**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 176 OF 2014**

**REPUBLIC .....APPLICANT**

**VERSUS**

**DIRECTOR OF CHILDREN'S SERVICES .....1ST RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF**

**LABOUR SOCIAL SECURITY & SERVICES.....2ND RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO .....3RD RESPONDENT**

**SENIOR PRINCIPAL MAGISTRATE**

**MILIMANI CHILDREN'S COURT.....4TH RESPONDENT**

**EX-PARTE**

**CHAIRMAN, SECRETARY & TREASURER OF GOOD HOPE ORPHANAGE HOME**

**JUDGEMENT**

The notice of motion application dated 22nd May, 2014 is brought by the Chairman, Secretary and Treasurer of Good Hope Orphanage Home. The Applicant seeks orders as follows:

> **"a. An order of CERTIORARI be granted by this Honourable Court to bring into this Court and quash the 1st Respondent's decision/report dated 4th February, 2014, of cancellation of children Welfare programme, of the Applicant, of staying the Applicant's Application for registration as a Charitable Children's Institution (CCI) *(sic)*.**
>
> **b. An Order of MANDAMUS be issued by this Honourable Court to compel 1st and 2nd Respondents to re-evaluate/revisit the pending Application for registration made by the Applicant on 13th February, 2013 and cause it to be registered as a Charitable Children's Institution (CCI).**
>
> **c. An Order of PROHIBITION be issued by this Honourable Court to prohibit the 1st**

**Respondent and the 4th Respondent from discharging the Committal Orders of the 87 children (40 orphans, 47 partial orphans) from the Applicant.**

**d. That the said:**

**(1) The Report dated 4th February, 2014 given by the Director of Children's Services (Ngong Division) be quashed.**

**(2) There be a stay of proceedings and/or further orders of the 4th Respondent in MISCELLANEOUS CHILDREN APPLICATION NO. 119 OF 2013–JOYCE K. MUDASIA-vs-BJORNAR HEIMSTAD AND FIVE OTHERS.**

**(3) Costs of and incidental to the Application be in the cause".**

The Director of Children's Services; the Principal Secretary, Ministry of Labour, Social Security and Services; the County Government of Kajiado and the Principal Magistrate- Milimani Children's Court are named as the 1st, 2nd, 3rd and 4th respondents respectively.

Among the documents in support of the application are the chamber summons application for leave, the statutory statement and the verifying affidavit of Esther Okello. The application is also supported by the supplementary affidavit and the further supplementary affidavit sworn by Fred Mandara on 10th June, 2014 and 11th July, 2014 respectively.

According to the documents and the submissions filed in Court, Good Hope Orphanage Home was registered as a society in 1989. There is a sister organisation called Good Hope Business Ltd incorporated as a limited liability company in 2008. The Applicant has put up structures aimed at caring for destitute/orphaned children on its land parcel number KJD/OLCHORO – ONYORE/2547 in Kiserian.

Sometimes in the year 2013 a dispute arose over the management of the Applicant. Joyce Mudasia the Interested Party herein who was a former director of the Applicant filed **MISCELLANEOUS CHILDREN'S CASE NO. 119 OF 2013** against five directors of the Applicant and the Director of Children Services. She obtained orders barring the six defendants from interfering with her discharging her mandate as the director of the Applicant and also denying her access to the Applicant. She also obtained orders restraining the defendants from interfering with her management of an institution called Good Hope Hill Academy.

Subsequently, the 4th Respondent asked for a report from the 1st Respondent in respect of the Applicant. The 1st Respondent prepared a report dated 4th February, 2014 and made the following recommendations:

**"?THAT the current management has failed to meet the criteria set out in Section 18(2) of the Charitable Children's Regulations, 2005 to warrant the home's registration.**

- **The Department takes note that the institution has good facilities that can serve needy children if proper management is put in place.**
- **The Department of Children's Services recommends that the institution ceases all child welfare programmes it is undertaking until the wrangling parties secure a comprehensive resolution of their dispute and put in measures that will qualify it for registration as a CCI.**

**The Area Advisory Council Kajiado will draw a strategy of closure to ensure that the Welfare of the children is safeguarded as they are reintegrated back to the community or placed in other facilities."**

The report was presented to the 4th Respondent on 20th February, 2014. On 20th March, 2014 D. K.

Kuto, Acting Senior Resident Magistrate adopted the report of the 1st Respondent.

The Applicant has through this application therefore approached this Court seeking to quash the report of the 1st Respondent. The ground upon which the order is sought is that the process of making the report was tainted with illegality, irrationality and biasness as the 1st Respondent is a party to the case before the 4th Respondent. It is the Applicant's case that the decision will result in unnecessary suffering of the children accommodated by it as no other home can treat them better than the Applicant.

