



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 758 of 2007

MEDO MISAMA.....
APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL &

REGISTRAR OF SOCIETIES.....RESPONDENT

RULING

The background information is that a party calling itself Chama cha Mapindusi prepared a Constitution dated April 2006 annexure pmm/1. Its objects are set out in paragraph 2.0 among them are:-

- (a) All men and women are born equal.
- (b) Inherent right to life.
- (c) Right to own property.
- (d) Socialism.
- (e) Self reliance.
- (f) Eradication of tribal nepotism and tribalism which are social economic diseases.
- (g) Politics sharpen people's lives directly or indirectly.

The aims are set out in paragraph 2.1 among them a desire to contest the elections, promote socialist self reliance policies, protect independence of Kenya

and and promote civil liberties, promote employment opportunities, promote and protect freedom of speech, association religious belief, political participation, free ingress and outgress of Kenya, adherence to the rule of law, ensure that Kenya is democratically governed, to cultivate, promote and foster a revolutionary culture and spirit amongst Kenyans and compatriot elsewhere with the view of making our society a more tolerant and better place for all to raise and founder a family, promote universal declaration of human rights, economic development, develop cooperative movements within socialist ideas, wiping out of social menaces such as poverty, ignorance, disease, gender in equality and child labour, equal treatment of people without discrimination based on sex, religion, creed, race or social

status; denounce oppressive practices such as victimization, intimidation, discrimination, corruption, fear and or favour, to fight colonialism, neo-colonialism, slavery, illicit trade or drugs, human trafficking, money laundering, terrorism environment degradation and any other vice that threatens to destroy humanity and life as presently known, foster good working relationship, with other political parties in Kenya, Africa for purposes of consolidation. African unity with the aim of consolidating good neighbourliness and preserving heritage in Africa and also cooperate with other political parties in the world.

Armed with that constitution the applicants allegedly applied to the Registrar of societies for Registration as a political party. The response to this is found in annexure PMM2 dated 22nd September, 2006 via which the Registrar conveyed her refusal to register the party in accordance with the provisions of Section 11 of the Societies Act Cap.108 Laws of Kenya. The content of the reason is as follows *“The Registrar has reasonable cause to believe that the interests of peace, welfare or good order in Kenya would be likely to suffer prejudice by reasons of your registration as a society”*. Following that refusal efforts were made by the KNCHR (Kenya National Commission on Human Rights vide their letter KNCHR/CRD/1071/2006 dated 4th September 2006 appealing to the Hon. The Attorney General to have the party registered. Apparently there was no response. This lack of response prompted the issuance of annexure PMM4 from the KNCHR dated 15.11.2006 of the intention to sue the Registrar of Societies. But before coming to court the matter was taken to KNCHR as a complaint. The proceedings annexed to the supplementary affidavit show that the proceedings were conducted on 14th June 2007 and 12, 13 July 2007. It is evident from the heading of the proceedings that the office of the Attorney General on its own behalf and on behalf of the Registrar of Societies and Acting Registrar of societies was represented by Counsel. Scheming through the proceedings shows that the promoter of the party Professor Misama was grilled at length on the party by the representatives of the Attorney General. At page 12 of the proceedings of 12th July 2007 the promoter clarified that Chama Cha Mapinduzi in Swahili would simply mean *“a party of change”* in English. At page 16 the promoter was taken through the objects and aims of the party.

As per the documentation presented to court, the proceedings closed before the Attorney General or the Registrar of Societies opted to offer any evidence the panel. The decision of the panel is annexed to the main supporting affidavit as annexure PMM5. After reviewing all the evidence submitted to it, revisiting the provisions of the relevant law made the following findings:-

“In this respect considering the evidence placed before us and the testimony of the complaint and in the absence of contrary evidence from the respondents after fair opportunity to produce such evidence was given, we find that the Registrar of Societies’ reason for refusal to register Chama Cha Mapinduzi was in sufficient, unreasonable and amounts to an infringement of a basic right.

Discretionary powers ought to be exercised with reasonableness, proportionality and accountability. The days when public officials exercised their discretion without being accountable for them must be in the past. We must uphold the rule of law and the principles of natural justice, which demand that all legislative powers are exercised fairly and transparently, and most of all, accountably. We therefore order that the Registrar of Societies produced to register the complainant’s political party within fourteen days from today’s date. The Registrar must allow all Kenyans to participate in the democratic process of this country openly and indiscriminately”

Upon delivery of the said decision, the applicants Counsel extracted an order of the same attached to annexure PMM6 and forwarded it to the Registrar of Societies vide their letter dated 17th September, 2007 demanding compliance with the said decision. According to representations to this court the Hon. The Attorney General never responded to that letter.

That non response on the part of the Hon the Attorney General led to the filing of these proceedings. The applicant has come by way of a miscellaneous application by way of a chamber summons brought in the matter of the Kenya National Commission on Human Rights Act 2002 and in the matter of the National Commission of Human rights Complaint No. KNCHRCH P/8/2006 and in the matter of an award under Section 19(2) of the KNCHR Act 2002 and Regulation 34(1) and (2) of the Kenya National

Commission on Human Rights (Complaints procedures Regulations 2005). The application was brought under certificate of urgency. The prayers sought are that the applicant herein be granted leave by this Honourable Court to enforce the order dated 3rd August 2007 issued by the complaints hearing panel of the Kenya National Commission on Human Rights complainants No. KNCHR/CH P/8/2006 as its own decree and that costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit, supplementary affidavit and oral submissions in court. The major ones are:-

- (1). The application is made ex parte as per the provisions of Section 19 (5) of the KNCHR Act of 2002 having been prompted by the Registrar of societies refusing to register the applicants Chama Cha Mapinduzi as a political party, upon whose refusal a complainant was lodged with the KNCHR. The applicant was heard and on ward given, which award is the one being sought to be adopted as a decree of this court so that the same can be enforced.
- (2). The complaint is justified as the Registrar of Societies is duly bound and must allow all Kenyans to participate in the democratic process.
- (3). The said Registrar has not complied with the KNCHR decision and so he/she must be ordered to comply.
- (4). The applicant is within the law and procedure and so this orders should be issued by this court ex parte.
- (5). This Court acquires its teeth from Section 19/5, of the KNCHR 2002 to enforce the commissions decision as the commission has no powers to enforce its decision.
- (6). In doing so this court has no power to question the merits of the decision arrived at. Its duty is just to enforce the decision reached once, the appeal allowed for the Registrar to react or appeal has run out like in this case. This Court is not expected to exercise any appellate jurisdiction when dealing with the matter, save that it has to take cognizance of the provisions of Section 80(1) of the Constitution of Kenya which is clear as regards fundamental rights of freedom of association.
- (7). A properly constituted body has reached a decision that the applicant is entitled to register its party and participate in the forth coming general election.

On the courts assessment of the facts herein it is not true that the hands of this court are tied and all that it is required to do is to rubber stamp the decision of the KNCHR as its jurisdiction has not been invoked in its appellate capacity but its original capacity. With due respect to learned Counsel, a High Court properly constituted and vested or clothed with unlimited powers by Section 60 of the Kenyan Constitution cannot be taken and should not be taken as a rubber stamp. Doing so will defeat the spirit of that section. It is entitled to inquiry whether moved expressly or implied as to whether its jurisdiction has been properly invoked". It was in the exercise of this unlimited jurisdiction that learned counsel asked on 05/10.2007 to furnish a certified copy of the entire proceedings before the KNCHR which he did. The Court does appreciate that it is not seized of this matter in its appellate jurisdiction. However it is entitled to satisfy itself that on the documentations before it, there is a genuine complaint to be redressed, that the correct procedure has been followed to seek the intervention of this court, and thirdly that it is procedurally in order for this court to intervene and make appropriate orders. This observation means that this court has to resolve the matter by answering three simple questions:-

- (1) Is there a genuine complaint in existence.
- (2) Has the right procedure been followed to reach this venue.
- (3) Is this court procedurally seized of the matter and can it grant the orders it is being asked to grant?.

Applying the foregoing to the facts herein, there is no doubt that the Registrar acted under Section 11 of the Societies Act to decline, Registration. The KNCHR has termed this to be a wrong exercise of discretion in addition to it not being exercised in a transparent manner. The Registrar as per contents of PMM2 exercised his powers conferred on her by Section 11 of the Societies Act Cap.108 Laws of Kenya which provides:-

“11 (1) The Registrar may refuse to register a society where:-

(a) he is satisfied that such society is a branch of, or is affiliated to or connected with any organization or association of a political nature established outside Kenya or

(b) any of the proposed officers has been at one time an officer of a society which has been refused registration or which has had its registration cancelled under Section 12 of this Act.

