



Case Number:	Petition 404 of 2017
Date Delivered:	02 Feb 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR
Advocates:	-
Case Summary:	<p><u>The Action to Deregister the Petitioner Violated the Petitioner's Right to Fair Administrative Action and The NGO Co- Ordination Act</u></p> <p>Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR</p> <p>Petition No 404 Of 2017</p> <p>High Court at Nairobi</p> <p>Constitutional and Human Rights Division</p> <p>February 2, 2018</p> <p>E.C Mwita, J</p> <p>Reported By Felix Okiri</p> <p><i>Constitutional Law – fundamental rights and freedoms – right to fair administrative action - right to fair hearing – whether the Petitioner's right to fair administrative action was violated where it was</i></p>

deregistered without being accorded an opportunity to be heard as required by article 47 of the Constitution - Constitution of Kenya, 2010, articles 27,28, 47 and 50

Administrative law – administrative functions – where the NGO Board advised and directed the Governor Central Bank of Kenya to freeze the accounts of the Petitioner, Commissioner General of KRA to collect taxes and Director of Immigration depot expatriates – whether that advise/direction was ultra vires – Constitution of Kenya, 2010, article 231 (3); Kenya Revenue Authority Act, section 3(1)

Statute law – procedure of deregistering an NGO - notice of the cancellation of a certificate of registration- whether such a notice was to be served on the Organisation in respect of whom such cancellation related- NGO Co-ordination Act, section 16

Facts

The 1st Petitioner Kenya Human Rights Commission was a body corporate registered under the Non-Governmental Organization Act, 1990. The Respondent was a Non-Governmental Agency established under the Non-Governmental Coordination Act, 1990 and exercised regulatory authority over all non-governmental organizations in Kenya.

The Executive Director of the Respondent circulated to the media a letter purporting to cancel the 1st Petitioner's registration on grounds that the 1st Petitioner had committed some illegal acts including; operating illegal bank accounts, failing to pay tax and employing foreigners without valid work permits among other accusations. The 1st Petitioners stated that it was not aware of the allegations and that it was neither given notice of the allegations nor called upon to show cause.

The Petitioners stated that the Respondent's actions contravened articles 27, 28, 47 and 50 of the Constitution. The Petitioners also stated that the Respondent's action was ultra vires its

powers by attempting to direct Kenya Revenue Authority, the Central Bank of Kenya, and Director of Immigration, independent Institutions on what to do in the performance of their duties.

Issues

- i. Whether the Petitioner's right to fair administrative action was violated where it was deregistered without being accorded an opportunity to be heard as required by article 47 of the Constitution
- ii. Whether the actions of the NGO Board in advising and directing the Governor Central Bank of Kenya to freeze the accounts of the Petitioner, Commissioner General of KRA to collect taxes and Director of Immigration depot expatriates was ultra vires

Relevant provisions of the law

NGO Co-ordination Act.

Section 16

(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.

Section 19 (1)

Any organization which is aggrieved by the decision of the Board

made under this Part may, within sixty days from the date of the

decision, appeal to the Minister.

Constitution of Kenya

Section 7(1) of the Sixth Schedule

all law in force immediately before the effective date continues to be in force but shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.

Held

1. It was apparent that the 1st Petitioner was deregistered without being accorded an opportunity to be heard as required by article 47 of the Constitution, despite the fact that it had been operating in Kenya for over 25 years and was in compliance with the law and regulations throughout its operations. The Respondent's action to deregister or cancel the first Petitioner's registration was an administrative action that affected the Petitioner's right to exist and operate within the country.
2. Section 16 of NGO Co-ordination Act was clear that the notice for cancellation of registration of an NGO had to be served to the NGO concerned and it was only to take effect after 14 days of the notice. Section 19(1) provided for the procedure for appealing against such a decision. Under section 19(3) the minister was required to issue a decision on such appeal within thirty days from the date of the appeal. Any aggrieved organization could thereafter appeal to the High Court and the Court's decision was to be final.
3. Any action taken against a non-governmental organization had to be in accordance with the law because it was only then that an aggrieved party could exercise the right of appeal provided for in the Act. Such actions being administrative in nature were also subject to the Constitution.