The Applicant contends that the 1st and 2nd respondents failed to adhere to Article 47(1) of the Constitution which provides for the right to fair administrative action.

It is the Applicant's case that the 4th Respondent's decision to stop or cancel the child welfare programme was made for no apparent reason and was based on a biased, unfair and unreasonable report as the members of its board were never interviewed before the report was made.

It is the Applicant's case that it was never informed about its intended closure until 4th February, 2014 when the 1st Respondent produced the report. Further, the Applicant asserts that it had applied to be registered as a charitable children's institution but an unfair decision had been made not to register it.

The Applicant contends that the orders that had been issued in favour of the Interested Party by the 4th Respondent had been set aside on 19th February, 2014 and the Interested Party referred to the Industrial Court on the issues she had raised.

The 3rd Respondent did not respond to the application. The 1st, 2nd and 4th respondents and the Interested Party opposed the application. The 1st, 2nd and 4th respondents opposed the application through a replying affidavit sworn on 23rd June, 2014 by Vivienne Mang'oli the Children Officer for Kajiado North Sub-County.

The respondents' case is that one of the functions of the Director of Children Services is to ensure compliance with the Charitable Children's Institutions Regulations, 2005 and to ensure that the welfare of children is protected. The deponent denied that the report she prepared is tainted with illegality, irrationality and bias.

It is the respondents' case that the Applicant applied to be registered as a charitable children's institution on 13th February, 2013. On 18th July, 2013 a director of Good Hope Orphanage Home wrote a letter complaining about several issues and sought intervention from the department.

On 23rd July, 2013 the Area Advisory Council (AAC) Inspection Sub-Committee conducted a social inquiry at the premises and made various recommendations. The inspection team noted the barely concealed acrimony between the institution's management and one Bjornar Heimstad, a long term donor and associate of the institution. The inspection team recommended that the registration be deferred and also made a raft of other recommendations to be implemented in the intervening period.

Ms Mang'oli averred that on 13th August, 2013 the Executive Director of the Applicant one Joyce Mudasia (the Interested Party) took letters to her showing that the said Bjornar Heimstad was determined to take over the operations of the institution. The Interested Party later filed **NAIROBI MISC. CHILDREN CASE NO. 119 OF 2013** and obtained orders stopping the defendants from interfering with her mandate as director of Good Hope Orphanage Home. The same order also restrained the defendants from interfering with the running, management and administration of Good Hope Hill Academy.

Following the issuance of the orders, the sponsor Bjornar Heimstad stopped sending money to the Applicant; the administrator one Mike Mandara refused to sign cheques withdrawing money from the

Applicant's account citing instructions from Bjornar Heimstad not to withdraw any money whereas Joyce Mudasia and Mike Mandara are co-signatories in all the institution's bank accounts; the staff did not receive their salaries; the needs of the children were inadequately met; and animosity among staff aligned to Joyce Mudasia and those aligned to Bjornar Heimstad intensified.

Ms Mang'oli averred that all the findings of the inspection team had been communicated to Mr. Bjornar Heimstad who had even been summoned to appear before the Committee but had refused to do so.

Ms. Mang'oli averred that the parties were advised by the Children's Court to settle the matter out of court but instead on 17th January, 2014 Mr. Bjornar Heimstad terminated all the staff and told those who wished to work under the new management to reapply for their jobs. On 21st January, 2014 members of staff were given termination letters but those aligned to the Interested Party refused to leave the institution's premises.

Ms Mang'oli deposed that a magistrate by the name Nyoike discharged the injunction issued in favour of the Interested Party but on 23rd January, 2014 the "trial magistrate" ruled that the orders issued on 3rd October, 2013 remained in force. Due to the confusion, the welfare of the children deteriorated.

Ms. Mang'oli deponed that on 13th February, 2014 the Department of Children Services was ordered by the Children's Court to conduct an inquiry and issue a report on the situation at Good Hope Orphanage Home. A report was prepared and filed in Court on 20th February, 2014 and on 20th March, 2014 the Court ruled that the Director of Children Services should take appropriate action as recommended in the report. She averred that on 26th March, 2014, a special meeting was convened by the AAC to draw a strategy of closure of the institution. That although all the parties were involved, the recommendations arrived at had not been implemented. Since the Applicant had failed to implement the recommendations, the AAC had closed the institution vide the letter dated 7th May, 2014.

Ms. Mang'oli averred that an assessment had been carried out on the children at the orphanage and 20 children who were found to be destitute had been given alternative institutions. The rest had been released to their guardians and the district children officers in their respective jurisdictions were duly notified to find alternative institutions for them where necessary.

