



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 617 OF 2017

REPUBLIC.....APPLICANT

-VERSUS-

FAZUL MAHAMED.....1STRESPONDENT

NGOS COORDINATION BOARD.....2NDRESPONDENT

AND

M/S IRENE KHAN.....1STINTERESTED PARTY

PROF. MAKAU MUTUA.....2ND INTERESTED PARTY

OKIYA OMTATAH OKOITIL.....EX PARTE APPLICANT

JUDGMENT

The ex parte applicants case.

1. By a Notice of Motion dated **24th** October 2017, the ex parte applicant seeks the following orders:-

- a) An order of **Prohibition** prohibiting the first and Second Respondents and or any person under its behest or direction from acting outside the scope of the Respondent's constitutional and statutory mandate including taking cognizance of, entertaining, acting upon, or howsoever enforcing or in any way complying with the Respondent's orders, directions and or decision as contained in their letter **RE: NGOB/5/30A/8/Vol. XV** dated **5th** October 2017.
- b) An order of **Certiorari** to quash the Respondents letter **RE: NGOB/5/30A/8/Vol. XV** dated **5th** October 2017 for vesting powers in the Respondent outside the scope of the Respondent's constitutional and statutory mandate.
- c) An orders of **Mandamus** to compel the first Respondent to expunge from the record their letter **RE: NGOB/5/30A/8/Vol. XV** dated **5th** October 2017 purporting to vest powers in the first and second Respondents contrary to the scope of their constitutional and statutory mandate.
- d) Such further directions and orders as may be necessary to give effect to the foregoing orders and or favour the cause of justice.
- e) That costs be in the cause.

2. The core grounds relied upon as I discern them from the application, the statement and the verifying affidavit are:-

- a. **That** the Respondents have contravened the Constitution, the Fair Administrative Action Act,**[1]** the Treaty Making and Ratification Act**[2]** and the Non Governmental Organizations Co-ordination Act**[3]** by issuing an unlawful, illegitimate, arbitrary, malicious and oppressive orders vide a letter **RE: NGOB/5/30A/8/Vol. XV** dated **5th** October 2017, purporting to prohibit the International Development Law Organization (IDLO) from carrying out its lawful, legitimate and necessary activities (including

collaborating with the key agencies in the country responsible for the implementation of the Constitution, access to justice, public finance management and representation of the people, advancing gender equality across the country and operationalizing the gender provisions contained in the Constitution, and strategic policy development, critical legislative review, expert technical advice, institutional strengthening and capacity building).

b. **That** vide the said letter the Respondents ordered IDLO to immediately seek to obtain a certificate of registration under section 10 of the Non Governmental Organizations Coordination Act^[4] to acquire the requisite legal status to enable it to operate in Kenya and at the same time suspended its operations and directed it to close down all its offices in Kenya until such time that it shall acquire a certificate of registration under the act.

c. Further, by the same letter, the Respondents advised the Governor of the Central Bank of Kenya and the Directors of Financial Reporting Centre to immediately preserve any funds held under IDLO Bank accounts until further communication from the first Respondent.

d. **That** the said decision has no basis in law, and that disrupting IDLO' activities will disrupt many ongoing projects and activities that are important to Kenya's reform agenda and overall development.

e. **That** the Government of Kenya became a member of IDLO in 2009 and the same year IDLO began its work in Kenya providing technical assistance to the then Committee of experts which was tasked with the development of the Constitution; and, since then, IDLO has collaborated with key agencies in the country responsible for implementation of the Constitution, particularly relating to the Bill of Rights, land and environment, devolution, access to justice, public finance management and representation of the people, advancing gender equality across the country and operationalizing the constitutional provisions relating to gender. Also, IDLO supports strategic policy development, critical legislative review, expert technical advice, institutional strengthening and capacity building; and, that IDLO's work is undertaken at the formal request from and with full knowledge of the Government of Kenya.

