IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 20 OF 2015

BETWEEN

CHILD WELFARE SOCIETY OF KENYA ..…..…..…….....…… APPELLANT

AND

REPUBLIC EX-PARTE ……...……...…..…..…..…… 1ST RESPONDENT

CHILD IN FAMILY FOCUS KENYA

THE HONOURABLE ATTORNEY GENERAL...…….....….…….....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LABOUR,

SOCIAL SECURITY AND SERVICES.....……..…..……...3RD RESPONDENT

AND

THE LAW SOCIETY OF KENYA ……..…….…….....1ST INTERESTED PARTY

KENYANS TO KENYANS PEACE

INITIATIVE ADOPTION SOCIETY (KKPI) ……..…….....2ND INTERESTED PARTY

LITTLE ANGELS NETWORK …….....3RD INTERESTED PARTY

KENYA CHILDREN'S HOME ADOPTION SOCIETY …….....4TH INTERESTED PARTY

BUCKNER KENYA ADOPTION SERVICES ……..…….....5TH INTERESTED PARTY

BENEAH OTIENO ONYANGO …….....7TH INTERESTED PARTY

JENNIFER WANJIKU KANUSU ……..…….....8TH INTERESTED PARTY

ANNE NUNGARI THAIRU …….....9TH INTERESTED PARTY

BABY J & 219 OTHERS (SUING THROUGH

T N AS NEXT FRIEND) ……..……..…….....10TH INTERESTED PARTY

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Weldon Korir, J) dated 25th September, 2014

in

Judicial Review No. 164 of 2014)

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JUDGMENT OF THE COURT

1. The law applicable in this country on the rights and welfare of children has come a long way. From the inadequacies of the ***The Children and Young Persons Act (Cap. 141); The Adoption Act (Cap. 143); The Guardianship of Infants Act (Cap. 144),*** all of which were repealed in 2001, Parliament put in place a comprehensive regime of laws under **The Children Act, No. 8 of 2001**. In its preamble, the Act makes provision for *'parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes'*. Parliament also enacted ***The Counter-Trafficking in Persons Act, No. 8 of 2010*** which focuses on women and children. The guiding principle in all the provisions relating to children is that **"the best interests of the child is the first and paramount consideration"** which has since been etched in our supreme law as **Article 53** of the **Constitution 2010**. In this appeal, the focus is on Adoption.

2. The oldest adoption society in the country is the Child Welfare Society **(CWSK)**, the appellant herein. It is not clear how and when it started off or under what legal regime, but the information before us indicates that it was gazetted in 1955 as an approved society for the *'care, protection and control of children'* under the **Prevention of Cruelty to and Negligence of Children Ordinance (No. 12 of 1955)**. It was also among three Societies which were exempted from registration under the **Societies Ordinance (No. 52 of 1952) in** 1955 (the two others being 'Patidar Institute, Kitale' and 'Sahiwal Breeders Society of Kenya'). In 1969, it was approved as an Adoption Society for purposes of the **Adoption Act**, Cap 143, and continued as such under the transitional provisions of the Children Act ***(Regulation 9 of Schedule 7).*** Lately, on 23rd May 2014, **Legal Notice No. 58** of **2014** was published under the **State Corporations Act, Cap 445** creating a state corporation known as **"The Child Welfare Society of Kenya"** with the object, *inter alia*, of taking over and succeeding CWSK. It was declared the *"National Adoption Society"*. That was done one month after commencement of these proceedings in the High Court, but whether or not the process of creating the State Corporation was in accordance with the law is beyond the scope of this appeal and we make no consideration of it.

3. All the elaborate provisions for adoption of children, whether local or international, are to be found in **Part XII** of the Children Act **(the Act).** As relevant to this appeal, and in line with ***The Hague Convention on the Rights of the Child (the Hague Convention), The African Charter on the Rights and Welfare of the Child*** and ***The United Nations Convention on the Rights of the Child,*** which Kenya has ratified and therefore are part of our laws vide ***Article 2 (6)*** of the Constitution, an Adoption Committee is set up under ***section 155*** with specific functions in the administration of adoptions, including:

(a) formulating the governing policy in matters of adoption

(b) effecting liaison between adoption societies, the Government and Non-governmental Organizations

(c) considering and proposing names of the officers who may serve as guardians *ad litem*

(d) monitoring adoption activities in the country

(e) such other functions as are conferred on the Committee by this Act.

4. ***Section 177*** of the Act makes provision for Adoption Societies and restriction on making arrangements for adoption. It provides in mandatory tone as follows:

"177. (1) No body of persons shall make any arrangement for the adoption of a child under the provisions of this Act unless that body is registered as an adoption society under this Part.