It is the respondents' case that the recited events led to the suspension of the Applicant's application for a licence to operate as a CCI. Further, the respondents contend that Good Hope Orphanage Home was registered in 1989 as a society and not as a CCI and it has therefore been operating illegally contrary to the CCI Regulations, 2005.

The respondents further point out that an inspection carried out recently had revealed that there is a new school within the institution known as Good Hope Preparatory School which had not been notified to the AAC and approved by the National Council of Children's Services as required by the CCI Regulations, 2005. The respondents informed the court that it had been brought to its attention that Good Hope Village had three organisations namely Good Hope Orphanage Home, Good Hope Hill Academy and Good Hope Business Limited. The mandate of Good Hope Business Limited is not clear. It is the respondents' case that the Applicant could not be registered as the cases in Court may impact negatively on the children.

The Interested Party opposed the application through a Notice of Preliminary Objection dated 28th May, 2014 and a replying affidavit sworn by herself on 28th May, 2014.

The Interested Party's preliminary objection is premised on two grounds namely that this Court has no jurisdiction to hear the application and that the proceedings are an abuse of the court process.

The Interested Party's case is that the Applicant ought to have sought a review of the decision of the Children's Court or appealed against it instead of filing these proceedings.

The Interested Party exhibited the interim orders issued to her on 3rd October, 2013 in **JOYCE MUDASIA v BJORNAR HEIMSTAD & 5 OTHERS**, **Milimani Children's Court Miscellaneous Application No. 119 of 2013** restraining the defendants from interfering with the discharge of her mandate as the director of Good Hope Orphanage Home. The orders also restrained the defendants from interfering with her management and administration of Good Hope Hill Academy. The defendants were further restrained from denying the Interested Party access to Good Hope Orphanage Home.

The Interested Party's case is that once the Children Court adopted the Children Officer's report, the report became an order of the Court and that the Children's Court is competent to hear and determine children's cases. She avers that **"the children's court closed down the orphanage so that the parties could be given time to negotiate."**

In response to the assertions by the respondents and Interested Party, the Applicant insisted that this Court has jurisdiction as these proceedings are made in the interests of the child as provided by **Section 4(2) of the Children Act, 2001.** The Applicant contends that the report dated 4th February, 2013 was prepared without the input of the children in the institution as required by **Section 4(4) of the Children Act.**

The question to be answered in this judgment is whether the Applicant has met the threshold for grant of judicial reviews orders. The basis for grant of judicial review orders were clearly laid down by Lord Diplock in the case of **COUNCIL FOR CIVIL SERVICE UNIONS v MINISTER FOR CIVIL SERVICE [1985] A.C. 374, at 401D** when he stated that:-

> **"Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

In order to obtain judicial review orders an applicant must therefore satisfy the Court that a public authority has acted illegally, unreasonably or in breach of the rules of natural justice.

The Interested Party contended that this Court has no jurisdiction to handle this matter. As will be demonstrated shortly, the issues raised by the Applicant are about process and not the merits of the decision. This Court therefore has jurisdiction to consider the issues raised and make a determination as to whether the orders sought should be granted. It is indeed not disputed that the Applicant could have sought a review of the decision of the magistrate or appealed against that decision. It is also important to note that judicial review is a remedy of last resort and is generally inappropriate where suitable alternative safeguards exist. The question is whether the other remedies available are equally effective and convenient. A perusal of the papers filed herein shows that the issues raised pivot around the application by the Applicant for registration as a CCI. This in my view is an issue better dealt with by way of judicial review.

The parties herein all claim that their actions are driven by the best interest of the child. For the respondents and the Interested Party, the closure of the Applicant is in the best interest of the child. For the Applicant, the continued operation of the institution is in the best interest of the child. This Court's mandate is however limited to establishing whether the respondents complied with the law, acted rationally and within the rules of natural justice in respect to the report dated 20th February, 2014.

It was conceded by all the parties that the Applicant is not registered as required by the CCI Regulations,

2005. This is a very interesting admission. The Interested Party participated in the running of an institution that had not complied with the law. The 1st Respondent who ought to ensure compliance with the law tacitly approved and supervised the operation of an illegal outfit. In fact the courts acting on the advice of the 1st Respondent committed children to the institution.

The second point to note is that there is a disagreement between the Interested Party who was a director of the Applicant and the sponsor Bjornar Heimstad. One needs not dig deep to find that the differences arise from the control of the Applicant and its resources. According to the replying affidavit of Vivienne Mangoli, the 1st Respondent was all along aware of this dispute.

