Otieno & 2 others v Attorney General & another; Katiba Institute & 9 others (Interested Parties) (Petition E519 of 2024) [2025] KEHC 8557 (KLR) (Constitutional and Human Rights) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 8557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E519 OF 2024

AB MWAMUYE, J

APRIL 30, 2025

IN THE MATTER OF ARTICLES 1(1), 1(2), 1(3), 2(1),2(4), 3(1), 4(2), 10, 19, 20, 21(1), 22(1), 22(2)(C), 23(1) & (3), 24, 31(C), 36, 47, 50(1), 159 (1) & (2), 160(1), 165 (3), 172(1)(C), 230(4)(A), 258 (1) AND 259 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE PUBLIC BENEFITS ORGANIZATIONS ACT, 2013

BETWEEN

DAVID CALLEB OTIENO .... 1ST PETITIONER

CIVIL SOCIETY REFERENCE GROUP .... 2ND PETITIONER

NATIONAL PUBLIC BENEFIT ORGANIZATIONS CONSORTIUM .... 3RD PETITIONER

AND

THE ATTORNEY GENERAL .... 1ST RESPONDENT

THE PUBLIC BENEFIT ORGANIZATIONS REGULATORY AUTHORITY .... 2ND RESPONDENT

AND

KATIBA INSTITUTE .... INTERESTED PARTY

LAW SOCIETY OF KENYA .... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

HON. MWAMBU MABONGAH .... INTERESTED PARTY

AMB. JOSEPH VUNGO	**INTERESTED PARTY**
KANINI K. NTHIGA	**INTERESTED PARTY**
JOSEPH TOO	**INTERESTED PARTY**
MICHEAL MAINA KAMANDA	**INTERESTED PARTY**
STEPHEN CHEBOI	**INTERESTED PARTY**
MUTUMA NKANATA	**INTERESTED PARTY**

JUDGMENT

Introduction.

1. This judgment arises from a constitutional petition filed by David Calleb Otieno, Suba Churchill, and Timothy Odhiambo Mwololo, who are registered officials of Public Benefit Organizations (PBOs) and active members of civil society. The Petition challenges several provisions of the *Public Benefit Organizations Act*, 2013 (hereinafter "the *PBO Act*"), alleging that they violate multiple constitutional rights and principles, including the freedom of association, the right to privacy, the right to fair administrative action, and the right to a fair hearing.

2. The impugned provisions include: Paragraphs 5(1) and 5(2) of the Fifth Schedule, requiring previously registered NGOs to apply afresh for registration as PBOs; Sections 35 and 50, dealing with the composition and independence of the PBO Regulatory Authority Board and the PBO Disputes Tribunal; Sections 21(1), 21(9), and 23(2), which impose structural obligations on PBOs, including compulsory membership in the national federation and restrictions on recognition of forums; Section 32, which mandates disclosure of information by PBOs; and Sections 18(1)–(3) and 19(1)(b), which provide for suspension or cancellation of registration.

3. The Petitioners argue that the cumulative effect of these provisions is to undermine the autonomy and functionality of PBOs, entrench state control, and suppress civil society participation—all contrary to the constitutional vision of an open and democratic society governed by the rule of law and the values of pluralism, transparency, and human dignity.

4. The 1st Respondent, the Attorney General, and the 2nd Respondent, the Public Benefit Organizations Regulatory Authority, oppose the petition. They submit that the *PBO Act* is a comprehensive statutory framework intended to improve accountability, coordination, and legitimacy of public benefit organizations, and that any limitations it imposes are justifiable under Article 24 of the *Constitution*.

Background.

5. The *Public Benefit Organizations Act*, 2013 was enacted to replace the *Non-Governmental Organizations Co-ordination Act* (Cap. 134). Though passed in 2013, the Act remained in limbo until it was brought into force on 14 May 2024 via *Legal Notice No. 60 of 2024*.

6. The purpose of the Act, as set out in its preamble and Section 3, is to facilitate and support the establishment and operation of public benefit organizations that serve the public good, while providing an accountable and transparent regulatory framework.

7. The Petitioners argue that while the *Act* purports to create an enabling environment for civil society, several of its provisions impose regressive and unconstitutional restrictions. Specifically: the re-registration requirement (Paragraph 5 of the Fifth Schedule) allegedly renders existing NGOs non-compliant, effectively stripping them of legal status without due process; the PBO Authority Board and Disputes Tribunal, as currently structured, are claimed to lack institutional independence, contrary to Articles 160 and 172 of the *Constitution*; the mandatory federation membership and forum recognition requirements are said to infringe on freedom of association; Section 32 allegedly breaches the right to privacy; and Sections 18 and 19 are claimed to allow punitive enforcement without fair hearing.

8. The Respondents maintain that the impugned provisions are necessary for ensuring transparency, preventing abuse of charitable status, and aligning PBOs with national development goals. They assert that sufficient safeguards exist under the law, including the right of appeal to the Tribunal and public participation mechanisms embedded in the *Act*.