f. **That** IDLO's activities are governed by the Treaty Making and Ratification Act,^[5] hence it is not subject to the Respondents. Also, not all non-profit making organizations and charities are registered or ought to be registered under Cap 34, Laws of Kenya; but, a NON profit making organization or a charity can be registered as a trust under the Trustees (Perpetual Succession) Act,^[6] as a company limited by guarantee under the Companies Act^[7] or as a an NGO. Further, since IDLO is not a Non-Governmental Organization, the Respondents have no basis in law to exercise supervisory powers over it pursuant to the Non-Governmental Organization Co-ordination Act,^[8] and that the letter complained of was written out of malice and in bad faith.

g. **That** there is no basis to back the Respondents allegations that the Government of Kenya had vide a letter referenced MFA.AU.16/12 (28) dated 13th September 2017 revoked the Privileges and Immunities conferred to IDLO. Also, contrary to the principles of Natural Justice and Article 47 of the Constitution and the Fair Administrative Action Act,^[9] the Respondent and the first Interested Party did not give the second Interested Party a hearing, hence, the decision complained of violates Articles 10 (2), 47, 73, 75 (1), 232, (a)-(f) and 259 (1) of the Constitution.

h. **That** the impugned decision violates Kenya's national values and principles of good governance enunciated in the Constitution and it will adversely affect many operations of the government which are supported by IDLO, which is a threat to the reform agenda and it is against public interest and prejudicial to the Rule of Law and inconsistent with the Constitution.

First and Second Respondent's Grounds of opposition.

3. The Honorable Attorney on behalf of the first and second Respondents filed grounds of opposition on 14th December 2017 stating that:-

a. **That** the application is frivolous, vexatious and an abuse of court process.

b. **That** the Respondents' actions through the letter dated 5th October 2017 are well within its statutory mandate of regulation of Non-Governmental Organizations in the Republic of Kenya.

c. **That** the actions complained of are not illegal, ultra vires, unreasonable or against the rules of Natural justice but are founded on law.

d. **That** the prayers sought are tantamount to inviting the Court to usurp the statutory powers of the second Respondent.

Issues for determination.

4. Upon considering the detailed descriptions of the Parties' positions and submissions, I find that the following issues distil themselves for determination:-

a. Whether the Respondents decision is ultra vires its statutory mandate.

b. Whether the first Respondent violated the provision of the Fair Administrative Action Act.

c. Whether the Impugned decision is unconstitutional.

d. Whether the ex parte applicant has the locus standi to institute these proceedings.

e. What are the appropriate orders in the circumstances of this case?

a. Whether the Respondents' decision is ultra vires its statutory mandate.

5. The *ex parte* applicant argued that the first Respondent's violated the Constitution, the Fair Administrative Action Act,^[10] the Treaty Making and Ratification Act^[11] and the Non-Governmental Organizations Co-ordination Act^[12] by issuing an illegal, arbitrary, malicious and oppressive order. He also argued that the Board acted *ultra vires* its mandate and that the impugned decision has no basis in law. Also, he argued that IDLO is governed by the Treaty Making and Ratification Act^[13] and not the Non-Governmental Organizations Co-ordination Act,^[14] hence, it is not subject to the provisions of the Non-Governmental Organizations Co-ordination Act^[15] which is only applicable to the registration and co-ordination of Non-Governmental Organizations in Kenya and for connected purposes.^[16] He cited *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others*^[17] where it was held that power which is abused should be treated as power that has not lawfully been exercised.

6. The Respondent's counsel submitted that the actions complained of did not go outside the scope of the Respondents' constitutional and statutory mandate, but fell within its mandate under section 7 of the Non-Governmental Organizations Co-ordination Act. He argued that the letter complained of was written pursuant to its mandate in furtherance of a decision made by the Ministry of Foreign Affairs. He also argued that IDLO carries out charitable activities which fall under the supervisory duty of the second Respondent, and, that all things are presumed to have been legitimately done until the contrary is proved.^[18] He submitted that Judicial Review is concerned with the process not the merits of the decision.^[19]

7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

"(t)he 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"^[20]

8. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.^[21] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent's are constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its exercise of power. The Respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations.

