



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 58 OF 2020**

**BETWEEN**

**JUDDY WAIRIMU MIRANGO.....APPLICANT**

**VERSUS**

**NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION BOARD...1<sup>ST</sup> RESPONDENT**

**ASSOCIATION FOR THE PHYSICALLY DISABLED IN KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING NO 2**

1. The *ex parte* Applicant herein filed a Notice of Motion application dated 26<sup>th</sup> November 2020, on which directions were given as to filing of responses and submissions, for *inter partes* hearing today. The *ex parte* Applicant is seeking orders in the said application that the 2<sup>nd</sup> Respondent be restrained by way of injunction from holding the meeting convened for 10<sup>th</sup> December 2020 as per the Notice of Annual General Meeting as issued and advertised on page 25 of the *Daily Nation* Newspaper of 24<sup>th</sup> November 2020, and that the costs of the application be borne by the Respondents .

2. The application is supported by an affidavit and supplementary affidavit both sworn by the *ex parte* Applicant on 26<sup>th</sup> November 2020 and 3<sup>rd</sup> December 2020 respectively. The *ex parte* Applicant's advocates on record, Onsando Ogonji & Tiego Advocates also filed submissions dated 2<sup>nd</sup> December 2020 on the application.

3. The grounds for the application are that despite this matter being *sub judice*, the Patron of the 2<sup>nd</sup> Respondent, h as in concert with the 1<sup>st</sup> Respondent, issued and advertised in the Daily Nation Newspaper of 24<sup>th</sup> November 2020 a Notice of Annual General Meeting of the 2<sup>nd</sup> Respondent to be held on 10<sup>th</sup> December 2020. Further, that the Patron of the 2<sup>nd</sup> Respondent has no authority to issue such a notice or to convene an Annual General Meeting of the 2<sup>nd</sup> Respondent. The *ex parte* Applicant also states that the agenda of the aforesaid meeting is *inter alia*, to adopt a report by the chair of the caretaker committee, election of office bearers; the 2<sup>nd</sup> Respondent's Constitution, which issues are directly in issue in the present suit.

4. The *ex parte* Applicant therefore contends that the unless restrained by way of injunction the Respondents will unlawfully hold the aforesaid meeting, which will render this Court's Proceedings futile and render nugatory any orders issued herein. The *ex parte* Applicant in this respect submitted that Article 9 (c) of the Constitution of the 2<sup>nd</sup> Respondent provides that the Annual General Meeting shall be held each calendar year on a date determined by the Board, and the Patron has no powers or mandate to convene an Annual General Meeting on 10<sup>th</sup> December 2020 or any other meeting of the of the 2<sup>nd</sup> Respondent. Further, that there is no provision in the Constitution of the 2<sup>nd</sup> Respondent for a Caretaker committee , as such the agenda item to adopt the report by the Chair of the Caretaker committee is unconstitutional.

**The Responses**

5. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 8<sup>th</sup> December 2020 by Mercy Cherutoh Soy, its legal officer. The 1<sup>st</sup> Respondent explained that the events leading to the present dispute, which were triggered by an application made by the 2<sup>nd</sup> Respondent for change of officials which was received in its office on 5<sup>th</sup> October 2018, and a subsequent complaint by Mr. Fredrick Owako dated 6<sup>th</sup> September 2019 on an illegal meeting held on 16<sup>th</sup> July 2019, illegal elections of officials and an attempt to alter names of officials unprocedurally.

6. The 1<sup>st</sup> Respondent stated that it then summoned the outgoing and incoming officials for a discussion on the governance and compliance issues facing the 2<sup>nd</sup> Respondent's Board, which meeting resolved that the opposing factions meet with the Patron of the 2<sup>nd</sup> Respondent.

That at the meeting held with the Patron, a number of resolutions were made including the formation of the impugned caretaker committee. The 1<sup>st</sup> Respondent annexed copies of the notices, summons and minutes of the said meetings.

7. The provisions of Article 7(a) of the 2<sup>nd</sup> Respondent's Constitution were cited by the 1<sup>st</sup> Respondent, for the averment that the Patron of the 2<sup>nd</sup> Respondent is the overall advisor of the organization in furtherance of its operations and objectives, while the 1<sup>st</sup> Respondent's mandate includes regulation, facilitation and coordination of the activities of non-governmental organizations, and that all it did was facilitate discussions between the warring factions.