4. Article 47(1) of the Constitution was in mandatory terms that every person had a right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) made it even more forceful that if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for that action.
5. Article 260 of the Constitution defined a 'person' to include a company, association or other body of persons whether incorporated or not. In that regard, the first Petitioner was a person for purposes of article 47 of the Constitution in that its right as an entity was adversely affected by the Respondent's impugned decision and was therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. It was equally entitled to a hearing before the adverse action was taken against it.
6. The Constitution was the supreme law of the Republic and was decreed as such in article 2(1). It bound all persons and all state organs in the course of performing their duties. The provisions in article 47 to the extent that they required that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affected a person's right or fundamental freedom, the affected person was entitled to be given written reasons for the action, was a constitutional control over administrative bodies to ensure that they did not abuse their power and that individuals concerned received fair treatment when actions were taken against them. Failure to observe that constitutional decree, undermined the rule of law and the value of article 19(1) of the Constitution which stated that the Bill of Rights was an integral part of Kenya's democratic state as the framework for social, economic and cultural policies.
7. Although the right to just administrative action was entrenched in Kenya's

Constitution in recognition of the importance of the common law governing administrative review, it was not correct to see the provisions on fair administrative actions as a mere codification of common law principles. The right to just administrative action was now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law were to be important though not necessarily decisive, in determining not only the scope of fair administrative actions but also its content. The principal function of fair administrative actions was to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affected or threatened individuals, the procedures followed complied with the constitutional standards of administrative justice. Those standards were to be informed by the common law principles developed over decades.

8. Article 47(1) marked an important and transformative development of administrative justice for, it not only laid a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenched the right to fair administrative action in the Bill of Rights. The right to fair administrative action was a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies were now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
9. Article 47 was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law or judicial review under the Law Reform Act but was to be measured against the standards established by the

Constitution.

10. The Respondent's actions violated the 1st Petitioner's right to a fair administrative action contrary to article 47 of the Constitution. Administrative actions that flowed from statutes had to meet the constitutional test of legality, reasonableness and procedural fairness. According a party a hearing before taking action against him was no longer discretionary. It was firmly entrenched Kenya's Constitution as an inviolable right. It was an important safeguard against capricious and whimsical actions that led to abuse of authority by public bodies exercising administrative and quasi-judicial functions. Those no longer had place in Kenya's constitutional dispensation.
11. It was no longer even a mere legal requirement but a constitutional one that a person was entitled to be heard and that the action that was to be taken had to meet the constitutional test. Those taking administrative actions were bound by that constitutional decree failure of which rendered their actions unconstitutional, null and void.
12. Any time the Respondent purported to exercise its powers under section 16 of the NGO Co-ordination Act, it had to realize that Kenya was in the post 2010 era and had to observe constitutional dictates, and the provisions of the Act and regulations made thereunder. The Respondent had to be alive to the provisions of section 7(1) of the Sixth Schedule to the Constitution.
13. When applying the NGO Co-ordination Act, the Respondent had to act in a manner that was in conformity with and not in contravention of the Constitution. The Respondent purported to take action to cancel the first Petitioner's registration in a raft of allegations but which it failed to defend in the instant petition. The purported notice of cancellation did not state when the alleged failures on the part of the 1st Petitioner took place. They were more of general than specific allegations to amount to a breach of the law.
14. The notice itself did not even state if and

when the Respondent carried out investigations and came to the conclusion that the first Petitioner's conduct violated the conditions upon which it was registered. It was only after investigations and the 1st Petitioner given a chance to rebut any allegations made against it about certain failures, that the Respondent could make a determinate conclusion in the nature of blame against the first Petitioner. The Respondent's action therefore violated the first Petitioner's right to fair administrative action contrary to article 47 of the Constitution, the Fair Administrative Action Act and the NGO Co- ordination Act.

