



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 109 OF 2020**

FREEKENYA POPULAR INITIATIVE SOCIETY.....1<sup>ST</sup> PETITIONER  
NICHOLAS OYOO OCHIENG.....2<sup>ND</sup> PETITIONER  
MULIALIA OKUMU.....3<sup>RD</sup> PETITIONER  
BOB NJAGI.....4<sup>TH</sup> PETITIONER

VERSUS

REGISTRAR OF SOCIETIES (JACOB IKIARIA).....1<sup>ST</sup> RESPONDENT  
ASSISTANT REGISTRAR OF SOCIETIES  
(KAREN W. NDEGWA).....2<sup>ND</sup> RESPONDENT  
REGISTRAR GENERAL (MARY NJUYA).....3<sup>RD</sup> RESPONDENT  
SOLICITOR GENERAL (KENNEDY OGETO).....4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

**JUDGMENT**

**PETITION**

1. The Petitioners herein filed a Petition dated 13<sup>th</sup> March 2020 and supported by the Affidavit of Nicholas Oyo Aching seeking the following reliefs from the court:-

- a. The Honourable Court do issue and hereby issues an order that the Registrar of Societies to complete the registration of the Free Kenya Popular Initiative as a Society within 7 days of making this order.*
- b. The Honourable Court do issue and hereby issues an order that the Registrar of Societies delete and expunge from their records the illegal refusal and consequent future application of Section 11 (2) (a) of the Societies Act.*
- c. The Honourable Court do issue and hereby issues an order that the Respondents compensate the Petitioners for damage caused to the dignity, reputation and security of the persons of the Petitioners.*
- d. The Honourable Court do issue and hereby issues and order that the Respondents compensate the Petitioners for finances lost due to their unconstitutional and illegal actions.*
- e. Consequent to the grant of the prayers above the Honourable Court be pleased to issue any other or further remedy (directions and orders) that the Honourable Court shall deem fit and necessary to give effect to the foregoing orders, and/ or favour the cause of justice.*

## **PETITIONERS CASE**

2. The Petition is premised on the refusal by the of the Petitioners' application for registration as a society. The Petitioners assert that their application was refused without the "reasonable cause" of the refusal being stated and upon the appeal within the stipulated time to the substantive Minister in charge of Registration of Societies. The Petitioners further allege 7 months after filing their appeal a response is yet to be received.

3. The Petitioners assert that the 1<sup>st</sup> Respondent's demand that they change the name of the association from "Free Kenya Initiative" to "Free Kenya Popular Initiative Society" violated the right to freedom of expression protected under **Article 33 of the Constitution**. Additionally, the Petitioners claim that their freedom of association has been infringed by the 2<sup>nd</sup> Respondent's demand that they change the objectives of the Free Kenya Initiative to exclude objectives which are neither unconstitutional nor illegal.

4. Furthermore, the Petitioners claim that their right to fair administrative action articulated in **Article 47 (1) of the Constitution** of Kenya as the duration of their engagement was protracted beyond the timelines stipulated for the services requested. Additionally, **Article 47 (2) of the Constitution** was violated as the Respondents failed to respond to their appeal through the right channel and in a manner that addresses the matter appealed.

5. The Petitioners allege that the 2<sup>nd</sup> Respondent's refusal to register the 1<sup>st</sup> Petitioner without stating reasonable causes compelling her to refuse to violate **Section 11 (2) (a) of the Societies Act**. The Petitioners assert that the 2<sup>nd</sup> Respondent has acted arbitrarily and has discriminated against the Petitioners in violation of **Article 27 of the Constitution** which prohibits discrimination based on conscience or belief.

6. It is further asserted that by the Respondents declaring that the Petitioners are a "threat to peace, welfare and good order in Kenya" without giving a reasoned cause has violated the Petitioners' dignity and good standing in society and violated the right to human dignity as per **Article 28 of the Constitution**. The 5<sup>th</sup> Respondent is alleged to have violated **Articles 35, 47 and 50 of the Constitution** by failing to respond to the Petitioners appeal and give them a fair hearing in defence against the allegations given as reasons for the refusal of their registration.

7. The Petitioners accuse the Respondents of abuse of office under **Section 46 of the Anti-Corruption and Economic Crimes Act** for being partisan and deliberately holding back the Petitioners' initiative.

## **RESPONDENT'S CASE**

8. In their Ground of Opposition dated 29<sup>th</sup> June 2020, the Respondents seek for the Petition to be dismissed on the grounds that the orders sought are based on a misconception of the law that renders the Petition incurably defective as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents who are accorded protection from personal liability while executing official duties under **Section 8 of the Office of the Attorney General Act 2012**. Furthermore, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents claim to be indemnified by law under **Section 52 of the Societies Act**.

9. The Respondents jointly filed a Replying Affidavit sworn by Maria Moretti Naraka on 29<sup>th</sup> June 2020 in which the entire Petition is opposed on grounds that it is bad in law, lacks merit and is a gross abuse of the process of this Honourable Court and has been instituted in bad faith.

10. The Respondents assert that it is their view that the Petitioner's objectives mainly touched on matters of public interest which do not fall within the meaning of a society under **Section 2 of the Societies Act**. It is averred that societies do not include lobby groups, public interest groups, civic organisations, human rights organisations, advocacy groups or any other group targeting the interests of the general public. Therefore, the Respondents aver that they do not have the mandate to register the Petitioners' proposed society.

11. The Respondents contend that the Petitioners application received due consideration and was subjected to the registration requirements mandated under the Societies Act and the Societies Rules which it did not meet. The Respondents confirms that they have acted in an impartial, un-prejudicial an objective manner within powers granted by statute as expressly laid out in the Societies Act.

12. It is further claimed that practice of the Societies section since post-colonial times has dictated that registration applications be subjected to vetting by a government agency, herein being the National Intelligence Service.

## **ANALYSIS AND DETERMINATION**

13. I have very carefully considered the Petitioner's Petition ; and the Respondents grounds of opposition and Replying Affidavit as well as the parties rival submissions and from the aforesaid the following issues for determination arises:-

**a. Whether the 1<sup>st</sup> – 5<sup>th</sup> Respondents are protected from personal liability by Section 8 of the office of the Attorney General Act 2012 and are indemnified by law under Section 52 of the Societies Act (Cap 108) Laws of Kenya?**

**b. Whether the Petitioners have set out to a degree of precision the alleged violations of their fundamental human rights and freedoms?**

**c. Whether the Respondents' decision to issue the statutory notice (form E) notifications of Refusal to Register a Society on 21<sup>st</sup> June 2019, to the proposed Free Kenya popular initiative Society was lawful?**

**A. WHETHER THE 1<sup>ST</sup> – 5<sup>TH</sup> RESPONDENTS ARE PROTECTED FROM PERSONAL LIABILITY BY SECTION 8 OF THE OFFICE OF THE ATTORNEY GENERAL ACT 2012 AND ARE INDEMNIFIED BY LAW UNDER SECTION 52 OF THE SOCIETIES ACT (CAP 108) LAWS OF KENYA?**

14. The Respondents seek the Petition be dismissed for being incurably defective as against the 1<sup>st</sup> – 4<sup>th</sup> Respondents, who are accorded protection from personal liability while executing official duties under *Section 8 of the Office of the Attorney General Act 2012* and further indemnified by law under *Section 52 of the Societies Act*.

15. The Petitioners are opposed to the respondent's objection to the Petition.

16. *Section 8 of the Office of the Attorney General Act 2012* provides as follows:-

***“No matter or thing done by the Attorney-General, the Solicitor-General or subordinate officer shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the Attorney-General, Solicitor-General or other subordinate officer personally liable to any action, claim or demand whatsoever”.***

17. Further *Section 52 of the Societies Act, Cap 108 Laws of Kenya* provides that:-

***“No suit shall lie against any public officer for anything done or omitted to be done by him in good faith and without negligence in the intended exercise of any power or the intended performance of any duty conferred or imposed on him by or under this Act.”***

18. At *Section 8 of the Office of the Attorney General Act 2012* and *Section 52 of the Society Act* it is clearly stipulated, that anything done by the Attorney General; the Solicitor-General or a subordinate officer, if done in good faith for executing the functions, powers or duties of the Commission shall not render such persons liable for any action, claim or demand whatsoever. It is further provided that no suit shall lie against any public officer for anything done or omitted to be done by him in good faith and without negligence in the intended exercise of any power or performance of any duty conferred or imposed on him by or under the society Act.

19. The Petitioner seek to counter the Respondents contention by relying on *Article 232(1) of the Constitution* which provides:

***“232. Values and principles of public service***

***(1) The values and principles of public service include***

***(a) high standards of professional ethics;***

***(b) efficient, effective and economic use of resources;***

***(c) responsive, prompt, effective, impartial and equitable provision of services;***

***(d) involvement of the people in the process of policy making;***

***(e) accountability for administrative acts;***

***(f) transparency and provision to the public of timely, accurate information;***

***(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;***

***(h) representation of Kenya's diverse communities; and***

***(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—***

***(i) men and women;***

***(ii) the members of all ethnic groups; and***

***(iii) persons with disabilities.”***

20. Clear reading of *Article 232(1) of the Constitution* reveal that the values and principles of Public Service include accountability for administrative acts and that values and principles of public service apply to public service in all state organs in both levels of government.

21. *Section 8 of the Office of the Attorney General Act 2012* and *Section 52 of the Societies Act* do not contradict *Article 232(1) of the*

**Constitution.** The two Sections clearly spell out under what circumstances the Public Officers cannot be called upon to account; thus where the matter is done in good faith and without negligence in the execution of functions, powers or duties of the Commission. The purpose of the Sections is to insulate such officers where they have done something in good faith and without negligence. It does not mean that one cannot be called upon to account where he/she had done something in bad faith and negligently.

22. The Petitioners in this Petition have not demonstrated that the Respondents herein who fall under category mentioned at **Section 8 of the Office of the Attorney General Act**, and at **Section 52 of the Societies Act** acted in violation of **Section 8 of the Office of the Attorney General Act** and **Section 52 of the Societies Act**. I find that no evidence has been tabled before this Court to demonstrate that the 1<sup>st</sup> – 4<sup>th</sup> Respondents, in this matter, acted in bad faith and not in good faith in executing functions, powers and duties of the Commission to render them liable to any action, claim or demand whatsoever. Further I find under **Section 52 of Societies Act** no suit shall lie against the Respondents as Public Officers for anything done or omitted to be done in good faith and without negligence in the intended exercise of any power or intended performance of any duty conferred or imposed on them by or under the Societies Act.

23. In view of the aforesaid, I find that the 1<sup>st</sup> – 4<sup>th</sup> Respondents herein have demonstrated that they are insulated and/or protected from personal liability under **Section 8 of the Office of the Attorney Act 2012** and indemnified by Law under **Section 52 of the Societies Act (Chapter 108) Laws of Kenya**.

**B WHETHER THE PETITIONERS HAVE SET OUT TO A DEGREE OF PRECISION THE ALLEGED VIOLATIONS OF THEIR FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS?**

24. The Respondents contend that the Petitioners have failed to lay out the alleged fundamental human rights violations by the Respondents to a reasonable degree of precision. The principle of precision in setting out allegations of constitutional violations and infringements were clearly and specifically laid out in the Case of **Anarita Karimi Njeru v. Republic (1979 – 1980) KLR 1272** to include the following:-

**“i) Constitutional violations must be pleaded with a reasonable degree of precision**

**ii) The Articles of the Constitution which entitles rights to the Petitioners must be precisely enumerated and how one is entitled to the same.**

**iii) The violations must be particularized in precise manner**

**iv) The manner in which the alleged violations were committed and to what extent must be clearly stated.”**

25. It was further in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 Jessel M. R.** stated:

**“the whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”**

26. The Respondents contend that the Petition is basically premised on the infringement and contraventions of **Articles 22, 23, 27, 32, 36, 165 and 232 of the Constitution**.

27. A perusal of the Petition dated 13<sup>th</sup> March 2020 by the Petitioners under legal foundation of the Petition paragraphs 61 – 77 and particulars of violations of the Constitution under paragraph 85 – 91 of the Petition, reveal that the Petitioners have not shown how each alleged constitutional violation has been occasioned by the actions of the Respondents and how the same has interfered with their fundamental rights and freedoms. On **Articles 32 and 36 of the Constitution**, the Petitioners failed to demonstrate their rights therein have been infringed by direct conduct of the Respondents as the same has sufficiently been rebutted by the Respondents, who acted within the powers donated to them by statute devoid of any discrimination, as the Societies Act is applied uniformly to all societies seeking registration.

28. From the above, I find that the substantive test in **Anarita Karimi Njeru v Republic (Supra)** has not been met in this Petition as the Petitioners have not set out the Constitutional violations in the Petition within a reasonable degree of precision and the Articles of the Constitution which entitles rights to the Petitioners have not been precisely enumerated and shown how the Petitioners are entitled to the same. Further the alleged violations have not been particularized in precise manner nor have the Petitioners shown the manner in which the alleged violations were committed.

**C. WHETHER THE RESPONDENTS’ DECISION TO ISSUE THE STATUTORY NOTICE (FORM E) NOTIFICATIONS OF REFUSAL TO REGISTER A SOCIETY ON 21<sup>ST</sup> JUNE 2019, TO THE PROPOSED FREE KENYA POPULAR INITIATIVE SOCIETY WAS LAWFUL?**

29. The Respondents aver that the application for Registration by the Petitioners herein was given due consideration under the Societies Act and the Societies Rules prior to the issuance of the Notice of Refusal. The gravement of the Petition arises out of the process relating to the refusal of the application for registration of the Petitioners’ proposed Society.

30. There is no dispute that **Section 9 and 10(1) of the Societies Act**, makes clear provisions for registration process and the manner of effecting the registration. The Societies Act appears not to provide application for registration of a Society to be given audience as **Section 9 of the Societies Act** requires such application to speak for the Society.

31. The Respondents contend that after receiving the Petitioners application on 5/3/2019, the respondents subjected the same to rigorous scrutiny much like any other application received in the Respondents office. The Petitioners on their part have not demonstrated that their application was subjected to different treatment from any such like application. No evidence of discrimination has been provided herein.

32. It is averred by the Respondents upon receipt of an adverse confidential report from the intelligent services, the Petitioners application for registration was considered unsuccessful for failing to meet the requirements for registration and a formal notice of refusal was issued on 21<sup>st</sup> June 2019, well within the timelines of 120 days provided by the same Charter of the Office of the Registrar of Societies. The Respondents action therefore did not violate **Article 47(1) of the Constitution** which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

33. The Respondents have demonstrated that their administrative action was expeditious, efficient, lawful, reasonable and procedurally fair. The Respondents state further that they did not violate any of the Petitioners constitutional rights and to demonstrate that they sought reliance in the Case of High Court of Kenya at **Mombasa Misc. Civil Application No. 742 of 2005 Job Musa Kilonzo & 3 Others v. Registrar of Societies (2006) eKLR** where David Maraga, J, as he then was, held inter alia:-

***“As already stated in the quotation from paragraph 83 of 1 Halbury’s Laws of England 4<sup>th</sup> Edition not every administrative act calls for the observance of the procedural standards imposed by the rules of natural justice. Having obtained the intelligence report...require the Registrar to give the Applicants audience.”***

34. **Section 9 and 10 of the Societies Act** gives mandate to the Office of the Registrar of Societies as regards Registration and which includes ensuring that the registration process is adhered to in compliant with the Act. The Respondents in their Replying Affidavit contend that the Petitioners objectives in the proposed Society mainly touch on matters of public interest which Respondent contend do not fall within the meaning of a society as provided for under **Section 2 of the Societies Act**. It should be noted that Societies are by their very nature member based and are formed with the aim of promoting the non-profit and non-political interest of the members. The society do not include lobby groups, public interest groups; civic organizations; human rights groups or advocacy groups targeting the interest of the general public.

35. It clearly therefore follows, that the Respondents have no mandate under the governing law; **Societies Act Cap 105, Laws of Kenya**, to register the Petitioners proposed Society as it does not fall within the definition of a Society. The Petitioners herein has to comply with the provisions of the law under which they are seeking registration as court cannot force the Respondents to act beyond their mandate.

36. In this matter it is of paramount importance to note that one of the principal objectives of the proposed Society by the Petitioners is to advocate for a referendum using the popular initiative route which in my view constitutes a political agenda; as found by the Respondents, coupled with the name of the proposed Society. In the case of **Morris Jarha Maro & another vs. Registrar of Societies & another (2015) eKLR** where Anyara Emukule, J held inter alia;

***“a political association or an association wishing (like the proposed society) to advance an agenda that is political in nature, is designed by Kenyan legislation to be incorporated and regulated as a Political Party under the Political Parties Act, No. 11 of 2011.”***

37. Considering the Petitioners Petition and the Respondents response and action, I find that the Respondents acted in accordance with the provisions of the Societies Act; and accordingly discharged their statutory obligations and in an impartial, lawful, objective, fairly and just manner in fulfilment of their public duty. The Petitioners herein failed to demonstrate any wrong doing on part of the Respondents in reaching their decision to issue the statutory notice (Form E) thus, Notification of Refusal to Registrar a Society on 21<sup>st</sup> June 2019 to the proposed Free Kenya Popular Initiative Society. The Respondents decision was lawful and in accordance with the law.

38. In view of the findings, that I have come to, in this Petition; I find that the burden of proof lies within the Petitioners, who have failed to establish violation of the Constitution or any infringement of their rights and freedoms in the Petition. ***I find the Petition is without merits and the same is accordingly dismissed.***

39. ***In view of the nature of the Petition I order each party to bear its own costs.***

**Dated, Signed and Delivered at Nairobi on this 26<sup>th</sup> day of November, 2020.**

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**J. A. MAKAU**

**JUDGE**