



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW MISC. APPLICATION NO. 248 OF 2019

REPUBLIC.....APPLICANT

AND

THE NON GOVERNMENTAL

ORGANIZATIONS COORDINATION BOARD.....RESPONDENT

AND

DR. JOSPHINE KIBARU.....1ST INTERESTED PARTY

DR. GRACE MIHESO.....2ND INTERESTED PARTY

DR. ALICE KAARIA.....3RD INTERESTED PARTY

DR. BRIGID MONDA.....4TH INTERESTED PARTY

DR. KOKI KINANGWI.....5TH INTERESTED PARTY

DR. LUCY OMBOK.....6TH INTERESTED PARTY

AND

KENYA MEDICAL WOMEN'S ASSOCIATION.....EX PARTE APPLICANT

JUDGMENT

The parties

1.The *ex parte* applicant, Kenya Medical Women's Association is a Non-Governmental Organization registered under the Non-Governmental Organizations Act ¹(herein after referred to as the NGO Act).

2. The Respondent, the Non-Governmental Organizations Coordination Board is established under section 3 of the NGO Act. Pursuant to section 3(2) of the act, the Board is a body corporate with perpetual succession and a common seal. It is capable in its corporate name of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) receiving, borrowing and lending money; (d) entering into contracts; and (e) doing or performing all such other things or acts necessary for the proper performance of its functions

under the Act, which may lawfully be done or performed by a body corporate.

Factual Matrix

3. The factual chronology of the events which triggered this case is essentially common cause, undisputed or uncontroverted. It is common ground that the applicant held its Annual General Meeting of members on the 8th June 2019 and elected new Board Members and officials. It is also uncontested that association's Annual General Meeting (AGM) is its supreme organ and its decisions are binding on its members, its officials and Board members. It is admitted that the *ex parte* applicant submitted to the Respondent the returns of the association's elections to enable the Respondent to register its newly elected officials but the Respondent refused to effect the registration. The applicant maintains that the said failure undermines its ability to carry out its programs and meet its obligations to its members.

Legal foundation of the application

4. The applicant states that the failure to effect the said changes is illegal and offends the provisions of the NGO Act and the Fair Administrative Action Act² (herein after referred to as the FAA Act). It also states that the refusal ousts and undermines the authority of its AGM and its members' rights to associate and to democratically elect their

¹ Act No. 19 of 1990.

²Act No. 4 of 2015.

representatives in the Association. It also states that the failure by the Respondent to abide by the provisions of the Constitution and statute is irrational, unreasonable, in bad faith and it is actuated by an improper motive aimed at undermining the due process of the law and effective administration and applicant's governance. It also states that the failure is irrational and unreasonable for ousting the statutory provisions requiring that certain actions are taken within a stated time period.

5. Additionally, the applicant states that the impugned decision is unreasonable and *ultra vires* express provisions of Constitution and statutes, and that, it cannot be reasonably justifiable in an open democratic society. It also states that it has a legitimate expectation that the Respondent shall at all times abide and be guided by the laws of the Republic in executing its mandate and adhere to constitutional precepts.

The reliefs sought

6. The applicant prays for the following orders:-

a. AN ORDER OF MANDAMUS to compel the Respondent to register the Officials and Board Members of the ex-parte Applicant elected at the Annual General Meeting held on the 8th June 2019.

b. Any other remedy that the court deems fit and just; and

c. Cost of this suit.

Respondent's Replying Affidavit

7. Lindon Nicholas, the Respondent's Head of Operations, Compliance and Research in his Replying Affidavit dated 3rd October 2019 deposed that the applicant herein is not the Kenya Medical Women Association but rather a one Dr. Christine Sadia, its former chairperson. He deposed that a legal person such as the applicant does not appear in court on the whims of an individual but after a resolution minuted and approved by the directors of the board. He deposed that no such resolution has been presented to the court.

8. He averred that the election process was flawed because Notice calling the meeting did not disclose the venue of the meeting, the venue was only disclosed to a few select members who supported the former chairperson's re-election, hence, the AGM not only contravened rules of good governance which require that a notice to the members must disclose the date, time, agenda and venue of such meetings, but also contravened Article **10** of the Constitution. He deposed that the Notice for the meeting was discriminative against a section of the membership and alienated their rights to association.

9. Mr. Nicolas averred that prior to the AGM, there was a dispute on the validity of the Constitution and the identity of the fully paid up members. He averred that there were complaints that the chairperson was using her personal M-pesa platform as the only means of membership payments. He deposed that this case was triggered by a leadership dispute caused by Dr. Sadia's action of abrogating to herself the position, responsibilities and duties and office of the Chief Executive Officer.