15. Central Bank of Kenya was established under article 231(1) of the Constitution. Article 231 (3) was clear that the Central Bank of Kenya was not to be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions. The Respondent acted outside his mandate in advising the Central Bank to freeze the 1st Petitioner's bank accounts.
16. Just like the Central Bank, the Commissioner General of KRA did not require advice from the Respondent on how to recover taxes and from whom. KRA was established under section 3(1) of the KRA Act and had its own legal framework through which it determined whether or not tax was due, from which tax payer and how to collect it. The Respondent could also not advice the Director of Immigration to deport unknown and unidentified persons who were said to be working with the first Petitioner without valid work permits as had not conducted any investigations on the 1st Petitioner's operations and staff.
17. Article 21(1) of Kenya's Constitution stated in plain language that it was a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
18. The Bill of Rights was said to be integral to the country's democratic state and was

the framework of all the policies touching on the populace. It was the foundation on which the nation state was built. There was a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights. The state organs, administrative bodies or public officers were not to act in flagrant disobedience and or violation of the Constitution and laws of the land. They had an obligation to obey the Constitutional command and the law. That was why article 23 of the Constitution granted Kenyan courts authority to step in whenever there was allegation of violation or threat to violation of rights and fundamental freedoms in the Bill of Rights and grant appropriate reliefs.

19. Where there was a breach of fundamental rights and or abuse of power, the Court had the authority to grant compensation by exercising its jurisdiction under article 23 (3) (b) of the Constitution a demonstration that Courts frowned upon violation of the law and abuse of power reposed on public officers.

20. The Petitioners had succeeded in establishing that there was breach of a fundamental right beyond reasonable doubt. They had also established that the Respondent had taken an action against the 1st Petitioner similar to one that had been nullified by the Court in *Petition No. 495 of 2015*. Despite that fact, the Respondent purported to take similar action, the judgment in *Petition No. 495 of 2015* notwithstanding. Such conduct was inexcusable, amounted to abuse of power and was not to be allowed in a democratic state founded on national values and principles of governance in Kenya's Constitution. It undermined the rule of law and constitutionalism.

Petition allowed

Orders

a. *A declaration was issued that the adverse actions taken by the Respondent in*

	<p><i>cancelling the first Petitioner's registration, ordering the freezing of its bank accounts, ordering recovery of none-existent taxes from the first Petitioner and the purported directive for deportation of the first Petitioner's foreign staff was unconstitutional and therefore null and void.</i></p> <p><i>b. An order of certiorari was issued quashing the respondent's letter dated August 14, 2017 cancelling the first Petitioner's registration.</i></p> <p><i>c. The Respondent ordered to pay General damages of Ksh 2,000,000 to the first Petitioner.</i></p> <p><i>d. Costs and interest to the first Petitioner.</i></p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition Allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 404 OF 2017

KENYA HUMAN RIGHTS COMMISSION.....PETITIONER

COMMUNITY ADVOCACY &

AWARENESS TRUST (CRAWN TRUST).....2ND PETITIONER

VERSUS

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

1. Kenya Human Rights Commission, the 1st Petitioner, is a body co-operate registered under the Non-Governmental Organization Act, 1990, and is devoted to the promotion of Human rights in the country. Community Advocacy Awareness Trust, (**CRAWN TRUST**), is also a non -governmental Organization. The respondent is a Non-Governmental Agency established under the Non-Governmental Coordination Act 1990 and which exercises regulatory authority over all non-governmental organizations in the country.

2. The interested party, **The Law Society of Kenya**, is a professional organization of lawyers in Kenya established under the Law Society Act and mandated to advise the government and the public on legal and constitutional matters.

3. The petitioners state that on 14th August 2017, the 1st petitioner noticed a letter circulating in the media allegedly written by the Executive Director of the respondent addressed to the 1st petitioner's chairperson purporting to cancel the 1st petitioner's registration.

4. The petitioners stated that the purported letter deregistering the 1st petitioner though widely circulated in both print and electronic media on 14th and 15th August 2017, was not received by the 1st petitioner. The petitioners further stated that on seeing a copy of the letter from the media, the 1st petitioner wrote a letter to the respondent on 15th August 2017 asking the respondent to confirm or deny the existence of the letter and sought to have a copy thereof, but no response was received from the respondent. They averred that the 1st petitioner managed to obtain a copy of the letter from the media and it contained allegations to the effect that the 1st petitioner had allegedly committed some illegal acts including; operating illegal bank accounts, failing to pay tax and employing foreigners without valid work permits among other accusations.

5. The petitioners stated that the 1st petitioner is not aware of the allegations and further that it was not given notice of the allegations or called upon to show cause why or even be heard before such a punitive action was taken against it. The petitioners averred that the respondent had made similar allegations against the 1st petitioner in 2015 without giving it a hearing and purported to take similar action forcing the 1st petitioner to move the Court in **Petition No 495 of 2015** to quash the said decision.

