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

Misc Appli 44 of 2007

EDWARD GACAU KARIUKI & OTHERS……APPLICANTS

Versus

THE REGISTRAR OF SOCIETIES……RESPONDENT

JUDGMENT

By a Notice of Motion dated 7th February 2007 the six Applicants seek the following orders:-

(a) An order of mandamus compelling the Registrar of Societies to consider the Application for Registration of the United Popular Movement Political Party and to communicate his decision in accordance with the Societies Act;

(b) An order of mandamus compelling the Registrar of Societies to enter the United Popular Movement Party into the Register of Political Parties and to issue it with a certificate of Registration or exemption from Registration in accordance with the Societies Act;

(c) Costs of this Application be in favour of the Applicant.

The application is supported by a Statutory Statement and Verifying Affidavit sworn by Edward Kariuki Gacau, the interim Chairman of United Popular Movement Political Party. The Applicant also filed skeleton arguments dated 20th May 2007.

The Application was opposed and a Replying Affidavit was filed by Helen Koki, a State Counsel and Assistant Registrar of Societies in the Department of the Registrar General, Attorney General's Chambers who also filed skeleton arguments on 16th May 2007. Mr. Kimani urged the Application on behalf of the Applicant while Mr. Adera appeared for the Respondents.

Briefly, the Applicants' case is that on 9th May 2005, they presented an Application to the Registrar of Societies to register United Popular Movement as a Political Party. That they complied with the requirements set out in Section 9 of the Societies Act and Rules and paid for the Application.

That the Registrar has failed to communicate his decision to the Applicants within 120 days as required by law and it is over 1 ½ years since the said Application was madeand as a result, the activities of the Applicants have been compromised. That despite reminders (annexed as EKG 2), there has been no response It is the Applicants contention that failure to register the party is done in bad faith, is

discriminatory and is unreasonable. That other parties have been registered after their application and that in any event, no reason has been given for non registration nor are their objects incompatible with peace and good order as envisaged under Section 11 of the Societies Act.

That the Registrar has a statutory duty to register political parties but has failed to act in this case and the order of mandamus should issue. That the Applicants wish to take part in the upcoming campaigns but have been hampered. That they have demonstrated that they have standing in the matter. The Applicants relied on the case of KENYA

NAL EXAMINATION COUNCIL V REP CA 266/96 which set out the scope and nature of Judicial Review orders that are sought herein.

In reply to the Application, Helen Koki did acknowledge that an Application for Registration of a Political party was made by the Applicants on 9th May 2005. That the Respondent then forwarded it to the relevant Government agencies for vetting which is a condition precedent to the registration of any Political Party. That the delay in communicating its decision was occasioned by the delay by the other Government agency in communicating its decision. That the agency communicated back after these proceedings were instituted and that the recommendations are adverse to the registration of United Popular Movement, the key one being that the proposed party is composed of almost exclusively people of one ethnic group and region, the leadership is professionally biased and is not good for a country that seeks to promote national unity, ethnic harmony and non institutionalization of ethnicity. That the Society's composition is incompatible with peace, welfare and good order of Kenya and the Registrar cannot therefore register such a society. That the objectives of the proposed party of creating a non-ethnic and non sexist movement for Kenya is contradicted by its composition and gender exclusivity.

Mr. Adera therefore argued that the orders sought are not available as the 1st prayer is spent since the Respondent's now know reasons for non registration of their party and that the 2nd prayer too is unavailable as a public body cannot be compelled to exercise its discretion in a particular manner.

I have now considered the rival arguments by both counsel, the statement of facts, the Verifying Affidavit, the Replying Affidavit and Skeleton Arguments. It is not in dispute that the Applicants made their Application for Registration way back on 9th May 2005. When they did not get a response they sent to the Registrar two reminders dated 1st September 2005 and 21st March 2006. Section 4 of the Societies Act allows one to seek registration of a Society by the Registrar. S. 4 (2) States:-

"**S.4 (2) ……..the Registrar shall consider every Application for Registration of a Society or for exemption from registration and shall communicate his decision thereon to the Society within one hundred and twenty days of receipt of the Application."**

Under the above provision, there is a statutory duty imposed upon the Registrar to consider the Application and it also mandates the Registrar to communicate his/her decision within 120 days. It is obvious that the Registrar did none of the above. There is no evidence that the Applicants did not comply with the prerequisites of the said Application for Registration under S.9 of the Societies Act. The reminders to the Registrar elicited no reply. It is not until this Application was filed over 1 ½ years later that the Respondent gives the reasons for failure to communicate their decision to the Applicants, that is, that the other agencies were vetting the proposed party. In my view the delay in communicating with the Applicants was too long, unfair and unreasonable in the circumstances. There was nothing wrong or difficult with the Registrar writing to the Applicants and telling them the Registrar was awaiting a response from the other agencies. The Registrar's silence was unfair and unreasonable in the circumstances.