9. When the constitutionality of legislation or a provision in a statute or a decision or an act or omission of a statutory or public body is challenged, the Court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"^[22] the impugned legislation or provision or decision, or act or omission is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution^[23] and the relevant statutory provisions.

10. We are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

11. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.^[24] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.^[25] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

12. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The Courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

13. The preamble to the Non Governmental Organization Co-ordination Act^[26] reads-"An Act of Parliament to make provision for the registration and co-ordination of Non-Governmental Organizations in Kenya and for connected purposes." From the preamble statement, the purpose of the Act is to make provision for the registration and co-ordination of Non -Governmental Organizations in Kenya and connected purposes.

14. Section 3 of the Act established the Non-Governmental Organizations Co-ordination Board whose functions are provided for under Section 7 of the act as follows:-

- 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 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;
- i. and to develop and publish a code of conduct for the regulation of the Non-Governmental Organizations and their activities in Kenya.

15. Two critical issues flow from the foregoing section. *First*, whether the impugned decision can be read in a manner consistent with the functions of the Board stipulated under the above section. An administrative decision is flawed if it is *illegal*. A decision is *illegal* if it: - **(a)** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* **(b)** *pursues an objective other than that for which the power to make the decision was conferred;* **(c)** *is not authorized by any power;* **(d)** *contravenes or fails to implement a public duty.*

16. Statutes do not exist in a vacuum.^[27] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.^[28] The courts should therefore strive to interpret powers in accordance with these principles.

17. Further, where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.^[29] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others*^[30] citing Lord Denning:-^[31]

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”(Emphasis added).

18. It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only.^[32] The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful.^[33] A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.^[34]

19. Decision-makers should not pursue ends which are outside the “objects and purposes of the statute.” It is said that power should not be “exceeded” or that the purposes pursued by the decision-maker should not be “improper,” “ulterior”, or “extraneous” to those required by the statute in question. It is also said that “irrelevant considerations” should not be taken into account in reaching a decision.

20. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.^[35] What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

21. A decision can be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. A decision is unlawful if it is outside the powers conferred by the statute. A close look at the provisions of section 7 cited earlier which provides for the functions of the second Respondent leaves me with no doubt that the decision complained of cannot be read in a manner consistent with the above section. Differently put, the first Respondent acted outside its statutory functions. None of the actions complained of are expressly or impliedly provided for under section 7 or any other provision of the act.

22. The Rule of Law is a founding value of our constitutional democracy.^[36] It is the duty of Courts to insist that the State, in all its dealings, operates within the confines of the law. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to

the Rule of Law. When upholding the Rule of Law, we are thus required not only to have regard to the strict term of regulatory provisions but so too to the values underlying the Bill of Rights. Of importance is the demand that decisions must be made and executed lawfully, fairly and expeditiously.

23. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the Constitutional imperative that administrative action must be **lawful, reasonable** and **procedurally fair**.^[37]

24. Decisions by public bodies must conform to the Constitution and be interpreted and applied within its normative framework.^[38] Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated in Article 10 of the Constitution and the Bill of Rights. The action or decision complained of must conform to the statutory provisions and must pass the Constitutional muster.

25. In *John Wachuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*^[39] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

*c. Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*^[40]:-*

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

26. A clear reading of section 7 of the Non Governmental Organizations Co-ordination Act^[41] which the Respondents sought refuge in leaves me with no doubt that it does not authorize the impugned decision. It follows that that Respondents acted outside their statutory mandate in purporting to make the impugned decision. It is my finding that the impugned decision is out rightly illegal. In any event, it has not been established that IDLO is registered under the Non Governmental Organizations Co-ordination Act^[42] for it to be subject to the provisions of the act.

b. Whether the first Respondent violated the provisions of the Fair Administrative Action Act.