9. The issues for determination are as follows:

    i. Whether the requirement for fresh registration under Paragraphs 5(1) and 5(2) of the Fifth Schedule violates the *Constitution*.

    ii. Whether Section 32 unjustifiably infringes the right to privacy under Article 31.

    iii. Whether the composition of the PBO Authority's Board under Section 35 violates the *Constitution*.

    iv. Whether the establishment and appointment of the PBO Disputes Tribunal under Section 50 are unconstitutional.

    v. Whether Sections 21(1) and 21(9) infringe the freedom of association by compelling federation membership.

    vi. Whether Section 23(2) imposes an unjustifiable restriction on recognition of PBO forums.

    vii. Whether Sections 18(1)-(3) and 19(1)(b) violate the rights to fair administrative action and fair hearing.

Analysis and determination

Whether the requirement for fresh registration under Paragraphs 5(1) and 5(2) of the Fifth Schedule violates the *Constitution*

10. Paragraphs 5(1) and 5(2) of the Fifth Schedule require organizations that were registered under the repealed *Non-Governmental Organizations Co-ordination Act* (Cap. 134) to apply afresh for registration as public benefit organizations (PBOs) under the new regime established by the *Public Benefits Organizations Act*, 2013.

11. The Petitioners are aggrieved by these provisions and the directive to re-register. They assert that NGOs which were duly registered and compliant under the old law are now being compelled, without individual fault or cause, to submit to a fresh registration process on pain of deregistration. This, they argue, is not a mere administrative formality but a substantive legal burden with far-reaching implications.

12. The Petitioners argue that this undermines the right to fair administrative action under Article 47. The NGOs had a legitimate expectation – derived from the previous law – that their registration certificates

were of indefinite duration unless cancelled for cause under the procedures of that law. Paragraphs 5(1) and (2) thwart this expectation by effectively terminating existing registrations through a generalized legislative edict rather than any case-by-case wrongdoing or administrative due process. The Petitioners submit that such action would be procedurally unfair and unreasonable, violating Article 47(1) which guarantees every person administrative action that is lawful and reasonable. They note that legitimate expectation is recognized as a component of fair administrative action both in Article 47 and in Section 7(2)(m) of the *Fair Administrative Action Act*, 2015.

13. The Petitioners also submit that it is discriminatory, contrary to Article 27(4) of the *Constitution*, which prohibits unequal treatment on any ground. The impugned transition requirement applies only to organizations formerly under the *NGO Coordination Act* (essentially the NGO sector), and not to other analogous entities whose governing statutes have been repealed and replaced. The Petitioners point out that when other legal regimes were overhauled – for example, the replacement of the old *Companies Act* (Cap. 486) by the *Companies Act* 2015, or the transition from the old *Political Parties Act* (Cap. 7B) to the *Political Parties Act* 2011 – the law did not compel already registered companies or political parties to re-register afresh on pain of dissolution. In their view, singling out NGOs for such treatment, absent a compelling reason, amounts to unfair discrimination against the civil society sector.

14. Additionally, the Petition raises concerns about the institutional framework under the *PBO Act*, though these go beyond the immediate issue of re-registration. The Petitioners allege that the Public Benefit Organizations Regulatory Authority (the 2nd Respondent), which is tasked with registering and regulating PBOs (including handling the re-registration process), is improperly constituted in a manner that offends the *Constitution*. They argue that the PBO Authority's Board, as well as the PBO Disputes Tribunal established by the Act, exercise quasi-judicial powers yet do not meet the constitutional requirements for independence of adjudicative bodies (citing Articles 50 and 172(1)(c)).

15. The 1st Respondent maintains that the *PBO Act* (including its transitional schedule) was validly enacted to serve legitimate public ends – specifically, to modernize and improve the regulatory framework for public benefit organizations. Counsel for the Respondent submits that re-registration is a reasonable administrative measure to transition NGOs into the new legal regime, which may have different standards and requirements than the old law. It is emphasized that the law gives affected organizations a generous window (one year) to comply, and there is no evidence of any capricious or abusive application of these provisions so far. The Respondent disputes the notion that any constitutional rights are being violated or threatened merely by requiring compliance with a generally applicable statute.

16. The 1st Respondent further invokes the presumption of constitutionality of legislation. Since paragraphs 5(1) and (5(2) are part of an Act of Parliament that has been in the statute books for over a decade (albeit unimplemented until recently), the Court is urged to presume these provisions are constitutional unless and until the Petitioners prove otherwise. According to the Respondent, the Petitioners have so far made only general allegations of rights violations without tendering concrete evidence of harm. The Respondent argues that a "mere allegation" of contravention is not sufficient; the law requires a demonstration of a real, imminent danger to fundamental rights to justify conservatory orders. In their view, the fears expressed by the Petitioners – such as the concern that the re-registration process could be misused to target NGOs seen as critical of the government – are speculative and "with no basis" on the facts before the Court.

17. Article 36(3)(a) of the *Constitution* guarantees that "a person shall not be compelled to join an association of any kind" and that "registration of an association shall not be withheld or withdrawn unreasonably. The requirement to re-register imposes additional regulatory hurdles on already compliant entities, which undermines legal certainty, disrupts operations, and creates unnecessary

administrative burdens. There is no clear public interest or risk identified to justify such a broad and compulsory process.

18. Additionally, Article 47 of the *Constitution* guarantees the right to fair administrative action, including the right to be heard and to receive reasons for any administrative decision affecting one's rights or legitimate interests. The blanket re-registration requirement fails to meet this standard as it deprives existing NGOs of their legal status without an individualized assessment or process.

