

RADAR SCREEN WILLIAM MAEMA

CRACKDOWN Time ripe for the Public Benefit Organisations Act and special treatment for international NGOs with offices in city

For many Kenyans facing social, economic or even political hardship, the common *'naomba serikali'* ("I beg the Government") cry, is anchored in the understanding that the government is (or should be) the primary provider of basic necessities like food, health, shelter and education.

But if you ask people from the marginalised sections, you will find that such cries are often answered by the charitable organisations, also known as the Non-Governmental Organisations (NGOs).

The role of NGOs, secular or faith-based, in Kenya can neither be over-emphasised nor down-played.

Kenya has approximately 10,500 registered NGOs covering from small-scale agriculture to HIV/Aids prevention, famine and disaster relief, assisting refugees, widows and orphans, wildlife conservation – name it.

Kenya is also the hub for NGOs working in the Greater East African region and the Horn of Africa as well as the Great Lakes region.

NGOs operating in this region tend to choose Nairobi as their regional headquarters principally due to Kenya's relative economic advancement that comes with availability of social amenities as well as ease of transport. Nairobi is the natural "Rest & Recuperation" destination for expatriates working within the region.

Economic benefits accruing to Kenya from hosting these organisations are

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huge. For instance, expatriates working for these organisations pay rent, shop and eat in local restaurants, send their children to local private schools, hire Kenyans as gardeners, house helps, drivers and cooks, and boosting tourism.

It should, therefore, be expected that Kenya is excited by the presence of international NGOs and accord them almost semi-diplomatic treatment to encourage their stay.

This is the reason many Kenyans have been puzzled by the recent apparent "crackdown" on NGOs. The NGO Coordination Board's action in the recent past has, unfortunately, portrayed Kenya as a country that tolerates rather than welcomes international NGOs on its soil.

It is no secret that many NGOs, particularly international ones and their regional offices, feel they are under siege and some are already considering moving to alternative locations in the region.

NGOs in Kenya are governed by the

Huge losses ahead should top NGOs drop Nairobi as hub



provisions of the Non-Governmental Organisations 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.

The point is that 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, and whose goal was specifically to crack down on perceived enemies of the Moi Government.

This is the reason 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 approval of the NGO Board.

One issue that has been vexing international NGOs, especially those with regional offices in Kenya, is whether they 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 Kenya, they are not required to be registered under this law.

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.

But the NGO Board has taken the 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 offer 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.

The existing lacuna in the law is exactly what a repressive government needs to cripple any NGO, whose

activities rub the authorities the wrong way. The lacuna gives the NGO Board the ability to formulate policies that can be enforced against "un-friendly" NGOs without much 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 organisations working for "the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services" 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 Sh50,000 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. In a sense this is what led to the proliferation of charitable organisations operating under other laws that offer little or no regulation.

The so called 'crackdown' by the NGO Board is merely in exercise of power already conferred by the statute. The board is simply reclaiming its statutory mandate as the regulator of the NGO sector by requiring charitable organisations operating outside the NGO Act to become compliant.

But 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 exercised in a discriminatory manner.

The Department of Immigration has joined the fray, turning the heat on NGOs operating outside the NGO Act by denying expatriate staff work permits unless the application is supported by a clearance letter from the NGO Board. This is 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.

It all boils down to the fact that 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.

PLACE OF NGOS
Africog executive director Gladwell Otieno (left) whose non-governmental organisation was raided and Mr Fazul Mahamed, the NGO Board CEO. -FILE

Lacuna in the law is what a repressive government needs to cripple any NGO

MAEMA | AUTHOR

Maema is a Partner in the law firm of Iseme, Kamau & Maema Advocates. Email: wmaema@km.co.ke