REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

MISC CIVIL APPLI 41 OF 2009

IN THE MATTER OF: THE CONSTITUTION OF KENYA AND THE POLITICAL PARTIES ACT 2007

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

THE REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE REGISTRAR OF POLITICAL PARTIES.....RESPONDENT

EX-PARTE

HARKMAN MUIRURI MUNIU INTERIM CHAIRMAN)

PROPOSED KENYA AFRICAN MAU MAU UNION

NJOKA KARUGU, INTERIM SECRETARY GENERAL)

JASPTER RUTERE, INTERIM TREASURER)

JUDGMENT

By the Notice of Motion dated 27/1/09, the ex parte Applicants, Harkman Muiruri Muniu, Njoka Karugu and Japser Rutere who are the Interim Chairman, Secretary General and Treasurer of the proposed Kenya African Mau Mau Union (KAMMU) are challenging the decision of the Registrar of Political Parties dated 5/1/09 declining to register the above named union as a political party under the Political Parties Act 2007. The Applicants seek the following orders against the Registrar;

(1) An order of certiorari to remove into the High Court and quash the decision of the Registrar of Political Parties declining to provisionally register Kenya African Mau Mau (KAMMU) Union as a political party.

(2) An order of mandamus compelling the Registrar of Political Parties to provisionally register KAMMU in accordance with the requirements of section 21(1) of the Political Parties Act 2007.

(3) That an order of prohibition prohibiting the Registrar of Political Parties from declaring KAMMU as an unlawful Political Party.

(4) Costs of the application be provided.

The Notice of Motion is premised on the supporting affidavit of Harkman Muiruri Muniu, grounds found in the statement dated 21/1/09, skeleton submissions filed in court on 23/3/09 and a list of authorities of the same date. Mary Ndungu, Registrar of Political Parties swore an affidavit dated 6/3/09 opposing the Notice of Motion. Mr. Kabaiku appeared for the Applicant whereas Mr. Meso urged the application on behalf of the Respondent.

Briefly, the facts of this case are that on 29/1/08 the Applicants applied for Provisional Registration of KAMMU by lodging Form PP.2 in accordance with Rule 3(1) and Form PP1 in accordance with Rule 3(3) together with copies of the Constitution of KAMMU and paid the requisite fees of Kshs.100,000/= thus complying with the Political Parties Act, 2007. However, by letter of 5/1/09, the Registrar declined to register KAMMU as a political party but did not give any reason for failure to register it. That the said decision contravenes s.21(1) of the Political Parties Act, 2007 because it was made more than 30 days after the presentation of the application on 4/1/08. That as a result, the said decision contravenes S.80 of the Constitution of Kenya for denying the Applicants the freedom of assembly and association and that the decision is unconstitutional. The Applicant also contends that the decision was actuated by improper motives and is devoid of reason and based on irrelevant considerations. The decision of the Respondent is exhibited as HMM5.

In the replying affidavit, Lucy Ndungu, the Registrar, deponed that she did receive the application for registration made by KAMMU, considered the said application and formed the opinion that it offends provisions of the Political Parties Act, 2007 in that the name is derived from a slogan "***mzungu arudi ulaya mwafirika apate uhuru***" which is admitted at paragraph 4 of the exparte Applicant's affidavit. That the slogan invokes racial connotations and that directly contravenes section 12 and 20 of the Act. That the slogan with ethic racial divisions. That the Act encourages parties of a national character. That according to articles 2(i) to (m) of the proposed Constitution of the party and the applicants (HMM1) of the supporting affidavit, the party is for the benefit of ex freedom fighters and their family members rather than for the benefit of the entire citizenry. The Applicants did not controvert the Respondent's allegations of what the slogan means.

Under Order 53 rule 4(1) of the Civil Procedure Rules the grounds upon which one will rely upon in support of the Notice of Motion are those set out in the statement and no more. That rule reads as follows:

"***Rule 4(1) copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

The Applicant purported to introduce new grounds in his submissions for example that the failure to register the political party has breached the Applicants legitimate expectation. That is not one of the grounds upon which Judicial Review application was predicated. The applicants can not be denied to rely on that ground. In the case of ***R v KRA exparte ABERDARE FREIGHT SERVICES LTD.*** Misc. Application No. 946 of 2004, Justice Nyamu held that a new ground that was not specified in the statement should be ignored. I totally agree with that holding.