(2) An application for registration of an adoption society under this Act shall be made to the Director in the manner prescribed by this Act.

(3) Where an application is made, the Director shall refer the matter to the Adoption Committee which may –

(a) accept the application for registration:

(b) refuse the application for registration on the ground that;

(i) a person taking part in the management or control of the society or a member of the society has been convicted of an offence under this Part, or of a breach of any regulations made under this Part;

(ii) it would not be in the public interest to approve the same, having regard to the number of adoption societies already approved and functioning in the particular locality.

(4) Where an application for registration is refused, no further application for registration of the adoption society may be made under this section within a period of six months beginning with the date when the applicant is notified of such refusal.

(5) Where the Adoption Committee approves and accepts the registration of an adoption society, it shall issue a Certificate of Registration in the prescribed form and shall at the end of the period of twelve months beginning with the date or registration and annually thereafter, review the registration of the adoption society for the purpose of determining whether the registration should continue being in force or be cancelled.

(6) An appeal against the decision of the Adoption Committee in refusing or cancelling the registration of an adoption society shall be made in the prescribed manner to the Minister whose decision upon the hearing and determination of the appeal shall be final.

(7) The functions of an adoption society shall be –

(a) to make such inquiries and investigations and to cause such reports as shall be prescribed or as the court may direct, to be obtained for the purpose of ensuring so far as may be possible, the suitability of a child for adoption.

(b) to examine and interview any prospective applicant for an adoption order and to make such inquiries and investigations and to cause such reports as shall be prescribed, to be obtained or as the court may direct; for the purpose of ensuring so far as may be possible,

the suitability of the applicant for the making of an adoption.

(c) to ensure that the parent or guardian of the child concerned understands the effect in relation to his rights as a parent or guardian, of the making of an adoption order in respect of the child, and in this regard and whenever possible to procure any consents to the adoption from the persons specified under section 158 (4);

(d) where the child in respect of whom arrangements for adoption are to be made appears to have been abandoned, to ensure that as far as possible all necessary steps are taken to trace the parents or relatives of the child;

(e) subject to its having the facilities to do so, to take care and possession of any child whose parent or guardian is desirous of causing the child to be adopted, pending arrangements for adoption;

(f) when appointed by the court to act as guardian ad litem in any adoption proceedings to nominate a member or officer of the society to so act;

(g0 in so far as the funds at its disposal permit, to make provision for the care and supervision of children who have been placed by their parents or guardians at the disposition of the society;

(h) to maintain a register and records in respect of all or any children in respect of whom arrangements for adoption have been made by the society, and the names and particulars of any applicants for adoption or of the adopters; and

(i) to perform such other duties as may be prescribed.

(9) Any corporate body of persons or any person who takes part in the management or control of an unregistered body of persons, which make arrangements for the adoption of a child in contravention of subsection (1) commits an offence.

(10) Any corporate body which commits an offence under this section shall be liable on conviction to a fine not exceeding one hundred thousand shillings.

(11) Any person who takes part in the management or control of a corporate body of persons which is guilty of an offence under this section shall be liable to imprisonment for a term not exceeding one year, or to a fine not exceeding one hundred thousand shillings or to both.

(12) In any proceedings under this section, proof of the things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the management or control of a body of persons, or in making arrangements for the adoption of children on behalf of the body, shall be admissible as evidence of the purpose for which that body exists."

5. Under those provisions, several Adoption Societies have been approved and licenced by the Adoption Committee **(the Committee)** including the seven entities enjoined as **Interested Parties** before us and in the High Court. In line with the section, CWSK obtained licences from the committee for several years since 2005 until the year 2013 when the committee insisted on compliance with certain requirements of the Regulations before renewal, viz-:

*a) independently audited accounts and balance sheet for the previous year in line with **Regulation 20** of the Children (Adoption) Regulations, 2005;*

*b) registration as a non- profit making organization in accordance with **Regulation 10 (a);***

c) Annual report for the period 2011/2012 under ***Regulation 12.***

6. CWSK did not respond to the committee's demand or appeal the decision as provided under ***section 177 (6)*** of the Act. Instead, purporting to appeal under ***section 195*** of the Act, it reacted by applying to the Cabinet Secretary responsible for the administration of the Act, **(the Minister)** (3rd respondent) seeking exemption from the provisions of the Act under ***section 198***. It informed the minister that it was being *"victimised, harassed and interfered with"* by the committee which was insisting on compliance with procedural regulations before renewal of its licence. It cited its long existence and special treatment by the authorities since 1955, and its continuation as an adoption society despite the enactment of the Children Act. CWSK also said it was *'impractical and inexpedient'* to apply the provisions of section 177 to it.