19. The principle of legitimate expectation, as established in *Republic v Kenya Revenue Authority Ex parte Shake Distributors Ltd* [2001] eKLR, holds that public authorities must not frustrate a legitimate expectation arising from their past conduct or promises unless overriding public interest demands it. The Petitioners, having been lawfully registered under the previous Act, had a legitimate expectation of continuity of registration without arbitrary revocation.

20. Moreover, the requirement may have a discriminatory impact by selectively disadvantaging organizations that, though compliant under the old Act, are now forced to undergo fresh vetting and potentially denied registration. This violates Article 27(1) and (4) on equality and non-discrimination.

21. The Respondents have not demonstrated that this blanket requirement is necessary to serve any pressing public need, nor that less restrictive means (such as transitional recognition or conversion of status) would be insufficient to achieve the legislative intent. In the absence of such justification, the requirement fails the limitations test under Article 24, which requires that any law limiting a constitutional right must be reasonable and justifiable in an open and democratic society. In *Law Society of Kenya v AG & Another* [2016] eKLR, the Court emphasized that statutory provisions must be aligned with the *Constitution* and any that unjustifiably limit fundamental freedoms are liable to be struck down.

22. Therefore, Court finds that the requirement for fresh registration under Paragraphs 5(1) and 5(2) of the Fifth Schedule violates Articles 36(3)(a), 47, and 27 of the *Constitution*. It is an unjustified, unreasonable, and procedurally unfair limitation on the freedom of association and administrative justice.

Whether Section 32 unjustifiably infringes the right to privacy under Article 31 of the *Constitution*

23. Section 32 of the *PBO Act* mandates that every registered PBO submit annual reports to the PBO Authority, including financial statements and presumably other information prescribed by regulations. From the submissions, it appears Section 32 may also empower the Authority to request or access personal information about the PBO's members, officials, donors, or beneficiaries, and perhaps even to publish certain information (since transparency is a stated objective of the Act). The exact wording was not given in full, but the Petitioners' concern indicates that Section 32 either explicitly or implicitly requires disclosure of what would ordinarily be private details – for example, lists of members or donors, minutes of internal meetings, personal addresses, and contacts of officials, etc. They claim this violates Article 31(c) of the *Constitution*, which guarantees the right not to have information relating to one's private affairs unnecessarily required or revealed.

24. The Petitioners argue that while some reporting by PBOs is justified (for accountability in use of funds, etc.), Section 32 as it stands is overbroad and intrudes into privacy without adequate safeguards. They rely on international guidelines that caution against compelling associations to hand over detailed internal information to authorities. In particular, the *ACHPR Guidelines on Freedom of Association* state that organizations should not be required to submit "detailed information such as the minutes of their meetings, lists of their members, or personal information of their members" to authorities, and that the privacy and confidentiality of associations and their members must be respected in any

reporting process. These principles recognize that forcing associations to divulge their membership or donor lists can chill participation (people may fear being harassed or stigmatized if their association with a cause is exposed) and can subject private individuals to unwanted attention or risk.

25. The Petitioners also invoke comparative jurisprudence on privacy. They cite a *Kenyan High Court decision, Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR, where a piece of legislation that allowed the government to monitor and collect personal data from mobile devices was struck down for violating privacy. In that case, the Court performed a rigorous Article 24 analysis and found the data collection measure disproportionate. The Petitioners argue that a similar analysis of Section 32 leads to the conclusion that it is not the least restrictive means to achieve accountability and that it lacks proper procedural safeguards (such as how the data will be protected from misuse, who can access it, etc.).

26. The Respondents emphasize the need for transparency and accountability in the operations of PBOs, many of which handle public donations or foreign funding intended for public benefit. They argue that requiring comprehensive annual reports (including details on governance, programs, and finances) helps prevent fraud, diversion of funds to illegal activities (such as terrorism or money laundering), or abuse of beneficiary rights. They also assert that any interference with privacy is minor and justified by the public interest in oversight. For instance, knowing who the officers of an organization are standard for regulating entities, and knowing how funds are obtained and used is crucial to prevent wrongdoing.

27. However, the Petitioners counter that even if some information must be disclosed, personal information about members or donors who are not in management should not be compelled, absent a specific reason. Article 31(c) protects "information relating to family or private affairs." Membership in an association can be considered part of one's private life, especially if the cause is sensitive (e.g., an association advocating for LGBT rights, or an association of people living with a certain illness – members may not want their identities revealed to the government or public). Similarly, donors often expect confidentiality unless they choose to go public. The *Act* does not appear to temper its demands with considerations of necessity or consent; it casts a wide net.

28. The Court acknowledges that financial transparency is a legitimate aim. Indeed, Article 10 of the *Constitution* enshrines accountability as a national value. But privacy and accountability must be balanced. Article 31 is a fundamental right that can only be limited by law to an extent that is reasonable and proportionate. We must ask: does Section 32 require more than necessary, and does it provide safeguards to ensure information is used only for proper purposes?

