



SHIFTING GROUND: WHICH WAY FOR NGOS IN KENYA

The underlying message behind the '*naomba serikali*' ('I beg the Government') clarion call which has acquired the notoriety of a popular ringtone in Kenya is that the Government is (or should be) the primary provider of basic necessities like food, health, shelter and education to its citizenry. However, if you ask someone from Northern Kenya or anyone from the poor and marginalised sections of the Kenyan population, you will learn an interesting fact: that the alternative Government in Kenya is not the NASA coalition. In terms of provision of basic necessities and livelihoods, the charitable organisations sector, also known as the Non Governmental Organisations, comprising both secular and faith-based organisations, is the *de facto* Government. The role of NGOs in Kenya can neither be over-emphasised or down-played.

Kenya boasts approximately 10,500 registered NGOs operating in virtually every sector of human endeavour—from small scale agriculture to HIV/AIDS prevention, refugees to widows and orphans,

forestry to prevention and control of tropical diseases, wildlife conservation to research on the social behaviour of baboons and elephants; rehabilitation of drug addicts to saving the donkey, ante-natal care to male circumcision, good governance to human rights and criminal justice, famine relief to micro-finance. The overarching objective behind all these activities is public benefit.

Apart from NGOs that operate programmes within Kenya, the country happens to be the hub for the Greater East African region comprising Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan; the Horn of Africa (Ethiopia and Somalia) as well as the Great Lakes region. NGOs operating within this region naturally tend to choose Nairobi as their regional headquarters principally due to our relatively more advanced economy, availability of social amenities, easier transport and air connection to other countries in the region. Nairobi is the natural "Rest & Recuperation" destination for expatriates working within the region.

Given the above scenario, it is to be expected that Kenya would play host to NGOs that operate both within the country as well as those which operate or oversee projects in the neighbouring countries but based in Kenya.

The economic benefit accruing to Kenya from the location of these Organisations here is huge. The expatriates working for these organisations pay rent to Kenyan landlords, shop in our malls and eat in our restaurants, send their children to private schools which, even if not locally owned, employ Kenyans; hire Kenyans as gardeners, house helps, drivers and cooks, market our country abroad thereby boosting tourism, and sometimes, marry our girls.

One would therefore expect that Kenya should be very grateful, honoured and excited by the presence of international NGOs in the country and, therefore, accord them almost semi-diplomatic treatment to encourage them to stay and dissuade them from ever considering re-locating their offices to any of our neighbouring countries.

Some of our neighbours are known to offer generous incentives (tax exemptions, smooth grant of work permits, etc) to attract these organisations but Kenya still remains attractive. The apparent “crackdown” on certain NGOs by the NGO Coordination Board witnessed in the recent past has, unfortunately, portrayed Kenya as a country that tolerates rather than welcomes international NGOs to operate from our soil. It is no secret that many NGOs, particularly international NGOs and their regional offices, feel as if they are under siege and some are already considering alternative locations within the region. Can we, as a country, say that we don't care?

NGOs in Kenya are governed by the provisions of the Non-Governmental Organizations Co-ordination Act, 1990 and the Non-Governmental Organisations Co-ordination Regulations, 1992. The Public Benefit Organisations Act passed in 2013 is yet to come into force. Thanks to vested interests on both the side of the Government and the NGO sector, this law has been gathering dust on the shelves for almost 5 years now. Either side of the divide wants amendments to the law before it is operationalised but will not accept the amendments proposed by the other side. In the meantime, the NGO Board continues to regulate this important sector by means of a repressive law passed in 1990 at the height of the clamour for multi-party democracy, aimed specifically at cracking down on the perceived enemies of the Moi Government. No wonder this law prescribes only one penalty-deregistration – even for the slightest infraction like failing to file annual returns or adding a signatory to a bank account without the prior approval of the NGO Board!

One issue that has been vexing international NGOs, especially those hosting their regional offices in Kenya, is whether such offices are required to be registered by the NGO Board or not. On the basis that the mandate of the NGO Board is to regulate organisations that operate programmes *in the country* as defined in the NGO Act, many international NGOs have taken the logical view that since they do not operate any programmes within the country, they are not required to be registered under the NGO Act. They have therefore operated for years in Kenya as branches of foreign companies or companies limited by guarantee under the Companies Act, Trusts or Societies. Branches of foreign companies and Trusts are by far the most common forms of registration used by these organisations.

On the other hand, the NGO Board has taken the contrary view that by law it is the regulator of the charitable/public benefit sector. Accordingly, every entity operating within the sector whether in Kenya or outside, so long as it is based in Kenya, is subject to regulation by the NGO Board.

To be fair, there is merit in both arguments. Unfortunately, the existing law does not assist in providing a solution to the stalemate. The PBO Act has elaborate and clear provisions on the matter but since it is not yet law, it is probably not even worth setting out its provisions here. Suffice to say that the existing lacuna in the law is exactly what a repressive Government needs to cripple any NGO whose activities rub the Government the wrong way. The lacuna gives the NGO Board the ability to formulate policies which can be enforced against “*un-friendly*” NGOs without much debate or resistance.

It is instructive to note that while registration is not mandatory under the PBO Act, Section 10 (1) of the NGO Act makes it mandatory for all charitable/non profit organisations operating in the sectors outlined under Section 2 of the Act, namely, **“the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services”** to be registered under the NGO Act.

It is an offence for any person to operate an NGO in Kenya without registration. Upon conviction, such person is liable to a fine not exceeding Ksh. 50,000/ – or to imprisonment for a term not exceeding eighteen (18) months, or both.

Regulation 25 further provides that upon registration as an NGO, the entity ceases to exist under any other law. Therefore, all previous registrations under other laws fall away and are of no legal effect.

Until recently, there has been no strict enforcement of the above provisions by the NGO Board. In a sense this is what led to the proliferation of charitable/non profit organisations operating under other laws since there is normally little or no regulation under such laws. The so called ‘crackdown’ by the NGO Board is merely an exercise of power which is already conferred by the statute. The NGO Board is simply reclaiming its statutory mandate as the overall regulator of the NGO sector by requiring charitable organisations operating outside the NGO Act to become compliant with the statute. Having said that, the motive behind the exercise of such power in what

appears to be a selective fashion is a different subject altogether. Statutory power is never conferred to be used or in a discriminatory manner.

In a well coordinated choreography, the Department of Immigration Services has, for its part, turned on the heat on NGOs operating outside the NGO Act by stopping the issuance of work permits to their expatriate staff unless the application is supported by a clearance letter from the NGO Board irrespective of whether the applying entity is registered as an NGO or not. The NGO Board will, of course, not issue the clearance until the applicant gets

registered as an NGO. This combined strategy has left many international NGOs with very few options, short of relocating to other countries within the region.

Unless there is a change of policy, Kenya might very soon lose its status as the regional hub for the multi-million dollar humanitarian aid sector. To the poor villager or slum dweller whose life literally depends on the benevolence of NGOs, the ongoing controversy between the Government and NGOs is a macabre dance over his grave. The proverbial bull fight will inevitably end up in the needless suffering and literal death of the grass. Only then will the bulls stop the fight, look at each other and ask: *“where is the grass we were fighting over?”*



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