Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014) [2014] KESC 6 (KLR) (9 December 2014) (Ruling)

Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR

Neutral citation: [2014] KESC 6 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 29 OF 2014

WM MUTUNGA, CJ & P, KH RAWAL, DCJ & V-P, PK TUNOI, MK IBRAHIM, JB OJWANG & NS NDUNGU, SCJJ

DECEMBER 9, 2014

BETWEEN

MUMO MATEMU ..... PETITIONER

AND

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS .... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT

THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS ..... 5TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION ..... 6TH RESPONDENT

(Being an Application under Rules 23 and 26 of the Supreme Court Rules, 2012; and Order 2, Rule 15(1)(d), and Rule 15(3) of the Civil Procedure Rules 2010)

The locus standi of an NGO deregistered in the course of legal proceedings.

Reported by Beryl A Ikamari

Constitutional Law*-locus standi-locus standi in public interest litigation-whether a Non-Governmental Organization which had purportedly been deregistered could institute an appeal at the Supreme Court-Constitution of Kenya 2010, articles 22, 258 & 260; Non-Governmental Organizations Co-ordination Act (Cap 134), sections 12(2), 12(3) & 16(2).*

***Statutes**-statutory interpretation-mode of cancelling the registration of a Non-Governmental Organization-statutory requirement for notice of cancellation to be served upon the affected Non-Governmental Organization-whether a Gazette Notice would be sufficient- Non-Governmental Organizations Co-ordination Act (Cap 134), sections 12(2), 12(3) & 16(2).*

Brief facts

The Trusted Society of Human Rights Alliance, the 1st Respondent, a Non-Governmental Organization lodged a suit, in public interest, to challenge the appointment of Mr Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission at the High Court. At the time the suit was lodged at the High Court, the 1st Respondent was duly registered as a Non-Governmental Organization.

In its judgment, the High Court annulled the appointment of Mr Mumo Matemu and there was an appeal to the Court of Appeal, wherein the annulment of the appointment was set aside. The 1st Respondent lodged a Petition of Appeal at the Supreme Court against the Court of Appeal decision.

At the Supreme Court the question as to whether the 1st Respondent had become a non-entity, which could not lodge a suit in court, due to its deregistration was raised.

On August 16, 2013 Gazette Notice No 11962 was published pursuant to section 16 of the Non-Governmental Organizations Co-ordination Act (Cap 134), it announced the intention to cancel the registration of certain Non-Governmental Organizations (NGOs) which included the 1st Respondent. The cancellation of the registration of those NGOs was on the basis of breaches of the requirements of the Non-Governmental Organizations Co-ordination Act (Cap 134).

Later, on July 8, 2014, a letter was written on behalf of the Executive Director of the Non-Governmental Organization Co-ordination Board to the 1st Respondent stating that the 1st Respondent was deregistered on August 16, 2013 and was not on the Board register as at September 2, 2013. A second letter written on behalf of the Executive Director of the same Board was a recommendation letter dated October 7, 2014, indicating that the 1st Respondent had complied with the Rules and Regulations governing Non-Governmental Organizations as well as the terms and conditions of registration.

Issues

i. Whether the deregistration of an NGO rendered it a non-existent entity and it therefore lacked the *locus standi* to institute an appeal.
ii. Nature of notice required for the deregistration of an NGO.

Relevant provisions of the Law

Constitution of Kenya 2010, article 260;

"person" includes a company, association or other body of persons whether incorporated or unincorporated;

Constitution of Kenya 2010, article 258;

258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(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.

Non-Governmental Organizations Co-ordination Act (Cap 134), section 16;

16. Cancellation of certificate

(1) The Board may cancel a certificate issued under this Part, if it is satisfied that—

(a) the terms or conditions attached to the certificate have been violated; or

(b) the organisation has breached this Act; or

(c) the Council has submitted a satisfactory recommendation for the cancellation of the certificate.

(2) Notice of the cancellation of a certificate shall be served on the Organisation in respect of whom such cancellation relates and shall take effect within fourteen days after the date of that notice.

Held

1. The notice of cancellation or suspension of a Non-Governmental Organization, as required in section 16(2) of the Non-Governmental Organizations Co-ordination Act (Cap 134) was a notice to be served upon the affected Organization and not a Gazette Notice. The applicable legal provision on the issue of the cancellation of the registration of an NGO made no reference to the issuance of a Gazette Notice.
2. The requirements of section 16(2) of the Non-Governmental Organizations Co-ordination Act (Cap 134) were that a notice would have to be served upon the Non-Governmental Organization whose registration was being cancelled. There was no evidence of service of such a notice to the 1st Respondent.
3. The Gazette notice was not the notice contemplated by the law as it was not served upon the 1st Respondent but was published for the public's information. Further, the import of the Gazette Notice was that it was a notification of an intention to cancel or suspend certificates of registration for various Non-Governmental Organizations. In and of itself, the Gazette Notice was not the instrument of deregistration. In the circumstances, it was not possible to ascertain if and when the 1st Respondent was deregistered as a Non-Governmental Organization.
4. The two letters, one written on July 8, 2014 stating that the 1st Respondent had been deregistered and was not on the Board register as at September 2, 2013 and the second letter, written on October 7, 2014, a recommendation letter indicated that the 1st Respondent was duly registered at that date, without stating whether the 1st Respondent had ever been deregistered, created uncertainty with respect to the 1st Respondent's registration status.
5. The 1st Respondent was not directly aggrieved and had filed the Petition on behalf of the public at large. Articles 22 and 258 of the Constitution of Kenya 2010 provided that every person had the right to institute proceedings claiming that the Constitution had been contravened and 'person' in that regard, included one who acts in the public interest.
6. The definition of a Non-Governmental Organization under section 2 of the Non-Governmental Organizations Co-ordination Act (Cap 134) as read with article 260 of the Constitution of Kenya 2010 justified the categorization of a Non-Governmental Organization as a person as it was an association, under article 260, despite the question on whether it was incorporated or unincorporated.
7. Under section 12(3) of the Non-Governmental Organizations Co-ordination Act (Cap 134) it was registration that made an NGO a body corporate capable of suing and being sued.
8. The Non-Governmental Organizations Co-ordination Act (Cap 134) had to be interpreted in conformity with the Constitution of Kenya 2010. Although sections 12(2) and 12(3) of the Act provided for the legal status of the 1st Respondent, when read together with articles 22, 258 and 260 of the Constitution and in the public interest, the inference that the 1st Respondent did not lose *locus standi*, even if it lacked registration status, could be drawn.
9. The facts applicable to the case were such that the act of de-registering the 1st Respondent had not deprived the 1st Respondent of the standing in law to lodge an appeal before the Supreme Court in a matter of public interest.
10. As the case raised constitutional issues of a public nature, it was in public interest for each party to bear its own costs.