29. The *Data Protection Ac*t 2019 operationalizes Article 31(c)and (d). Any personal data collected by the Authority would be subject to that Act, meaning it should be collected only for a specific, legitimate purpose, stored securely, and not disclosed without consent or other legal authorization. The *PBO Act* predates the *Data Protection Act*, so it doesn't explicitly harmonize with it. Ideally, if Section 32 is to be upheld, it should be read in conformity with data protection principles (to avoid constitutional conflict). The problem is, Section 32 in its wording (as far as provided) doesn't specify limits – it likely leaves it to regulations and the Authority's demands and therefore, fails to provide such safeguard.

30. Under Article 24, a limitation of rights must be reasonable and justifiable. The limitation must pursue a legitimate aim, be based on law, and be the least restrictive means to achieve that aim. In this case, the goal of transparency is legitimate, but demanding personal information of individuals connected to PBOs is not narrowly tailored, and no adequate safeguards were shown to exist to prevent misuse of that data.

31. In *Okiya Omtatah Okoiti v Communications Authority & 8 Others* [2021] eKLR, the Court reiterated that personal data should not be demanded unless its collection is clearly authorized by law, necessary,

and proportionate. A similar standard applies here: PBOs can be held accountable through audited accounts and public financial reports without exposing private details of individuals.

32. Therefore, this court holds that Section 32 of the *PBO Act* violates Article 31(c) of the *Constitution* by unjustifiably intruding upon the privacy of individuals involved in public benefit organizations. The provision is disproportionate in its reach and lacks safeguards for the protection of personal data. It is accordingly declared unconstitutional and invalid.

Whether the composition of the PBO Authority's Board under Section 35 violates the *Constitution*

33. Section 35 of the *Public Benefit Organizations Act*, 2013 provides for the establishment and composition of the Board of the Public Benefit Organizations Regulatory Authority. It comprises members appointed largely by the Cabinet Secretary, with representation from various state bodies and civil society.

34. The Petitioners contend that the Board, as constituted under Section 35 and the Third Schedule, does not meet the constitutional requirements of independence, transparency, and separation of powers. They argue that the Executive's dominance in the appointment process compromises the impartiality of a body that exercises quasi-judicial functions, such as the power to suspend or cancel registration of PBOs.

35. The Petitioners rely on Article 50(1) of the *Constitution*, which guarantees every person the right to have disputes resolved by an independent and impartial tribunal or body. They argue that since the Board handles disputes involving PBO compliance and status, it must be independent from executive control.

36. The Petitioners further invoke Articles 160 and 172, which safeguard the independence of bodies performing judicial or quasi-judicial roles. Article 172(1)(c) mandates that judicial officers and members of subordinate courts and tribunals be appointed by the Judicial Service Commission (JSC) to insulate them from political or executive interference.

37. The Respondents argue that the Board's primary role is regulatory and administrative, and not judicial. They assert that oversight over the PBO sector falls within the domain of the Executive and that the appointments' structure is consistent with enabling legislation.

38. However, the Board's powers under the Act include determining whether a PBO is in breach of the law or its constitution (Section 18), and issuing sanctions including fines, suspensions, and deregistration. These are clearly quasi-judicial functions, as they involve determining rights and liabilities of entities through the application of legal standards.

39. In *Judges and Magistrates Vetting Board & Another v Centre for Human Rights & Democracy & 11 Others* [2014] eKLR, the Supreme Court emphasized that any entity exercising judicial or quasi-judicial authority must be institutionally independent, and that its composition must comply with the standards set by the *Constitution*.

40. Moreover, in *CREAW & 6 Others v AG & Another* [2014] eKLR, the High Court held that bodies involved in adjudicative functions must include transparent, merit-based, and participatory appointments, failing which their impartiality is compromised. Section 35 lacks such a framework; appointments are predominantly executive-driven, without any role for the JSC, public participation, or safeguards against politicization.

41. The Third Schedule further entrenches this by providing for nominations by Cabinet Secretaries and the National Assembly, while Paragraph 6 of the Fifth Schedule controversially transitions

former NGO Board members into the new Board without a fresh vetting process. This continuity of appointment defeats the intent of reform and violates the principle of constitutionalism under Articles 10 and 2.

42. Accordingly, the Court finds that the composition of the PBO Authority Board under Section 35(1), the Third Schedule, and Paragraph 6 of the Fifth Schedule violates Articles 50(1), 160, and 172 of the *Constitution*. The Board's lack of independence renders it unsuitable to discharge quasi-judicial functions affecting rights of PBOs.

Whether the establishment and appointment of the PBO Disputes Tribunal under Section 50 are unconstitutional

43. Section 50(1) of the *Public Benefit Organizations Act*, 2013 establishes the PBO Disputes Tribunal and provides that its members shall be appointed by the Chief Justice with the approval of the National Assembly. Section 50(6)(c) empowers the Chief Justice to remove tribunal members, while Section 50(5) allows the Authority to determine their remuneration in consultation with the Salaries and Remuneration Commission (SRC).

44. The Petitioners challenge the structure, independence, and appointment process of the Tribunal. They argue that since the Tribunal exercises judicial authority, it must comply with constitutional requirements under Articles 50(1), 160, and 172, which guarantee the independence of adjudicatory bodies.

45. The Petitioners argue that by bypassing the Judicial Service Commission (JSC) in the appointment and removal of tribunal members, Section 50 infringes upon Article 172(1)(c), which mandates that judicial officers and members of subordinate courts and tribunals be appointed and disciplined by the JSC.

46. They further contend that allowing the PBO Authority—a body that may be a party to proceedings before the Tribunal—to determine the remuneration of its adjudicators under Section 50(5) creates a conflict of interest, undermining the institutional and financial independence of the Tribunal.

47. In *CREAW & Others v Attorney General* [2014] eKLR, the High Court held that the judicial independence of tribunals must be protected through independent appointment procedures, security of tenure, and control over remuneration. Where these safeguards are absent, the tribunal fails the test of impartiality under Article 50(1).

48. Similarly, in *Judges and Magistrates Vetting Board v Centre for Human Rights & Democracy & 11 Others* [2014] eKLR, the Supreme Court stressed that the independence of anybody exercising judicial or quasi-judicial functions is a fundamental constitutional requirement. Where the Executive or any interested party exercises control over the tribunal, impartiality is compromised.

49. In the present case, although the Chief Justice is involved in appointments, the exclusion of the JSC's constitutional role under Article 172 is a significant deviation. Moreover, approval by the National Assembly introduces a political filter that is inconsistent with the independence required of adjudicative bodies.

50. Furthermore, Section 50(6)(c) gives the Chief Justice the unilateral power to remove tribunal members. This conflicts with the disciplinary framework established in Article 172(1)(c), which places removal powers exclusively under the JSC to ensure security of tenure and protection from arbitrary removal.

51. The provision on remuneration—Section 50(5)—empowering the PBO Authority to determine compensation for tribunal members in consultation with the SRC, violates Article 230(4)(a). This Article vests exclusive responsibility for setting public officer remuneration in the SRC. The Authority's role creates dependency and undermines the financial independence of the tribunal.

52. The Respondents argue that the current process ensures expedient appointments and facilitates operational autonomy. However, no sufficient justification was given to demonstrate why the JSC could not oversee appointments and removals as mandated by the *Constitution*.

Whether Sections 21(1) and 21(9) infringe the freedom of association by compelling federation membership

53. Sections 21(1) and 21(9) of the *Public Benefit Organizations Act* establish the Federation of Public Benefit Organizations as an umbrella body for all registered PBOs in Kenya. The provisions create an impression of mandatory membership, implying that all PBOs must join or operate under the jurisdiction of the Federation.

54. The Petitioners argue that these provisions violate Article 36(2) of the *Constitution*, which guarantees every person the right to freedom of association, including the freedom not to join or be compelled to join an association of any kind.

55. The Petitioners contend that by making Federation membership appear compulsory, the impugned sections impose a form of compelled association, which is constitutionally impermissible. They assert that many PBOs may prefer independence or affiliation with alternative networks, and that forcing them into one national umbrella body undermines their autonomy, diversity, and pluralism within civil society.

56. The Petitioners rely on the decision in *Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) v Kenya Medical Association & 2 others* [2019] eKLR, where the High Court held that freedom of association includes the freedom not to associate. The Court stated that compelling membership in any body without consent is unconstitutional, save for very narrow exceptions expressly allowed by the *Constitution*. Additionally, in *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR, the Court emphasized that statutory provisions must not create associations by default, as doing so would negate voluntary will—a key tenet of Article 36.

57. The Respondents argue that the Federation was established to enhance coordination, self-regulation, and policy dialogue between the PBO sector and the State. They maintain that it is not intended to suppress independent operation or impose ideological conformity, but rather to serve as a representative structure for engagement with government.

58. While the purpose of coordination is legitimate, compelling organizations to associate through law—whether explicitly or implicitly—is not justified under Article 24. The limitation is neither necessary nor proportionate in an open and democratic society. Voluntary membership in umbrella bodies has been shown to serve coordination goals without infringing rights. Furthermore, nothing in the *Constitution* or in international best practice (e.g., *African Commission Guidelines on Freedom of Association*) supports forced affiliation with umbrella groups. PBOs are entitled to form or join alternative networks, or none, depending on their needs and ideologies.

59. A more constitutionally compliant approach would be to establish the Federation as an optional umbrella that PBOs may choose to join. That preserves both the benefits of collective representation and the constitutional right to opt out.

Whether Section 23(2) imposes an unjustifiable restriction on recognition of PBO forums

60. Section 23(2) of the *Public Benefit Organizations Act* provides that only self-regulation forums representing a "significant number" of PBOs, as prescribed by the Cabinet Secretary, shall be recognized by the PBO Authority.

61. The term "significant number" is undefined and vague – it grants the Cabinet Secretary broad power to set an arbitrary threshold and grants the Authority broad power to approve or deny recognition on that basis. This vagueness offends the principle of legality under the rule of law (a law limiting rights must be sufficiently clear to be understood and applied consistently). It also creates a real risk of arbitrary or discriminatory decisions: the Authority could, for instance, refuse to recognize a forum that is critical of the government by claiming it isn't "significant" enough, while recognizing a more compliant forum.

62. The Petitioners challenge this provision on grounds that it violates the freedom of association under Article 36(1) and (2) of the *Constitution* by imposing vague, discretionary, and exclusionary criteria that effectively deny legal recognition to legitimate forums of public benefit organizations.