6. The petitioners stated that the respondent acted in contempt of the Court and in total disregard of the law when it attempted to replicate the same action that was declared illegal by the Court and again without giving the 1st petitioner an opportunity to be heard. The petitioners stated that the respondent had acted in violation of both the Constitution and the law and even acted **ultra vires** its powers by attempting to direct **Kenya Revenue Authority**, the **Central Bank of Kenya**, and **Director of Immigration**, independent Institutions on what to do in the performance of their duties.

7. The petitioners further averred that the respondent acted in excess of jurisdiction, without jurisdiction and also in gross abuse of its office and the law, that the respondent's actions are in contravention of the Public Benefit organization Act, the NGO Co-ordination Act and the Constitution in purporting to persist with actions that violate Articles 1, 2, and 3 of the Constitution in so far as they require everyone to apply and uphold the Constitution. That it violated Articles 47 and 50 of the Constitution with regard to Fair Administrative Action and Fair Hearing, and Articles 27 and 28 of the Constitution in so far as it acted oppressively and against the 1st petitioner's right to dignified and humane treatment.

8. On the basis of the facts stated above, the petitioners filed this petition dated 21st August 2017 and sought the following reliefs:-

(a) A declaration that the adverse actions taken against the Petitioner by the respondent in cancelling its registration, in ordering the freezing of its bank accounts, in ordering the recovery of none-existent taxes from itself and the purported deportation of its foreign staff are unconstitutional and therefore null and void abintio.

(b) A conservatory order and/ or a perpetual order of injunction suspending the cancellation of the said certificate of registration and restraining the Respondent by itself, its servants and/or its employees from directing the freezing of the petitioner's Bank accounts, the collection of none-existent taxes and the deportation of its foreign staff.

(c) An order of certiorari directing that the letter dated 14/8/2017 cancelling the petitioner's registration be and is hereby quashed.

(d) General damages including aggravated and exemplary damages.

(e) Costs of its petition and interest thereon and (c) above at court rates

(f) Any other relief that this Honourable court may deem fit and just to grant Submissions

9. Although the petition was served on the respondent, no appearance was entered or response filed. The petition therefore proceeded undefended.

10. Senior Counsel **Mr. Nzamba Kitonga**, submitted on behalf of the petitioners that respondent took action against the 1st petitioner through a letter that was only circulated in the media but not served on the 1st petitioner. According to learned Senior Counsel, despite the 1st petitioner seeking to have a copy of the said letter, the respondent never made it available. Senior Counsel submitted that the respondent

had taken a similar action against the 1st petitioner in 2015 but it was nullified by the Court. According to Senior Counsel, the respondent was reenacting the nullified action through the impugned letter of 14th August 2017.

11. Learned Senior Counsel contended that the 1st petitioner has been in existence for over 25 years with a staff of over 150 people yet the respondent purported to cancel its registration in a more casual manner in total disregard to law. Learned senior counsel argued that it is a requirement under Article 50 of the Constitution that before an adverse action is taken against a person or body, the affected party must be afforded an opportunity to be heard. According to Senior Counsel, the respondent did not even attempt to follow the repealed **NGO Co-ordination Act** but subjected the 1st petitioner to a process that is a kin to mob justice by simply cancelling its registration without any pretence of affording it some form of a hearing.

12. In Senior Counsel's view, had the respondent attempted to apply the repealed NGO Co-ordination Act, it would have had to read it as incorporating constitutional requirements and the principles of natural justice. Mr. Gitonga went on to submit that the **NGO Co-ordination Act** was repealed and replaced by the **Public benefits authority Act**, and that by virtue of that repeal, the respondent's alleged existence is not based on any law and its officials have no legal standing at all.

13. In that case Learned Counsel submitted, the respondent's action against the 1st petitioner is **ultra vires** the Constitution and applicable laws. He contended that in purported exercise of power and obsessed with illusion of grandeur, the Executive Director of the respondent purported to "**order**" **Instruct**" and "**direct**" independent institutions such as Kenya Revenue Authority, the Central Bank of Kenya, and the Director of Immigration to collect taxes, freeze bank accounts, deport expatriates and investigate the 1st petitioner, actions that were **ultra vires** the respondent's powers.

14. On Article 47 of the Constitution, learned senior counsel submitted that public bodies are required to observe fair administrative actions and practices as required by that Article as amplified by the Fair Administrative Action Act, 2015 which contains stringent and elaborate procedures to be observed by Public bodies whenever they take administrative actions by observing the principles of fair hearing and natural justice.

15. Mr Gitonga submitted that failure to observe due process violated Article 47 of the Constitution and the Fair Administrative Action Act. Senior Counsel contended that the respondent made a grave announcement that the petitioner had engaged in criminal activities including operating illegal bank accounts, false accounting, illegal employment of expatriates, misappropriation of donor funds and tax evasion, grave offences of economic crime. Learned senior counsel argued that the petitioner was not given a hearing yet the respondent made such a conclusion and announcement to the whole world even before informing the petitioner of the intention to make such an announcement.

16. According to Senior Counsel, the respondent had simply engaged in brazen and unlawful actions, behaved in uncivilized, capricious, oppressions and high handed manner thus violated values and principles of the constitution. Learned counsel contended that this was not an isolated misadventure arguing that the respondent had taken a similar action in 2015 before it was stopped by the Court in **Kenya Human Right Commission v NGO Coordination Board Petition No 495 of 2015**. Learned senior counsel urged the Court to grant damages contending that the respondent had in a way defamed the petitioner by telling the world that it had engaged in criminal activities which causing the petitioner irreparable loss and suffering as well as violated its constitutional rights.

17. Senior Counsel contended that the petitioner had not only acted in bad faith but also in contempt of

Court. He urged the Court to award Ksh80,000,000 in general, aggravated and exemplary damages.

Interested Party's Submissions

18. The interested party filed written submissions dated and filed in Court on 8th November 2017. The interested party fully associated itself with the petitioner's submissions. The interested party in particular agreed with the petitioner that the respondent failed to comply with the right to Fair Administrative Action under Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

19. The interested party pointed out that section 4(3) of the Fair Administrative Act requires that where an administrative Action is likely to adversely affect the rights and fundamental freedoms of a person the administrator should give the person to be affected by the decision prior and adequate notice on the nature and reasons for the intended action, an opportunity to be heard and make representations.

20. The interested party submitted that the respondent informed the petitioner of the cancellation of its registration but did not give the petitioner an opportunity to be heard before the action was taken. The interested party therefore contended that the notice of cancellation of the petitioner's registration was unreasonable, procedurally unfair and contrary to Article 47 of the Constitution thus unlawful.

21. The interested party further contended that the petitioner's right to fair hearing and presumption of innocence guaranteed under Article 50 of the constitution was violated. In the interested party's view, the petition could not answer any allegation against it, if it was not given sufficient notice to respond. The interested party submitted that every time there is failure to follow the letter and spirit of the constitution itself, it breeds cynicism and encourages impunity especially where such failure stems from a deliberate effort to undermine the Constitution.

22. According to the interested party, Article 47 intends to bring discipline to administrative actions so that values and constitutional principles are infused in matters of public administration under Article 10, especially where one applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

23. In that regard, the interested party submitted that in order to advance the purpose of Article 10, the respondent's action must not only be lawful and founded on the law it must also not be capricious or whimsical. The interested party therefore submitted that the respondent's action is unconstitutional but also adversely affects the petitioner's operations. According to the interested party, the requirement for Fair Administrative Action is entrenched in the Constitution as a control over the exercise of power. The interested party relied on the decision in the case of **Kenya Human rights Commission v NGO coordination Board** Petition No 495 of 2015 and urged that the Court to allow the petition.

Determination

24. I have considered this petition, submissions on behalf of the petitioners and the interested party as well as the authority relied on. Although the petition was served, the respondent did not enter appearance or file a response. Mr. Kuria who appeared for the respondent informed the Court that he did not file a response to the petition because of lack of instructions. Learned counsel intimated to Court that although he had received a letter from the respondent on 10th August 2017 instructing him to act in the matter, no pleadings were forwarded to him even after he called for them.

25. Learned counsel told the Court that he raised the issue with the respondent's CEO through letter dated 31st October 2017 but even as at the time of hearing, he had not received instructions. He also

informed the Court that he had even drawn the respondent's attention to the judgment in **petition No 495 of 2015** but received neither a response nor instructions over the matter and therefore, could not defend the case and never applied for an adjournment.

26. The respondent issued a letter dated 14th August 2017 addressed to the 1st petitioner's Chairperson and signed by **Fazul Mohamed**, the Executive Director of the respondent notifying the chairperson of cancellation of the 1st petitioner's registration certificate on a number of grounds. Some of these were that the 1st petitioner had opened and was operating bank accounts contrary to provisions of the Act, failure to pay statutory taxes to KRA, that the 1st petitioner had employed expatriates without valid work permits, and concealment of illegal remuneration to Board members among others.

27. In that letter, **Mr. Fazul Mohammed** went ahead to advise Governor of Central Bank to freeze and preserve all funds held in the 1st petitioner's accounts, advised the Commissioner General of KRA to initiate the process of recovering accrued taxes from the 1st petitioner, and the Director of Immigration to immediately deport all foreigners working with the 1st petitioner without valid work permits.

28. It would appear the 1st petitioner was deregistered without being accorded an opportunity to be heard as required by Article 47 of the Constitution, despite the fact that it has been operating in Kenya for over 25 years. The 1st petitioner says it had all along complied with the law and regulations throughout its operations, a fact that was uncontroverted since the respondent never filed a response to the petition.

29. The 1st petitioner was registered under the NGO Co-ordination Act. The respondent's action to deregister or cancel the 1st petitioner's registration was an administrative action that affected the petitioner's right to exist and operate within the country. The action was taken pursuant to the provisions of that Act.

30. Section 3 of the Act establishes the **NGO Co-ordination Board** whose functions are provided for under section 7 of the Act. Section 10 of the Act deals with registration of non- governmental organizations. Section 16 thereof deals with cancellation of registration certificates of NGOs registered under that Act. It provides;

(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.

31. The section is clear that the notice for cancellation must be served to the Non -governmental organization concerned and would only take effect after 14 days of the notice. Section 19(1) provides for the procedure for appealing against such a decision. It provides that **any organization which is aggrieved by the decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.** Under section 19(3) the minister is required to issue a decision on such appeal within thirty days from the date of the appeal. Any aggrieved organization may

thereafter appeal to the High Court and the Court's decision will be final.

32. The law governing non-governmental organizations is therefore clear that any action taken against a non-governmental organization must be in accordance with the law because it is only then that an aggrieved party can exercise the right of appeal provided for in the Act. Such actions being administrative in nature are also subject to the Constitution.

33. Article 47(1) of the Constitution is in mandatory terms that **every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair**. Sub Article 2 makes it even more forceful that **if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action**.

34. Article 260 of the Constitution defines a "**Person**" to include a company, association or other body of persons whether incorporated or not. In that regard, the 1st petitioner is a person for purposes of Article 47 of the Constitution in that its right as an entity was adversely affected by the respondent's impugned decision and was therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. It was equally entitled to a hearing before the adverse action was taken against it.

35. The Constitution is the **Supreme law** of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of **Article 19(1) of the Constitution** which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies...

36. The petitioners stated as well as deposed that the notice of cancellation of the 1st petitioner's registration was not served. They stated that they learnt of the action through the print and electronic media and only obtained a copy of the letter from the same media. The 1st petitioner further stated that even though it sought to have a copy of the letter and reasons for cancellation of its registration, none was made available. It remains unexplained why the respondent, if it believed in the legality of its actions to deregister the 1st petitioner, did so through the media instead of giving the letter conveying the decision and reasons for the action to the 1st petitioner as required by section 16 of the Act.

37. The fact that the right to Fair Administrative Action is a constitutional right was stated by the **Constitutional Court of South Africa** in the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to

ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

38. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated in the case of ***Judicial Service Commission v Mbalu Mutava & another*** [2014] eKLR; that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

39. And in the case of ***Dry Associates Ltd v Capital Markets Authority and Another,*** [2012] eKLR the Court observed;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

40. Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent violated 1st petitioner’s right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of ***legality, reasonableness*** and ***procedural fairness***. According a party a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

41. This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.

42. Any time the respondent purports to exercise its powers under section 16 of the NGO Co-ordination Act, it must realized that we are in the post 2010 era and must observe constitutional dictates, let alone the provisions of the Act and regulations made thereunder. The respondent must always be alive to the provisions of ***section 7(1)*** of the ***Sixth Schedule*** to the Constitution that ***“all law in force immediately before the effective date continues to be in force but shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”***

43. That is to say when applying the NGO Co-ordination Act, the respondent has to act in a manner that is in conformity with and not in contravention of the Constitution. The respondent purported to take action

to cancel the 1st petitioner's registration in a raft of allegations but which it failed to defend in this petition. I have seen the purported notice of cancellation. It does not state when the alleged failures on the part of the 1st petitioner took place. They are more of general than specific allegations to amount to a breach of the law.

44. The notice itself did not even state if and when the respondent carried out investigations and came to the conclusion that the 1st petitioner's conduct violated the conditions upon which it was registered. It is only after investigations and the 1st petitioner given a chance to rebut any allegations made against it about certain failures, that the respondent could make a determinate conclusion in the nature of blame against the 1st petitioner. I therefore find and hold that the respondent's action violated the 1st petitioner's right to fair Administration Action contrary to Article 47 of the Constitution, the Fair Administration Action Act and the NGO Co- ordination Act.

45. That is not all. It is even worrying that **Mr. Fazul Mohamed** took it upon himself to play roles reposed on other independent institutions and purported to advise them on what to do. For instance, he advised the **Governor of the Central Bank** to freeze the 1st petitioner's bank accounts. Central Bank of Kenya is established under Article 231(1) of the Constitution. Under Article 231(2) **the Central Bank is responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.** Sub-Article (3) is clear that **The Central Bank of Kenya is not to be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.**

46. To that extent, the Central Bank of Kenya is an independent institution that does not work on anybody's advice or direction and does not perform its functions or conduct its business under any one's direction... In that regard therefore, the respondent's Executive Director acted outside his mandate in advising the **Central Bank** to freeze the 1st petitioner's bank accounts. Its actions were thus **ultra vires**. More over even if the respondent had acted within its powers, it did not point out which bank accounts had been illegally opened or operated by the 1st petitioner. It would appear the respondent was only interested in paralyzing the 1st petitioner's operations than enforcing the law. Neither were the actions in public interest nor in pursuit of justice.

47. This is even so because the respondent's Executive Director further advised the **Commissioner General of KRA** to recover taxes from the 1st petitioner without stating how he knew that there were taxes due. Just like the Central Bank, the Commissioner General of KRA did not require advice from the respondent on how to recover taxes and from whom. KRA is established under section 3(1) of the KRA Act, and as the general agent of government responsible for assessing and collecting revenue from tax payers, it has its own legal framework through which it determines whether or not tax is due, from which tax payer and how to collect it.

48. Further still, the respondent's Executive Director purported to advice the Director of Immigration to deport unknown and unidentified persons who were said to be working with the 1st petitioner without valid work permits. The respondent's Executive Director did not state that he had conducted any investigations on the 1st petitioner's operations and staff and could not therefore purport to state without evidence, that the 1st petitioner was on the wrong said of the law. And as I have stated earlier, the respondent's actions were to that extent, meant to paralyze the 1st petitioner's operations that is why **Mr. Fazul Mohamed** purported to direct institutions that do not fall within the respondent's mandate. The cumulative effect of the respondent's misadventure rendered its actions **ultra vires, illegal, null and void**.

49. Learned Senior Counsel drew this Court's attention to the fact that the respondent had acted in a

similar manner in 2015, an action that was successfully challenged in ***petition No 495 of 2015, Kenya Human Rights Commission v NGO Co-ordination Board & 2 Others [2016]eKLR*** and the Court nullified the respondent's decision to deregister the 1st petitioner on allegations similar to those in the present petition. He urged the Court to award damages for the respondent's wrongful actions.

50. Senior Counsel argued that the respondent took an action similar to one the Court had nullified hence it was acting in contempt of the Court's judgment. In Learned Senior Counsel's view, an award of damages would be appropriate. Senior Counsel contended that the respondent's action was made in bad faith aggravating its actions and urged for an award of Ksh. 80,000,000 general, aggravated and exemplary damages as a deserving remedy in the circumstances.

