



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR MISCELLANEOUS APPLICATION NO. 308A OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS

AND

**IN THE MATTER OF NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION ACT, 1990 OF
KENYA**

BETWEEN

REPUBLICAPPLICANT

VERSUS

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

AND

TRANSGENDER EDUCATION AND ADVOCACY

(SUING THROUGH ITS OFFICIALS)

AUDREY MBUGUA ITHIBU (CHAIRPERSON)

MAUREEN MUIA (SECRETARY)

**ANNET JENNIFER MUTHONI THIAYA
(SECRETARY).....EX-PARTE APPLICANTS**

JUDGEMENT

1. By an amended Notice of Motion dated 23rd January, 2014, the *ex parte* applicant herein, **Transgender Education and Advocacy**, which describes itself as a Non-Governmental Organisation seeks substantially an order of mandamus to compel the 1st Respondent to carry out its statutory mandate by registering the Applicant as a non-Government Organization. It also seeks an order for costs.

Ex Parte Applicant's Case

2. The same application is based on a Statement filed on 23rd August, 2013 and the verifying affidavit sworn by **Audrey Mbugua Ithibu**, the applicant's Chairperson on 23rd August, 2013.
3. According to the deponent, the Applicant was formed with the aim and objective of advocating for human rights and preventing stigma facing transsexual people in Kenya and internationally and as a legal requirement, the Applicant is required to apply for registration to the 1st Respondent before commencing its operations.
4. Consequently on 19th March 2013 the officials of the Applicant sought to reserve the Applicants name with the 1st Respondent for purposes of registration and the 1st Respondent confirmed that name of the Applicant was indeed available for registration and allowed the officials to proceed and apply for registration as a Non-Governmental Organization which the applicant through its officials did on March 26, 2013.
5. It was deposed that the Applicant provided all the necessary information met the requirements for such an application and paid the prescribed registration fee as required by the 1st Respondent and therefore had the legitimate expectation that the 1st Respondent would consider and process its application and grant it the registration. However, the 1st Respondent failed and or refused to process the Applicant's application and the despite the applicant through its advocate enquiring about the status of the Applicant's application for registration, but the 1st Respondent failed and or refused to respond to the said inquiry.
6. According to the deponent, the failure and or refusal by the 1st Respondent to register the Applicant is an act of failure by the 1st Respondent to discharge its statutory functions and mandate which failure is unfair, unreasonable, unjustified and in breach of the rules of natural justice. It was contended that as a result of the 1st Respondent's failure and or refusal to discharge it statutory function, the Applicant is unable carry out its mandate, functions or its operations for which it was formed.
7. To the applicant, this is a case deserving the exercise of supervisory powers over the 1st Respondent by this Honourable Court and hence it is in the interest of justice and fairness that the 1st Respondent be compelled to discharge its statutory function by registering the Applicant.

Respondents' Case

8. In opposing the application the respondent filed an affidavit sworn by **Lindon Otieno**, the Respondent's Legal Affairs Manager, on 14th October, 2013.
9. According to the deponent, the Notice of Motion application as filed and presented before the Honourable Court is frivolous, vexatious, untenable, lacks merit and is otherwise as abuse of the process of the Honourable Court hence fatally and incurably defective for want of form and procedure. It was deposed that the application being a special application different from ordinary pleadings in civil matters, the Honourable Court ought not to accept it in its present form, as it is incompetent since it has been brought in the Applicant's name and not that of the Republic contrary to the laid down provisions of the law.
10. To the deponent, the Applicant who should be the *ex parte* in this case, is not a Non-

Governmental Organization as described in the Applicant's statutory statement as it has not been issued with a Certificate of Registration in accordance with the *Non Governmental Co-Ordination Act*, Cap 134, Laws of Kenya (hereinafter referred to as the Act). Neither are the individuals suing on behalf of the Applicant, officials of the organization.

11. It was deposed that the individuals herein, claiming to be officials of the Applicant, submitted their application for registration on 20th March 2013 and paid the prescribed registration fees and that among the requirements for registration of an Organization are a letter addressed to the Executive Director requesting for registration, photocopy of a National Identification, form 3 containing personal particulars and 2 recent coloured passport photographs of each of the proposed officials of the intended organization. However, the documents submitted for registration including form 3 from two of the proposed officials of the intended Organization bear different names from those that appear in their National Identification Cards. Similarly, two passport size photographs filed appear different from those in the National Identification Cards.
12. It was further averred that the two individuals described as the Chairperson and Secretary of the intended Organization submitted to the 1st Respondent deed pools dated 30th November 2010 and 19th January 2012 indicating that they had changed their names which change was published in the Kenya Gazette through Gazette Notice.
13. When on 26th June 2013, the Applicant through its advocate enquired about the status of the Applicant's application for registration, the 1st Respondent replied to the same noting that it had opted to postpone and/or delay the application until the case in which the one of the Applicants sought to change his name and be officially referred to and known by this new preferred name was dispensed with. According to the deponent, the Applicant's intended officials change of gender and name put a halt to the registration process as the same is subject of a court case where **Audrey Mbugua** has sued Kenya National Examination Council seeking the removal of the male gender mark in his academic certificate to reflect her female status. He also seeks change of his name from **Ithibu Mbugua** to **Audrey Mbugua Ithibu** hence the 1st Respondent therefore cannot proceed to register the Intended Organization without guidance from the Court on change of names and gender and that this position was explained to the applicants through a letter dated 27th July 2013.
14. According to the deponent, the 1st Respondent has not failed or refused to register the intended Organization as the Act and its Regulations 1992 provides for clear process on refusal of registration which the 1st Respondent did not and has not invoked. It was further deposed that the failure by the 1st Respondent to register the intended organization as alleged is (sic) unfair, unreasonable and unjustified as the matter before the 1st Respondent is peculiar as it not only involves change of names of the officials of the intended Organization but also change of gender.
15. To the deponent, the Applicant's application raises no reasonable cause of action as against the 1st Respondent as the orders sought by the Applicant would only apply if and when the 1st Respondent arbitrarily declines and/or refuses to register and/or process the Applicant's application and as such this Honourable Court should dismiss with costs, the Applicant's application.

Applicant's Submissions

16. It was submitted on behalf of the applicant that the 1st Respondent did not furnish the applicant with the reasons for the refusal to register the applicant since it did not have any reasons hence the refusal was unreasonable. It was further submitted that the 1st Respondent has not given any valid ground or explanation to justify the refusal to register the applicant.
17. To the applicant the ground relied upon being the discrepancy in the names of the applicant's officials was explained was explained to the 1st Respondent as due to their change of names by way of Deed Poll which explanation the 1st Respondent has not said it is not satisfied with. To the

applicants, by requiring that the applicants for registration indicate their former names in the application forms, is a recognition that the 1st Respondent recognises the possibility of changing names.

18. It was submitted that since the 1st Respondent requires the current photographs to be submitted the same would be necessarily different from the ones appearing in the national identity cards which may have been taken earlier on.
19. On the issue of the pending case, it was submitted that the issues are different and that it is not true that in the said pending case, **Audrey Mbugua** intends to change her name since she had already done so and in any case the 1st Respondent is not a party to the said case and cannot be bound by the orders emanating therefrom.
20. According to the applicant gender is not a requirement for registration of a Non-Governmental Organisation hence there is no justification for refusal to register the applicant. According to the applicant, the grounds relied upon by the 1st Respondent do not fall under section 14 of the Act hence cannot be valid grounds for non-registration.
21. It was submitted that the 1st Respondent never gave the applicant an opportunity to address the 1st Respondent's concerns which concerns would have been ironed out had the same been raised with the applicants hence the 1st Respondent contrived the provisions of Article 47 of the Constitution. Having complied with all the required conditions, it was submitted that the 1st Respondent's decision violated the applicant's legitimate expectation. Further since the grounds for refusal to register the applicant were not based on the relevant act, the decision was in bad faith. In support of its case the applicant relied on **Re An Application by Bukoba Gymkhana Club [1963] EA 488** and ***Halsbury's Laws of England***.

Determinations

22. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.
23. The Respondents raised the issue of the competency of the application based on the intitulement of the Motion. However on 21st January, 2014, this Court granted leave to the applicant to amend its Motion and the same was accordingly amended. That issue therefore no longer falls for determination.
24. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons

has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

25. Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) 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 the action.

26.section 10(3) of the act stipulates the particulars to be contained in an application for registration of an ngo and it provides:

An application for registration shall be made by the chief officer of the proposed organization and specify—

- a. other officers of the organization;***
- b. the head office and postal address of the organization;***
- c. the sectors of the proposed operations;***
- d. divisions and locations of the proposed activities;***
- e. the proposed average annual budgets;***
- f. the duration of the activities;***
- g. all sources of funding;***
- h. the national and international affiliation and the certificates of incorporation;***
- i. such other information as the Board may prescribe.***

33. It is true that the 1st Respondent has a discretion to register the applicant. However it is trite law that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held as follows:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it

exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them... “

34. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.
35. In this case the 1st Respondent has declined to exercise a discretion placed on it by the law. The basis for the failure to do so are not grounded in law. In my view the 1st Respondent has not lawfully exercised a power bestowed upon it. To decline to exercise a power on some extraneous grounds amounts to abuse of power and as was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (supra) while citing Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC:

“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord

Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

36. Apart from the foregoing it is my view that to discriminate persons and deny them freedom of association on the basis of gender or sex is clearly unconstitutional. That would contravene the provisions of Article 27(4) of the Constitution which provides that:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

37. Although the law is that where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way, in the instant case the 1st Respondent has purported to justify its non-action on legally untenable grounds. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, it was held that in the ordinary way and particularly in cases, which affect life, liberty or property, reasons for the decision ought to be given and if none are given the court may infer that there are no good reasons. In the instant case I have found that the reasons advanced by the 1st Respondent have no legal basis and are unreasonable.

Order

38. I accordingly find merit in the amended Notice of Motion dated 23rd January, 2014 and in the result I grant an order compelling the 1st Respondent to carry out its statutory mandate by registering the Applicant as a Non-Governmental Organization.

39. The applicant is awarded the costs of the application to be borne by the 1st Respondent.

Dated at Nairobi this 23rd day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chege for Mr Ojiambo for the ex parte applicant.

Cc Kevin



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