63. Article 36(1) guarantees the right to form, join or participate in the activities of an association of any kind, while Article 36(2) prohibits compelled association or any unreasonable limitations on the formation and operation of associations. The Petitioners argue that Section 23(2), by limiting recognition to forums with a "significant number" of PBOs—without defining that threshold—grants the Cabinet Secretary and the Authority broad, unchecked discretion to approve or reject forums. This, they say, enables arbitrary discrimination, especially against smaller, regional, or issue-specific networks that may not meet an undefined numeric threshold.

64. The Respondents maintain that the provision is intended to ensure that forums recognized for purposes of self-regulation and sectoral coordination are genuinely representative. They argue that limiting recognition prevents fragmentation and enables efficient oversight.

65. No substantial justification was offered by the Respondents for this limitation. There is no evidence that unrecognized smaller forums would harm any public interest. If the concern is administrative convenience, that is not a sufficiently important objective to curtail constitutional freedom. The Article 24(1) analysis yields a negative result: The law's purpose (perhaps to ensure forums are representative) is not weighty enough to override the freedom of association. There is no rational connection shown between excluding small forums and any demonstrable benefit; indeed, multiple forums could coexist without issue. And less restrictive means are readily apparent – for example, the Authority could recognize all forums that meet basic criteria (like having a constitution and lawful objectives) and then engage with them in proportion to their size or scope, rather than refusing recognition outright.

66. However, under Article 24, a limitation on a constitutional right (such as freedom of association) must be: Based in law; Pursuing a legitimate aim; Reasonable and justifiable in an open and democratic society; The least restrictive means to achieve the objective. While representativeness may be a legitimate aim, the means used—namely requiring a "significant number" without definition or clear procedure—fail the legality and proportionality tests. The standard is vague, and its application lacks transparency, predictability, and fairness. In *Kenya Human Rights Commission & 2 Others v Non-Governmental Organizations Co-ordination Board* [2016] eKLR, the Court emphasized that administrative discretion must not be exercised arbitrarily and must comply with the constitutional standards of fairness and legality under Article 47 (fair administrative action).

67. Additionally, the *African Commission on Human and Peoples' Rights Guidelines on Freedom of Association and Assembly* (2017) provide that associations must be allowed to establish umbrella or coordination bodies freely and without interference, and that no minimum number of members may be imposed for such forums to operate. Denying recognition to legitimate forums based on unclear numerical thresholds limits their ability to participate in sectoral self-regulation, potentially denying them access to funding platforms, engagement with regulators, and representation.

68. This court finds that Section 23(2) of the *PBO Act* unjustifiably limits the freedom of association of PBOs and fails to meet the Article 24 criteria. It essentially allows the state to dictate which associations of PBOs are worthy of formal existence, which is antithetical to an "open and democratic society."

Whether Sections 18(1)– (3) and 19(1)(b) of the PBO Act violate the rights to fair administrative action and fair hearing.

69. Section 18(1)– (3) of the *PBO Act* empowers the PBO Authority to take enforcement measures including suspension and cancellation of registration—where it believes a PBO has violated the Act or its own constitution. Section 18(1) allows the Authority to issue a default notice; subsection (2) allows for written representations; and subsection (3) authorizes the Authority to fine, suspend, or cancel registration if the explanations are deemed unsatisfactory. Section 19(1)(b) provides for cancellation of registration where a PBO is "carrying out its activities contrary to its constitution."

70. The Petitioners argue that these provisions violate the right to fair hearing (Article 50(1)) and fair administrative action (Article 47) because they do not ensure a proper opportunity to be heard before severe penalties (suspension or cancellation) are imposed. They also argue that Section 19(1)(b) is so broad and subjective that it allows for unreasonable cancellation, contrary to Article 36(3)(a) (which forbids unreasonable withdrawal of registration of an association).

71. When the PBO Authority issues a default notice under Section 18(1), it is effectively initiating an enforcement action that could lead to depriving the organization of its legal status (or at least suspending it, which halts operations). The only chance the PBO gets to defend itself at that stage is by sending written representations (Section 18(2)). There is no provision for an oral hearing, no provision to present and challenge evidence, and the same Authority (which might have investigated or accused the PBO of default) is the judge of whether the representation is satisfactory. This concentration of functions – investigator, prosecutor, and judge – within the Authority is problematic. It is a cardinal principle of justice that one should not be a judge in their own cause. Here, the Authority, having perhaps formed an initial view that a violation occurred (to issue the notice), then evaluates the PBO's defence. Human nature and institutional bias may incline the Authority to confirm its preliminary finding. Article 50(1) entitles the PBO to an independent and impartial adjudicator for the dispute over whether it violated the Act.

72. Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Section 18's procedure is expeditious (perhaps too expeditious – minimum 15 days notice is given, which might be short) and arguably efficient, but is it reasonable and procedurally fair? Procedural fairness in administrative context usually requires notice of the case, an opportunity to present one's case, and an unbiased decision-maker. Notice is given (default notice), an opportunity to present a written defence is given – but no opportunity to confront the evidence or have an oral hearing if needed, and no separation of roles to ensure an unbiased mind. As for reasonableness, Section 18(3) uses the term that if representations are not "satisfactory" to the Authority, it shall fine, suspend or cancel. That indicates once the Authority subjectively finds the PBO's explanation unsatisfactory, sanction is almost automatic. There is a worry that this could

lead to disproportionate outcomes – the law does not explicitly require the punishment to fit the infraction (though presumably the Authority will choose fine vs suspension vs cancellation depending on severity, but it's at their discretion).