8. According to the 1<sup>st</sup> Respondent, it is misleading and wrong to claim that the appointment of the caretaker committee was done *in secret* and without the knowledge of the 2<sup>nd</sup> Respondents members, and that under the Fair Administrative Actions Act, the 1<sup>st</sup> respondent cannot fail/neglect and/or refuse to accommodate valid grievances and concerns from members and proceed to engage in actions that are deemed as flawed.

9. Lastly, the 1<sup>st</sup> Respondent averred that the term of the caretaker committee has since lapsed rendering it *functus officio*, and therefore the Notice of Motion dated 26<sup>th</sup> November 2020 lacks merit since the same has been overtaken by events. Further, that failure to hold a proper Annual General Meeting would occasion lacunae in the governance of the 2<sup>nd</sup> Respondent and aggravate mismanagement of assets and funds, lack of sustainability, lack of donor confidence leading to its dissolution/winding up.

10. The 2<sup>nd</sup> Respondent's response was in a replying affidavit sworn on 7<sup>th</sup> December 2020 by Benson Kiptum, its Ag. Chief Executive Officer and Head of Programs. The deponent termed the averments by the *ex parte* Applicant as untrue and misleading, and stated that the meeting was convened at the instance of the 2<sup>nd</sup> Respondent's members to solve challenges of the 2<sup>nd</sup> Respondent, though the Board whose challenges the members wanted addressed, purported to call off. Further, that the Board elected by the members of the 2<sup>nd</sup> Respondent on 10<sup>th</sup> July, 2018 was voted out by the same members on 2<sup>nd</sup> August 2019.

### **The Determination**

11. It is evident from the pleadings filed that the Notice of Motion dated 26<sup>th</sup> November 2020 arises from a dispute between the parties herein as regards the existence and membership of the 2<sup>nd</sup> Respondent's Board, and which official of the 2<sup>nd</sup> Respondent is entitled to call an Annual General Meeting. These issues that are not before this Court for determination, as the *ex parte* Applicant's substantive Notice of Motion dated 26<sup>th</sup> October 2020 filed herein is seeking judicial review orders with respect to the powers of the 2<sup>nd</sup> Respondent to appoint a caretaker committee. In any event the resolution of the said disputes is beyond the remit of this Court as a judicial review Court, as it involves resolving contested issues on their merit.

12. This Court will therefore have to decline the attempt to engage it in the arena of the said disputes through the orders sought in the Notice of Motion dated 26<sup>th</sup> November 2020. For the avoidance of doubt, the reasons for this Court's decision is that the issues raised by the Notice of Motion dated 26<sup>th</sup> November 2020 are not substantive issues before this Court for determination and on which interlocutory orders can therefore issue, and secondly the Court will not only be acting in vain, but also beyond its jurisdiction in addressing the issues raised by the  
the said Notice of Motion.

13. It is necessary at this point to mention that injunctions are normally in principle granted where there has been a breach of private law rights, and not with respect to public rights or duties, and are therefore not an appropriate remedy in judicial review proceedings. The Court of Appeal in ***Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 others, (2015) e KLR*** held as follows as regards the grant of injunction in judicial review proceedings: -

**“34. Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.**

**The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies.”**

14. Likewise, the Supreme Court of Kenya, when explaining the distinction between injunctions, and order of stay and conservatory orders in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, (2014) e KLR*** held as follows:-

**“(85)These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.**

**(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest...”**

### **The Disposition**

15. I accordingly order as follows arising from the foregoing findings and reasons:

- I. The the prayer of injunction sought in the *ex parte* Applicant's Notice of Motion dated 26<sup>th</sup> November 2020 is declined, and the said Notice of Motion is hereby dismissed with no order as to costs.
- II. The *ex parte* Applicant's substantive Notice of Motion dated 28<sup>th</sup> October 2020 shall accordingly proceed to full hearing and the Respondents shall file and serve their responses thereto within fourteen (14) days of today's date.
- III. The *ex parte* Applicant is granted leave to file and serve its submissions on the within fourteen (14) days of service of the responses to the Notice of Motion or upon default thereof.
- IV. The Respondents are granted corresponding leave to file and serve their reply submissions within fourteen (14) days of service by the *ex parte* Applicant.
- V. The Notice of Motion dated 28<sup>th</sup> October 2020 shall be heard by email on 3<sup>rd</sup> February 2021.
- VI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, Notice of Motion dated 28<sup>th</sup> October 2020 shall be heard on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.
- VII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).
- VIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).
- IX. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).
- X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 3<sup>rd</sup> February 2021.
- XI. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant and Respondents by electronic mail by close of business on Thursday, 10<sup>th</sup> December 2020.
- XII. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE