



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 30 OF 2015**

**IN THE MATTER OF: ARTICLE 22(1), 22(2)(b) AND 23(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19(3)(C), 20(1),20(2), 20(3)(a), 20(4)(a), 23(3)(a), (b), (c) and (d), (e) and (f), 24, 27, 36, 47, 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, (2006)**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, (2013)**

**AND**

**IN THE MATTER OF: THE PREVENTION OF TERRORISM ACT (NO. 30 OF 2012)**

**AND**

**IN THE MATTER OF: A NOTICE OF INTENTION TO SPECIFY ISSUED UNDER KENYA GAZETTE NOTICE NO. 2326 OF 7<sup>TH</sup> APRIL, 2015**

**BETWEEN**

- 1. OMAR KHAMIS MWAMNWADZI**
- 2. RANDU NZAI RUWA**
- 3. ABDALLAH ALI SHEIKH.....PETITIONERS**

**VERSUS**

- 1. THE INSPECTOR GENERAL OF POLICE**
- 2. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGMENT**

1. The Petitioners are the interim officials of a yet to be registered “**Mombasa Republican Council Society**” (hereinafter referred to as **MRC**). They Petitioners reside in Mombasa County and on behalf of members of the MRC they had applied to the Registrar of societies to

have their society registered which was rejected prompting them to file a **Constitutional Petition Number 4 of 2015 in the matter of an Application by Omar Khamisi Mwamwazi & 2 others for Enforcement of fundamental rights and freedoms.**

2. The 1<sup>st</sup> Respondent is the Inspector General of police of the Republic of Kenya.

3. The 2<sup>nd</sup> Respondent is the Attorney General of the Republic of Kenya

4. The Petitioners filed this Petition dated 7/4/2015 challenging the Gazette Notice No. 2326 of 7 /4/2015 issued by the 1<sup>st</sup> Respondent, the Inspector General of Police and published in the Special Issue of the Kenya Gazette Vol. CXVII-No. 36 which called upon the MRC to demonstrate within twenty four hours why they should not be recommended to the Cabinet Secretary for Internal Security and Co-ordination of National Government for declaration as specified entities within the meaning of Sections 2(1)(m) and 3 of the Prevention of Terrorism Act (POTA).

5. The Petitioners state that prior to the said Gazette Notice, they had been engaged in several on-going Court cases against the 2<sup>nd</sup> Respondent but they never received any communication whatsoever from the Respondents regarding the status and/or their compliance with the existing law and legal requirements. The Petitioners state that although within the 24 hours they could not prepare any adequate defence, they still responded to the Gazette Notice vide letter dated 10/4/2015, which was attached as annexure **“RNR-1(b)”** to the Supporting Affidavit of the 1<sup>st</sup> Petitioner.

6. It is the Petitioners’ case that the purport of the Gazette Notice rendered nugatory the presumption of their innocence and shifted the burden of proof to their disadvantage as their activities have come to be deemed as “terrorist” in nature, despite the absence of any new criminal charges against them and/or their prospective members.

7. The Petitioners state that every person is equal before the law and that they are entitled to equal protection and equal benefit of the law as provided under Article 27(1) & (2) of the Constitution, and which the Respondents have refused to guarantee and/or satisfy despite having a positive duty in that regard.

8. The Petitioners state that the Respondents have neglected to respect and protect their inherent right to dignity as provided under Article 28 of the Constitution. Further, the Petitioners’ state that by unreasonably withholding their registration as a society, the Respondents are in violation of Article 36(1) & (3) (a) of the Constitution which guarantees the Petitioners the freedom of association which includes the right to form, join or participate in activities of an association of any kind.

9. The Petitioners state that their right to a fair administrative action guaranteed under Article 47 (1) & (2) of the Constitution has been violated by the Respondents who gave the Petitioners only 24 hours within which the Petitioners were to demonstrate why they should not be declared a specified entity and which period was inadequate. Further, the Petitioners state that the 2<sup>nd</sup> Respondent has refused to register the Petitioner as a society and/or to give reasons written reasons for such refusal.

10. The Petitioners state that the Respondents are in violation of Article 50(1), (2) (a) & (b) of the Constitution by denying the Petitioners right to a fair public hearing before a Court; and failure to presume the Petitioners innocent until the contrary is proved; and failure to inform the Petitioners of the charges and/or accusations against them and/or the accusations which the Respondent intend to make against them with sufficient details to enable Petitioners to answer them. Further, the 24 hours given by the 1<sup>st</sup> Respondent vide the said Gazette Notice requiring the Petitioners to demonstrate why they should not be declared a declared entity, did not facilitate adequate time and resources to prepare a defence.

11. In their Petition, the Petitioners seek the following orders:

**a) Spent**

**b) A declaration that the action by the Inspector General of Police in issuing the Notice of Intention to specify by way of Kenya Gazette Notice Number 2326 issued on 7/4/2015 is unconstitutional;**

**c) A declaration that the twenty-four (24) hour response period provided by the Inspector General of Police in issuing the Notice of Intention to Specify by way of Kenya Gazette Notice Number 2326 issued on 7/4/2015 is unconstitutional;**

**d) A declaration that the action by the Inspector General of Police, by failing to provide the Petitioner with particulars of the charge(s) and/or accusation which the 1<sup>st</sup> Respondent wishes to make against them, with sufficient detail to enable the Petitioner answer the charges made against them is unconstitutional;**

**e) Orders of Certiorari to quash the decision of the Inspector General to issue Notice of intention to specify by way of Kenya Gazette Notice Number 2326 issued on 7/4/2015.**

**f) Orders of prohibition directed to the Inspector General of Police, from making any decisions in connection with the Petitioners’ pending Application for registration as a society, that are unconstitutional and against laws of natural Justice;**

**g) Order of mandamus directed to the Inspector General of Police and the Attorney General compelling them to make just and fair decisions in regards to the Petitioners’ pending Application for registration of a society, that are constitutional and promotes the laws of natural Justice;**

*h) That his honourable Court do further make such Orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and/or securing the proper administration of Justice, having regard to all the circumstances, by the aforesaid Inspector General of Police and the Attorney General;*

*i) That the costs of this Application be provided for.*

12. The petition is supported by the affidavit of the 1<sup>st</sup> Petitioner sworn on the 7/5/2015, on his behalf and on the behalf of the other Petitioners.

### **The Response**

13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Petition via Grounds of Opposition dated 20/5/2020. The grounds are summarized as follows:

*a) That the Petition is misconceived, frivolous, and vexatious and an abuse of the Court process.*

*b) That Section 3(2) of the Prevention of Terrorism Act confers powers to the Inspector General of Police to notify entities to demonstrate within 24 hours why the petitioners should not be declared as a specified entity as per the Gazette Notice dated 7/4/2015.*

*c) That the MRC made an Application to the registrar of societies on the 17/11/2011 with the requisite documentation*

*d) That the Registrar of societies forwarded the documents to the Director General for vetting, the same was done, and a confidential report made.*

*e) That the MRC made its intention of wanting to secede the Mombasa city known under the slogan “Pwani si kenya”*

*f) That the registrar of societies relied on the confidential report and as mandated by the societies Act issued a Notification of Refusal to register the society.*

*g) That the limitation of the Petitioner fundamental rights and freedom was made to ensure that the enjoyment of right and fundamental freedoms by an individual does not prejudice the right and fundamental freedom of others.*

*h) The Registrar of Societies reasonably withheld the registration and in good faith under the circumstances as registration of the same would breach national security.*

*i) That the Petitioners are fugitives who have warrants of arrest issued against them.*

### **Submissions**

14. The Petition was dispensed with via written submissions. The Petitioners filed their submissions on the 12/5/2020 while the Respondents' submissions were filed on 21/5/2020.

15. **Mr. Kithi** Learned Counsel for the Petitioners reiterated the content of the Petitioners' Supporting Affidavit. He submitted that the Petitioners' Petition remains undefended because the grounds of opposition filed appear to be in response to **Mombasa High Court Petition 4 OF 2015** rather than a response to the instant Petition. Further, Counsel submitted that despite indulging the Respondent for four years and 10 months no substantive response has been filed in response to the Petition.

16. Counsel further submitted that the limitation of the Petitioner rights on the basis of Article 24 of the Constitution cannot be justified as the Gazette notice is unconstitutional for violating the Petitioner rights guaranteed under Articles 27,36,43,47 and 50 of the Constitution.

17. **Mr. Mkok** Learned Counsel for the Respondents submitted that the 1<sup>st</sup> Respondent acted well within his mandate as per the provisions of Section 3 of the Prevention of Terrorism Act and therefore the Gazette Notice Number 2326 remains legitimate, valid and enforceable. Counsel further submitted that the Petitioners are a mortal threat to the public good and well-being of the country as a whole, and have failed to demonstrate how their rights have been infringed.

### **Determination**

18. I have considered the submissions filed on behalf of the Petitioners, as well as the Grounds of Opposition filed by the Respondents and all other relevant material. The argument by the Respondents is that the Petition is frivolous, misconceived, vexatious and an abuse of the Court process as Section 3(2) of the prevention of Terrorism Act confers the Inspector General with powers to notify entities to demonstrate within 24 hours why they should not be declared as specified entities as per the Gazette Notice dated 7/4/2015 of Notice of Intention to Specify.

19. It is noteworthy that the Respondents never filed any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that the 1<sup>st</sup> Respondent's publication in the Kenya Gazette provide for 24 hours within which the petitioners are to demonstrate why they should not be declared a specified entity. The Petitioner are of the view that the period was woefully inadequate and contravened their rights guaranteed under Article 47 (1) of the Constitution on the right to a fair administrative action that is efficient, lawful, reasonable

and fair. Further, the Petitioners aver that they were not given adequate time to prepare their defence as required under Article 50(2) (c) of the Constitution and that they have not been informed of any charges and/or accusations against them. It is the Petitioners' case and rightfully so in my view, that the Grounds of Opposition that were filed by the Respondents are only deemed to address issues of law; that said grounds of opposition are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see **Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR** where Odero J, addressing a claim where the Attorney General as the Respondent failed to file a Replying Affidavit stated:

**“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014 and ELIUD NYAUMA OMWOYO & 2 OTHERS –Vs KENYATTA UNIVERSITY). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”**

20. Similarly, in **Phillip Tirop Kitur vs. Attorney General [2018] eKLR**, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner’s evidence stood unchallenged. In addition, the High Court rejected the Attorney General’s contention that the delay in filing the Petition had caused it prejudice, ruling that in the absence of a Replying Affidavit or oral evidence, the court had no facts upon which it could make such a finding. Therefore, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the Petitioners’ claims?

21. Section 3(1) and (2) of POTA provides thus:

**“3 (1) Where the Inspector-General has reasonable grounds to believe that—**

**(a) an entity has—**

**(i) committed or prepared to commit;**

**(ii) attempted to commit; or**

**(iii) participated in or facilitated the commission of, a terrorist act; or**

**(b) an entity is acting –**

**(i) on behalf of;**

**(ii) at the direction of; or**

**(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.**

**(2) Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.”**

22. From the foregoing, I find and hold that Section 3(1) and (2) of POTA grant powers to the 1<sup>st</sup> Respondent to make recommendation to the Cabinet Secretary that a certain entity ought to be declared as specified entity and the said Section does not expressly require the Inspector-General of Police either to provide reasons for his suspicions or investigations. However, Section 3 (2) is to the effect that before making such recommendation, the 1<sup>st</sup> Respondent ought to afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.

23. At this stage, it is imperative to consider the following issues, which have inevitably arisen for determination.

**1. Whether the Petitioners’ right under Article 47(1) and (2) of the Constitution was violated when the 1<sup>st</sup> Respondent issued the Gazette Notice without making known the allegations against them and according them an opportunity to be heard.**

**2. Whether the 1<sup>st</sup> Respondent violated the Petitioners’ right to a fair hearing guaranteed under Article 50(2) (b) and (c).**

24. This Court will not be drawn to alleged violation of the Petitioners’ freedom of association since the said issue is pending in **Constitutional Petition Number 4 of 2015 in the matter of an Application by Omar Khamisi Mwamwazi & 2 others for Enforcement of fundamental rights and freedoms**, wherein the Petitioners were *inter-alia* challenging the refusal by the Registrar of societies and the Attorney General to register the Petitioners’ society.

1. *Whether the Petitioners' right under Article 47(1) and (2) of the Constitution was violated when the 1<sup>st</sup> Respondent issued the Gazette Notice without making known the allegations against them and according them an opportunity to be heard.*

25. Article 47 of the Constitution guarantees the right to fair administrative action in the following manner:

**“47(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. The 1<sup>st</sup> Respondent being a public person established under Article 245 of the Constitution, has a constitutional and statutory obligation placed on him to give the Petitioners a right to be heard, bearing in mind that the decision he is bound to arrive at would have adverse effects on the rights and fundamental freedoms of Petitioners.