10. He deposed that the Non-Governmental governance structure is spelt out in the second schedule of the *Non-Governmental Organizations Co-ordination Regulations, 1992* which separates the membership from the body and the secretariat which is the implementation arm of the organization. He averred that one cannot be a member, a chairperson and a CEO at the same time. Mr. Nicolas averred that even though the Respondent as the regulator has a statutory mandate to recognize and effect changes to the leadership of non-governmental organizations, it cannot do so blindly without paying attention to the procedures set out in the organization's Constitution, the law and the Regulations.

11. Additionally, he deposed that under the FAA, Act, the Respondent cannot ignore valid grievances and concerns from members. Further, he deposed that the Regulators mandate includes regulation, facilitation and coordination of the activities on Non-governmental organizations and this must be done with due regard to the law and where the law and procedure has been circumvented for the benefit of an individual as in this case, the Regulator cannot be expected to act blindly without due regard to the law.

12. Mr. Nicolas deposed that following grievances and petitions presented to the Respondent relating to the procedure of calling for the AGM, the validity of both the Constitution and the organization's paid up members, the Respondent deemed it fit to summon the disputing parties to a meeting for purposes of establishing the veracity of the claims. He deposed that the Respondent has commenced investigations into the allegations tabled before them. He also deposed that the alleged changes made at the AGM have been disputed hence it would be improper for the respondent to confirm the former chairperson to the disputed position.

Applicant's further affidavit

13. Christine Sadia, swore the further affidavit dated 15th November 2019 in reply to the above Replying Affidavit. She averred that the organization communicated to its members the venue of the AGM and further that some members especially some of the interested parties herein voluntarily and willingly chose not to attend and or participate in the proceedings at the AGM. She averred that the information has been made known to the Respondent in the several meetings that they have had regarding this matter and that none of the Interested Parties has never challenged the outcome of the elections.

14. She averred that the Respondent's failure to effect the changes is an affront to the Organization and undermines its ability to effectively carry out and execute its mandate. She also deposed that the organization has an elaborate dispute resolution mechanism which is open and available to all members which has not been invoked by any member regarding the elections or any of the AGM's resolutions, hence, the Respondent has no basis to refuse to effect changes in question.

Courts' directions

15. On 3rd December 2019, the court granted leave to the applicant to file the substantive application within two days and directed the Respondent and the Interested Parties to file their Responses to the substantive application within **3** days from the date of service. The court also directed parties to exchange submissions within **7** days from the date of receipt of the last response and scheduled the application for

hearing on 29th January 2020.

16. However, on the said date the Respondent's counsel did not attend court despite being served. On her part, counsel for the Interested Parties stated that she was yet to file Reply and submissions and asked for more time and upon hearing objections from the applicant's counsel the court noted that the Respondent and the Interested Parties had failed to comply with the courts' previous directions and ordered the case to proceed.

17. Mr. Maloba, counsel for the Interested Parties adopted the Respondent's Replying Affidavit filed on 3rd October 2019 and made oral submissions. The Respondent's counsel did not attend court despite having been served.

The argument

18. Mr. Otieno Willis, the applicant's counsel cited section 7 of the NGO Act and submitted that the applicant has demonstrated grounds to warrant the orders sought. He also cited Regulation 22 of *the Non-governmental Organizations Co-ordination Regulations, 1992* and argued that the Regulation requires the Respondent to effect changes. He argued that the applicant submitted the requisite form accompanied by minutes as required and that the refusal offends Article 47 of the Constitution, hence it is illegal and unreasonable. He also argued that the delay is unreasonable and that there is no explanation for the refusal. He argued that the refusal is a breach of the applicant's legitimate expectation that the Respondent would comply with the law. He submitted that the Respondent must adhere to the provisions of Article 47 of the Constitution and that the refusal is unjustifiable. He submitted that the Respondent conferred upon itself powers it does not possess to resolve a dispute outside its powers

19. Mr. Otieno argued that the refusal is un-procedural. He submitted that the parties ought to have followed the procedure laid down in the applicant's Constitution to resolve the dispute. To fortify his argument, he cited *Republic v Non-governmental Organizations and Co-ordination Board ex parte Kalonzo Musyoka Foundation*,³*Mutanga Tea & Coffee Company Ltd v Shikara Limited & another*⁴ and *Njenga Krume v R* for the holding that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an act of Parliament, that procedure should be followed. He argued that the Interested Parties never challenged the outcome of the election in any forum. He urged the court to allow the application with costs.

20. As stated earlier, the Respondent's counsel did not file any submissions nor did they attend the hearing despite being served.

21. The Interested Parties did not file any reply to the application nor did they file submissions. However, their counsel Mr. Maloba relied on the Respondent's Replying affidavit and made oral submissions. He questioned the applicant's *locus standi* to file these proceedings citing absence of a resolution by the association's Board. He cited

³ {2018} e KLR.

