REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 690 of 2008

IN THE MATTER OF S.84 OF THE CONSTITUTION

FRANCIS NDUTHU KARANJA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT

RULING

The application dated 10th November 2008 seeks a conservatory order to stop the Respondents herein from implementing the Political Parties Act No 10 of 2008.

The Applicant (Citizen Democratic Party of Kenya) has relied on interalia, the following grounds:-

1. That the Applicant was registered in 2006 before the enactment of the Political Parties Act No 10 of 2008.

2. The said Act applies to all political parties regardless of the date of registration hence unconstitutional.

3. The financial requirements for the registration pursuant to the said Act are exorbitant and short notice has been provided for the compliance with the same.

4. That the requirement that a Party should have not less than two hundred members who are registered as voters for the purposes of Parliamentary election from each province is unconstitutional as it breaches the fundamental rights of membership of the Applicant contrary to section 80 of the constitution.

The Applicant wishes to attack the validity of the notice issued by the ECK on 3rd September, 2008 based on section 19(2) of the Political Parties Act (PPA).

The Act is aimed at providing a new regime for registration of political parties in Kenya and the Order made under s 19(2) requires that political parties which were registered under the Societies Act before the Political Parties Act came into operation on 1st July 2008 to amend their constitutions in order to comply with the schedule to the Act and to do so within 3 months for 3rd September, 2008.

At this stage of this matter I must guard against delving into the merits of the petition which will come for hearing regardless of the fate of this application.

The first point to note is that although the Applicant in the petition seeks to attack the constitutionality of the Political Parties Act No. 10 of 2008, the application seeking conservatory orders is on the contrary based on the order made under s 19(2) of the PPA. In the petition the Applicant seeks a declaration that the PPA is unconstitutional to the extent that it provides for three months for the political parties registered under the former regime to amend their constitutions or rules which period is allegedly too short for party members with limited resources.

The second point is that the new requirements apply to all parties registered under the old regime of law - and not only to some. It is therefore a law of general application.

The third point is that the Applicant would like to have the entire Act declared unconstitutional for contravening section 80 of the Constitution.

I reject the Application on the following grounds:-

1. On a prima facie basis there is no firm nexus between the petition and the conservatory order sought in the application.

2. Particulars of the threatened or actual contraventions of s 80 have not been given.

3. The cause of action against the ECK as the implementing authority is not apparent, because all that is required of the Applicant now is to amend the Constitution in order to register under the new regime and it is not at this threshold stage shown how the constitutional right of Applicant is being limited or restricted by the amendment of its Constitution. In addition it has not been shown on a prima facie basis that the PPA is not an Act contemplated as capable of limiting the rights under s 80 of the Constitution. As held in the ***KENYA BUS SERVICES LTD & 2 OTHERS v ATTORNEY GENERAL & 2 OTHERS [2005] e KLR*** fundamental rights are not absolute and are subject to the particular limitations as set out in each provision and also subject to the rights of others and the public interest. In this case it is clear to the Court that the Act is aimed at attaining the public interest of achieving an orderly party system, national cohesion and party discipline - see S 1A of the constitution.

4. Although the Applicant has had 3 months to comply he chose to come to court on 20th November, 2008 only 23 days before the deadline of amending the Constitution namely 3rd December, 2008. The Applicant has not given any good or valid reasons as to why it could not comply with the order. The reason that the notice was too short and that it has a limited membership is not on prima facie basis valid taking into account that the notice was for 3 months. In addition the PPA does have a provision for extension for compliance.

5. The Act has transitional provisions which take care of the old and the new regimes and consequently the arguments on the effect of retrospectivity or retroactivity might not be sound taking into account s 46 of the Constitution.

6. The final reason is that in the circumstances the Petition will not be rendered nugatory by a denial of the conservatory order in that the issue of the alleged unconstitutionality can still be addressed in the Petition and relief (if any) granted.

Counsel for the Applicant has argued that failure to grant a conservatory order would render the petition nugatory. However, I cannot uphold this contention in that under section 84 and section 123(8) of the Constitution the High Court has jurisdiction over any person or authority both for the purposes of the enforcement of fundamental rights and for the purpose of interpreting the Constitution and is also empowered to make such orders issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing fundamental rights. The High Court is not limited in the remedies it may give for the purpose of enforcing and securing fundamental rights and freedoms. No

authority or person is immune from this jurisdiction. It follows therefore even if the Applicant were to be deregistered under the PPA the High Court could if the Applicant is finally successful and it is appropriate to do so make an order of restoration of the party.

7. On the issue whether the Applicant has satisfied the threshold test for the grant of a conservatory order as regards the requirement as to whether what is alleged to have happened is justifiable in a democratic state the court finds that the Applicant has not passed the test. Firstly the phrase justifiable in a democratic state means tolerance, broadmindedness, and respect for human rights. While under section 1A of the Constitution Kenya is a multiparty and democratic state she cannot necessarily apply the same test as in some of the other states that have wholly or substantially homogeneous cultures. A valid test must take into account the diversity and the multethnic nature of the state where the overriding public interest is to cultivate cohesiveness unity, common good and vision. Thus Kenya has to retain a margin of appreciation in order to take into account her unique public interest considerations and would not become undemocratic for limiting some rights by law in order to cater for her special needs. It has not been demonstrated on a prima facie basis that through the provisions of PPA Kenya has gone outside her margin of appreciation.

8. Moreover even at this threshold stage the court appreciates the need to apply the test of proportionality. Thus it cannot be right or proportionate for the Court to grant a drastic conservatory order to stop the operation of an Act of Parliament on some still unproven special needs of one party Applicant because this would be contrary to need to uphold the common good or the public interest being advanced by the PPA.

9. The Applicant is also guilty of laches and as contended by the Hon the Attorney General's representative the passage of the PPA did involve a substantial element of stakeholders consultations and this did in turn meet the requirements of participatory representation and democracy as contemplated by S1A of the Constitution. Waiting until the final three weeks of the deadline in order to mount a challenge undermines the values of participatory representation and democracy and therefore a conservatory order would be unjust.

For the above reasons the application is dismissed and I make no order as to costs.

DATED and delivered at Nairobi this 2nd day of December, 2008.

J.G. NYAMU

JUDGE