(2) The Registrar shall refuse to register a Society where he has reasonable cause to believe that the society has among its objects or is likely to pursue or to be used for any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya or that the interests of peace, welfare or good order in Kenya would otherwise be likely to suffer prejudice or

(b). The Minister has under paragraph (ii) of the proviso to Section 4(1) of this Act declared it to be a Society dangerous to the good government of the Republic or

(c). the terms of the constitution or the rules of the society are in any respect repugnant to or inconsistent with any law or

(d). he is satisfied that the application does not comply with the Act or any rules made there under or

(e). he is satisfied that the society does not exist or

(f). the name under which the society is to be registered –

(i) is identical to that of any other society which either is existing or has existed or of any whose application for registration has been refused under this Section or

(ii) so nearly resembles the name of any other society as to be likely to deceive the public or the members of either society as to its nature or identity or

(iii) is repugnant to or inconsistent with any law or is otherwise undesirable”

The reasons that the registrar gave was that *“she has reasonable cause to believe that the interests of peace welfare or good order in Kenya would be likely to suffer prejudice by reason of its registration as a society”*. The grounds on which that decision was based are not indicated. These same grounds are supposed to have been offered at the stage when proceedings giving rise to this ruling were being conducted. The office of the Attorney General which is officially mandated to defend wrongful or rightful execution of public duty participated in the proceedings. Annexure PMM1 to the supplementary affidavit reveals a thorough grilling of the promoter of the applicant. Having received the answers to the questions put, the burden shifted on to the Registrar of Societies to justify the exercise of her discretion and be cross examined on the same. As noted in the decision of the panel, they did not utilize that opportunity to offer an explanation. A reading of Section 11 of Cap.108 Laws of Kenya set out above shows that the exercise of that discretion is not absolute. It is questionable, and when questioned an explanation was not given and where no explanation has been forthcoming the aggrieved party is entitled to seek a legal remedy to enforce its rights. By the very fact that parliament in its wisdom found it fit to regulate formation and registration of societies within its jurisdiction, it meant that those wishing to avail themselves of that law were free to do so long as they meet the standards set therein. The requirement to meet the standards set therein also gives rise to a corresponding requirement on the part of the agent duly authorized under the said Act to give an explanation as to why he/she thinks that the Standards have not

been met. And where the aggrieved party has gone further like in this case to move to a neutral forum to invite the Registrar to come forward and defend his/her decision and the registrar fails to do so, the applicant is entitled to assume that there is really no good reason to deny him registration and seek enforcement through other lawful avenues.

The foregoing notwithstanding this court is entitled on the basis of the material before it to determine whether the exercise of the discretion was right without necessarily reviewing the entire evidence. In doing so the court is confined to the documentations that were placed before the Registrar in the first instance namely the constitution of the intended party. A summary of the objects and aims of the constitution of the intended party talks of respect for human rights, equal opportunities for men and women, economic growth, social justice etc. These ideals can be traced in the preamble of the charter of the United Nations namely:-

- (a) To reaffirm faith in fundamental human rights, on the dignity and worth of the human person in the equal rights of men and women....
- (b) Establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.
- (c) To promote social progress and better standards of life in larger freedoms.

Freedom of association being touted has its base in international treaties whose mother is the universal declaration of human rights which is cited. Social progress and better standards of life would be directed at the social menaces mentioned such as disease, poverty, ignorance etc.

The preamble of the UDHR(Universal declaration of Human Rights) recognizes the following ideals:-

- (1) The inherent dignity of the equal and inalienable right of all members of the human family.
- (2) The advent of an a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.
- (3) Man is not to have recourse as a last resort to rebellion against tyranny and oppression.
- (4) That human rights should be protected by law.
- (5) The International “Boys Club” (the United Nations) has reaffirmed its faith on the fundamental human rights in the dignity and worth of the human persons and in the equal rights of men and women and were determined to promote social progress and better standards of life in larger freedoms. Article 2 thereof spells out clearly that the prescription of rights are to be enjoyed by every one without distinction of any kind Articles 18,19,20 and 21 make provision for prescriptions for what is being inquired into here namely right to:-
 - (a) freedom of thought
 - (b) freedom of opinion and expression
 - (c) freedom of peaceful assembly
 - (d) right to take part in the government of his country.

While still at the international level, there is also the International covenant on economic, social and cultural rights. The preamble of this convention recognizes the following ideals:-

- (1) recognition of the inherent dignity and of the equal and inalienable right of all members of the human family

(2) free human beings enjoying freedom from fear and want which can only be achieved if conditions are created whereby every one may enjoy his economic social and cultural rights as well as his civil and political rights.

(3) The individual having duties to other individuals and to the community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the covenant. Articles 3,6,7,8,9,10,11,12,13 recognize the right to:-

(1) equal rights of men and women.

(2) Right to work

(3) Right to just and favourable conditions of work

(4) Right to form trade unions or freedom of association.

(5) Right to social security

(6) An adequate standard of living for himself and his family adequate food clothing and housing and to continuous improvement of living conditions.

(7) highest attainable standard of physical and mental health.

(8) Right to Education

(9) Right to cultural life.

The international convention on civil and political rights recognize the following ideals:-

(1) recognition of the inherent dignity and of the equal inalienable rights of all members of the human family.

(2) The ideal of free human beings enjoying civil and political freedom and freedom from fear and want which can only be achieved if conditions are created where by every one may enjoy his civil and political rights as well as his economical, social and cultural rights Articles 3,9,12,14 18, 19, 21, 22, 23, 24, 25,26 recognize the right to:-

(a) equal right of men and women

(b) right to liberty

(c) freedom of movement to leave and come back to ones country.

(d) equality before the law.

(e) freedom of thought conscience and religion.

(f) right to hold opinion without interference.

(g) freedom of peaceful assembly.

(h) freedom of association with others.

(i) right to a family.

(j) protection of children

(k) right and opportunity to take part in the conduct of public affairs directly or through freely chosen representatives.

(l) Equal protection of the law.

On the regional scene there is the OAU Charter, though replaced by the AU constitution Act the constitution of the applicant has borrowed some ideals from it. It recognizes the following ideals:

(1) Freedom, equality, Justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people.

(2) Efforts to achieve a better life for the peoples of Africa.

(3) To eradicate all forms of colonialism.

The all Constitution Act among others recognizes the ideal of:-

(a) partnership between governments and all segments of civil society in particular women, youth and the private sector in order to strengthen solidarity and cohesion among people.

(b) Protect human and peoples rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.

Among its objectives, the all undertakes to promote democratic principles and institutions, popular participation and good governance, to promote and protect human and people's rights in accordance within the African Charter on Human and Peoples Rights and either relevant human rights institutions, promotion of cooperation in all fields of human activity to raise the living standards of African people. Where as among its principles to promote gender equality, respect for democratic principles, human rights, the rule of law and good governance, promotion of social justice to ensure balanced economic development, respect for the sanctity of human life condemnation and rejection of impunity.

The ideals recognized by the African Charter on Human and People Rights recognizes the following ideals in its preamble among others:-

- principles and ideals in the OAU(AU) Charter
- To intensify efforts to achieve a better life for the peoples of Africa
- Recognition of virtues and values of African civilization (whatever that means.)
- Respect for people's rights should necessarily guarantee human rights.
- Enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.
- The satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights
- Undertaking to eliminate colonialism, neocolonialism, apartheid Zionism and all forms of discrimination especially those based on race, ethnic group colour, sex, language religion or political opinions.
- Adherence to the principles of human and people rights and freedom contained in the declaration, conventions and other instruments, Article 3,9,10(1), 11, 12, 13, 15,16,17,18,19,22 and 27 guarantee
- Equality before the law and equal protection of the law.

- Right to express and disseminate his opinion within the law.
- Freedom of association subject to abiding by the law.
- Rights to assembly subject to restrictions provided by the law
- Freedom of movement subject to abiding by the law.
- Right to work and to equal pay.
- Right to physical and mental wealth.
- Right to Education and family. Equal rights.
- Right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- Recognition of duties both to the family, community and society.
- The right and freedoms, of each individual are to be exercised with due regard to the rights of others collective security, morality and common interest.

Turning to the Constitution of Kenya it is to be noted that Section 70(b) makes prescription of enjoyment of fundamental rights and freedoms of the individual among them freedom of conscience, of expression and of assembly and association subject to such limitation that the enjoyment of the same do not prejudice the rights and freedoms of others or the public interest. Section 79 thereof guarantees enjoyment of his freedom of expression which is to hold opinion, receive ideas and information, and communicate ideals and information and freedom of correspondence without interference. These are to be clawed back in circumstances specified under subsection 2 namely, in the interest of defence, public safety, public order, public morality or public health. Section 80 on the other hand guarantees freedom of assembly and association that is to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests. These are clawed back in circumstances set out in sub section 2 namely actions undertaken in the interest of defence, public safety, public order, public morality or public health, for purposes of protecting the rights or freedoms of other persons. The prescriptions under Section 82 prohibits discrimination of any one by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority among others on political opinion. These are clawed back in instances where action is done in pursuance of a written law.

A reading of the foregoing sections of the Kenyan Constitution relevant to this ruling, it is clear that these give rise to three corresponding rights both to the individual and the state:-

- (1) The first right is that of the individual to claim entitlement as the applicant has done.
- (2). The state has a corresponding right to claw back that right or withhold it in circumstances where it is done within the law in the interests of defence, public safety, public order, public morality or public health.
- (3). The individual has a 3rd corresponding right which entitles him to the right clawed back by the state if he can show that what the state has done is not reasonably justifiable in a democratic society.

This courts excursion into the international, regional and national prescriptions of human rights was solely for purposes of determining whether the applicant's ideals in the objects and aims of his intended political party are within the standards set for the enjoyment of the human rights both internationally, regionally and nationally. The court takes judicial notice of the fact that Kenya is a signatory to all the above examined treaties and conventions. It is therefore bound by the Vienna law on treaties. Article 26,

27 and 46 thereof are relevant. Article 26 makes provisions for the operation of the doctrine of pacta sunt servanta servants which makes provisions that every treaty in force is binding upon the parties to it and must be performed by them in good faith Article 27 on the other hand provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. Article 46 permits or allows Kenya to withhold its consent to perform a freely given discretionary power of consent under article 27 only if the said consent is in violation of its internal law which violation is required to be manifest and concerns a rule of its internal law, of fundamental importance.

Applying the foregoing International, Regional and National human rights prescriptions to the document on the basis of which the registration was declined, the court makes the following findings:

- (1). object No.1 and 2 which are unqualified or not clawed back have been lifted from the ideals in the Charter of the United Nations, Universal Declaration of Human Rights, both the international conventions on civil and political rights and economic, social and cultural rights.
- (2). Object number 3,4 and aim number b,(e) can easily find its anchor in the prescription for the individual's duty to the community and the society prescribed for in the UDHR and the African Charter on Human and People's Rights. Self-reliance can link itself to self-determination both in the ICCPR (International Convention on Civil and Political Rights) and the economic, social, and cultural rights as well as the self-determination prescription under the ACHRR.
- (3). Object No.5 and aim number a, d, s, t and u find their way in the ideals of non-discrimination on account of political opinion. Those on international and regional political cooperation have their roots in the Charter of the United Nations which promotes regional arrangements on condition that they are within the principles and purposes of its Charter. They also find their way in the regional prescription both in the OAU Charter as incorporated in the AU Constitutive Act.)
- (4). Aim number c,i and r are anchored in the ideal in the OAU Charter as adopted by the AU Constitution Act i is also an ideal in the ACHPR (African Charter on Human and Peoples Rights).
- (5.) Aim number f, k, find their roots in the AU Constitutive Act on promotion of good governance and the rule of law.
- (6). Aim number g,h,m,n,o find their roots in the state responsibilities prescribed in the UDHR, AU Constitutive Act., ACHPR, ICCPR and the ICESCR provisions of sound economic policies for purposes of uplifting peoples standards of life. They also find their anchor in the preamble in the Charter of the United Nations.
- (7). The only odd ones out would be, those in aim number "1" because of the use of "revolutionary", because of the use of the word "egautarian" and because of the use of the words oppressive particles. The court has judicial notice that they sound Marxist in character. But if these three words are severed these can easily fall within the numerous sessional papers promulgated by Kenya that this court has judicial notice of on pronouncements on equal share of the National wealth by all Kenyans. Eradication of poverty, disease and good governance and adherence to the rule of law. Expounding of these are beyond the scope of this ruling. It is however enough to say that these are not alien and should not have been used as a basis to deny registration.

Having established that all the prescriptions in the objects and aims of the applicant's constitution on the basis of which registration was declined on account of the interests of peace, welfare or good order in Kenya being likely to suffer prejudice by reason of that registration. The burden shifts to the Attorney General to justify the clawing back of this right. The Attorney General assumes responsibility over the Actions of the Registrar by virtue of the provisions of Section 26(2) of the Constitution which makes the Attorney General the principal legal advisor to the government of Kenya. And as per the holding *inter alia* in the case of **REPUBLIC VERSUS ATTORNEY GENERAL EX PARTE BIWOTT(2002) 1 KLR 668** where Rimita, Rawal JJ. Held *inter alia* that under the Constitution, the Attorney General is an office

in the public service and he is the guardian of and represents the public interests as well as being the custodian of the legal process. This coupled with the earlier finding of this court that the exercise of the discretion under Section 11 of Cap.108 is not absolute, and calls for explanation where challenged, all go to show that the Attorney General has failed to justify the withholding of the discretion.

It is also on record that nearly all the ideals in the objects and aims can be explained away in both the international, regional and the national prescriptions of the right sought to be enforced herein. The burden shifts to the Attorney General to explain that there is justification for the Attorney General to hide under its national law and riggle out of its obligations under the treaties by virtue of the national law being of fundamental importance. That explanation has not been rendered. In the absence of the explanation, the Attorney General cannot exercise his right of clawing back that right as provided for in the Constitution of Kenya as set out herein earlier on. In the absence of showing such justification, the applicant is entitled to contend that such an exercise of discretion is not reasonably justifiable in a democratic society. If the Attorney General was frightened by words such as “*revolutions egalitarian and oppressive practices*”, the Attorney General should have simply asked the applicant to strike them out and amend them to be in line with the accepted principles of good governance and adherence to the rule of law. It should also be noted that the promoter of the intended party was grilled at length on those aims and objects and he was not shaken. No representations were made by the Attorney General as to what they found odd in those objects and aims. On the basis of the foregoing assessment the court is satisfied that there is a genuine complaint of an infringement of a right guaranteed and which has not been clawed back rightly.

Having established that there is a genuine complaint, the court moves to determine whether the right procedure has been followed to access this forum and whether this court can grant the orders sought. Section 15 of the Act provides for redress upon refusal to register. It provides: 15(1) “Any Society aggrieved by the Registrars refusal to register it, or by the cancellation or suspension of its registration under Section 12 “may”.

(a) in the case of a political party appeal to the High Court within 30 days of such refusal cancellation correct action or suspension.....” The operative word here is “may”. The procedure here is therefore optional. The aggrieved party can resort to it or to some other appropriate procedures recognized by the law of the land.

The applicant herein utilized the procedure provided for under Section 22 of the Kenya National Commission on Human rights Act 2002. It provides:-

22(1). “A person wishing to lodge a complaint of the violations of human rights shall do so orally or in writing addressed to the secretary or such other person as may be duly authorized for that purpose:

(2). a complainant under subsection (1) shall be in such form and contain such particulars as the commission may from time to time prescribe.

(3). Upon receipt of a complaint under subsection (1) the commission may-

(a) call for information or a report regarding such complaint from the government or any other body within such reasonable time as may be specified by the commission provided.

(i) if the information or report is not received within the time stipulated by the commission, the commission may proceed to inquire into the complaint without such information or report.

(ii) if on receipt of the information or report the commission is satisfied either that no further action is required or that the required action has been initiated by the government or other body, the commission shall in writing, inform the complainant accordingly and take no further action.

(b) Without prejudice to paragraph (a) initiate such inquiry as is considered necessary having regard to the nature of the complaint”.

The foregoing provisions is therefore proof that the applicant acted within the law in declining the procedure under section 15 (1) of Cap.108 and invoking the procedure under section 22 of the KNCHR Act 2002. The Commission also acted within the law by invoking the provisions of Section 23 of the same Act to notify the Attorney General and the Registrar of Societies who had been named adversely in the complaint to participate in the proceedings. This Section provides:-

“23 (1) subject to subsection (2) if at any stage of an inquiry the commission-

(a) considers it necessary to inquire into the conduct of any person or

(b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry,

It shall give that person an opportunity to appear before the commission by himself or by an advocate to give evidence in his own defence. Annexure PMMI to the supplementary affidavits is proof that the opportunity was given to the adverse party and annexure PMM3 to the supporting affidavit is the notice that went to the Attorney General soliciting intervention and non response to which led to the inquiry being held. The inquiry gave rise to the commission's decision annexure PMM5.

The enforcement procedural is set out in Section 19 of the same Act. Section 19(2) (c). Provides *“The commission may, if satisfied that there has been an infringement of any human right or freedom order.*

(c). Any other lawful remedy or redress. The remedy awarded herein is annexure PMM5, a finding that the Registrars reason for refusal to register Chama Cha Mapinduzi was in sufficient, unreasonable and amounts to an infringement of a basic right. And that discretion powers sought to be exercised with reasonableness, proportionally.

Compliance with Section 19(2) (c) sets in motion the procedures under subsection 3,4,5 and 6. These are:

19(3) A person or authority dissatisfied with an order made by the commission under subsection (2) may appear to the High Court within 21 days of such order.

19(4) An order of the commission under subsection

(2). may be filed in the High Court by any party thereto in such manner as the commission may in Regulations in Consultation with the chief justice prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order. 19(5) if no appeal is filed under subsection (3,) the party in favour of whom the order is made by the commission may apply ex parte by summons for leave to enforce such order as a decree and the order may be executed in the same manner as an order of the High Court to the like effect.

The provisions of Section 19(4) do not apply because there are no regulations in place attached to the Act. It therefore follows that the applicant was not required to give the 30 days notice of the filing of the order. The applicant was therefore right to come to court under Section 19(5) of the Act. The move was taken after giving the Attorney General notice of the same done vide annexure PMM6 dated 17th September 2007. The annexure bears a stamp from the Registrars office of the same date of 17th September, 2007. 21 days leave expired or lapsed on 8th October. The application for enforcement was presented on 4th October, 2007 about 4 days prematurely. That notwithstanding the court is satisfied that no prejudice is suffered by the Registrars department as:-

(a). They have not complained.

(b). They took part in the proceedings before the KNHCR, they were given an opportunity to justify the exercise of their discretion but they failed to do so as none was offered.

(c). Having participated in the said proceedings they are deemed to have been expected to act diligently to know the entrance of the said ruling which was delivered on 3rd August, 2007 but they did not do so until the applicant took steps to notify them of the same vide their letter of 17th September 2007 annexure PMM6.

(d). Having been notified and having acknowledged receipt of the said letter by appending their stamp on the said letter, and being aware of their rights of appeal under Section 19(3) of the KNHCR Act 2002, and being aware of the applicants corresponding right of applying *ex parte* for enforcement of the said order as a decree of the court have not taken steps to put road blocks in the path of the applicant to seek relief to enable them enjoy the fruits of the said order. They are deemed to have accepted defeat and surrendered.

In view of the above, the court makes a finding that it is procedurally seized of the matter and it has both the mandate and jurisdiction to grant the reliefs sought.

In conclusion the Court makes the following orders:-

(1) This court as both a court of law and justice was not expected to rubber stamp the proceedings herein solely because they are *ex parte* as there is no rule of law or judicial practice which precludes it from scrutinizing such proceedings before it and either grant or reject the same. It was entitled to evaluate the entire process and satisfy itself that all was well before moving to grant relief and that is what it has done. In so evaluating, the court, is not sitting on appeal over the KNCHR's decision but just to ensure that the complaint is properly anchored in the prescriptions that it alleges to be emanating from, that the applicant complied with the rules, that the Registrar violated the law and or rules in denying the right, that the applicant has a genuine complaint, he has followed the correct procedure to seek the courts intervention and that the court has the mandate and the jurisdiction to intervene. This court has done so and it makes orders that:-

- There is a genuine complaint raised by the applicant requiring this courts intervention.
- The correct procedure has been set in motion to seek the intervention.
- It is procedurally in order for this court to intervene.

(2). It is the finding of this court that although the Registrar, in annexure PMM2 did state the basis of his refusal to Registrar the applicants party, it is the judicial assumption of this court that it was on the basis of the name of the party, its objects and aims that contributed to refusal to register the intended party as that was the basic document presented to the Registrar of Societies. As assessed above most of the ideals in the objects and aims of the party have their base on both the basic International and Regional Human Rights prescriptions instruments with the exception of the claw back justifications in the ACHPR and Sections 79 and 80 of the Kenya Constitution.

(3). As assessed above this court has judicial notice that Kenya is a signatory to the above instruments and has undertaken under its state responsibility provision to avail the said rights to its citizens among them the applicant. It is therefore bound by the doctrine of *pacta sunt servanda* in article 26 of the Vienna Treaty to perform the said obligations in good faith. Kenyan Agencies charged with the legal duty to oversee Kenyas' performance is the office of the Attorney General as provided for in Section 26(2) of the Constitution and as confirmed by the holding in the case of **REPUBLIC VERSUS ATTORNEY GENERAL EX PARTE BIWOTT.(supra) (pg.29 of this ruling)**

By virtue of this legal Agency, it is the Attorney General who is responsible for the actions of the Registrar of Societies on behalf of the government.

(4). On the basis of justification or non justification for refusal to Register the applicants party, it is the finding of this court that the Registrar of Societies can only wriggle out of the obligations imposed on Kenya to avail the right claimed to the applicant and take refuge under the provisions of section 11(2) of the Societies Act Cap.108 Laws of Kenya as well as the claw back clauses both in the ACHPR and the

Constitution if it can be shown that the violation of the said rules is manifest, and it concerns a rule of its internal law (the Society Act) which is of fundamental importance. Further that it has conducted itself in accordance with named practice and good faith.

(5). This court has judicial notice that the constitution is supreme and the societies Act is subordinate to it. This being the case the withholding of the Registration has to be subject to the provisions of Section 79-80 of the Constitution. These two sections which form the basis of the prescription for the right complained of, make provision that the said right can only be clawed back in accordance with the exceptions provided for therein. It is the finding of this court that the Registrar of Societies has not brought himself/herself within the exceptions provided because:

(i). The exercise of the discretion under section 11 of Cap.108 is not absolute. It is challengeable. Where it is challenged an explanation and or justification is called for.

(ii). The nature and extend of the justification and or explanation called for is that set out in section 79 and 80 of the Constitution as anchored on the ACHPR from which the claw back clauses are inherited. The clawing back is justified in the name of public safety, public order, public morality or public health. Nothing has been presented to this court or before the KNCHR to show that the Registrar of societies exercised his/her discretion within those exceptions.

(iii). After being ruled against by the KNCHR and after due notification of the said order, the Registrar of Societies indifferently took no steps to avail himself/herself of the relief of appeal provided for in section 19(3) of the KNCHR Act 2002 within 21 days from the date of notification.

(6). In view of the matters aforesaid, the applicant is entitled to avail himself of the corresponding right of showing that the action of clawing back of the right claimed, is not reasonably justifiable in a democratic society. It is the stand of this Court that the applicant is entitled to avail himself of that corresponding right, because as shown herein, both the ideals in the objects and aims put forward in his Constitution PMM1:-

(i) have their base in the core international and regional human rights prescriptions as well as the Kenyan Constitution itself.

(ii) The use of the ward “Revolutionary, Egalitarian” and “oppressive practices” which this court has judicial notice that they may sound Marxist in nature considered alien in a democratic capitalist state like Kenya, could be ordered struck out or explained as was done in the proceedings, PMM1 to the supplementary affidavit and there is no contrary view that they bear harmful meaning and/or intention contrary to what the applicant assigned to it in the proceedings.

(iii) This court has judicial notice that Kenya as a nation or state is equipped with sufficient tools in the form of security forces and legal institutions which can tackle any mischief that may arise as a result of the applicant being allowed to operate within its borden as political party should its activities be found to be contrary to the established principles of law governing such organizations in particular and other institution generally.

The Registrar will not be devoid of a remedy if applicant is registered and found to be engaging in subversive activities in future as there is a remedy of cancellation and or suspension provided for in section 12 of the same Act. The Section empowers the Registrar to de registrar, cancel or suspend registration on the ground that:-

(a) the society has among its objects or is likely to pursue or to be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace welfare or good order in Kenya.

(b). The interests of peace, welfare or good order in Kenya would be likely to be prejudiced by the continued registration of the society or

- (c). The terms of the constitution or of the rules of the society are in any respect repugnant to or inconsistent with any law or
- (d). The society has willfully and after notice from the Register contravened any of the provisions of its constitution or of its rules or has contravened Section 20 of the Act or
- (e). The society has failed to comply within the time allowed for compliance with an order made under Section 31(1) of the Act or
- (f). The society has dissolved itself.
- (g). The executive of the society is constituted otherwise than in conformity with its constitution and rules or
- (h). The society has one of its officials a person who has been in office of another society which has been refused registration under this Act or which has had its registration cancelled and the registrar has given notice that such an officer must be removed within a specified period which the society has not heeded.
- (i). The society has failed to furnish one of the documents required under Section 30(1) of this Act or
- (j). That the society is or has without the Registrars' consent become a branch of or affiliated to, or connected with any organization or group of a political nature established outside Kenya.

All that the Registrar is required to do to invoke the above provision is to issue a notice calling upon the society to show cause within such period as is specified in the notice why its registration should not be cancelled and or suspended and if the society fails to show cause the Registrar may cancel or suspend the Registration as the case may be. Alternatively the Registrar may seek approval of the minister to cancel and or suspend under Section 10 of the Act, or should the and instead grant exception. Further should the society be a non starter or cease to be a society within the meaning of a society within the should the minister under paragraph (ii) of Section 4 of the Act declare it to be a dangerous society to the good government of the Republic of the Registrar can cancel or suspend the same. Should the society be found to have opened branches all over the country, the registrar will have power to cancel or suspend the parent society as well as the branches.

(7). In view of the matter stated in No.6 above, there is no justification for the Registrar to anticipate that the operations of the applicants society will be contrary to law without giving it a chance to prove itself and only if it fails to conform is when it can be denied not only the right to exist but also to carry out its activities. The Registrars fears are baseless.

For these reasons there is merit in the applicant's application dated 3rd October 2007 and filed on 4.10.2007. Prayer 2 thereof is granted. The applicant be and is hereby granted leave of this court to enforce, the order dated 3rd August 2007 issued by the complaints panel of the Kenya National Commission on Human Rights Complaint No. KNCHR/CH P/2006 as a decree of this Court.

(8). Since the proceedings were exparte, costs of the same are ordered to be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2007.

R.N. NAMBUYE

JUDGE