73. Section 18(4) and (5) do provide for an internal review by the same Authority and thereafter an appeal to the Tribunal. The Respondents argue this satisfies Article 36(3)(b) (right to a review of cancellation by a court or independent body). To an extent, yes: an appeal to the Tribunal (if the Tribunal were independent and functional) is a vital safeguard. However, that kicks in after the penalty has been imposed. The question is whether the initial lack of full hearing can be tolerated because a later appeal is available. In some contexts, immediate action can be taken with post-deprivation hearing (for instance, in emergencies or interim measures). But Section 18(3) does not limit itself to emergency situations; it applies generally. There is no requirement that the violation be serious or ongoing or urgent to trigger suspension before hearing. Thus, an NGO could be suspended for a relatively minor paperwork lapse after 15 days notice, and then it might take months to conclude an appeal in the Tribunal, during which time its work is paralyzed. That is neither fair nor proportional.

74. Suspension (temporary revocation of registration for a period) and cancellation (permanent removal) are both provided as options. The Act doesn't detail how long a suspension can last or what conditions attach. In either case, the PBO's operations are halted (Section 19(3)(b) says the Authority, upon suspension or cancellation, shall order the PBO to stop operations). So even a suspension is a grave interference with the right to associate and to work. One would expect at least that before cancellation there be a very robust process (perhaps even involving the Tribunal or court at first instance). But the Act puts it in the hands of the Board.

75. The Petitioners further argue that Section 19(1)(b) is vague and overly broad, as it permits cancellation for any perceived inconsistency with a PBO's constitution—even minor or technical ones. This opens the door for arbitrary or disproportionate sanctions.

76. Section 19(1)(b) allows cancellation if a PBO is carrying out its activities in a manner contrary to its constitution (the PBO's own constitution, i.e., its governing document or bylaws). While on the surface it might seem logical that if an organization isn't following its own rules, it could be deregistered, in practice this is a highly intrusive ground. An organization's internal affairs (how strictly it adheres to its constitution) can vary – minor deviations or disputes are common and usually resolved internally by members. The state stepping in to deregister on that basis is extreme. For example, if a PBO's constitution says it will hold an AGM every calendar year, and it delayed by a few months, is that "carrying out activities contrary to its constitution"? Possibly yes. Should the penalty for that be deregistration? That would clearly be an unreasonable withdrawal of registration under Article 36(3)(a). That article specifically guards against withdrawing registration "unreasonably."

77. I find that Section 19(1)(b) could easily be applied in an unreasonable manner. It does not set a threshold of seriousness. It does not require that the contravention of the PBO's constitution be material or that it prejudices the public interest or the PBO's members or beneficiaries. In effect, it empowers the Authority to punish what might be purely private governance matters. That is an outsized state power that does not meet the necessity test. If a PBO's members are unhappy that its leadership isn't following the *Constitution*, they have remedies (internal elections, or seeking intervention via the courts under societies law or trusts law to enforce the *Constitution*). The government need not play a part in that. This violates Article 36(3)(a) of the *Constitution*, which provides that registration of an association shall not be withdrawn unreasonably. Without requiring the breach to be material or harmful, Section 19(1)(b) grants the Authority excessive discretion and enables unreasonable withdrawal of registration.

78. In *Keroche Industries Ltd v Kenya Revenue Authority & 5 Others* [2007] eKLR, the High Court held that administrative decisions must meet the threshold of procedural fairness, including: Prior notice of allegations; access to evidence; opportunity to be heard; and an impartial decision-maker. Section 18(1)– (3) falls short of this standard, as it allows the Authority to suspend a PBO based solely on written representations, without requiring a hearing or independent adjudication.

79. Similarly, in *Geothermal Development Company Ltd v AG & 3 Others* [2013] eKLR, the Court of Appeal held that administrative bodies must adhere to rules of natural justice, especially where a decision adversely affects rights. The Court emphasized the principle of audi alteram partem—the right to be heard before adverse action.

80. The right to appeal to the Tribunal under Section 18(5) does not cure the initial procedural unfairness, especially where suspension or cancellation takes immediate effect. The harm to an organization's operations, funding, and reputation may be irreversible before the appeal is heard.

81. Under Article 24(1), a law limiting a constitutional right must be reasonable and justifiable in an open and democratic society. Section 18's procedural shortcomings and Section 19(1)(b)'s overbreadth fails this test.

82. While the Respondents argue that enforcement powers are necessary to ensure compliance, the means employed must be fair and proportionate. Effective regulation is not incompatible with constitutional due process.

83. In conclusion, Sections 18(1)– (3) and 19(1)(b) cannot stand as they are to the extent that they fail to provide a fair hearing prior to the suspension or cancellation of the PBO's registration. We grant the declarations and orders necessary to rectify the situation and protect the rights of PBOs to fair administrative action and fair hearing.

Conclusion.

84. For the reasons set out above, the Court finds that the impugned provisions of the *Public Benefit Organizations Act*, 2013 are unconstitutional either in whole or in part. In particular, the requirements for mandatory re-registration of NGOs, the composition of the PBO Authority's Board, the establishment and appointment of the PBO Disputes Tribunal, the compulsory nature of the National Federation of PBOs, the restriction on recognition of PBO forums, the sweeping disclosure obligations infringing privacy, and the lack of fair process in suspension/cancellation of registration, all violate various articles of the *Constitution* of Kenya 2010.