The grounds upon which the application was brought as set out in the statement are that Registrar's decision has contravened S21 of the Political Parties Act, contravened s80 of the Constitution, is ultra vires the Constitution of Kenya; was actuated by improper motives; was unreasonable and based on irrelevant considerations. These are the only grounds upon which the application can be urged.

As to whether the decision was in breach of the Applicants rights under section 80 of the Constitution,

Judicial Review is not the proper forum for the Applicants to urge breach of their Constitutional rights. If they wished to do so, they should have come under the Constitutional provisions Chapter 5 of the Bill of Rights. Judicial Review is a special jurisdiction donated under Section 8 and 9 of the Law Reform Act and whose procedure is provided under Order 53 Civil Procedure Rules. If the Applicants wanted to enforce their fundamental rights, they should come under Section 84 of the Constitution and the Rules made thereunder. When one moves the court by way of Judicial Review, they must confine themselves within that jurisdiction and the procedure under Order 53 Civil Procedure Rules and constitutional orders can not lie in a Judicial Review application. In Judicial Review the court can only grant orders of certiorari, mandamus and prohibition pursuant to S 8 and 9 Law Reform Act and Order 53 Civil Procedure Rules. However, if one moved the court under the Constitutional provisions the court can issue any orders or even Judicial Review orders under S 84(2) of the Constitution. Under section 84 2 (b) the court is authorized to grant any order, writs, give any directions for purposes of doing justice to the parties.

The impugned decision is contained in a letter dated 5/1/09 (HMM5) it reads as follows:

"***RE PROVISIONAL REGISTRATION OF KENYA AFRICAN MAU MAU UNION (KAMMU)***

I refer to your application dated 28/1/08.

I wish to inform you that the said application has not been approved.

Yours faithfully,

Lucy K. Ndungu Mrs

Registrar of Political Parties"

The decision does not give any reasons why the approval of KAMMU as a political party was rejected. The question that needs to be ultimately answered is whether the Registrar was bound to give reasons for failure to approve the registration.

The Applicant contends that the decision offends S21(1) of the Act. That section reads as follows:-

"***S21(1) upon making an application for registration a political party shall first be provisionally registered and issued with a certificate of provisional registration within 30 days on fulfilling conditions prescribed in S18.***

(2) ----------

(3) ----------"

It seems to be the Applicants contention that the Respondents decision is illegal because it was made after 30 days and the second reason is that no reasons were assigned to the said decision. My understanding of S21(1) is that the provisional registration should be done within 30 days. It does not state that the decision to refuse or grant registration should be made within 30 days.

The 2nd reason why the Applicant contends that the decision is illegal is because no reasons were assigned to the decision to refuse the registration. S 21 does not provide for the giving of any reasons by the Registrar. It is silent on that issue. The requirement that an administrative body or public officer determining the rights of a citizen acts fairly goes hand in hand with the requirement that reasons for such decision be given. But it is not in all circumstances that one will be required to give the reasons for their decision. In some instances, It will not be desirable or necessary to give one a hearing as we know it. It can be sufficient if a letter is written and a reply thereto considered. In the instant case, a registration can

be rejected for reasons set out in the Act. Sections 14, 18 and 20 provides some of the reasons why registration will not be allowed.

Section 14 prohibits the Registrar from registering ethnic and regional parties. It reads as follows:

"***14(1) The Registrar shall not register a political party which ?***

(a) is founded on an ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious basis or which seeks to engage in propaganda based on any of these matters;

(b) uses words, slogans, emblems or symbols which could arouse ethnic, age, racial, gender, regional, linguistic, corporatist, professional or religious division;

(c) has a constitution or operational ethic that provides in any way for discriminatory practices contrary to the provisions of the Constitution or of any written law;

(d) accepts or advocates the use of force or violence as a means of attaining its political objectives;

(e) advocates or aims to carry on its political activities exclusively in one part of Kenya; or

(f) does not allow regular, periodic and open election of its office bearers.

(2) For the purposes of subsection (1), a political party is formed on an ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious basis if its membership or leadership is restricted to or includes only members of a particular ethnic, age, tribal, gender, regional, linguistic, corporatist or racial group, profession or religious faith or if its structure and mode of operation are not national in character."

S. 18 gives the conditions for provisional registration, while S. 20 provides that parties with certain names may not be registered. In the instant case, the fact that section 14, 18 and 20 give restrictions on when or when not to register a party, the decision to deny registration must have been assigned one of those reasons. I think it would have been proper and fair for the Applicants to be told why they could not be issued with a provisional licence. The letter written to the Applicant was bare and anybody reading it may have only concluded that it is done in bad faith. The Respondents will only be seen to be acting fairly if they assigned reasons to their decision and not leave it to guesswork.

It is only after this application was filed that the Respondent gave the reason for refusal to register the Applicant's Political Party, that the application offends S. 12 and 14 (1) (b) of the Act. S. 12 allows the formation of Political Parties subject to the provisions of the Political Parties Act, the Constitution and any written law. S. 14 (1) (b) which I already alluded to above bars the registration of a party which uses words, slogans, emblems, symbols which could arouse ethnic, age, tribal, racial, gender , region or religious divisions. It is the Respondents contention that the use of the word 'MAU MAU' which is drawn from the slogan that the white man should go back to Europe so that the African gets independence, advocates for expulsion of a certain race from Kenya which amounts to racial division. S. 12 provides that the party should conform with the provisions of the Constitution but the slogan offends S.82 of the Constitution which prohibits any form of discrimination. In this case, on the face of it, the party slogan advocates for racial discrimination. It is noteworthy that Judicial Review is not concerned with the merits of the decision made but the review of the decision making process and whether the said process was fair. In my view, failure to inform the Applicants the reason why their party could not be provisionally registered was indeed unfair. It matters not that the decision they would have arrived at would be the same. The Respondent had a duty to give reasons for its decision as it had a duty to hear or consider the Applicant's request. Ordinarily, this decision would be susceptible to being quashed by an order of certiorari.

Whether the decision of the Registrar is unreasonable, I find that the Applicant has not demonstrated that the reason is so unreasonable as to be absurd so as to fall within the 'WEDNESBURY' principle of

unreasonableness. ***(SEE ASSOCIATED PROVINCIAL PICTURE HOUSES LTD V WEDNESBURY CORPORATION (1948) 1 KB 223.*** The reasons given by the Respondent, though belatedly, fall within the exceptions under S 14 (1) (b) of the Political Parties Act.

Can the orders sought issue? Judicial Review orders are discretionary so that even if it is shown that a party deserves them, they may not be issued if they will not be the most effective remedy in the circumstances. The supreme court practice Rules para. 53/1 – 14/14 states:

"***Even if a case falls into one of the categories where Judicial Review will lie the court is not bound to grant it; the jurisdiction to make any of the various orders available in Judicial Review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the particular case."***

It is my considered view that though deserved, an order of certiorari will not serve any purpose in the circumstances of this case given the background of the Respondent's decision to refuse registration i.e. that the party was likely to cause racial divisions. An order of mandamus can not issue to compel the Respondent to register KAMMU because an order of mandamus merely directs a public officer or body to perform its duty in accordance with the law. The order can not however direct a body on how to perform the duty. That is exactly what the Applicant wants the Respondent to do i.e. act in a particular manner by registering KAMMU: That prayer can not issue. In support of the above, the case of ***KNEC V REP. ex parte Githinji CA 266/1966*** is relevant. The Court of Appeal held that mandamus lies to a public body compelling it to perform a statutory duty but does not direct how the duty is to be done.

The Applicant also seeks an order of prohibition to prohibit the Registrar from declaring KAMMU as an unlawful political party. Prohibition issues to a body acting without or in excess of jurisdiction or where there is a threat of breach of rules of natural justice. It prohibits that which is yet to be done. In this case, the order of prohibition can not lie because the Respondent has not even considered the merits of the application. The decision was made even before a provisional licence was issued. Besides, the Court can not interfere with the exercise of the Respondent's discretion in considering whether or not KAMMU can be registered as a political party. To prohibit the Respondent as prayed would be usurping the Respondent's powers under the Act. The result is that none of the prayers sought can issue and the application is dismissed with each party bearing their own costs.

Dated and delivered at Nairobi this 30th day of September 2009.

R.P.V. WENDOH

JUDGE

Delivered in the Presence of:

Mr. Kabaiku for the Applicant

No appearance for the Respondent

Muturi - Court Clerk