The Concurring opinion of Njoki Ndungu, SCJ

1. Public interest litigation had a transformative role in society. It allowed various issues affecting different spheres of society to be presented for litigation. For such reasons, the Constitution of Kenya 2010 aimed at enlarging *locus standi* in human rights and constitutional litigation.
2. *Locus standi* had a close relationship to the right of access to justice. In instances where public interest suits were threatened by administrative action, to the detriment of constitutional interpretation and application, the Court had discretion, on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. That discretion was drawn from article 259 (1) of the Constitution of Kenya 2010 wherein the Courts were required to interpret the Constitution in a manner that promoted its values and purposes, advanced the rule of law, human rights and fundamental freedoms, permitted the development of the law and contributed to good governance.
3. Section 16 of the Non-Governmental Organizations Co-ordination Act (Cap 134) permitted the Non-Governmental Organizations Co-ordination Board to cancel the registration of a Non-Governmental Organization, in certain prescribed instances.
4. There was a clear lacuna in the law which failed to protect the legal interests of a Non-Governmental Organization or its creditors upon its deregistration and also threatened the role of NGOs in public interest litigation, and in effect, social change and human rights defence through litigation. The lacuna needed resolution through legislative initiative or through a challenge of constitutionality in line with the provisions of articles 22 and 258 of the Constitution of Kenya 2010.
5. The Constitution of Kenya 2010 enlarged the capacity to file a claim in defence of the Constitution. Article 3(1) provided that every person had an obligation to respect, uphold and defend the Constitution and it defined a person in article 260 to include a company, associate or other body of persons whether incorporated or unincorporated. Pursuant to article 258(1) of the Constitution, every person had the right to institute court proceedings claiming that the Constitution had been infringed or threatened with contravention.
6. An interpretation of section 16 of the Non-Governmental Organizations Co-ordination Act (Cap 134) in line with the Constitution and the special circumstances of the case, meant that the deregistration of the 1st Respondent did not fatally compromise the validity of the Appeal lodged at the Supreme Court.

Application dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. This is an application by way of Notice of Motion, under certificate of urgency, dated 14 July, 2014, seeking the following Orders:

i. that the petition already before this Court, Trusted Society of Human Rights Alliance v. Mumo Matemu and Five Others, Petition No. 12 of 2013 of 30 August, 2013, filed on 2 September, 2013 by 1st respondent, be struck out;

ii. that the costs of, or incidental to this application be borne by the deponent to the supporting affidavit to the petition.

2. The 1st respondent filed an appeal in the Supreme Court against the Judgment of the Court of Appeal at Nairobi (Kihara Kariuki PCA, Ouko, Kiage, Kairu & Murgor JJ.A) dated 26 July, 2013 in Mumo Matemu v. Trusted Society of Human Rights Alliance and Five Others, Civil Appeal No. 290 of 2012.

B. Background

3. The President appointed the applicant (Mr. Matemu) as the Chairperson of the Ethics and Anti-Corruption Commission, through Gazette Notice No. 6602 dated 11 May, 2012. On 15 May, 2012, the 1st respondent (Trusted Society of Human Rights Alliance) challenged the appointment of the applicant as the chairperson, by way of petition at the High Court: Trusted Society of Human Rights Alliance v. Mumo Matemu and Five Others, High Court Constitutional Petition No. 229 of 2012. In a decision dated 20 September, 2012, the High Court (Joel Ngugi, Mumbi Ngugi and Odunga JJ) annulled the applicant's appointment, on the basis that it was unconstitutional.

4. The applicant, being dissatisfied with the decision of the High Court, appealed to the Court of Appeal: Mumo Matemu v. Trusted Society of Human Rights Alliance and 5 Others Civil Appeal No. 290 of 2012. In a judgment delivered on the 26 July, 2013, the Court of Appeal (Kihara Kariuki PCA, Ouko, Kiage, Kairu & Murgor JJ.A) set aside the whole Judgment and Orders of the High Court. Subsequently, on 2 September, 2013, the 1st respondent filed an appeal at the Supreme Court, contesting the Judgment of the Court of Appeal.

5. At both the High Court and the Court of Appeal, the 1st respondent described itself as a Non-Governmental Human Rights Society registered and regulated under Section 10 of the Non-Governmental Organizations Co-ordination Act (Cap. 134, Laws of Kenya.) The 1st respondent described its mandate as, to promote human rights and constitutionalism.

6. On 16 August, 2013 the Non-Governmental Organisations Coordination Board Gazette Notice No. 11962 was published, pursuant to Section 16 of the aforementioned NGO Act, announcing the intention to cancel the registration of certain Non-Governmental Organisations. The intended cancellation of registration was on account of breaches of the requirements of the Act. The said cancellation would take effect fourteen days, following the publication of the notice. The 1st respondent was one of the organizations listed in the Gazette Notice.

7. The applicant produced a letter (Exhibit MM 6(b)), at page 150 of application) dated 8 July, 2014, written by Mr. Henry Otieno Ochido, on behalf of the acting Executive Director of the Non-Governmental Organisation Coordination Board. This letter stated that the 1st respondent was deregistered on 16 August, 2013 and was not on the Board's register, as at 2 September, 2013. In the meantime, the 1st respondent produced a different letter – a letter of "recommendation" – from one Ms. Juliana Akinyi Otieno, on behalf of the same Executive Director of the NGO Board, dated 7 October, 2014. This second letter stated that the 1st respondent is registered and has complied with the Rules and Regulations governing Non-Governmental Organizations, as well as the terms and conditions of registration.

8. On 14 July, 2014, the applicant filed an application under a certificate of urgency, and a Notice of Motion, before this Court seeking to have the 1st respondent's appeal struck out. The applicant submitted that at the time the Petition of Appeal was filed in this Court on 2 September, 2013, the 1st respondent had been deregistered, in accordance with the Gazette Notice, which he alleged was dated 1 August, 2013. The application contests the legal capacity of the 1st respondent to institute the petition in the Supreme Court.

9. On 15 July, 2014, Njoki SCJ directed that the applicant serve the application on all respondents, and that it be heard as a preliminary issue, during the hearing of the main Petition of Appeal.

C. Submissions For The Parties

a. The Applicant

10. The applicant was represented by learned counsel, Messrs. Gatonye, Kilonzo and Taib. Mr. Gatonye relied on the applicant's application dated 11 July, 2014, as well as the supporting affidavit dated 11 July, 2014. He submitted that the 1st respondent was deregistered on 16 August, 2013, which was 14 days after the date of Gazette Notice No. 11962, issued by the NGO Board.

11. The 1st respondent filed the Petition of Appeal in this Court on 2 September, 2013. Counsel submitted that the 1st respondent having been deregistered, was not in existence at the time of filing the appeal. Therefore, on this basis, the appeal was incompetent. It was further submitted that the 1st respondent had taken no steps to secure registration after it had been deregistered.