85. In crafting relief, the Court is mindful of its duty under Article 258 to uphold the *Constitution*, and under Article 259 to do so in a manner that *inter alia* promotes its purposes and values. Consequently:

    i. A Declaratory Order be and is hereby issued that Paragraph 5(1) and 5(2) of the Fifth Schedule to the *Public Benefit Organizations Act*, 2013 are unconstitutional, null and void for violating Articles 36(3)(a) & (b), 47, and 27(4) of the *Constitution*. In consequence thereof, no public benefit organization that was previously registered under the repealed *Non-Governmental Organizations Co-ordination Act* shall be required to apply afresh for registration under the *PBO Act* to be recognized as a public benefit organization.

    ii. An order of mandamus be and is hereby issued directing the 2nd Respondent (Public Benefit Organizations Regulatory Authority) to automatically and unreservedly transition and register as public benefit organizations all organizations that were, as of the commencement date of the

PBO Act (14 May 2024), registered under the *Non-Governmental Organizations Co-ordination Act* (repealed).

iii. A Declaratory Order be and is hereby issued that Section 32 of the *Public Benefit Organizations Act*, 2013 is unconstitutional for violating Article 31(c) of the *Constitution* (right to privacy) to the extent that Section 32 compels public benefit organizations to disclose personal information of their members, donors or beneficiaries or other private affairs without sufficient safeguards or justification, it is invalid.

iv. A Declaratory Order be and is hereby issued that the Board of the Public Benefit Organizations Regulatory Authority, as currently constituted under Section 35(1) of the *PBO Act* (including the Third Schedule procedure for nomination and Paragraph 6 of the Fifth Schedule on transitional members), is unconstitutional; and consequently, Section 35(1) of the *Act*, the Third Schedule to the *Act*, and Paragraph 6(1) and (2) of the Fifth Schedule are hereby declared unconstitutional and invalid.

v. A Declaratory Order be and is hereby issued that Sections 50(1), 50(5) and 50(6)(c) of the *Public Benefit Organizations Act*, 2013 are unconstitutional for violating Articles 50(1), 160(1), 172(1)(c) and 230(4)(a) of the *Constitution*. In particular:

   a. Section 50(1), by assigning the appointment of Tribunal members to the Chief Justice with approval of the National Assembly (and excluding the Judicial Service Commission), infringes on the independence of the Judiciary and the constitutional mandate of the JSC in appointing judicial officers.

   b. Section 50(6)(c), by allowing removal of Tribunal members by the Chief Justice unilaterally, violates Article 172(1)(c) which requires JSC involvement in removal/discipline of judicial officers, and undermines security of tenure of Tribunal members.

   c. Section 50(5), by providing that the remuneration of Tribunal members is determined by the PBO Authority (even if in consultation with SRC), contravenes Article 230(4)(a) of the *Constitution* and imperils the independence of the Tribunal.

vi. A Declaratory Order be and is hereby issued that Sections 21(1) and 21(9) of the *Public Benefit Organizations Act*, 2013, to the extent that they purport to compel all public benefit organizations to join, belong to, or come under the jurisdiction of the National Federation of Public Benefit Organizations, are unconstitutional for violating Article 36(2) of the *Constitution* (freedom from compelled association). The provisions establishing the National Federation shall be read as permissive and not mandatory. Consequently, membership or affiliation of a public benefit organization to the National Federation of PBOs is strictly voluntary, and no public benefit organization shall suffer any disadvantage or sanction for choosing not to join the Federation. Any implication in Section 21 or any other part of the Act that PBOs are required to be members of the Federation is hereby nullified. The Federation may continue to exist and operate as an umbrella body for those PBOs that freely elect to be members, but the State shall not by law or policy impose it as an exclusive or compulsory representative of the PBO sector.

vii. A Declaratory Order be and is hereby issued issued that Section 23(2) of the *Public Benefit Organizations Act*, 2013 is unconstitutional for unjustifiably limiting the freedom of association guaranteed under Article 36. The requirement that only those self-regulation forums of PBOs that represent a “significant number” of organizations (as prescribed by the

Cabinet Secretary) shall be recognized by the Authority violates Article 36 and 24 of the *Constitution* and is thus void.

viii. A declaration is hereby issued that Sections 18(1), 18(2) and 18(3) of the *Public Benefit Organizations Act*, 2013 are unconstitutional for violating the right to fair hearing under Article 50(1) of the *Constitution*, insofar as they permit the Public Benefit Organizations Regulatory Authority to suspend or cancel the registration of a public benefit organization without according the organization an adequate opportunity to be heard by an independent and impartial body. Likewise, Section 19(1)(b) of the *Act* is declared unconstitutional for violating Articles 36(3)(a) and 24 of the *Constitution*, as it allows for the unreasonable and unjustified cancellation of a PBO's registration on the ground of acting contrary to its own constitution.

ix. Each party to bear its own costs.

DATED, SIGNED, AND DELIVERED ON THIS 30TH DAY OF APRIL 2025.

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BAHATI MWAMUYE.

JUDGE.