S. 4 (2) the Societies Act clearly provides that the Registrar '**shall consider'** the Application. That phrase clearly gives the Registrar a discretion to grant or deny the Application. Registration may proceed under S.11 of the Societies Act. Under S. 11 (1) the Registrar is given discretionary powers to allow or refuse a registration.

It reads:-

S. 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 any time an officer of a society which has been refused registration or which has had its registration cancelled under Section 12 of this Act.

However, S.11 (2) is couched in mandatory terms. It stipulates;-

"**11 (2) The Registrar shall refuse to register a society where-**

(a) he has reasonable cause to believe that the society has among its objects, or is likely to pursue or to be used for any unlawful purpose or any purpose pre-judicial to or incompatible with peace, welfare or good order in Kenya, or that the interests of peace, welfare of good order in Kenya would otherwise be likely to suffer prejudice by reason of the registration of the society"

The Registrar is thus given wide powers to refuse registration if the registration of the proposed society would be prejudicial to the interests of "**peace, welfare or good order in Kenya".**

Helen Koki has deponed that they have since received communication that the proposed party has ethnical, and tribal leaning, gender insensitive and goes against the principles of national unity which are not good for the peace, welfare or good order of Kenya and that therefore registration cannot be granted, that in light of ethnic tensions, tribal clashes that have been experienced in Kenya, it would be unwise to register a party that has tribal or ethnic inclinations as that would be a threat to the peace, welfare and good order of all Kenyans. It is upto the Registrar, in considering the Application for registration, to decide what is incompatible with peace, welfare and good order of the Kenyans. That decision has now been made though it comes over 1 ½ years later. Registration has been refused. So can the orders as sought in the Application be granted?

But even before I consider that question, what is the nature and scope of an order of mandamus? The Court of Appeal in considering the scope of mandamus in the **KENYA NATIONAL EXAMINATION COUNCIL CASE** reproduced Halsbary's Laws of England 4th Ed. At paragraph 89 it is stated.

"**The order of mandamus is of a most extensive nature, and is in the form of a command issuing from the High Court of justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases which although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial or effectual."**

At paragraph 90 – it is stated:-

"**The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way".**

In this case, the Registrar had a public duty imposed on him by S.4 of the Societies Act to consider the Applicant's Application and make a determination allowing or refusing registration. Though the Registrar had not performed that duty when this Application was filed, the same has now been considered and registration refused. It means that the prayer for mandamus has been overtaken by events or it is

spent and cannot issue because there is nothing more for the Registrar to consider. If the Applicants are dissatisfied with that decision, they know what to do, appeal to the Minister under S. 15 of the Societies Act. Prayer I of the Notice of Motion cannot be granted.

In prayer 2, the Applicants seek to compel the Respondent to register their Political Party and issue them with a registration certificate. The Applicants want the court to order the Respondent to act in a specific way. The court has no powers to interfere with the Registrar's discretion as it would be usurping his powers under the Act. The discretion is wholly in the hands of the Registrar, to register or not to register considering all the circumstances of the case. If the Applicants are dissatisfied with that decision, they have a right of appeal. This is an Application for Judicial Review which considers not the merits of a decision made but the process by which a decision was arrived at. Again, the court would not grant the 2nd prayer.

Though the court noted there having been some unfairness on the part of the Registrar in not telling the Applicants what had befallen their application, this court finds that they are not entitled to the orders sought for the reasons given in this judgment. Judicial Review orders are discretionary and the court may decline to grant them even if deserved depending on the circumstances of each case.

The upshot is that the Notice of Motion dated 7th February 2007 is hereby dismissed with each party bearing their own costs.

Dated and delivered this 9th day of November 2007.

R.P.V. WENDOH

JUDGE

Read in presence of:

Mr. Adera for the Respondent

Daniel: Court Clerk