7. The minister acceded to the application by letter dated 16th October, 2013 and proceeded to issue and publish gazette notice No. 206 on 25th October, 2013 exempting CWSK in the following manner:

"THE CHILDREN ACT (No. 8 of 2001)

IN EXERCISE of the powers conferred by section 198 of the Children Act, 2001, the Cabinet Secretary for Labour, Social Security and Services makes the following Order:-

THE CHILDREN (EXEMPTION) ORDER, 2013

1. This Order may be cited as the Children (Exemption) Order, 2013.

2. The provisions of section 177 (1), (2), (3), (4), (5), (9), (10), (11) and (12) of the Act shall not apply to the organization specified in the Schedule with effect from the date of the commencement of the Act.

SCHEDULE

THE CHILD WELFARE SOCIETY OF KENYA

Dated the 17th October, 2013

SAMWEL KAZUNGU KAMBI

Cabinet Secretary,

Labour, Social Security and Services."

The minister also disbanded the committee by gazette notice published in December 2013, thus paralyzing its functions until he appointed a different one in January 2014.

8. The **Child in Family Focus Kenya (CFFK) (2nd respondent)** was aggrieved by that exemption. It describes itself as a company limited by guarantee for the objective of advocacy for the protection and promotion of family based care options for disadvantaged children, children rights and practices relating to children. It also clarified that it was not an adoption society. By a Judicial Review **(JR)** application lodged with leave on 8th May, 2014, it sought an order of *certiorari* to have the exemption quashed, and an order of *prohibition* to stop the minister from issuing the legal notice or similar legal notices without legal justification. It's view was that the exemption was inimical to the interests and welfare of the child contrary to ***Article 53*** of the Constitution; it was contrary to ***Article 10*** on accountability, public participation and transparency; the minister acted *ultra vires* ***section 177*** sub sections (1) to (12) and did not have the power under ***section 198*** to issue the exemption; acted *ultra vires* ***section 177 (9), (10), (11)*** and ***(12)*** by placing CWSK above the law; arbitrarily granted adoption powers to an unregistered body; elevated CWSK above the supervision and accountability of the committee; acted contrary to the Hague convention, thus endangering inter-country adoptions; exempted the CWSK from criminal liability; and

acted in a manner discriminatory of other adoption societies.

9. In seeking that order, CFFK was supported by Little Angels Network **(LAN)** (3rd interested party); Law Society of Kenya **(LSK)** (1st interested party); Kenyans to Kenyans Peace Initiative Adoption Society **(KKPI)** (2nd interested party); Kenya Children's Home Adoption Society **(KCHAS) (**4th interested party); and Buckner Kenya Adoption Services **(Buckner)** (5th interested party). They asserted that there was no distinction between the so-called *'private adoption society'* or *'profit making agency'* and *'government sponsored adoption agency'*, since all adoption societies were equal under **Article 27** of the Constitution in terms of registration, regulation, compliance and mandate. They contended that the transiting of CWSK as an adoption society ended in 2005 when the Regulations governing registration and operations of all adoption societies became operational. In their view, the historical exemption from registration under the Societies Act as touted by CWSK did not mean there was exemption from registration and licencing under the Regulations.

10. CWSK, the minister, as well as the Attorney General **(AG)** (1st respondent) opposed the JR application, narrating the long history of CWSK, going back to the colonial days, as a government sponsored and funded agency with wide and unique duties of offering a wide range of welfare amenities to disadvantaged and vulnerable children. It flaunted its pedigree by having His Excellency President Uhuru Kenyatta as its patron and the guaranteed direct funding by the National Treasury of its hefty annual budgets in excess of half a billion shillings to carry out its wide ranging roles and duties throughout the country. As regards adoptions, it claimed that unlike the private adoption societies which were motivated by financial gain, CWSK was not driven by commercial/profit interests since adoption for it was the last resort and was done locally under stringent conditions. CWSK charged that CFFK and the other private adoption societies were selling Kenyan children in the name of international adoptions making big money in the process and were merely ganging up against it for laying emphasis on local adoptions and its adherence to the principle of subsidiarity under the **Hague Convention**. It further asserted that the Minister acted lawfully within ***section 198*** since he based his discretion on the *'impracticable and inexpedient'* yardstick provided therein which was applicable in this case. According to them, the exemption was merely on registration requirements and not criminal liability unassociated with such registration. The exemption did not remove CWSK from supervision of the committee and there was no risk therefore that alleged violations like child trafficking, child abuse and such like, would occur.

