 47 of the Constitution and Section 4 of the Fair Administrative Action Act No. 4 of 2015.
19. Moreover, Counsel submitted that the 1st respondent's actions blatantly disregarded Article 10 of the Constitution as they were unreasonable, unlawful and irrational. It was argued further that it acted in excess of its jurisdiction and outside its express statutory powers by purporting to direct other independent institutions to take steps which are not among the powers conferred under the NGO Act. In support of this argument reliance was placed on the case of Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR where it was held that the right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. Also see
- i. Baker v. Canada (Minister of Citizenship & Immigration) 2 SCR 817 6
 - ii. Republic v Kenyatta University Ex Parte Njoroge Humphrey Mbuti [2015]eKLR.
20. Counsel contended that the petitioner's "accusers" had never been disclosed to it and neither availed for cross-examination thus failing to meet the threshold under Article 47 of the Constitution. In support reliance was placed on the case of Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR where it was held that it is only after investigations and the 1st petitioner given a chance to rebut any allegations made against it about certain failures, that the respondent could make a determinate conclusion in the nature of blame against the 1st petitioner. Similar reliance was placed on the case of Mohammed & Another v Haidara [1972] EA 166 at page 167 and Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR.
21. He submitted that the freezing of the petitioner's accounts violated its right and reputation under Article 33(3) of the Constitution and its right to property as enshrined under Article 40 of the Constitution.
22. Relying on the case of Republic v Non-Governmental Organizations Co-ordination Board Ex-Parte Research, Care And Training Programme Family Aids Care & Education Services (Rctp-Faces)(Judicial Review 141”B” of 2016) Counsel submitted on the second issue that the power to order the freezing of a bank account is a very powerful tool indeed, which leaves the account holder at the mercy of the authority directing freezing. From the cited case, such power can only be expressly granted by the law. Even where crime is involved, investigative authorities such as the police and the Ethics and Anti-Corruption Commission do not exercise such power of their own motion. In order to access somebody's account, an investigator has to obtain orders of the court.
23. In conclusion Counsel submitted that the respondents and the interested party's actions were laced with malice, bias and were made with ulterior and improper motives, other than seeking regulatory compliance. It was hence argued that unless the Court intervened by granting the orders sought, the petitioner would suffer real prejudice. In support reliance was placed on the case of International Centre for Policy and Conflict v Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013 where it was held that Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution.



The 1st and 2nd Respondent's submissions

24. The 1st and 2nd respondents filed written submissions and a list of authorities dated 3rd April 2022, and identified four issues for determination. It was submitted on the first issue that the petitioner was engaging in regulatory mischief in view of Regulation 25(2) of the [NGOs Co-ordination Regulations, 1992](#). This was emphasized in the case of *Maendeleo ya Wanawake Organisation & 2 others v NGOs Co-ordination Board and others* Constitutional Petition No. 9 of 2014 where it was held that with regard to the multiple registration of the 1st petitioner this was an attempt on the part of the 1st petitioner to escape transparency and regulations with regard to the NGO Board but also its members.
25. On the second issue, it was submitted that under Section 7 of the [NGOs Co-ordination Act](#) the 1st respondent has the mandate to facilitate and co-ordinate the work of all National and International NGOs in Kenya. As such, Section 12(4) of the [NGOs Co-ordination Act, 1990](#) provides for the Terms and Conditions attached to the Certificate of Registration wherein Clause 10 stipulates that all NGOs are required to seek authorization from the 1st respondent before opening and operating a Bank Account.
26. According to the respondents the import of this is that bank accounts which are opened and operated without express authority of the 1st respondent are viewed as illegal and/or unauthorized. It was on this basis therefore that the 1st respondent in discharging its mandate sought to have the said accounts frozen in a bid to preserve the interests of the beneficiaries. To buttress this point reliance was placed on the case of [Kenya National Examination Council and Republic Ex Parte Geoffrey Gathenji Njoroge and Others](#) Civil Appeal No.266 of 1996 where the Court of Appeal held that as a creature of the statute, the Council can only do that which its creator (the Act) and the Rules made thereunder permit it to do. If it were purported to do anything outside that which the Act and the Rules permit it to do, then like all public bodies created by Parliament, it would become amenable to the supervisory jurisdiction of the High Court.
27. On the third issue, the respondents submitted that their actions had stemmed from a series of complaints from the petitioner's members who highlighted misappropriation of funds, embezzlement, tax evasion and general mismanagement of the organization. It is submitted that these allegations were brought to the petitioner's attention including the 1st respondent's intention to investigate them. This failed as the petitioner changed its address contrary to Regulation 20 of the [NGO's Co-ordination Regulations](#) of 1992.
28. It was argued that the petitioner was seeking redress in Court while its hands were unclean. He contended that he who comes to equity must come with clean hands and must also do equity as held in the case of [Caliph Properties Limited v Barbel Sharma & Another](#) [2015] eKLR. The 1st and 2nd respondents argued further that they had not violated the petitioner's right to administrative actions as their intention to carry out investigations into the allegations made, freezing of the accounts to preserve donor funds and writing to notify other authorities were all part of administrative procedures under its mandate.
29. Reliance was placed on the case of [President of the Republic of South Africa and Others v South African Rugby Football Union and Others](#) (CCT16/98) 2000 (1) SA 1 where it was held that the purpose of the right to fair administrative action was to regulate the conduct of public administration. In particular it is to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice.