51. I have perused the facts of the case as contained in the judgment in ***petition No. 495 of 2015***. It is true that the circumstances of that case are similar to those in the petition before this Court. Indeed after hearing that petition, the Court (***Onguto J***) held:-

"In the circumstances and in conclusion, I return the verdict that in as far as the Respondent did not give the Petitioner any hearing prior to arriving at the decision to cancel the Petitioner's registration certificate and seek that the Petitioner's bank accounts be frozen, the Petitioner's rights under Article 47 of the Constitution were violated. This was compounded further when the Respondent failed to give written reasons for its decisions"

52. The respondent had made a decision to cancel the 1st petitioner's registration without according her a hearing just as it did in the present petition. The respondent had also asked that the 1st petitioner's bank accounts be frozen which is the same in this petition. Looking at the facts of the previous litigation and those in the petition before me, there is no doubt that they are similar. I have also noted that the 1st petitioner sought reasons for the respondent's action but none was given. The respondent was equally served but filed no response to this petition leaving the petitioners' averments and depositions uncontroverted.

53. In my respectful view, this was a case of abuse of power by a public officer and or body. The respondent cannot act as though there is no law in this country. Rights have inherent value and must be enhanced, respected and protected. In that regard, Article 21(1) of our Constitution states in plain language that ***it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.***

54. The Court of Appeal had much to say on the value attached to rights and fundamental freedoms in our Bill of Rights in the case of ***Attorney General v Kituo cha Sheria & 7 others [2017] eKLR*** when it stated;

"Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights ...The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State....respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."(Emphasis)

55. It cannot be the case therefore, that state organs, administrative bodies or public officers should act in flagrant disobedience and or violation of the Constitution and laws of the land. They have an obligation to obey the Constitutional command and the law and in the event they violate any of them, their actions will in no doubt be declared unconstitutional and illegal. That is why Article 23 of the Constitution grants Courts of this country authority to step in whenever there is allegation of violation or threat to violation of rights and fundamental freedoms in the Bill of Rights and grant appropriate reliefs. In a case like this, the role of the court to protect citizens against the excesses of public bodies and their officialdom becomes all the more important.

56. In the case of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3, the Constitutional Court of Uganda observed that ***the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution and that if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.***

57. I entirely agree with the above observation and add that where there is a breach of fundamental rights and or abuse of power, this Court has the authority to grant compensation for it by exercising its jurisdiction under Article 23 (3) (b) of the Constitution which confers authority ***courts to grant appropriate relief, including an order for compensation.***

58. I am satisfied beyond doubt that the petitioners have succeeded in establishing that there was breach of a fundamental right. They have also established that the respondent had taken an action against the 1st petitioner similar to one that had been nullified by the Court in *Petition No. 495 of 2015*. Despite that fact, the respondent purported to take similar action, the judgment in *Petition No. 495 of 2015* notwithstanding. Learned counsel, Mr. Kuria even informed the Court that he had drawn the respondent's attention to that judgment but was apparently ignored. Such conduct was inexcusable, amounted to abuse of power and must not be allowed in a democratic state founded on national values and principles of governance in our Constitution. It undermines the rule of and constitutionalism. Public officers and state organs must obey the Constitution and the law. When they do not, the Constitution has granted courts power to intervene and remedy such breaches.

59. In the circumstances of this case, I find that an award of damages is justified, a demonstration that Courts frown upon violation of the law and abuse of power reposed on public officers. In this case I must find disfavour with the respondent's conduct of cancelling the 1st petitioner's registration thus closing its operations in total disregard of the Constitution and the law, a conduct that was contemptuous to a decision of the Court. As to quantum, I consider general damages of Kenya Shillings two million appropriate.

60. Ultimately and for the above reasons, the petition dated 27th August 2017 is allowed as follows;

(a) A declaration is hereby issued that the adverse actions taken by the respondent in cancelling the 1st petitioner's registration, ordering the freezing of its bank accounts, ordering recovery of none-existent taxes from the 1st petitioner and the purported directive for deportation of the 1st petitioner's foreign staff are unconstitutional and therefore null and void.

(b) An order of certiorari is hereby issued quashing the respondent's letter dated 14th August 2017 cancelling the 1st petitioner's registration.

(c) The respondent do pay General damages of Ksh 2,000,000 to the 1st petitioner.

(d) Costs and interest to the 1st petitioner.

Dated Signed and Delivered at Nairobi this 2nd Day of February 2018

E C MWITA

JUDGE



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