11. Joining CWSK in opposition to the application were the 7th to 10th interested parties who are individuals whose adoption applications through CWSK were already at various stages of consideration by the Courts and who feared that the success of the application would be prejudicial to them. In their view, the application was not made in the best interests of the child.

12. The learned Judge **(W. Korir, J.)** considered the application, the bulky affidavits and annexures thereto, the written and oral submissions of all counsel and the numerous authorities cited --- in all, three volumes containing in excess of 1500 pages --- and in the end granted the order for *certiorari* but refused to grant the order of *prohibition*. In arriving at that conclusion, the learned Judge observed that the interested parties had unduly expanded the scope of the JR application by raising a deluge of issues outside the grounds and relief set out in the statutory statement, contrary to the provisions of **Order 53 Rule 4 (1)** of the **Civil Procedure Rules.** The Judge then determined several issues which are not relevant in this appeal, and framed two issues relevant to this appeal as follows:

> ***1. Whether the 2nd Respondent*** (the minister) ***had power to exempt the CWSK from the provisions of Section 177 of the Act.***
>
> ***2. If the 2nd Respondent had power to exempt the CWSK, the next question would be whether he exercised his discretion properly.***

13. The 1st issue called for the construction of ***section 198*** of the Act which states as follows:

"The Minister may, from time to time, by order, either retrospectively from the passing of this Act or prospectively, exclude from the operation of all or any of the provisions of this Act <u>the members of any race, tribe, religious group or sect</u> in Kenya, or <u>any part of such race, tribe, religious group or sect</u>, or <u>to</u> <u>whom the Minister may consider it impracticable or inexpedient to apply such provisions</u>, and may also from time to time revoke any such order, but not so that the revocation shall have any retrospective effect." [Emphasis added].

14. The Judge decided that the section had disjunctive categories of exemption as emphasized above, and so the minister had the power to exempt CWSK. He reasoned as follows:-

"If Parliament had no intention of opening the benefit of exemption to other persons outside the classes of race, tribe, religious group or sect, then nothing would have been easier than for Parliament to state in respect of the third group thus: "or any member of the said groups." In using the terms "to whom", Parliament opened up the exemption benefit to all legal persons.

There is only one condition which applies to the three categories; the Cabinet Secretary must satisfy himself/herself that it is impracticable or inexpedient to apply the provisions of the Act to the beneficiary of the exemption. That is to say that when the Cabinet Secretary decides to grant an exemption to a race, tribe, religion or sect or part thereof, he/she must be satisfied that it is inexpedient or impracticable to apply the provisions of the Act to the beneficiary of the exemption. The same condition applies to any other legal person who may benefit from the exemption."

15. There is no challenge by way of a cross appeal to that finding. Only an improper and feeble attempt was made to revisit the issue in submissions before us by counsel for CFFK & LAN Mr. Charles Kanjama. In passing, even if we were to consider it, we find no error in the reasoning of the trial Judge. It is apparent that the section is not elegantly drafted and perhaps the addition of *"any other person"* or *"group of persons"* between *"or"* and *"whom"* would have brought more clarity. But we think the disjunctive use of *"or"* alone before *"whom"* makes all the difference and creates a third category, unlike the first two, which the minister may consider exemptions for.

16. As for the 2nd issue, the learned Judge faulted the exercise of discretion by the minister even after expressing the view that:

"***The decision as to whether it is impracticable or inexpedient to comply with a certain provision of the Act should be left to the Cabinet Secretary otherwise the power of exemption granted to him/her will not serve any purpose. Public administrators should be given the leeway to exercise their lawful powers and the courts should not be seen to be breathing down the neck of the executive. The courts should be cautious in exercising its supervisory power so as to avoid causing paralysis in the operations of the Government".***

17. The Judge was of the view that the court could not abdicate its supervisory jurisdiction to ensure that the exercise of discretion by decision makers was lawful and proper, and that there was no abuse of power. He examined several authorities on the applicable principles including:***<u>Republic vs Chief Magistrate's Court & 2 Others ex-parte Safaricom Limited,</u> Misc. Civil Application No. 299 of 2012; <u>Republic vs Minister for Home Affairs and Others ex-parte Sitamze Nairobi</u> HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323*** and ***<u>Padfield vs Minister of Agriculture, Fisheries & Food</u> [1968] AC 997, 1030 B. D.*** where **Lord Reid** stated thus:

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court."