12. In effect, then, learned counsel urged, the appeal which was filed, was void ab initio. He submitted that, that which is void ab initio, cannot be rendered valid; and that this condition was beyond cure even if the 1st respondent re-entered the register. Counsel for the applicant, Mr. Kilonzo relied on the British House of Lords case, Benjamin Leonard Macfoy v. United Africa Company, Privy Council Appeal No. 67 of 1960, in which it was held that if an act is void, then it is in law a nullity, and is not only bad, but incurably bad. Further any proceeding which is founded on it is also bad and incurably bad. Counsel also invoked the High Court decision, Housing Finance Company of Kenya Ltd v. Embakasi Youth Development Project, Civil Case No. 1068 of 2001; [2004] 2 KLR in which Ojwang J applied the principle that only a juristic person, endowed with legal personality, can have locus standi before the Court, and can be the subject of rights and liabilities.

13. In relation to the two letters issued in the name of the NGO Board, counsel submitted that the later one does not contradict the earlier one, because it only states that the 1st respondent is duly registered, and not that it was de-registered, at the time the appeal was filed. Learned counsel submitted that the 1st respondent had failed to address this issue in its replying affidavit.

14. Learned counsel, Mr. Kilonzo relied on the case, Elijah Sikona and George Pariken Narok, on Behalf of Trusted Society of Human Rights Alliance v. Mara Conservancy and Five Others, Nakuru High Court Civil Case No. 37 of 2013; [2014] eKLR, for the principle that a person must first exist, before filing any proceedings. In that case Emukule J recognised the fact that at the time of filing petition, on 30 April, 2013 the plaintiff – which is also the 1st respondent herein – was duly registered. However, the plaintiff was deregistered by a Government Gazette Notice of 1 August, 2013 which was published on 16 August, 2013. As a result of the deregistration, which took place during the pendency of the hearing of the matter, the learned Judge held that there was no lawfully existing body on whose behalf the 1st respondent could purport to act, and that it would therefore be an abuse of the Court process to have a suit pending on behalf of a non-existent organisation. The High Court further held that the overriding objective of civil litigation would be defeated, if the Court's time and resources would be applied in entertaining a cause that had no valid prosecutor.

15. Counsel urged that the issues in the instant matter stood out more distinctly in the Elijah Sikona case. In the earlier case, the 1st respondent (Trusted Society of Human Rights Alliance) was registered at the time the suit was being filed, whereas in the instant case, the 1st respondent was already deregistered at the time the appeal was being lodged.

16. Mr. Kilonzo also referred the Court to the High Court case, Dennis Ololoigero and Two Others v. The Art of Ventures Ltd. and Two Others, Civil Case 1358 of 2005; [2006] eKLR, in which Aluoch J struck out the pleadings filed, on the ground that the plaintiffs had changed their status as a group registered under the Society's Act, to a community-based organisation enrolled under a Government Ministry. The Court held that the certificate held by the plaintiffs was not recognised under the Societies Act, and that they lacked the legal capacity to commence or maintain the proceedings. The former Kenyan Supreme Court decision, The Fort Hall Bakery Supply Co. v. Frederick Muigai Wangoe (1959) E.A. 474, in which the principle that a company with no legal existence has no capacity to sue, was also relied upon.

17. On the issue of matters which are void ab initio, counsel relied on the dissent of Ibrahim SCJ in the Supreme Court decision, Lemanken Aramat v. Harun Meitamei Lempaka and Two Others Sup Ct. Petition No. 5 of 2013; [2014] eKLR; the Judge had held that on the basis of the Court of Appeal decision in Owners of the Motor Vessel Lillian "S" v. Caltex Oil (Kenya) Ltd 1989 KLR 1 case, this Court should have downed its tools, and not delved into any questions of merit, where proceedings in lower Courts had been considered void ab initio.

18. In response to the 1st respondent's submissions, learned counsel, Mr. Taib submitted that Article 159(2) of the Constitution of Kenya, 2010 which provides that justice must be administered "without undue regard to technicalities", has been misapplied generally. He called upon this Court to give appropriate direction by defining and interpreting the terms of that Article. Learned counsel submitted that, if the drafters of the Constitution did not want to consider procedural technicalities, they would have replaced the word "undue regard" with the phrase "without any regard." He submitted that this provision should be interpreted to mean that if injustice is caused on account of the rules, then the Court should not give undue regard to procedural technicalities.

19. Mr. Taib raised the question as to whether ascertainment of the proper status of a party, can be typified as a simple technicality. He submitted that, because the matter transcends procedural technicalities, Article 159(2)(d) is not applicable in this instance.

20. With regard to the differing letters on the 1st respondent's standing, counsel urged that the letter dated 8 July, 2013 is the fulcrum of the entire application; and the letter dated 7th October, 2013 is conveniently silent on the vital issue of registration and deregistration of the 1st respondent. Learned counsel urged that the second letter, ex facie, stands as a mere "recommendation" and therefore, it does not take a declaratory position on registration status. Counsel submitted that the appeal was filed on the 2nd of September 2013, and it did not matter whether or not the Gazette Notice was dated 1st of August, 2013, or the 16th of August, 2013: because the 1st respondent was still not registered.

21. On the issue of costs, it was counsel's submission that costs should be awarded, for the work which each of the counsel put in the matter; and besides, the 1st respondent was aware of its deregistration, but still went ahead to file suit.

b. The 2nd and 3rd Respondents

22. Learned counsel for the 2nd and 3rd respondents, Mr. Ngugi, shared common cause with the applicant. He submitted that two situations arise in this matter: firstly, that the 1st respondent urges this Court to find that it was registered, and in the event of a finding otherwise, that they could still appeal to the Court; and secondly, the High Court at Nakuru had held that the 1st respondent was not duly registered, even though the 1st respondent seeks to rely on a "recommendation" letter from the NGO Board – a letter which, by itself, cannot give registration status.

23. Learned counsel urged that the state of fact contradicts 1st respondent's averment on appeal, that it is a registered organization; and on this account, the appeal is for striking out.

c. The 4th Respondent

24. The 4th respondent, the Office of the Director of Public Prosecutions was represented by learned counsel, Mr. Ashimosi who took a position in support of the applicant's submissions. He asked the Court to strike out the appeal, with costs to the applicant.

d. The 1st Respondent

25. The 1st respondent was represented by learned counsel, Mssrs. Imanyara and Ndubi. Mr. Imanyara urged that the application had no merit, and should be dismissed with costs. He submitted that in view of the principles declared in the Constitution, an interpretation is to be adopted that favours and upholds the law of the land, as regards locus standi.