The respondents conceded that the Applicant's application for registration as a CCI was received on 13th February, 2013. No action was taken up to the time a complaint letter was received from the Interested Party on 19th July, 2013. This was in clear breach of Regulation 3(3) of the CCI Regulations, 2005 which provides that:

> **"The Area Advisory Council shall acknowledge receipt of every application for registration in the form set out in the Second Schedule within thirty days after the date of receipt, and shall indicate the date (which shall not be later than thirty days from the date of receipt) when the Area Advisory Council shall inspect the premises of the institution to ascertain whether it meets the requirement set out in the Third Schedule."**

There is no evidence that the application was acknowledged. The Applicant institution was not visited within thirty days from the date of the receipt of the application.

In fact the visit to the institution which was carried out on 23rd of July, 2013 was not made in relation to the application for registration. At paragraph 10 of her replying affidavit sworn on 23rd June, 2014 Vivienne Mang'oli discloses the purpose of the visit as follows:

> **"THAT since an inspection of the premises was due to be conducted on 23rd of July 2013, the AAC Inspection subcommittee in discharging the mandate of its institution/office decided to conduct a social inquiry at the premises on the said sate for a fact finding mission before addressing the said allegations and upon conducting the visit the committee made the following findings and recommendations. Annexed hereto and Marked VM2 is a copy of the AAC findings and recommendation."**

The first red flag is raised by the fact that this report was later used to recommend deferral of the Applicant's application for registration and yet the visit was not for the purposes of finding out whether the Applicant was qualified for registration. The visit was to verify the complaints of the Interested Party.

Secondly, the AAC having noted that there was acrimony between the sponsor and the Interested Party did not bother to seek the views of the sponsor before preparing the report. One cannot be faulted for saying the report was biased in that it only considered the views of one of the wrangling parties.

For those reasons alone, one can say that the decision to defer or deny the Applicant's registration was unlawful and did not comply with the rules of natural justice.

There is the second report which was made in compliance with the order issued by the Children's Court on 13th February, 2014. The report is dated 20th February, 2014 and was allegedly adopted by the Court on 20th March, 2014. I suspect this is the report that the Applicant says is dated 4th February, 2014.

It is indeed clear that the Applicant does not seek to quash the proceedings before the 4th Respondent. The Applicant only prays for stay of proceedings and/or further orders of the 4th Respondent in **Misc. Children's Application No. 119 of 2013, JOYCE K MUDASIA v BJORNAR HEIMSTAD & FIVE OTHERS.**

I have looked at the report dated 14th February, 2014 and note that among the recommendations made is that the institution ceases all child welfare programmes until the wrangling parties secure a comprehensive resolution of their dispute. The report then proceeds to recommend the closure of the institution.

The Applicant's application for registration as a CCI has never been considered. It has even never been acknowledged and neither has a visit been made to the premises as required by the CCI Regulations, 2005.

The second report recommending the closure of the Applicant has no foundation since the core issue in the matter before the 4th Respondent had been referred to the Industrial Court. It was a floating report as the proceedings under which the report was sought had essentially been terminated. The magistrate no longer had jurisdiction to receive the report and order its implementation.

Had the Applicant sought an order to quash the proceedings, I would have been inclined to grant such an order. Where a subordinate court exceeds its jurisdiction, this Court can call for the proceedings for purposes of quashing. This was the observation of Lord Reid in **ANISMINIC v FOREIGN COMPENSATION COMMISSION [1969] 2 AC 147** when he stated that:

> **"There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done.....something in the course of the inquiry which is of such a nature that its decision is a nullity .....It may... have misconstrued the provisions giving it power to act so that it decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account."**

The 4th Respondent considered the issue of the closure of the Applicant and this was not a matter remitted to him. Having concluded that the matter before him was an issue for the Industrial Court, the 4th Respondent no longer had any reason for dealing with the report prepared by Ms Vivienne Mangoli.

Be that as it may, I have found that the report that was made by Vivienne Mang'oli in compliance with the orders of the 4th Respondent has no basis. The proceedings before the 4th Respondent in **Misc. Children's Application No 119 of 2013, JOYCE K MUDASIA V BJORNAR HEIMSTAD & 5 OTHERS** were deemed to have been terminated by the order of the 4th Respondent referring the Interested Party to the Industrial Court.

The end result is that the application before this Court succeeds. Orders are made as follows:

1. An order of certiorari is issued quashing the report prepared by Vivienne Mang'oli recommending the closure of the Applicant's child welfare programmes.
2. The Applicant to file a fresh application for registration as a CCI within 30 days from the date of this judgment. The 1st Respondent shall consider the said application in accordance with the CCI Regulations, 2005.
3. The Applicant will remain operational pending the decision of the 1st Respondent.
4. An order of prohibition is issued prohibiting the 1st and 4th respondents from discharging the committal orders of the 87 children from the Applicant. This order will only be in force pending the determination of the application for registration by the 1st Respondent.
5. Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 4th day of September , 2014.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**