18. He also examined the circumstances demonstrated by the appellant in support of the wrong exercise of discretion including: the composition of the Adoption committee under ***section 155 (1)*** and ***9th Schedule*** of the **Act**; the role and functions of the committee under ***section 155 (2);*** the creation,

registration and functions of adoption societies in order to legally operate under ***section 177***; the offences created under ***section 177*****;** the facilitative ***Regulations*** made by the Minister to operationalize the Act; **Part XII** of the Act which Parliament dedicated to adoption only; ***Article 6*** of the ***Hague Convention*** which obligates Contracting States to designate a Central Authority to discharge the duties which are imposed by the Convention upon such states, hence the Adoption Committee which has been given a key role of managing inter-country adoptions; and ***Article 53 (2)*** of the ***Constitution*** and ***section 4*** of the Act , all of which dovetail with the universal principle of **"the best interests of the child."**

19. From the consideration of all those matters, the court was of the view and held that:-

> ***"...the adoption process needs close supervision as it is likely to be subjected to abuse if not checked. In this country, Parliament gave the supervisory role to the Adoption Committee. The only way the Adoption Committee can successfully supervise adoption societies is through registration and renewal of registration. In the case before me, the exercise of discretion by the 2nd Respondent has resulted in distorting the purpose for which the Act was enacted.***
>
> ***If the decision of the Minister is allowed to remain in force it will mean that the CWSK will operate outside the radar of the law and beyond the reach of the Adoption Committee. That would defeat one of the purposes, to wit regulation of adoptions, for which the Act was enacted. In exercising powers granted under the law, a public officer must ensure that the powers are exercised so as to promote the objectives of the law and fulfill the intentions of the lawmaker. In the case before me it is clear that Parliament desired to have close supervision of the adoption process. The responsibility of ensuring compliance with the rules governing adoption was given to the Adoption Committee. Any attempt to remove any adoption society from the superintendence of the Adoption Committee will end up defeating the intentions of the legislature".***

20. The learned Judge declared that the exercise of the discretionary power given to the Minister was not only improperly exercised but also exercised in bad faith. He reasoned thus:-

> ***"... the Cabinet Secretary allowed an appeal where there was no decision to appeal. He also went ahead and disbanded the Adoption Committee after it presumably stuck to its guns. Those actions confirm the Applicant's allegation that the discretion was exercised in bad faith. Something done in bad faith is an abuse of power. Abuse of power is often remedied by issuance of judicial review orders."***

21. And so, the order of *certiorari* was issued and the ***Children (Exemption Order) 2013*** *contained in* ***Legal Notice No. 206 of 25th October, 2013*** was quashed. On application made by CWSK, the orders were stayed pending the hearing and determination of this appeal.

22. It is the findings and holding made on the 2nd issue that aggrieved CWSK. It sought to challenge them on seven grounds listed in the memorandum of appeal but which counsel appearing for them, **M/s Ogeto, Otachi & Company Advocates**, urged as four grounds in written submissions which were not orally highlighted. They may be summarized:

> ***The learned Judge erred in that:***
>
> ***(i) Having found that the Minister had the power to exempt, it was not open to the learned judge to find that the Minister had exceeded the power.***
>
> ***(ii) holding that the exemption meant that CWSK was not subject to the supervisory role of the committee.***
>
> ***(iii) holding that the Minister exercised his power in bad faith.***
>
> ***(iv) making contradictory, legally baseless findings and quashing the exemption notice without***

appreciation of the evidence on record.

23. On the 1st ground, counsel submitted that so long as the minister had the jurisdiction to adjudicate upon the matter of exemption and did so in a regular manner, he was as much entitled to decide wrongly as he was to decide rightly. Reliance was made on the case of ***Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR.*** In counsel's view, there was no finding that the Minister had exceeded his powers and it was not for the Judge to substitute himself for the Minister after expressing the view that it was for the Minister to determine what amounted to *'impracticable and inexpedient'*. In effect, submitted counsel, the Judge converted the JR into an appeal against the decision of the Minister and thus wrongly substituted his opinion for that of the Minister. The cases of ***Republic vs Kenya Revenue Authority [2014] eKLR*** and ***Republic vs Retirement Benefits Appeals Tribunal ex-parte Augustine Juma & 8 Others [2013] eKLR*** were relied on in that regard.