26. On locus standi, counsel submitted that the case law must be attuned to the terms of Article 260 of the Constitution, which defines "a person" to include a company, an association, or other body of persons whether incorporated or unincorporated. He urged this Court to find that the NGO Act is subservient to the Constitution, and that the Act stands relegated, as the Court makes its determination.

27. Counsel submitted that this Court ought to look at the person who brings the matter before the Court: in this instance, a class of people concerned with the constitutional office holder. He urged the Court to overlook the Gazette Notice issued by the NGO Board, on account of its "ambiguity." He urged the Court to bear in mind Article 3(1) of the Constitution, which provides that every person has an obligation to respect, uphold and defend the Constitution.

28. Learned counsel submitted that Article 48 of the Constitution, by providing that all persons have a right access to justice, relegates the standing of deregistration by virtue of the NGO Act; and consequently, the principled position is for the appeal to be heard. Counsel further urged that, in terms of Article 159(2)(d) of the Constitution, justice must be administered without undue regard to procedural technicalities.

29. Mr. Ndubi submitted that the instant application was founded on regulations under the Act, rather than on the substantive law. He contended that the Gazette Notice issued by the NGO Board's Executive Director is ambiguous, and fails to provide particulars and reasons why the listed organisations were to be deregistered. He contended that the Gazette Notice only signifies a notice of intention to cancel the registration certificates, but lacked direct effect. Learned counsel urged that there was no indication in the Gazette Notice of what was to happen if any of the organizations listed corrected the purported failing on their part. He submitted that the 1st respondent was entitled to receive a specific personal notice, specifying which provisions of the licence had been breached, and that such failure on the part of the NGO Board was contrary to the Constitution; and consequently, the 1st respondent was "unaware of the cancellation of the registration certificate".

30. It was further submitted that it was undesirable to apply restrictive measures to Non-Governmental Organisations, and that such measures would be in breach of the Constitution. Counsel submitted that the NGO Act should be interpreted in accordance with the principle stated in Section 7(1) of the Sixth Schedule to the Constitution, that all law continues in operation, but is to be so construed as to bring it into conformity with the Constitution; and therefore, the NGO Board should have written to the 1st respondent, stating which licence had been struck out.

31. Mr. Ndubi submitted that costs should not be awarded in this matter, as no party has any interests. An award of costs, he urged, will have a negative effect on those who strive to ensure that the Constitution is upheld.

e. The 5th and 6th Respondents

32. Learned counsel, Mr. Nderitu stated that his clients had been amici curiae at the High Court, and that they were non-partisan, and did not support or contest the application. He raised two issues: Firstly, that there was a contradiction as regards the date of the Gazette Notice which ordered the cancellation of the registration of the 1st respondent. According to the application, the Gazette Notice was published on 16 August, 2013 whereas the letter written on behalf of the acting Executive Director of the NGO Board to the applicant is dated 1 August, 2013. It was counsel's contention that the correct date of publication of the Gazette Notice needed to be known: so as to determine the date when the 1st respondent became a party, in terms of the Act. Counsel submitted that the notice was ambiguous, and that if there were to be any legal consequences, then the notice should not be relied upon.

33. The second issue raised was as regards the two letters emanating from the NGO Board, written by different individuals on behalf of the NGO Board's Executive Director. It was submitted that the letters were contradictory, as they contained differing information, which was sent to the applicant and the 1st respondent. Counsel urged that the 5th and 6th respondents favoured the second letter, which stated that the 1st respondent was registered.

34. On the issue of locus standi, counsel submitted that the 2010 Constitution has broadened the avenues of constitutional litigation; and on that basis, he urged that it would be improper for the Court to refrain from considering and determining a matter of great public importance.

35. With regards to costs, learned counsel submitted that there was no justification for the payment of costs, in particular as the matter was not one of personal interest, but a constitutional matter; thus, no party should be seen to profit from costs, and parties should bear their own costs.

f. Further Submissions: The Applicant

36. Learned counsel, Mr. Kilonzo submitted that it was essential for legislation such as the NGO Act, which pre-dated the Constitution of 2010, to be given effect, lest there be a legal vacuum: and hence the NGO Board's powers to register or deregister Non-Governmental Organizations remained in force.

37. Responding to learned counsel, Mr. Imanyara's submission that the applicant's objection on locus standi had not been raised earlier, learned counsel, Mr. Gatonye urged the trite point of law that a point that an issue bearing upon jurisdiction can be raised at any time in the course of judicial proceedings. Mr. Gatonye asked the Court to scrutinise the different letters written in the name of the NGO Board, so as to determine their authenticity.

D. Issues For Determination

38. The issues for determination are as follows:

    i. whether the 1st respondent herein has the locus standi to appear before the Supreme Court;

    ii. whether costs should be awarded in this matter.

E. Analysis

(i) Locus standi in General

39. The submission has been made that the objection on locus standi had not been raised since the filing of the matter on 2 September, 2013. The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis.

(ii) Has 1st Respondent locus standi in the Supreme Court?

40. Several questions arise, as to the 1st respondent's locus standi to file a petition before this Court. These are: (a) on what date was the 1st respondent's registration certificate cancelled? (b) is there a contradiction between the two letters written by different persons on behalf of the Executive Director of the NGO Board? (c) what are the consequences of a party filing a constitutional matter when it does not have locus standi? (d) is the issue of locus standi a procedural technicality, in the terms of Article 159(2)(d) of the Constitution?

a. Date of cancellation of 1st respondent's registration

41. The applicant contended that the 1st respondent did not have the locus standi at the time of filing the petition before this Court. He urged that the NGO Board had issued Gazette Notice No. 11962, dated 1 August 2013, pursuant to Section 16 of the Act, cancelling the registration of the 1st respondent. Specifically, he argued the Gazette Notice notified the 1st respondent of the cancellation of registration certificates of certain listed Non-Governmental Organisations within 14 days of the notice. The 1st respondent was one of the Non-Governmental Organisations listed in the Gazette Notice.

42. Counsel for the 5th and 6th respondents, to the contrary, urged that there was a contradiction between the date of the Gazette Notice on the application, and the letter dated 8 July, 2014 written on behalf of the acting NGO Board Executive Director, to the applicant. According to counsel, the application specified that the date of publication of the Gazette Notice was 16 August 2013, whereas the letter written on behalf of the NGO Board's acting Executive Director implied that the date was 1 August, 2013. Thus, it was submitted that the Gazette Notice was ambiguous, and that this Court should clarify the correct date, if reliance is to be placed on the said dates.

43. An examination of Gazette Notice No. 11962 reveals that its date is 1 August, 2013, whereas the date of publication of the Kenya Gazette which contains the Gazette Notice is 16 August, 2013. The date of the specific Notice is indicated at the end, just before the signature of the NGO Board's Executive Director. In this instance, the date specified in the Gazette Notice is 1 August, 2013. Therefore, the point has been raised that the cancellation of the certificate of registration took effect fourteen days after 1 August, 2013; and 16 August, 2013 is the date of publication of the issue of the Kenya Gazette which contains the said Gazette Notice, i.e. Kenya Gazette Vol. CXV-No.18.