⁴ {2015} e KLR.

section 10 & 16 of the NGO Act and argued that the Constitution does not permit the chairperson to institute court proceedings. He submitted that the Interested Parties are aggrieved by the applicant's conduct, hence, they filed a complaint with the Respondent on 8th July 2019 and the Respondent directed the officials to comply with certain provisions and declined to effect the registration. He urged the court to dismiss the suit.

22. Mr. Otieno, in his submissions in reply referred to the applicant's affidavit and pointed that that there is a resolution authorizing the filing of the suit.

Determination

23. The starting point is that *Mandamus* will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.⁵ Simply put, *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.⁶

24. There is no dispute that the applicant held its AGM as required and conducted its elections. It is evident that the Interested Parties were unhappy with the outcome of the elections. They never challenged the elections either in court or as per the association's dispute resolution mechanism. Instead, they complained to the Respondent who declined to effect the changes presented to him by the applicant. The AGM is the supreme decision making organ of the association. The election results unless annulled by a court of law or through the mechanism provided under the association's Constitution remain valid.

25. The Respondent's role is provided in Regulation 22(1) which provides that:-

22. (1) Where there is any change of officers or of the title of any officer of a registered organization, notice in Form 13 set out in the First Schedule shall be given to the Board within fourteen days of the change and the notice shall be signed by three of the officers of the organization.

⁵ See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

⁶W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

26. My reading of the above provision is that where there is any change of officers as happened in this case, any officer of the organization is required to give a notice of the change in the prescribed form within 14 days and signed as appropriate. That is the only requirement stipulated in the above provision.

27. The competence of the Form 13 or its compliance with the above provision has not been questioned in this case. Instead, the Respondent's refusal to register the officials is premised on complaints raised by the Interested Parties who appear to be unhappy with the election results. The Respondents functions are stipulated in section 7 of the NGO Act as read with the Regulations. The said functions do not extend to acting as an election court. It follows that the Respondents failure or refusal to effect the changes is not anchored on the enabling statute.

28. In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*⁷ I discussed in detail the tests for granting an order of *Mandamus* as set out in *Apotex Inc. vs. Canada (Attorney General)*⁸ citing *Dragan vs. Canada (Minister of Citizenship and Immigration)*.⁹ These are:-

There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal;
and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

⁷ {2019} e KLR.

⁸ [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

⁹ [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

29. Applying the above tests to the facts of this case, I find that the applicant has demonstrated the existence of a public legal duty to act on the part of the Respondent. The law requires the Respondent to effect the registration of the change of officials. The only requirement is to lodge the required documentation. As stated earlier, the competency or conformity of the submitted documents has not been challenged. The reason raised points to a complaints by parties who are dissatisfied with the election results. As stated above their remedy lies elsewhere in law.

30. The second test is that the duty must be owed to the applicant. I find no contest that by virtue of its statutory mandate, the Respondent is vested with a legal duty to perform its functions, and in this regard it owes a legal duty to the applicant. In the same vein, there exists a clear right to the performance of that duty. In this regard, the applicant has satisfied all conditions precedent for the duty to be performed. There was a change of officials occasioned by elections. The applicants filed the requisite form and there is a prior demand for the performance of the duty and a reasonable time to comply with the demand. In fact, what emerges is an outright and express refusal by the Respondent to perform the duty through unreasonable delay. Lastly, there is no other remedy available to the applicant in the circumstances of this case, hence, the reason why the writ of *mandamus* must issue.

31. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

32. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

33. The argument that the applicant lacks the *locus standi* to bring these proceedings is legally flawed and unsustainable. *First*, the applicant is the association, a body corporate capable of suing and being sued. It is not the chairperson as the Interested Parties and the Respondent purported to argue. Thus, the capacity to sue is not in doubt. *Second*, minutes and members resolutions have been annexed to the verifying affidavit. *Third*, before this court is not a challenge on the validity of the elections, but a question of the Respondent's failure to register the changes as the law permits. *Fourth*, the elections were held and all that the association is doing is to seek to have the registration of its new officials effected as the law states.

34. In view of my analysis herein above, I find and hold that the applicant has established grounds for this court to grant the Judicial Review Orders sought. The upshot is that the *ex parte* applicants' substantive Notice of motion dated 3rd December 2019 is hereby allowed. Accordingly, I order as follows:-

a. An order of mandamus be and is hereby issued compelling the Respondent to register the Officials and Board Members of the ex-parte Applicant elected at the Annual General Meeting held on the 8th June 2019 forthwith.

b.. No orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 16th day of April 2020.

John M. Mativo

Judge.