24. On the 2nd ground, counsel referred to ***section 177*** and the exemption made under ***section 198*** and submitted that the provisions and exemption related to registration and the consequences of non-registration only. In counsel's view, the provision and exemption did not cover supervision and oversight by the committee which functions are part of the '*monitoring of adoption activities'* reflected in ***section 155*** of the Act. Parliament found it prudent to separate the two sections and it was therefore wrong for the Judge not to read the Act as a whole. Parliament also made provisions under Part XII for further controls in adoption matters, for example: ***section 154 (1)*** where only the High Court has the authority to make adoption orders; ***sections 156*** to ***159*** setting up the pre-requisites for adoption which must be complied with; ***section 163*** on the discretion of the court in all matters adoption; ***section 179*** on payments to be made; and ***section 181*** which creates offences with regard to adoption. All these, it was stressed, were not exempted and the Judge was wrong to state that the appellant was exempt from oversight and accountability.

26. Moving to the 3rd ground, counsel submitted that bad faith was a question of fact but there was no pleading or evidence to support it. Relying on the case of ***Republic vs Inspector General (State Corporations) ex-parte Isaiah F. Kiplagat [2012] eKLR*** counsel submitted that:

> ***"The ex-parte applicant needed to demonstrate that there was an evil wind driving the allegations against him. He did not do so and neither did he adduce evidence to show bad faith."***

26. The 4th ground was adopted as drawn to be evaluated on the basis of the earlier submissions. Neither the minister nor the AG appeared at the oral hearing of the appeal. They did not file any written submissions either.

27. However, Beneah, Jennifer and Anne **(7th to 9th respondents)** represented **by M/s Ojienda & Company Advocates**, as well as Baby J & 219 Others **(10th respondent)** represented by **M/s Odiya & Company Advocates** filed written submissions in support of CWSK. Both emphasized that exemption from registration did not amount to exemption from supervision and oversight by the committee. They also emphasized the intention of Parliament in giving the powers of exemption to the minister and the need therefore to respect the decision of the minister. According to them, there was no evidence of illegality, irrationality, procedural impropriety or bad faith to warrant interference with the minister's decision. The case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** citing with approval the South African case of ***Democratic Alliance vs The President of the Republic of South Africa & 3 Others*****: *CCT 122/11 [2012] ZACC 24***, was relied on for the proposition that:

> ***"[I]t is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself…..The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would***

loom large."

28. In opposition to the appeal, CFFK and LAN, represented before us by **M/s Muma & Kanjama** Advocates filed written submissions which Mr. Kanjama highlighted orally. Counsel submitted that the duty squarely fell on the High Court to examine, through JR, whether the minister acted in excess of the powers given by statute. The case of ***Keroche Industries Limited vs Kenya Revenue Authority & 5 Others [2007] 2 KLR 240*** was relied on. In their view, the learned judge was examining the decision-making process and not the decision itself. That is because under the Act, the minister would only be involved in the registration/licencing process after the committee had made a decision which then the minister could, if justified, overturn on appeal, but the minister never waited for the committee to make a decision on CWSK's application. Instead the minister short-circuited the procedure, defied the law, and exempted CWSK from the checks and balances which have been put in place by the law. The High Court had the right to examine whether the minister acted *ultra vires* the law as stated in the cases of ***Republic vs The Minister for Local Government [2002] eKLR*** and ***Bukoba Gymkhana Club [1963] EA 478*** at **pg 479**. In counsel's view, the High Court did not hold that the minister had power to exempt CWSK from registration but held that he had power to exempt a certain class from registration and renewal but CWSK did not fall under the group of listed persons.

29. As to what amounts to *'impracticable and inexpedient'* counsel construed it to mean *'unachievable or unattainable'* and wondered how the minister could set up Regulations which were impracticable and inexpedient. No proof was shown that CWSK was incapable of complying with the requirements sought from it by the committee. On the contrary, observed counsel, CWSK had for many years complied with the law on renewal of its annual licences and nothing had changed. Furthermore, observed counsel, the basis upon which the minister granted the exemption was erroneous since it was grounded on a previous exemption as an approved society but not an adoption society. Everything changed, according to counsel, when the law on adoption was consolidated in the Children Act thus subjecting all adoption societies to one law. CWSK which had become an adoption society in 1969 and transited as such in 2001 was no exception.

30. As regards the effects of exemption, counsel submitted that the committee's mandate was limited to the adoption societies in its register and it was open therefore for CWSK, if it was exempted, to commit some acts which the committee had no mandate to interfere with.

31. Turning to the issue of bad faith, counsel submitted that there was sufficient basis in the facts analysed by the learned Judge to find that the minister was actuated by bad faith. He called for dismissal of the appeal.