30. On the fourth issue, it was noted that Section 7(a) of the *NGO Act* empowers the Board to facilitate and co-ordinate the work of all National and International NGOs operating in Kenya hence its actions were founded in law. To buttress this point Counsel relied on *AAA Investments (Proprietary) Ltd v Micro Finance Regulatory Council and Another* 2007(1) SA 343 (CC) where it was held that the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised ... Public power ... can be validly exercised only if it is clearly sourced in law. To that end it was argued that the petitioner had failed to prove that the 1st and 2nd respondents had acted illegally, unreasonably and irrationally.

The 3rd Respondent's submissions

31. The firm of Wainaina Ileri Advocates LLP on behalf of the 3rd respondent filed written submissions and a list of authorities dated 3rd December 2021. Counsel raised two issues for determination. He commenced by informing that according to section 33 (4 &5) of the *Banking Act*, the Central Bank may issue directions to institutions generally for the better carrying out of its functions. As such Clause 5.6.6 of the *Prudential Guidelines on the Enhanced Customer Due Diligence measures* provides that due diligence measures shall be applied to persons and entities that present a higher risk to the institution. Counsel submitted that one of the measures was freezing of a client's account which cannot be deemed unlawful.
32. To buttress this point reliance was placed on the case of *Mape Building & General Engineering v Attorney General & 3 others* [2016] eKLR where the learned Judge stated that:
- “I find too that the allegedly infringed rights, as to fair administrative action as well as the right to property are not non-derogable rights and that the respondents have adequately explained the reasonable justifications pursuant to Article 24 of the *Constitution*. The continued existence of the freezing order is also necessary for an effective investigation or prosecution to be undertaken.”
33. On this limb Counsel submitted that the 3rd respondent vide a letter dated 31st May 2018 was informed by the 1st respondent on the petitioner's legal status. In addition, it received a complaint from the interested party who is one of the signatories of the accounts. In view of this it wrote to the petitioner on 20th June 2018 inquiring on its legal status, correspondence which was never responded to by the petitioner.
34. Referring to Clause 5.6.5 (a) and (d) of the *Prudential Guidelines*, Counsel noted that it provides that Customer Due Diligence (CDD) measures be undertaken by institutions with the following objectives; to identify the customer and verify that customer's identity using reliable, independent source documents, data or information; to conduct on going due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship; to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including where necessary the source of funds.
35. Based on the above counsel submitted that banks are empowered to scrutinize accounts and take reasonable steps to ensure transactions being conducted are consistent with the institutions General Terms and Conditions. It contended that the General Terms and Conditions which bind the petitioner and the 3rd respondent provide under Clauses 3.12 and 7.10 that:



- i. the bank may at any time freeze any account if and so long as there is any dispute, or the bank has doubt for any reason (whether or not well founded) as to the person or persons entitled to operate the same, or for any other lawful purpose;
 - ii. without any obligation to institute interpleaded proceedings or to take any steps of its own initiative for the determination of such dispute or doubt and these General Terms and Conditions (as may be amended from time to time) form a legally binding agreement binding on the customer and the customer's assigns and successors(as the case may be). In support reliance was placed on the case of *National Bank of Kenya V Pipelastik Samkolit (K) Ltd & Another* [2001]eKLR where it was held that a court of law cannot purport to rewrite a contract between the parties, and the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.
36. It was further submitted that the 3rd respondent had not infringed the petitioner's rights and that the allegations were only meant to misdirect this Court on the justifiable cause leading to the temporary suspension of the petitioner's bank accounts. Counsel stressed that the circumstances of this case indicated that the 3rd respondent had acted legally and reasonably in temporarily suspending the petitioner's accounts.
37. To buttress this argument reliance was placed on the Court of Appeal case of *Equity Bank (Kenya) Limited v Don Ogalloh Riario & Another* [2019] eKLR where it was held that banks have a duty of care not only to their clients but also to third parties and that under certain circumstances, banks would be acting unfairly if they failed to investigate whether the client is acting in accordance with regulatory legislation. It was further held that if a bank investigation shows that a client has acted in violation of regulatory legislation, it will in principle, need to take steps to protect the interest of third parties; that the measures which are appropriate in any specific case will depend on the circumstances of the case.
38. One the second issue, Counsel submitted that the petitioner had not adduced evidence to show how the 3rd respondent had infringed its rights. He relied on *Sara Leitich v Joshua Rutto & 2 others* [2021] eKLR and section 107 of the *Evidence Act* to support this assertion.

The Interested Party's submissions

39. The interested party filed written submissions dated 10th May 2022 through her advocates Omulele and Tollo Advocates, and raised two issues for determination. On the first issue, Counsel submitted that the petitioner having undergone a subsequent registration under the *Non-Governmental Organization Coordination Act*, 1990, its description as a Trust was not true and was intended to mislead the Court as to its true identity. On this basis, it was submitted that the petitioner has no locus standi to sue or be sued as a Trust and so there was no lawful basis under which Rebecca Matheson could purport to act on the petitioner's behalf.
40. In support reliance was placed on the Court of Appeal case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* (2016)eKLR where the Court observed that a nonexistent entity cannot sue or be sued. Similar reliance was placed on the case of *Elijah Sikona & George Pariken Narok on Behalf of Trusted Societv of Human Rights Alliance v Mara Conservancy & 5 others* (2014[eKLR.
41. Counsel further submitted that where a suit is instituted by an organization, a resolution must be passed by the Board authorizing the institution of the suit. It was contended that no such resolution was passed to authorize the filing of the petition. It was therefore fatally defective and not properly placed before this Court. In support he cited the case of *East African Portland Cement Ltd v Capital*



Markets Authority & 4 others (2014) eKLR where the Court held that there was no authority to present the petitions and the application in the absence of a valid Board resolution sanctioning the petition.

42. On the second issue, Counsel submitted that the freezing of the petitioner's accounts by the 3rd respondent was lawful as already explained. A formal letter had been written. He referred to the case of *Viable Deco Solutions Limited v Co-operative Bank of Kenya Limited* (2014) eKLR where it was held that under clause 22 of the General Terms and Conditions, the bank is authorized at any time to "freeze any account of a Customer if and so long as there is any dispute or the bank has doubt for any reason (whether or not well founded) as to the person or persons entitled to operate the same, without any obligation to institute interpleader proceedings or to take any step o(its own initiative for the determination of such dispute or doubt. Similar reliance was placed on the cases of:
- i. *Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others* (2015) eKLR,
 - (ii) *R (Wright & Others v Secretary of Health & Another* (2009/ UKHL3, among others.
43. It was argued that the freezing of accounts does not necessitate prior notice as the same would prompt moving of the funds sought to be preserved hence the petitioner's right in this regard under Article 47 and 50 of the *Constitution* and attendant rights under Article 23(c), 33(3), 40, were not violated.

Analysis and Determination

44. Before commencing this determination I wish to state that I have observed that the parties discussed a number of issues in their submissions which issues had already been determined by this Court in its Ruling dated 21st January 2021 as delivered by Hon. Makau J. These issues are:
- i. The locus standi of the petitioner;and
 - ii. The legal status of the petitioner.
45. Makau J in the Ruling with reference to the locus standi of the petitioner stated as follows:
- “ 27. Our constitution under Article 22 and 258 of the *Constitution* generously allows every person to institute proceedings subject to claims set out in the said Articles without requirement of incorporation. In the instant Petition the Petitioner whether described as an incorporated or unincorporated body or whether a Trust or an NGO meets the qualification of a person who has locus standi to institute suit under Articles 22 and 258 of the *Constitution* as defined under Article 260 of the *Constitution*. There is in my view no requirement for a Petitioner to be either a company, or an association or other body of person so long as the person as defined under Article 260 of the *Constitution* is seeking remedies vide Article 22 and 258 as set out in the respective Articles. There is no requirement for incorporation. I find that it does not matter whether the petitioner is a Trust or an NGO but a association or body of persons instituting court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. I find and hold the Petitioner has locus standi to maintain the instant suit.”

46. Turning to the question on the legal status of the petitioner, the Court pronounced itself as follows:

“ 14. It is clear that the Petitioner admitted in its pleadings of being registered under two regimes of law at the same time or thereafter. The Petitioner was first



registered as a Trust under the *trustee (Perpetual) Succession Act* as per attached Registration document dated 14th May 2016 and thereafter registered as Non-Governmental Organisation under the *Non-Governmental Coordination Act, 1990* on 16th August 2016.

15. Section 25(2) of the *Non-Governmental Organisation Co-ordination Regulation, 1992* provides:-

“(2) Upon registration under the Act, the Organization referred to shall cease to operate under any other written law in Kenya or based on any agreements with the Government as the case may be.”

16. From the provision of the above-mentioned Section, it is apparently clear that upon an organization that was registered under another law undergoing a second registration as an NGO under the *NGO Act*, that organization loses its former identity under the previous Act/law it was registered under and its operations become fully governed by the *NGO Coordination Act, 1992* as clearly provided by the regulations thereto.

17. In view of the Petitioner herein on such second Registration under the *NGO Act* ceased to exist as a Trust upon its registration under the Non-Governmental Organization Coordination on 16th August 2016. The Petition herein as filed is bad in law on the basis that the Petitioner is not a trust as it represents itself. Its operations are now fully governed by the *NGO Coordination Act 1990* and is bound by the provisions of the aforesaid Act.”

47. Evidently these two issues were dealt with conclusively and I shall not re-determine them. That said, I have carefully considered the pleadings, submissions and evidence of the parties herein and in my considered view the issues that arise for determination are as follows:

- i. Whether the instant petition is defective for want of a Board Resolution.
- ii. Whether the petitioner’s rights under Articles 10, 33(3), 40, 47 and 50 of the *Constitution* were violated.
- iii. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i). Whether the instant petition is defective for want of a Board Resolution

48. The interested party challenged the competence of the instant petition on two fronts. First the locus standi of the petitioner and second the lack of a Board Resolution prior to filing of this petition. The interested party argued that this omission rendered the petition fatally defective.



49. Discussing the requirement of a Board Resolution the Court in the case of *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling) while citing Court of Appeal decisions stated as follows:

“The question is whether the suit before the trial court was filed without authority of the Board and if so, what are the consequences thereof? In *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR, the Court of Appeal held that:

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized”.

The same position was echoed in the persuasive authority in the case of *Eye Company (K) Limited v Erastus Rotich T/a Vision Express* [20201] eKLR where Ngetich J held that:-

“In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.”

In *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR, the Court of Appeal interpreted the law thus:

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

50. I stand guided by the stated authorities and find no distinguishing circumstances before this Court. I say so for two reasons. First the petitioner under the *NGOs Co-Ordination Act* No.19 of 1990 is recognized as a body corporate for purposes of its operations hence would require a Board Resolution in its decisions. Section 12 (3) of the *Act* provides as follows:

- (3) A registered Non-Governmental Organization shall by virtue of such registration be a body corporate with perpetual succession capable in its name of—
- a. suing and being sued;
 - b. taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;



- c. entering into contracts; and
- d. doing or performing all such other things or acts necessary for the proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

51. Secondly the petitioner, through Rebecca Faith Matheson, deposed under Paragraph 3 of the affidavit in support dated 18th June 2018 that:

“I am the Global director of the petitioner and I am duly authorized to swear this affidavit.”

52. A perusal of the documents annexed to the petitioner’s affidavit makes it clear that there was no Board resolution prior to filing of this suit. As guided in the cited authorities the absence of a Board resolution to institute a suit is not fatal to a suit. This is since the deponent, Rebecca Faith Matheson, deposed that she was authorized by the petitioner, to swear the affidavit. It was upon the interested party to prove that Rebecca F. Matheson had no such authority to swear the affidavit. Since she did not, it is presumed that the deponent’s authority was valid. The interested party besides adducing evidence that the deponent had since resigned, failed to demonstrate that the deponent at the time of filing this suit lacked authority to do so. Considering these elements. I therefore find that the petition is not defective as argued by the interested party.

Issue No. (ii). Whether the petitioner’s rights under Article 10, 33(3), 40, 47 and 50 of the Constitution were violated

53. The key issue raised by the petitioner is that the respondents’ and interested party’s actions violated its constitutional rights. It specifically asserted that its constitutional right under Article 47 of the Constitution was violated and this in turn violated the attendant rights as cited. The petitioner contended that the act of freezing its accounts without prior notice and being afforded an opportunity to challenge the complainants’ averments violated its right to fair administrative action and fair hearing. This as a consequence damaged its reputation and deprived it of its property. The petitioner also challenged the 1st respondent’s act of directing the 3rd respondent and other independent bodies in this matter, on what to do.

54. The respondents strongly opposed the petitioner’s submissions emphasizing that their actions were authorized and sanctioned by the law. It is noted that both the 1st and 3rd respondent and their officers’ had a duty not only to the petitioner but also the affected 3rd parties and the public at large. It is on this premise as guided by the law that they took the actions complained of. The interested party being a director of the petitioner argued that its funds were being mismanaged and its members had raised complaints over the same necessitating the respondents’ actions.

55. Article 47 of the Constitution of Kenya provides as follows:

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

56. The Fair Administrative Action Act No.4 of 2015 under Section 2 defines an “administrative action” as follows:

- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or



- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
57. The Court in the case of *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okioti* [2018] eKLR while discussing this right opined as follows
- “ 37. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- [53] Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action
- [54] The issue that inevitably follows is whether or not the manner in which the impugned decision was made violated the rules of Natural Justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.”
58. A party who claims that this right has been infringed is empowered under Section 7 (2) of the NGOs Co-ordination Act to seek redress on the cited grounds. This Section provides that the grounds of review by the Court include an administrative action that displays: bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. In light of this Section, this Court is only required to conduct a procedural review of the decision to determine whether or not it conformed to the dictates of Article 47 of the Constitution.
59. The NGOs Co-Ordination Act which is the enabling law with reference to the 1st and 2nd respondents' mandate and petitioner's legal status makes known in its preamble that its purpose is to make provision for the registration and coordination of NGOs in Kenya and for connected purposes.
60. The functions of the 1st respondent under Section 7 of the Act are listed as:
- a. to facilitate and co-ordinate the work of all national and international Non-Governmental Organizations operating in Kenya;
 - b. to maintain the register of national and international Non- Governmental Organizations operating in Kenya, with the precise sectors, affiliations and locations of their activities;
 - c. to receive and discuss the annual reports of the Non-Governmental Organizations;
 - d. to advise the Government on the activities of the Non-Governmental Organizations and their role in development within Kenya;
 - e. to conduct a regular review of the register to determine the consistency with the reports submitted by the Non-Governmental Organizations and the Council;
 - f. to provide policy guidelines to the Non-Governmental Organisations for harmonizing their activities to the national development plan for Kenya;



- g. to receive, discuss and approve the regular reports of the Council and to advise on strategies for efficient planning and co-ordination of the activities of the Non-Governmental Organizations in Kenya; and
- h. to develop and publish a code of conduct for the regulation of the Non-Governmental Organizations and their activities in Kenya.
61. The 1st respondent's mandate is also informed by the [Non-Governmental Organizations Co-Ordination Regulations](#), 1992 and the Terms and Conditions that are annexed to the Certificate of Registration in line with Section 12(4) of the [Act](#). The Terms and Conditions inform the specific requirements in line with the [Regulations](#) and the [Act](#) which an NGO such as the petitioner is required to adhere to while in operation.
62. The 3rd respondent in its submissions relied on the dictates of the [Banks' Prudential Guidelines](#), 2013 in relation to Customer Due Diligence measures and the attendant Terms and Conditions between the Bank and the petitioner as its client which were discussed comprehensively. What is clear from the material placed before this Court is that the petitioner was not accorded notice and opportunity to be heard prior to the making of the adverse decision that was rendered against it by the 3rd respondent. At face value, it would be understandable to conclude that the petitioner's rights were violated by the respondents' actions. The circumstances of this case however tell a different story which gives a glimpse into why the respondents took the decision they did.
63. To begin with it is apparent that the petitioner has been unlawfully operating under two regimes information of which was not disclosed to the 1st respondent as its governing authority and the 3rd respondents who managed its bank accounts. The petitioner as it were has been operating in violation of the [NGOs Act](#) while the 3rd respondent was deceived as it managed its accounts as a Trust instead of an NGO. The results of this discovery led to the actions that laid premise for instigation of this suit. The respondents in an effort to scrutinize the matter engaged the petitioner on separate occasions which never worked. The 3rd respondent is said to have written a letter dated 20th June 2018 (TO-3) to the petitioner over the complaints by the 1st respondent among others in respect of its bank accounts. They sought for clarification which the petitioner never offered. This fact was never rebutted by the petitioner. The respondents defended their actions arguing that they were based on the enabling laws and regulations.
64. It is imperative to state that the right to a fair administrative action is not one of the non-derogable rights listed under Article 25 of the [Constitution](#). This means that this right can be limited under Article 24(1) of the [Constitution](#) which provides that:
- A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...
65. Once the respondents laid the basis and justification for their actions, the petitioner was under the onus of proving that the limitation of the right was not justified as asserted by the respondents. The petitioner in this instant failed to rebut this assertion by not adducing the requisite evidence.



66. On the second limb, it is apparent that the petitioner's claim is disingenuous. I find myself in agreement with the opine in the case of *Esther Nugari Gachomo v Equity Bank Limited* [2019] eKLR where it was held as follows:

“7. He who comes to equity must come with clean hands. The application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted. This is what was stated in the case; *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”

67. It is my considered view that the respondents were under a legal duty to investigate all complaints raised in a legal manner. I am convinced that the petitioner failed to persuade this Court that the respondents acted outside their mandate, and in particular, the 1st respondent who is legally obligated to regulate NGOs in Kenya. In the same way there was no evidence adduced by the petitioner to support the allegation that the respondents' actions were carried out unlawfully and in violation of Article 24 of the *Constitution*. In addition the petitioner did not demonstrate how the 1st respondent's issuance of the said letters to the 3rd respondent and other institutions amounted to it issuing directions, and if so whether the decision made by the 3rd respondent was solely based on the 1st respondent's communication.

68. The 1st respondent formally informed the petitioner of complaints received plus its plan to visit the office on a given date for an investigation. When the 1st respondent arrived at the known premises of the petitioner's operation the petitioner was found to have moved offices without notifying the 1st respondent as by law required. The petitioner again did not rebut this serious allegation. This was an issue that could have been sorted out within the shortest time had the petitioner been genuine. The funds complained of are in the accounts held by the 3rd respondent.

69. To this end, this court is inclined to find that the petitioner's rights under Articles 10, 33(3), 40, 47 & 50 of the *Constitution* were not violated by the respondents. Against this backdrop the petitioner is not entitled to the reliefs sought.

70. The upshot is that the petitioner has failed to prove any malice or wrong doing by the respondents and interested party. The petition is found to lack merit and is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