44. The foregoing chronicle would have led us to the inference that deregistration of the 1st respondent took place by the Gazette Notice, 14 days after 1 August, 2013. However, the 1st respondent has brought to our attention another disputed point: that the NGO Board's failure to serve the 1st respondent with a notice of cancellation of the certificate of registration, infringed their rights. We have

considered the documents presented to us, in line with Section 16(2) of the NGO Act, which is the primary provision on the process of cancellation of registration certificates.

45. The NGO Board's Gazette Notice indicates that it was issued pursuant to Section 16 of the Non-Governmental Organizations Co-ordination Act, which thus provides:

> "(1) The Board may cancel or suspend a certificate issued under this Part, if it is satisfied that –
>
> (a) the terms or conditions attached to the certificate have been violated;
>
> (b) the organization has breached this Act;
>
> (c) the Council has submitted a satisfactory recommendation for the cancellation of the certificate.
>
> (2) Notice of the cancellation or suspension shall be served on the Organization in respect of whom such cancellation or suspension relates and shall take effect within fourteen days after the date of that notice" (emphasis supplied).

46. A close reading of Section 16(2) of the Non-Governmental Organization Co-ordination Act would show that the 'notice' contemplated in this provision is not a Gazette Notice. Section 16(2) states that "Notice of the cancellation or suspension shall be served on the Organization in respect of whom such cancellation or suspension relates and shall take effect within fourteen days after the date of that notice." There is no reference in this Section to publication in a Gazette. This is to be seen in light of Parliament's specific reference to Gazettement in other Sections. For example, Section 10(4) states that, "the Minister may, by notice in the Gazette, exempt such Non-Governmental Organizations from registration as he may determine." Section 18 provides that "If the Board has reasons to believe that a registered organization has, for any reason, ceased to exist, it may publish in the Gazette a notice calling upon such organization to furnish it with the proof of its continued existence." The comparison indicates that, had Parliament intended the Board to publish in the Gazette a notice, it would have expressly stipulated this in Section 16(2). The Gazette Notice is, therefore, not the notice contemplated in section 16(2) of the Act.

47. Section 16(2) of the NGO Act prescribes a mandatory requirement that the Board serves the notice of cancellation of suspension on the organization in question. The word 'serve' is neither defined in the Non-Governmental Organization Co-ordination Act, nor the Civil Procedure Act (Cap. 21, Laws of Kenya). However, the Civil Procedure Rules, 2010 provides for different ways in which service takes place. In Black's Law Dictionary, 9th Edition (at page 1490), 'serve' is defined as "to serve legal delivery of (a notice or process)"; or "to present (a person) with a notice or process as required by law". Therefore, the Gazette Notice issued by the Board was not the 'notice' contemplated under Section 16(2) of the Act, as it was not served upon the 1st respondent, but published for the public.

48. Counsel for the applicant has not presented evidence to show that the said notice was served upon the organization, as required by the NGO Act, for them to know of the intention of cancellation, or suspension of the certificate of registration. It has, therefore, not been shown that the notice required under Section 16(2) was served on the 1st respondent.

49. Moreover, the Gazette Notice cannot be regarded as proof of the cancellation, as it is merely a notice of cancellation. "Notice" is defined in Black's Law Dictionary 9th Edition (at page 1164) as "the legal notification required by law or agreement, or imparted by operation of law as a result of some fact."

The Gazette Notice merely serves as a notification to the public of the Board's intention to cancel or suspend the certificates of registration. It is not in and of itself the instrument of deregistration.

50. In Hassan Ali Joho and another v. Suleiman Said Shahbal and Two Others Sup Ct. Petition No. 10 of 2013; [2014] eKLR, this Court considered whether a Gazette Notice was the intended instrument of declaration of election results, in terms of the Constitution; its perception was thus stated (para. 99):

> "We are of the view that gazettement (Section 76 of the Elections Act) is one of the mechanisms through which the State publishes information to the public. The public nature of elections demands that the outcome of the polling is shared with the public. This is done in various ways, but most importantly, through a Gazette Notice, which forms part of Government records. Further, public information thus published, can be adduced as evidence in a Court of Law, pursuant to the provisions of the Evidence Act (Cap. 80, Laws of Kenya). The purpose of the Gazette Notice, in view of the process detailed in this Judgment, cannot be termed as the instrument of declaration of the election results" (emphasis supplied).

51. It is clear to us that the Gazette Notice is an essential procedure for the cancellation of registration certificates. But in this instance, it can only serve as an official record, conveying the intention of cancellation, and confirming that the Board intends to cancel a certificate of registration, and has in fact delivered such notification to the organisations listed. The Gazette Notice, by no means, represents the actual motion that reserves the registration status of the Non-Governmental Organization. Had the legislature intended otherwise, it would have stipulated as much, in the statute. We cannot therefore ascertain the exact date when deregistration took place.

52. We must, therefore, come to the conclusion that on the facts of the instant matter, it is not possible to ascertain if or when the 1st respondent was de-registered as a Non-Governmental Organization.

b. Two differing NGO Board letters: What is their effect on 1st respondent's registration status?

53. Learned counsel for the 5th and 6th respondents asked this Court to advert to the controversy regarding two separate letters written by different persons, on behalf of the acting Executive Director of the NGO Co-o-ordination Board. According to counsel, these letters contained contradictory information. The applicant relies on a letter (Exhibit MM 6 (b)) dated 8 July, 2014, written by a Mr. Henry Otieno Ochido, on behalf of the acting Executive Director. This letter was in response to a letter of even date, in which the applicant requested the NGO Board for information on the status of the 1st respondent.

54. Mr. Ochido in his letter, stated that the 1st respondent had been registered with the Board under Certificate No. OP.218/051/11-0813-7508 dated 18 November, 2011, but was deregistered on 16 August, 2013 and, therefore, lacked registered status as at 2 September, 2013.

55. The 1st respondent, however, had a riposte: he produced a letter (Exhibit EK S 1) dated 7 October, 2014, written by one Ms. Juliana Akinyi Otieno, who was writing on behalf of the acting NGO Board Executive Director. The letter, entitled "Recommendation Letter", states that the 1st respondent is a registered Non-Governmental Organisation, and has complied with the Rules and Regulations governing Non-Governmental organisations, as well as the terms and conditions of its registration.

56. An examination of both letters shows that the 1st respondent was registered on 18 November, 2011. The signatories of these letters are two different persons, each acting on behalf of the NGO Board's Executive Director. The letters were written three months apart.