32. Next came the LSK represented by **M/s Muriungi & Company Advocates**. They too filed written submissions and emphasized the primacy of the Constitution and the Act in guiding all affairs relating to children's welfare and best interests. In waiving some provisions of the law that protect and promote children's welfare, they contended, the minister utterly disregarded the spirit and letter of the Constitution and the Act. The actions of the minister also amounted to usurpation of the statutory powers bestowed on the committee, and caused disharmony and discriminative treatment of adoption societies. For those reasons, it was submitted, the Judge was right to question the process of reaching the decision the minister did and was within the law as stated by various courts including the House of Lords case of ***Anisminic Ltd vs The Foreign Compensation Commission & Another [1969] 2 A.C 147***; and ***Republic vs The Commissioner of Lands ex-parte Lake Flowers Limited Misc. Application No. 1235 of 1998.***

33. On the effect of exemption, counsel submitted that the notion advanced by CWSK that the exemption did not affect the supervision of the committee was fallacious and illogical. That is because the essence of subjecting adoption societies to ***section 177*** was to ensure oversight and supervision of the committee and the purported exemption effectively curtailed that statutory power. ***Section 198*** could not be read in isolation.

34. Finally on bad faith, it was submitted that there was a clear intention by the minister to frustrate the purpose of the Act by aiding CWSK to circumvent clear provisions of the law and international

conventions. Counsel called on us to follow the principles enunciated in the case of ***Mbogo & Another vs Shah [1968] E A 93*** in refusing to interfere with the trial court's discretion.

35. For **KKPI, KCHAS** represented by **M/s M'limbiine and Mungai Company Advocates** and **Buckner** represented by **M/s Musyimi & Company Advocates,** written submissions were also filed largely supportive of the submissions of CFFK, LAN and LSK. However, M/s Musyimi & Company emphasized that the brazen acts of the minister in accepting without verifying the accusations made by CWSK against the committee, disbanding the committee without a hearing, allowing CSWK's appeal on a non-existent decision of the committee; and publishing the offending gazette notice --- all done within a short span of time --- amounted to a biased abuse of discretionary power and was in bad faith. As to the effects of exemption, counsel submitted that the heart of supervisory functions of the committee, which is the only central authority set up under the Act, is principally expressed through the process of registration and renewal of licences. Furthermore, urged counsel, exemption of one of the adoption societies would be an affront to our national values in **Article 10** of the Constitution relating to transparency, integrity and accountability. They supported the dismissal of the appeal.

36. We have given due consideration to the appeal which in our assessment raises only one dispositive issue for determination, that is, whether the trial court judiciously exercised its discretion before coming to the conclusion that in issuing an order of exemption to CWSK, the minister did not exercise his discretionary power lawfully and judiciously. Judging from the numerous authorities cited before us by counsel on all sides, there is no serious divergence on the principles of law applicable in considering a JR application. Only the scope of its application calls for further discussion. The principles we have to apply in considering the appeal before us are also not in dispute. We may briefly restate them.

37. Sir Clement De Lestang V-P in ***Mbogoh & Anor vs Shah [1968] EA 93*** stated thus:

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

For his part, the Court President, Sir Charles Newbold in the same case stated:

> ***"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

38. Subsequently, Madan JA (as he then was) in ***United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR*** developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members for that of the trial court. He stated:-

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

We shall be guided by those principles in considering this appeal.

39. For a long time in the history of the common law, JR has been tried and tested as the most efficacious

remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process. See ***Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR*** and ***R vs Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER. 282.*** It was also principally concerned with the 3 'Is' --- "**Illegality, Irrationality and (procedural) Impropriety**" **---** and many are the decisions which followed such narrow considerations. For example:- ***An Application by Bokobu Gymkhana Club [1963] EA 478; Council of Civil Unions vs Minister for the Civil Service [1985] AC 2*;** both cited with approval in the Ugandan case of ***Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300*** which courts in this country have followed, stating:

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."***

40. However, the dynamism of society and the events of recent history have decidedly thrust JR into a whole new trajectory. Nyamu, J. as he then was, clearly 'smelt' the impending extension of the scope of JR in 1998 when in the case of ***Republic vs The Commissioner of Lands, ex-parte Lake Flowers Limited Nairobi Misc. Application No. 1235 of 1998*** he stated as follows:

> ***"..Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."***

41. In the same year, this Court expressed similar views in the case of ***Bahajj Holdings Ltd. vs Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998*** stating that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The trend continued in ***Kuria & 3 Others vs Attorney General [2002] 2 KLR 69*** where the Court expressed itself as follows:

> ***"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial***

review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

See also ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43; Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47,*** and ***Keroche Industries Limited vs Kenya Revenue Authority & 5 Others*** (supra).

42. The bells for expansion of the scope of JR rang even louder after the promulgation of the **Constitution 2010**. Odunga, J. for example, in ***Republic vs Commissioner of Customs Services ex-parte Imperial Bank Limited [2015] eKLR*** recognized that ***"Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision"*** and the ***"need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front".*** Mativo, J. similarly in the case of ***Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR*** (decided on 7th March, 2017), extensively examined comparative jurisprudence before expressing the following view:-

"...judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution... Judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny..... Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."

43. One of the sources of that bold view by the High Court is our own Supreme Court which had earlier, in the case of ***Communication Commission of Kenya vs Royal Media Services & 5 Others [2014] eKLR*** held that ***"... the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law."*** and that ***"... the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs Madison 5 U.S. 137 (1803)***."

44. Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as ***20th July, 2017,*** in the case of ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*** was in no doubt about the current place of JR in our system of governance. After extensively reviewing the ***CCK*** Supreme Court decision (supra) and other cases, including ***Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51,*** and ***Pharmaceutical Manufacturers Association of South Africa in re ex-parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33***, the five-Judge bench held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil

Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both..... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches."

45. We must now apply the above learning to the appeal before us. As we do so, we must reflect on another constitutional imperative in our governance system; that of separation of powers, which is not lost to us. The caution was made by a five-Judge bench of this Court in the ***Mumo Matemu case*** (supra) stating thus:

"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

> *"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."*

46. The Supreme Court also weighed in, in the case of ***Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011*** where it expressed itself as follows:

"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

In the case before us, **Korir J.** cautioned himself on that healthy co-existence between institutions of governance as demonstrated in paragraph 17 above.

47. In view of the principles on JR demonstrated above, the process adopted by the Minister in making his decision to exempt CWSK must be weighed against some relevant constitutional provisions. The most prominent is ***Article 10 (2)*** which sets out the national values and principles of governance, including: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development. This Court has already held that ***"the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable."*** See ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others*** (supra). They bind all state officers and organs and all persons applying or interpreting the Constitution; enacting, applying or interpreting any law; making or implementing public policy decisions.

48. **Article 259** then obliges us to interpret the Constitution in a manner that, *inter alia*, promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance; while **Article 159 (2) (e)** commands us to protect and promote the purpose and principles of the Constitution. We must therefore give the Constitution a broad, liberal and purposive interpretation in order to give effect to its fundamental values and principles.

49. It is our considered view that the Minister in this case was oblivious of the Constitutional requirements stated above and was unduly carried away by unsubstantiated pleas by CWSK that they were being *"victimised, harassed and interfered with"* by the Committee without giving any opportunity to the committee to explain itself. The power of the minister to exempt, which the lower court correctly upheld, was not unlimited power. It was only exercisable where the Minister considered it *"impracticable or inexpedient*" to apply such provisions. Such decision, in our view, called for a demonstration by CWSK of the impracticability and inexpediency of the legal provisions in a candid, transparent and accountable manner to avoid the appearance, unavoidably drawn by the other adoption societies, that there was discriminatory treatment. The process of exemption was, to say the least opaque. Furthermore, the quick-fire reaction by the minister in accepting without verifying the accusations made by CWSK against the committee, disbanding the committee without a hearing, allowing CSWK's appeal on a non-existent decision of the committee; and publishing the offending gazette notice, did nothing more than confirm a process tainted with bad faith, even abuse of power.

50. The Constitution and the Children Act are the great equalizers in matters adoption in this country, and the northern star in promoting and protecting the best interests of the child. International Covenants on the rights of the child which Kenya has ratified, form part of that law. It cannot therefore be casually waved or circumvented in the manner the Minister appears to have done in this matter. Such process is impeachable, the trial court was right to impeach it, and we so hold.

51. The trial court appreciated, and we do too, that CWSK is more than simply an adoption society. It provides other services including *'rescue of children in emergencies, paying school fees for children across the country, providing care and protection services, tracing and reuniting children with their families, sensitizing chiefs and their assistants on child adoption, child rights, child abuse, child protection and child welfare*.' It has clear pedigree and leadership. However, those services are unaffected by the legal provisions relating to adoption which is ring fenced by the Act. All players in the adoption arena must play the fair game envisaged in the Act.

52. We think we have said enough to satisfy ourselves that there was no error in principle committed by the lower court in the exercise of its discretion. We have no reason therefore to substitute our discretion for that of the lower court. In the result, this appeal is lacking in merit and we order that it be and is hereby dismissed. As the matter raises public interest issues, each party shall bear its own costs of the litigation.

Dated and delivered at Nairobi this 17th day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..……

JUDGE OF APPEAL

K. M'INOTI

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original**.**

DEPUTY REGISTRAR