27. The *ex parte* applicant argued that the impugned decision is unreasonable and violates Article 47 of the Constitution.^[43] He also argued that IDLO was not granted a fair hearing in violation of Articles 25 (c) and 50 (1) of the Constitution. To buttress his argument he cited *Judicial Service Commission vs Mbalu Mutava & Another*.^[44] Also he argued that the decision violated the principles of natural justice.^[45] The Respondents counsel did not address this issue at all in his submissions, save asserting that the impugned decision is lawful.

28. The provisions conferring mandate upon the second Respondent must be read in the context of not one but three different imperatives. The *first* is to enable the Respondents to effectively to carry out their specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for them to perform their functions through the application of the law. *Second*, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Respondents' decisions affects the *ex parte* applicant or IDLO or citizen rights, the Respondents are obliged **not** to act unfairly. The impugned decision must accordingly be construed so as to promote respect for the Bill of Rights. A *third* dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a Court or if appropriate another independent and impartial tribunal or body.^[46] Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the Respondents would act in such a manner as to violate or trump or trivialize a citizens' Constitutional rights in a manner other than contemplated under Article 24 of the Constitution.

29. It common ground that the decision was arrived at without affording IDLO an opportunity to be heard nor was it given a notice or reasons for the decision. No argument was advanced before me by the Respondents that the impugned decision is justifiable and can pass the Article 24 analysis test. It has not been shown 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, including the nature of the right or fundamental freedom, the importance or the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

30. Article 47 of the Constitution provides that every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The **Fair Administrative Action Act**^[47] was enacted to illuminate and expand the values espoused under Article 47 of the Constitution. Section 4(3) of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

31. In *Judicial Service Commission vs. Mbalu Mutava & Another*[48] the Court of Appeal held that:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. 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. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

32. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*[49] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

33. Section 7 (2) of the Fair Administrative Action Act[50] provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

34. When the constitutionality or legality of a decision made by a public body in the exercise of its statutory mandate is questioned, the duty of the court is to determine whether the impugned decision is capable of being read in a manner that is constitutionally compliant or as in the present case whether it can be read in a manner that conforms to the relevant statute. Every act of the state or public bodies must pass the constitutional test. put differently, it must conform to the principal of legality.

35. A contextual or purposive interpretation of the challenged decision must of course remain faithful to the actual wording of the statutes, namely the Fair Administrative Action Act,[51] the Constitution and section 7 of the Non Governmental Organizations Co-ordination Act. The challenged decision must be capable of sustaining an interpretation that would render it compliant with the constitution and the statutes, otherwise the courts are required to declare it unconstitutional and invalid.

36. A contextual interpretation of the impugned decision, therefore, must be sufficiently clear to accord with the Rule of Law. The other crucial question which must be answered is what is the standard by which the validity of the impugned decision and conformity with the Fair Administrative Action Act[52] and Article 47 of the constitution should be judged.

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.

38. In *Local Government Board vs. Arlidge*,[55] Viscount Haldane observed, "...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." As early 1906, the Judicial Committee[56] observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

39. In India the principle is prevalent from the ancient times.[57] In this context, para 43 of the judgment of the Supreme Court in the case of *Mohinder Singh Gill vs. Chief Election Commissioner*,[58] may be usefully quoted:-

“Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautilya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.”

40. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[59] observed, "Where a statute authorizes interference with properties or other rights and is

silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice." **Wade** in *Administrative Law*^[60] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

41. Natural justice has been described as "fair play in action, the principles and procedures which in any particular situation or set of circumstances are right and just and fair."^[61] Its rules have been traditionally divided into two parts: *Audi alteram partem*— the duty to give persons affected by a decision a reasonable opportunity to present their case. *Nemo judex in cau sa sua debet esse*— the duty to reach a decision untainted by bias. "Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."^[62]

42. Generally, however, it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.^[63]

43. *In the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge vs. Baldwin*^[64]**been alive to that fact.**

44. It is not disputed that IDLO was not given a notice prior to making the impugned decision. It is uncontested that IDLO was not give the opportunity to present its case nor where they afforded an opportunity to be heard. The impugned decision was made in total disregard to the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act.^[65] The impugned decision cannot pass the constitutional muster. It is an affront to our constitutional democracy. It is invalid.

c. Whether the Impugned decision is unconstitutional.

45. The *ex parte* applicant argued that the Impugned decision violated Articles 2 (1), 2 (4), 1, 2, 3 (1), 10 (2), 73, 75, 232 and 259 (1) & (3) of the Constitution. On his part, the Respondents' counsel submitted that that the decision was within the statutory mandate of the Respondents.

46. Like all other written Constitutions in the world, our Constitution declares its supremacy over all other laws and that it binds all persons and State organs at all levels of government.^[66] It also provides that no person may claim or exercise State authority except as authorized under the Constitution.^[67] Consistent with the supremacy clause, the Constitution provides that any act or omission in contravention of the Constitution is invalid.^[68]

47. Also relevant to the issue under consideration is Article 73 of the Constitution which provides that:-

73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

48. It will suffice to state that the impugned decision cannot by any stretch of imagination be described as consistent with the purposes and objects of the Constitution nor does it demonstrate respect for the people or bring honor to the nation and dignity to the office of the Respondents. Further, it does not promote public confidence in the integrity of the said office. Instead, it is a serious assault to the Constitution which the Respondents are obliged to respect, uphold and protect.

49. The impugned decision is a violation of the principles and values of governance. The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law,^[69] Leadership and Integrity,^[70] Values and Principles of Public Service^[71] which include accountability for administrative acts.

50. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the Rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article 259 is mandatory.

51. There is no doubt that the 2010 constitution brought a fundamental change to this country with a strong emphasis on the Rule of Law and national values. It was a major transition from the dark past to a future where constitutionalism would reign supreme. In other words, the era of having a Constitution without constitutionalism was brought to an end by the 2010 Constitution and every effort must be made to ensure that the Rule of Law which is one of the core values of constitutionalism reigns supreme.

52. This Court hoists high the supremacy of the Constitution and subscribes to the constitutional edict in Article 2 (4) that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. It is my finding that the impugned decision cannot be read in any manner consistent with the Constitution and it is therefore a violation of the above provisions of the Constitution hence null and void for all purposes.

d. Whether the ex parte applicant has the locus standi to institute these proceedings.

53. The *ex parte* applicant reiterated that he has the *locus standi* to institute these proceedings^[72] and that this suit qualifies as a public interest litigation.^[73] The Respondents counsel did not address this issue at all.

54. The Constitution contains two articles which are of relevance to Public Interest Litigation. The first of these articles is Article 22 – Enforcement of the Bill of Rights. It provides as follows:-

1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members

55. The second is Article 258 (1) of the Constitution. It provides that:-

"Every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention."

56. Public interest litigation is not defined in any statute or in any act in Kenya. In simple words, it means, litigation filed in a court of law, for the protection of "Public Interest." According to Black's Law Dictionary^[74] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

57. The *ex parte* applicant does not contest the impugned decision for his own interest. The impugned decision if implemented will not only affect IDLO but also will have an impact on any projects undertaken by IDLO. The projects likely to be affected are of tremendous benefit to the public.

58. There is nothing to show that the *ex parte* applicant is not acting in good faith. Dealing with the question of "*bona fides*" of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal*^[75] held as hereunder: -

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above,

Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

59. Relying on the above case, the Supreme Court of India in the case of *Dr. Akhtar Hassan Khan vs. Federation of Pakistan*^[76] held that while holding that the petitions are maintainable, the Court has to guard against frivolous petitions as it is a matter of common observation that in the garb of Public Interest Litigation, matters are brought before the Court which are neither of public importance nor relatable to enforcement of a Fundamental Right or public duty.

60. In Kenya in *Albert Ruturi, JK Wanywela & Kenya Bankers' Association vs The Minister of Finance & Attorney General and Central Bank of Kenya* (the Ruturi case) being the case which ushered in "a new dawn of Public Law," Justices Mbaluto and Kuloba J stated as follows:-

"In constitutional questions, human rights cases, public interest litigation and class actions...any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception."(Emphasis added).

61. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.^[77]Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns. This technique is concerned with the protection of the interest of a class or group of persons who are either the victims of governmental lawlessness, or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redress of their grievances due to lack of resources or ignorance or their disadvantaged social and economic position.

62. It is the duty of the court to see whether the petitioner who approaches the court has a *bona fide* intention and not a motive for personal gain, private profit or political or other oblique considerations. Considering the facts of this case, I find that this Judicial Review application cannot be said to have been brought for personal gain or in bad faith. I find and hold that this case is properly brought in public interest as opposed to private interest.

e. What are the appropriate orders in the circumstances of this case?

63. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated above, it is my finding the impugned decision is *ultra vires* the statutory functions of the second Respondent and violates provisions of the Constitution.

64. The *ex parte* applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

65. In view of my analysis and conclusions herein above, I find that the *ex parte* applicants have satisfied the threshold for this court to grant the Judicial Review orders sought.

66. However, as for the prayer for costs, I find that an order awarding costs, though deserved in this case, will injure the public coffers on account of a careless, arbitrary, illegal and unconstitutional decision by the first Respondent. I take the view that time has come for Courts to order that public officers be held personally liable to pay litigation costs where the litigation arises from their careless, illegal and unconstitutional actions, omissions or decisions. This is a proper case for the Court to make such an order so as to protect public resources which is a constitutional imperative. However, since the parties did not address this point, I will in exercise of my discretion order that each party meets his/its own costs.

67. Accordingly, I find and hold that the *ex parte* Applicant's Application dated **24th October 2017** succeeds. Consequently, I grant the following orders:-

*a) An order of **Prohibition** be and is hereby issued prohibiting the first and Second Respondents and or any person under its behest or direction from acting outside the scope of the Respondent's constitutional and statutory mandate including taking cognizance of, entertaining, acting upon, or howsoever enforcing or in any way complying with the Respondent's orders, directions and or decision as contained in their letter **RE: NGOB/5/30A/8/Vol. XV** dated 5th October 2017.*

*f) An order of **Certiorari** be and is hereby issued quashing the Respondents letter **RE: NGOB/5/30A/8/Vol. XV** dated 5th October 2017 vesting powers in the Respondent outside the scope of the Respondent's constitutional and statutory mandate.*

*g) An orders of **Mandamus** be and is hereby granted compelling the first Respondent to expunge from the record their letter **RE: NGOB/5/30A/8/Vol. XV** dated 5th October 2017 purporting to vest powers in the first and second Respondent contrary to the scope*

of their constitutional and statutory mandate.

h) That each party shall bear its own costs.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 11th day of September 2018.

John M. Mativo

Judge.

[1] Act No. 4 of 2015.

[2] Act No. 45 of 2012.

[3] Act No. 19 of 1990.

[4] Ibid.

[5] Act No. 45 of 2012.

[6] Cap 164, Laws of Kenya.

[7] Act No. 17 of 2015.

[8] Act No. 19 of 1990.

[9] Act No. 4 of 2015.

[10] Act No. 4 of 2015.

[11] Act No. 45 of 2012.

[12] Act No. 19 of 1990.

[13] Supra.

[14] Supra.

[15] Ibid.

[16] Citing Odunga J in *Republic vs Non-Governmental Organizations Co-ordination Board ex parte Okiya Omtatah Okoiti & 2 Others* {2017}eKLR.

[17] {2007}2 KLR, 240.

[18] Citing *Republic vs Kenya Power & Lighting Company Limited & Another* {2013}eKLR.

[19] Citing *Republic vs Commissioner of Customs Services ex parte Africa K-Link International Limited* {2012}eKLR.

[20] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

[21] *National Director of Public Prosecutions vs Zuma, Harms DP*

[22] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[23] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[24] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes"

<https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>.

[25] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. *Supra* note 1.

[26] *Supra*.

[27] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: “Parliament does not legislate in a vacuum. Parliament legislates for a...liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”).

[28] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become “the ultimate controlling factor in our unwritten constitution”; and see J. Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 262.

[29] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[30] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[31] Lord Denning, *The Discipline of Law*, 1979 London Butterworth, at page 12.

[32] As Ngcobo CJ said in *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49

[33] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[34] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[35] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[36] Articles 10 (2) (a) and 19 of the Constitution.

[37] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.

[38] See Article 259 of the Constitution.

[39] JR No 17 B of 2015.

[40] {1948} 1 K. B. 223, H.L.

[41] *Supra*.

[42] *Ibid*.

[43] Citing *Republic vs Kenya Power & Lighting Co. Ltd & Another* {2013} eKLR, *Republic vs National Police Service Commission ex parte Daniel Chacha* {2016} eKLR.

[44] {2015}eKLR. Also cited are *Republic vs Registrar of Companies ex parte Githungo* [2001]KLR 299, *Republic vs The Hon. THE Chief Justice of Kenya & Others ex parte Justice Moi* M. Ole Keiwua HCMCA No. 1298 of 2004 & *Onyango Oloo vs A.G* {1986-1989} E.A 456.

[45] Citing *General Medical Council vs Spackman* {1943} 2 ALL ER 337 and *Ridge vs Baldwin* {1963} 2 ALL ER 66 at 81.

[46] Article 50 (1).

[47] Act No. 4 of 2015.

[48] {2015} eKLR, Civil Appeal 52 of 2014.

[49]{CCT16/98} 2000 (1) SA 1, at paragraphs135 -136.

[50] Act No. 4 of 2015.

[51] *Supra*.

[52] Ibid.

[53] Article 47(1) of the Constitution of Kenya, 2010.

[54] Article 47(2) of the Constitution of Kenya, 2010.

[55] {1915} AC 120 (138) HL.

[56] {1906} AC 535 (539), Lapointe v. L'Association.

[57] We find it Invoked in Kautllya's Arthashastra.

[58] AIR 1978 SC 851.

[59] (1980), at page 161.

[60] (1977) at page 395.

[61] *Wiseman vs. Borneman* [1971] A.C. 297

[62] *Kanda vs. Government of the Federation of Malaya*, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in *R. v. Law Society of Alberta*, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

[63] David Phillip JONES and Anne S. de VILLARS, *Principles of Administrative Law* (4th edition), Thomson Carswell, 2004, p. 251.

[64] {1963} 2 ALL E.R. 66, {1964} A.C.40

[65] Act No. 4 of 2015.

[66] Article 2 (1) of the Constitution.

[67] Article 2 (2) of the Constitution.

[68] Article 2 (4) of the Constitution.

[69] Article 10 (1) (a)-(e)

[70] Chapter six of the Constitution

[71] Chapter thirteen of the Constitution

[72] Citing Articles 3 (1),22 and 258 of the Constitution

[73] Citing *Advancing Human Rights and Equality through Public Interest Litigation*, <http://www.pilsni.org/about-public-interest-litigation>, *Thakur Bahadur Singh and Another vs Government of Andhra, Peoples Union for Democratic Rights & Others vs Union of India & Others* (1982) 3 SCC 235.

[74] Sixth Edition.

[75] AIR 2004 SC 280.

[76]{2012} SCMR 455.

[77] Public Interest Litigation: Use and Abuse, <http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0>.