57. The letters differ in content. The applicant produced the letter dated 8 July, 2013, which stated that the 1st respondent was deregistered on 16 August, 2013. The 1st respondent produced the letter dated 7 October, 2014, a "recommendation letter" which states that the 1st respondent is duly registered; it cites the 1st respondent's objectives, and states that the 1st respondent has complied with the Rules and Regulations governing Non-Governmental Organisations, and the terms and conditions of registration. As counsel for the applicant put it, the letter is only a "recommendation letter", and is silent on the details of registration or deregistration of the 1st respondent.

58. On the basis of available information, it is not possible to verify the authenticity of either letter. What is clear, from the content of both letters, is that both the applicant and the 1st respondent requested specific information, regarding the 1st respondent's registration status. The applicant wrote a letter (Exhibit MM 6(a)) dated 8 July, 2014, in which he referred to an earlier letter which he had written to the same Board, on 3 July, 2014. The letter of 8 July, 2014 specifically asked the NGO Board to confirm the status of the 1st respondent as at 2 September, 2013. The NGO Board responded to this letter accordingly on 8 July, 2014. The NGO Board thereafter wrote a "recommendation letter" to the 1st respondent, on 7 October, 2014; this was after the 1st respondent requested a letter confirming its registration status after it was served with the instant application.

59. The applicant's crucial point, in this regard, is that the 1st respondent was de-registered before the date on which the Petition of Appeal was filed in this Court, namely, 2 September, 2013. The "letter of recommendation" relied on by 1st respondent only shows that it is currently registered. There is no indication whether it was ever de-registered – or whether any such state of de-registration would have covered the precise date of filing the petition before the Supreme Court. The two letters, thus, create an unending uncertainty in the mind of the Court. Now as these letters originate from one and the same office, they appear each to have been designed to serve the purposes of the party seeking it: and on this account they fail to lay proper information before the Court. Considering these letters in proper context, we have come to the conclusion that their materiality is secondary to that of other issues that we have laid out in this Ruling.

c. Locus standi: Did 1st respondent have standing to move the Supreme Court?

60. The main argument raised in the application is that the 1st respondent did not have the locus standi to file an appeal on 2 September, 2013 as it had been deregistered and, thus, legally non-existent. However, in the Petition of Appeal, and in the affidavit in support thereof, sworn by Elijah Sikona, it is averred that the 1st respondent filed the appeal in this Court in its capacity as a "Human Rights Society registered under Section 10 of the Non-Governmental Organizations Coordination Act". Counsel for the applicant urged that the 1st respondent could not sue or be sued, and consequently, the appeal before this Court is incompetent. Quite to the contrary, counsel for the 1st respondent urged this Court to take into account the right of access to justice, under Article 48 of the Constitution, as well as the principle of administering justice without undue regard to procedural technicalities, under Article 159(2)(d).

61. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum". The applicant's contention is that the 1st respondent was a non-existent entity, and it had misrepresented itself in the Petition of Appeal, and in the affidavit in support of the appeal. Already, we have observed that, by proper interpretation of Section 16(2) of the NGO Act, the "notice" contemplated is not Gazette Notice No. 11962. We are not, therefore, in a position to ascertain the date when the cancellation of registration took place; it cannot be ascertained whether notice was duly served upon the 1st respondent.

62. More importantly, such notice if duly served upon the 1st respondent, would provide an opportunity for a response – to which 1st respondent has both a right and a legitimate expectation. The right to make a response, in relation to dispensation of service by a public agency such as the NGO Board, manifestly falls within the safeguards for "fair administrative action" in the terms of Article 47 of the Constitution. Rights of such a kind, moreover, are actionable within the framework of judicial powers in relation to the quasi-judicial operations of statutory agencies. Such matters would ordinarily be subject to the High Court's judicial review jurisdiction. It emerges clearly, in the instant case, that the NGO Board had not given due notice of intended de-registration to 1st respondent, in the contemplation of the law.

63. An important question remains: is it tenable that a "party" can lodge an appeal before this Court, while being legally non-existent?

64. On locus standi, counsel for the 1st respondent submitted that this Court ought to look at the definition of 'person,' under Article 260 of the Constitution, and, in this instance on whose behalf the 1st respondent was filing the appeal. He further submitted that the NGO Act, which authorized the cancellation of certificates of registration, was subordinate to the Constitution.

65. Article 260 of the Constitution defines "person" to include:

> " a company, association or other body of persons whether incorporated or unincorporated."

Counsel for the 1st respondent contends that this organization had filed the appeal "on behalf of the public"; and he urges that if the Court finds that 1st respondent had been de-registered, it should still bear in mind that the 1st respondent is still classified as a "person", under Article 260 of the Constitution.

66. The 1st respondent's point is that locus standi before the Courts has a new meaning, by the terms of the Constitution of Kenya, 2010. A narrower conception of that term had prevailed earlier; and only an aggrieved party whose interests were directly affected could institute proceedings. In Maathai v. Kenya Times Media Trust Ltd [1989] KLR 267, the High Court held that the plaintiff had not shown that she had a special interest in the matter in question, as opposed to a public-interest claim. In Kenya Bankers Association v. Minister for Finance & Another [2002] 1 KLR 61, the High Court made a courts shift from the narrow interpretation of locus standi, holding that even though the applicant was not the directly-aggrieved party, it could represent the banks in a constitutional matter. A relevant consideration in that case was that the applicant had brought the matter in good faith, to uphold the supremacy of the Constitution. The Court further held that this was a case of public interest litigation, and the applicants were public-spirited persons acting bona fide.

67. It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

> " ...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."

68. Article 22 of the Constitution thus provides:

> "(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" [emphasis supplied].

69. And Article 258 thus provides:

> (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> (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" (emphasis supplied).

70. The 1st respondent, in the instant matter, submitted that if the Court were to determine that it does not have locus standi, the Court should consider on whose behalf the matter was filed. It is clear to us that the application herein and the Petition of Appeal which the 1st respondent had filed earlier, involve constitutional questions which are public in nature. "Public interest" is defined in Black's Law Dictionary, 9th Edition (page 1350) as: "the general welfare of the public that warrants recognition and protection" or "something in which the public as a whole has a stake, especially an interest that justifies governmental regulation". In the appeal, the 1st respondent alleges that the appointment of the applicant was not in accordance with the Constitution. Even though the 1st respondent was not directly aggrieved, it filed an appeal in this Court on behalf of the public at large.

71. Articles 22 and 258 of the Constitution provide that every person has the right to institute proceedings claiming that the Constitution has been contravened; and "person" in this regard, includes one who acts in the public interest.

72. Section 2 of the NGO Act defines a non-governmental organization as:

> "a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or

internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services.

It is to be noted that such a statutory definition, when read together with Article 260 of the Constitution, will justify the categorization of a 'non-governmental organization' as a "person", as it is "...an association...whether incorporated or unincorporated."