27. Section 4(3) of the Fair Administrative Act 2015 provides as follows: -

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) ...”**

28. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

**“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...”**

29. Similarly, Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

**“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”**

30. This Court is of the view that the publishing of the Petitioners' society's name in the impugned Gazette Notice was merely a preliminary stage of the process of declaring the Petitioners' association a specified entity, and the 1<sup>st</sup> Respondent was merely affording the Petitioner's association their right to be heard by requiring them to demonstrate within twenty four hours why the society should not be declared as a specified entity. The said notice in my view was in consonance with the provision of Section 3(2) of POTA, which requires the 1<sup>st</sup> Respondent to accord the entity an opportunity to demonstrate why it should not be declared a specified entity. Further, Section 3(4) of POTA provides that the Cabinet Secretary shall inform the entity in respect of which the order is made, in writing, of his decision under subsection (3) together with reasons for arriving at that decision, within a period of seven days from the date of declaring the entity a specified entity.

31. I am persuaded with my brother Korir J's finding, while deciding a similar case, in **Egal Mohamed Osman vs. Inspector General of Police & 3 others [2015] eKLR** when he stated as follows:

**“I do not see any violation of Article 47 of the Constitution because the Petitioner would have to undergo various stages before he is so specified as an entity. In that regard Section 3 of POTA is safe-checking and ensures that the decision of both the Inspector General and the Cabinet Secretary are in accordance with the law. For avoidance of doubt, it states as follows:**

**“3(3) Upon receipt of the recommendation under subsection (1), the Cabinet Secretary may, where he is satisfied that there**

are reasonable grounds to support a recommendation made under subsection (1), declare, by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.

(4) The Cabinet Secretary shall, subject to subsection (5), inform the entity in respect of which the order is made, in writing, of his decision under subsection (3) together with reasons for arriving at that decision, within a period seven days from the date of declaring the entity a specified entity.

(5) A specified entity may apply to the Inspector-General requesting for the revocation of an Order made under subsection (3) in respect of that entity.

(6) If on an application made under subsection (5), the Inspector-General is satisfied that—

(a) there are reasonable grounds for making the application, recommend to the Cabinet Secretary the revocation of the Order; or

(b) there are no reasonable grounds for making the application, the Inspector-General shall reject the application and shall, within sixty days of receiving the application, inform the applicant of the decision...”

2. Whether the 1<sup>st</sup> Respondent violated the Petitioners right to a fair hearing guaranteed under Article 50.

32. It is a matter of public notoriety and this Court takes judicial notice that the Petitioners’ society had threatened to have the Coastal region secede from the Republic of Kenya, under the slogan “*Pwani si Kenya*”. Further, the Petitioners’ society members are alleged to have attacked Nyali Barracks and Kaloleni Administration Police Post where three officers were slain. The foregoing leads to a conclusion that the Petitioners’ society in the 1<sup>st</sup> Respondent’s view was a threat to the National Security.

33. In *R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others* [2010] eKLR the Court while considering the applicability of the rules of natural justice held *inter alia*:

**“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the Court has to strike a balance.”** (Emphasis mine).

34. Similarly in *Russel vs. Duke of Norfolk* (1949) All ER 118, the Court had the following to say on the same issue:

**“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definition of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.”** (Emphasis added).

35. From the foregoing, it is noteworthy that right to be informed of the charge with sufficient details to answer it and the right to be given adequate time to prepare a defence and/or response as guaranteed under Article 50(2), (b) and (c) will depend on the circumstance of the case, the nature of inquiry and the subject matter that is being dealt with. Consequently, the said rights in my view may be limited as per Article 24 is in the following terms:

**“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

**(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**

**(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

**(3) The State or a person seeking to justify a particular limitation shall demonstrate to the Court, tribunal or other authority that the requirements of this Article have been satisfied...”**

36. The Petitioners’ society members have made their intention to secede from Kenya, and are alleged to have undertaken some attacks on the country’s security installations. The 1<sup>st</sup> Respondent was therefore justified in issuing the Gazette Notice number 2326 headed Notice of Intention to Specify requiring the Petitioners’ society to demonstrate within 24 hours why it should not be declared as a specified entity. Consequently, this Court finds and holds that the greater societal need for the limitation of the right outweighed the individual’s right to enjoy the right or freedom in question. Consequently, the duration of 24 hrs given to the Petitioners to respond to the Gazette Notice No. 2326 was reasonable bearing in mind the particular circumstances involving the Petitioners’ society.

37. From the foregoing, I find and hold that the Petition before the Court has not been proved, and lacks merit. The Petition is dismissed with no orders as to costs.

Orders accordingly.

**Dated, Signed & Delivered at Mombasa this 25<sup>th</sup> day of August, 2020.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered in Chambers via MS Teams in absence of parties.

Mr. Kaunda Court Assistant