73. Counsel for the 1st respondent urged that the Non-Governmental Organizations Co-ordinations Act is subordinate to the Constitution. This Act provides for the process of registration and licensing of non-governmental organizations; Section 10 requiring that every NGO be registered. Section 12(2) of the Act provides that evidence of such registration takes the form of a certificate, which authorizes the NGO to operate in Kenya. Section 12(3) provides that:

(a) registered Non-Governmental Organization shall by virtue of such registration be a body corporate capable in its name of –

a. suing and being sued..."

The foregoing provision is silent on whether a deregistered NGO cannot sue or be sued.

74. However, Section 22(1) of the NGO Act provides that it is an offence for any person to operate a Non-Governmental Organisation without registration, and a certificate under this Act. It thus provides:

(1) It shall be an offence for any person to operate a Non-Governmental Organization in Kenya for welfare, research, health relief, agriculture, education, industry, the supply of amenities or any other similar purposes without registration and certificate under this Act."

75. These provisions are in respect of the legal capacity, and locus standi of non-governmental organisations. The NGO Act was enacted prior to the promulgation of the Constitution in 2010; thus it has to be read in the light of the new Constitution. Courts cannot disregard legislation enacted prior to the promulgation of the Constitution; for the Constitution in Section 7(1) of its Sixth Schedule thus stipulates:

> "All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

76. The foregoing provision has recently been interpreted by this Court, in Communications Commission of Kenya & Five Others v. Royal Media Services Limited & Five Others, Sup. Ct. Petition No. 14 of 2014; [2014] eKLR, as follows (paragraph 197):

> "(iii) All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule.
>
> (iv) In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution" (emphasis supplied).

77. The NGO Act must be interpreted in conformity with the Constitution. Although Section 12(2) and (3) of the Act provides for the legal status of the 1st respondent, when read together with Articles 22, 258 and 260 of the Constitution, and in the public interest, it is to be inferred that the 1st respondent

did not lose its locus standi, even if it were to be assumed to have lacked registered status. The three Articles give an enlarged view of locus standi, to the effect that every "person", including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the Bill of Rights, or the Constitution.

78. In this context, we find no basis for concurring with the High Court decision in Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance. Counsel for the applicant relied on that case, in support of his argument that a "person" must first exist, as a precondition to lodging proceedings. The facts in that case, and in the instant one, are different. The 1st respondent herein was a plaintiff in the earlier matter; it was duly registered at the time of filing the cause, but was deregistered during the pendency of the suit. The learned Judge relied on the NGO Act which, as he found, vested in the 1st respondent the power to sue and be sued; and he held that the cancellation of the registration certificate had rendered the 1st respondent non-existent in law, so that its appearance amounted to an abuse of the Court process. This reasoning was adopted in other pre-2010 Constitution cases, which the applicant herein seeks to rely on, such as: Fort Hall Bakery; Dennis Ololoigero and Two Others; and Housing Finance of Kenya Limited. These cases can be distinguished from the instant one, as they were decided before the promulgation of the Constitution. Even if the 1st respondent was deregistered prior to filing a cause in this Court, the new Constitution directs that every person, including an association whether incorporated or not, can institute proceedings before a Court challenging the contravention of the Constitution.

d. The Constitution, Article 159(2)(d): Is locus standi to be regarded as a procedural technicality?

79. Article 159(2)(d) of the Constitution enjoins the Courts to exercise judicial authority, and to administer justice without undue regard to procedural technicalities. Counsel for the applicant has asked us to give a clear interpretation of this provision, which he perceives as amenable to tendentious construction. He submitted that, had the drafters of the Constitution not intended to value procedural technicalities, they would have replaced the phrase "undue regard" with the phrase "without any regard".

80. Article 159(1) of the Constitution stipulates that judicial authority is derived from the people, and is to be vested in, and exercised by Courts. Article 159(2) provides the guidelines, as to the mode of discharge of such judicial authority.

81. In the context of this case, and as we find the applicant's foregoing argument to have clear merits, it is our perception that the terms of Article 159(2)(d) require interpretation. We note that the categorization of what is a procedural technicality must be on a case-by-case basis. In this particular case, which involves public-interest litigation, we take cognizance of the history of locus standi in Kenya. Locus standi had operated, in the earlier constitutional dispensation, to limit the scope for litigants to pursue causes in the public interest. Articles 22 and 258 of the current Constitution opened the doors for such litigants to lodge causes on constitutional matters. In order to avoid frivolous suits, Courts in cases such as John Wekasa Khaoya v. Attorney-General, High Ct. Pet. No. 60 of 2012 have set out parameters to guide the filing of causes in the public interest. These include (paragraphs 18 to 20): (i) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant.

82. From all the documentation lodged before the Supreme Court, it is clear to us that this case involves a public-interest matter. Although the 1st respondent filed the appeal cause at a time of uncertainty in its registered status as an NGO, we have considered the element of public interest, in the terms of Article 159 of the Constitution. Without minimizing the importance of every aspect of Article 159(2) of the Constitution, we would hold, from the special facts of this case, that the act of de-registering the 1st

respondent under the NGO Act, had not deprived that respondent of the standing in law to lodge an appeal before this Court, in a matter of public interest.

iii. The Question of Costs

83. Counsel for the applicant submitted that costs should be awarded in recompense for the work-input of each Advocate in this matter. However, counsel for the 1st respondent was of a contrary view. He urged that the matter was a constitutional one, not involving private interests; he submitted that any award of costs would have a negative effect on those who strive to ensure observance of the Constitution.

84. The merits of an award of costs, is an issue that has featured in past decisions of this Court. In Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Ct. Petition No. 5 of 2013; [2013] eKLR, we thus held (paragraph 310):

> "Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel" [emphasis supplied].

85. And in Jasbir Singh Rai and Three Others v. Estate of Tarlochan Singh Rai and Four Others, Petition No. 4 of 2012, we ordered that each party should bear their own costs, and that (paragraph 27):

> "Just as in the Presidential election case, Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs" (emphasis supplied).

86. The High Court has also set out clear parameters of awarding costs in instances where a matter is filed before a Court pursuant to Articles 22 and 258 of the Constitution. In John Harun Mwau and Three Others v. Attorney-General and Two Others, Petition No. 23 of 2011; [2012] eKLR, the Court held that it had a discretion in awarding costs in instances of challenge to contraventions of the Constitution. The Court thus remarked (paragraphs 179; 180):

> The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.
>
> "In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed..." (emphasis supplied).

87. We hold that this case is one that raises constitutional issues which are public in nature. Therefore, in the public interest, each party should bear their own costs.

F. THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ

88. The Non-Governmental Organizations Co-ordination Act, (Cap 134 of the Laws of Kenya) (the NGO Act) defines a Non-Governmental Organization as private voluntary groupings of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves, inter alia, for the benefit of the public at large and for the promotion of social welfare. In line with this objective therefore, Non Governmental Organizations have, both at an international and national level, been critically instrumental in filing claims of a constitutional nature in the interest of the public.

89. Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.

90. The instant matter provides such an opportunity to determine a key point in the public interest; yet the legal standing of one party appears faulty and must first be considered, before the Court, may proceed to hear the matter. Section 16 of the NGO Act empowers the Non-Governmental Organizations Coordination Board to cancel a registration certificate issued to any NGO if, the terms and conditions attached to the certificate have been breached, the organization has breached the Act, or the council has submitted a satisfactory recommendation for the cancellation of the certificate. The cancellation of this certificate of registration affects the NGO's legal capacity particularly because the Act does not provide an avenue for perpetuity. This is in stark contrast, for example, to the provisions of the Companies Act, which provides for succession and perpetuity, protecting the legal interests of both a dissolved company and that of its creditors.

91. This is a clear lacunae in the law that fails to protect the legal interests of an NGO or its creditors upon deregistration, but one that also threatens the role of NGO's in public interest litigation and in effect, social change and human rights defense through litigation. What is to become of public interest where an NGO in the course of litigation in a matter affecting the larger citizenry, is deregistered? Who then protects the public concern raised and defends the ongoing matter? This clearly is an issue that needs resolve either through legislative initiative and reconsideration by Parliament, through an amendment of the appropriate law or a proper challenge of constitutionality in line with the provisions of Articles 22 and 258 of the Constitution.

92. The Constitution enlarges the capacity to file a claim in defence of the Constitution thereby laying the basis for rights and constitutional enforcement. Article 3(1) provides that "every person has an obligation to respect, uphold and defend this Constitution." It further defines "person" to "include a company, association or other body of persons whether incorporated or unincorporated." The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, adopts the constitutional definition of person. Article 258(1) in turn provides that "every person has the right to institute court proceedings, claiming that this Constitution has

been contravened or is threatened with contravention." In constitutional adjudication therefore, the traditional strictures of locus have been broken to allow every person the capacity to file a constitutional claim. This resonates with the holding of the Court of Appeal in this very matter, at paragraph 27 that:

> " Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution....."

93. Does the present matter meet the threshold to draw the Court's locus discretion? The claim at the High Court was filed on 15th May, 2013 seeking the constitutionality of the appointment of the Applicant as the Chairman of the Ethics and Anti-Corruption Commission. The Petition sought three key reliefs: a declaration that the process and manner in which the petitioner was appointed was unconstitutional; a declaration that the petitioner was not a fit and proper person with due regard to his honesty, dignity, personal integrity, and suitability and hence his appointment was inconsistent with the Constitution and invalid; and an order of review and to set aside the approval and appointment of the petitioner. At the time of this suit, the 1st Respondent was duly registered under the NGO Act. However, the issue of its capacity to institute the suit arose at the High Court and it was held that the 1st Respondent had the capacity to present the suit because it was acting in accordance with Article 258 of the Constitution and in the interest of the public. It is proper to note that the evaluation of locus ought to be based upon the constitutional considerations of capacity (Articles 3, 22 and 258), the nature of the suit and the enforceability of the Orders sought. These three considerations inform the enforcement mechanisms and the coherent clarity of the following inquiries: Who will the Orders be enforced against? Who bears the costs of litigation, if at all? Who represents the party(ies) in Court? These considerations would have warranted our deeper consideration had the de-registration status of the 1st Respondent been active at the time of hearing this application, particularly with respect to the eventuality of costs and representation. However, evidence was adduced to the fact that the 1st Respondent had subsequently been registered.

94. In the present case, the 1st Respondent sought Orders in the form of declarations. These declarations did not attach any prerequisites of enforcement against the 1st Respondent but rather upon the State Organ(s) responsible for the appointment and upon the Applicant. The effect of the declarations is to ascertain clarification of the law and the appointment prerequisites of State Officers in line with the Constitution as opposed to the 1st Respondent's 'organisational/personal rights.' Such is the public interest and broad constitutional enforcement nature of this matter qualifying the test of Articles 258 and 259 of the Constitution with regard to enforcement through the proper and requisite appellate procedures.

95. The capacity of the 1st respondent to institute this suit has been the subject of determination right from the High Court. The Court of Appeal's holding in the circumstances was most appropriate:

> " It is hard to maintain the argument that the 1st respondent did not suffer any injury to warrant its standing to lodge the petition before the High Court. It is equally hard to maintain the position that the 1st respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethics and Anti-Corruption Commission."

Although the Constitution makes reference to the institution of court proceedings as a locus qualifier, what interpretation is to be given to claims of capacity at the appellate stage? What is the constitutional imperative regarding capacity, public interest litigation, accrued rights and obligations and the appellate process? What considerations ought to be made and what is the place of judicial discretion?

96. It must be appreciated that the issue for consideration at the High Court, the Court of Appeal and the Supreme Court has been that of enforcement of Chapter Six of the Constitution. The High Court set out certain jurisprudential parameters for the enforcement of this Chapter as did the Court of Appeal. Accordingly, and in light of the principle of precedent, the decision of the Court of Appeal stands as the law. However, the system of Appeal is yet to be exhausted. As was held in Malcolm Bell v. Daniel Toroitich Arap Moi & the Board of Governors, Moi High School Kabarak, Sup Ct. Applic. No. 1 of 2013, at para 46:

> " It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law."

97. The Judgment of the Court of Appeal in this matter was delivered on 26th July, 2013, close to a month before the 1st Respondent was de-registered. As such, the principles established by the Court of Appeal regarding the interpretation of Chapter Six based on the matter before it, could not be challenged for want of capacity. However, the appellate mechanisms had not been exhausted and any aggrieved party still bore the legitimacy to file an appeal before this Court. Based on the conclusion and findings of the High Court and the Court of Appeal, it is clear that this matter is one of constitutional interpretation and application. As such, the parties before us qualify within the broad standing test of Article 258 of the Constitution. An interpretation of the provisions of section 16 of the NGO Act in line with the Constitution will find that, in the special circumstances of this case, the deregistration of the 1st Respondent does not fatally compromise the validity of the appeal before us. Accordingly, the exhaustive appellate mechanism, as a matter of right, is vested in this Court and ought to be exercised.

G. Orders

98. Upon a detailed and conscientious consideration of the nature and context of the 1st respondent's outstanding appeal, and of the character and circumstances of the applicant's objection, we will make specific Orders as follows:

a. The preliminary objection is disallowed.

b. The matter shall come up before the Registrar for mention, and for the assignment of a priority hearing date for the appeal.

c. The parties shall bear their own respective costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2014

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W. M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT