



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Misc Civ Appli No 742 of 2005

1. JOHN MUSA KILONZO)
 2. STELLA S. SEKI)
 3. ANTHONY M. M. MULWA)
 4. ANDREW W. ATETWE C/O S.O. OGUK & CO. ADVOCATES)
- APPLICANTS**

VERSUS

THE REGISTRAR OF SOCIETIES.....
....RESPONDENT

RULING

The Ex-parte Applicants are the interim officials of a new political party known as New Democrats Union For Change (the Party). On the 3rd November 2004 they applied for the registration of the party. In her letter dated 27th June 2005 the Assistant Registrar of Societies (the Registrar) refused to register it. After obtaining leave of this court the Applicants have applied for the orders of certiorari to bring to this court and quash that decision and mandamus to compel her to register it. As usual the Application has been brought under Order 53 Rules 1 and 3 of the Civil Procedure Rules. It is based on the grounds :-

“(a) That on or about the 3rd of November 2004 the Ex-parte Applicants who

are Kenyan citizens of good standing in the society applied to the

Registrar of Societies for the registration of a new political party under

the name of “NEW DEMOCRATS UNION FOR CHANGE” and

submitted the necessary Forms duly completed together with the

constitution of the party and the required fee for registration.

(b) That on or about the 27th of June 2005 the Registrar of Societies Notified the Ex-parte Applicants of her decision refusing to register the said party on the grounds that: -

“The Registrar has reasonable cause to believe that the interest of peace welfare or good standing in Kenya would be likely to suffer prejudice by reasons of your registration as a society”.

(c) That the decision of the Registrar of Societies in refusing to register the said political party and its interim officials was arrived at wrongly without any just or reasonable cause probably because the Minister for Justice and Constitutional Affairs has issued a political statement that the Government would no longer register any more political parties.

(d) That the Registrar of Societies by refusing to register the said political party is thereby acting contrary to the aspirations of many Kenyans who struggled for many years to widen the democratic space in the country and to usher in the multi-party politics.

(e) That the Registrar of Societies erred in law and fact by denying the Ex-parte Applicants registration of the new political party without offering any audience or the right to make any representation.

(f) That subsequent to the refusal to register the said party the Registrar of Societies erred by declining to allow the Ex-parte Applicants to make any representations and/or challenging the said decision hence making this application necessary.

(g) That the Registrar of Societies had a duty to act Judicially in its deliberations and to take into account all relevant matters and to act reasonably in coming up with her decision.

(h) That the decision by the Registrar of societies in refusing to register the said political party and the Ex-parte Applicants as its interim officials has caused and is likely to cause the Ex-parte Applicants irreparable loss and damage and amounts to denying the said Applicants the right to exercise their democratic rights of association and to propagate their political belief.

(i) As a result of the foregoing the actions of the Registrar of Societies are arbitrary, capricious and unreasonable”.

In his affidavit in support of the Application John Musa Kilonzo, the first Applicant, avers that in making that decision the Respondent acted judicially and was therefore not only under duty to take into account relevant matters but to also act reasonably. He further avers that it was not until the Registrar filed a replying affidavit that the Applicants knew that registration of their party was refused on the ground of ethnicity. In the supplementary affidavit he further avers that that is erroneous as the interim officials come from all the provinces of our Republic.

Basing himself upon these averments Mr. Oguk, counsel for the Applicants, argued that the Respondent was wrong in assuming that the interim officials of the party come from the same ethnic group. Even if they did counsel does not see anything wrong with that as the Applicants have a constitutional right enshrined in section 80(1) of the Constitution to associate with whoever they like, be they from one ethnic group or not. He contended that other political parties like The Peoples Progressive Party with members of one ethnic group have been registered. He concluded that line of argument that the reasons given by the Respondent for refusing to register the party are flimsy.

Mr. Oguk further argued that the Respondent flouted the rules of natural justice by failing to give the applicants audience before refusing to register the Party and prayed that the orders sought be granted.

In response to these submissions Mr. Adera for the Respondent relying on the replying affidavit of Hellen Koki, the Assistant Registrar of Societies, argued that this application is misconceived and had in law. He said if the Applicants were aggrieved by the Respondent’s decision they should have appealed to the High Court as provided by section 15(1)(a) of the Societies Act, Cap 108 of the Laws of Kenya. Mr. Adera further submitted that after receiving the Applicants application for the registration of the party the Respondent called for a confidential report which revealed that the initial interim officials of the Party are all from one ethnic group. That, he said, apart from contradicting clause 2 of the Party’s proposed

Constitution, is incompatible with the interests of peace and good order of the country.

Counsel further contended that that the self-same section 80 of the Constitution which the Applicants are touting as giving them the right of associating with whoever they like is qualified by subsection (2) thereof which provides that nothing done under the authority of any law in the interest, *inter alia*, of public order shall be regarded as an infraction of that right.

In response to the charge that the respondent flouted the rules of natural justice by denying the Applicants audience before making the decision, Mr. Adera submitted that the Societies Act does not provide for applicants for the registration of any party or association to be given audience. To the contrary, he said, section 9 of the Act requires such applications to speak for themselves. He concluded that in refusing to register the Party the Respondent was not in any way influenced by the utterances of the Minister for Constitutional Affairs that the government would no longer register any more political parties as claimed in the Application.

In his riposte Mr. Oguk submitted that although the Applicants were interviewed by the security personnel before registration was refused the report arising therefrom was erroneous and should not have been relied upon.

I have considered these rival arguments alongside the averments in the statement accompanying the application for leave and the supporting and replying affidavits. The grounds upon which this application is based which I have reproduced herein above are more of an appeal against the Registrar's impugned decision than an application for its review. The judicial review jurisdiction is not an appellate jurisdiction. It is a limited jurisdiction. The orders of certiorari and prohibition issue primarily to inferior courts and other persons and bodies having the duty to act judicially, where there has been an actual or threatened usurpation of jurisdiction or a breach of the rules of natural justice or an error of law on the face of the proceedings. The legal authority envisaged is normally one derived from statute but these orders can also issue to control the exercise of jurisdiction by non-statutory bodies performing functions of a public as distinct from a private nature like private universities which admit members of the public as their students.

The persons and bodies who have legal authority and are amenable to the two orders of certiorari and prohibition include public servants and state corporations who derive their power from statute. In respect of these persons and bodies as opposed to the courts or statutory tribunals it must always be borne in mind that it is the abnormal exercise of administrative power that is challenged in courts. The main control of administrative power is by administrative agencies. The two orders of certiorari and prohibition will not issue in respect of the performance of purely ministerial or administrative acts. The question then arises as to how one is to determine acts which are purely ministerial or administrative.

There is no clear cut definition of what acts are "purely ministerial or administrative". Each case will depend on its peculiar facts but the general criterion to be applied in determining whether or not the act complained of is purely ministerial or administrative has been stated thus in *1 Halsburys Laws of England, fourth Edition paragraph 83 at page 104: -*

“In order to establish that certiorari or prohibition will issue, it appears to be enough to show that the body in question was obliged to act in judicial manner, in the sense that it was under an express duty to adopt a procedure analogous to a judicial procedure, or that it was required to determine questions of law and fact or otherwise to exercise a limited or judicial discretion, or that it was

under an implied duty to act judicially in accordance with natural justice, or even under a more loosely formulated duty to act fairly.

A duty to act judicially may be inferred from the severity of the impact made by the exercise of a power or duty on individual interests; but not every person or body whose acts are subject to review by prohibition or certiorari is necessarily obliged to observe the procedural standards imposed by the rules of natural justice.

An act or decision lacking any judicial characteristic whatsoever, substantive or procedural, will not, it seems, be amenable to review by means of the two orders; hence, a discretionary decision that can be based entirely on considerations of public policy will not be thus reviewable unless it imports a duty to observe fair procedural standards.”

Certiorari and prohibition will also issue to control discretionary powers given to public servants and public bodies when those powers are exercised unreasonably. Public servants or bodies exercise their powers unreasonably when they take into account any matters which they should not, or, conversely, when they refuse or neglect to take into account matters they should take into account. Even when they have kept within the four corners of the matters they ought to consider the decision of public servants and bodies will nevertheless be amenable to review if the conclusion reached is so unreasonable that no reasonable person or authority could ever have come to it. - **Associated Provincial Picture House Ltd – Vs – Wednesbur Corporation (1948) 1 K.B. 223.**

The other order sought in this application is mandamus. What is its scope or when will it issue? Once again we turn to **1 Halsburys Laws of England 4th Edition**. At paragraph 89 on page 111 it is stated that: -

“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 where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate”, 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 other words “an order of mandamus will issue to compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.” – Kenya National Examination Council – Vs Republic, Ex-Parte Geoffrey Gathenji Njoroge & Others, Nairobi Civil Appeal No. 266 of 1996 (CA).

With these legal principles in mind I would now like to turn to the facts of this case and determine whether or not the Applicants are entitled to the orders of certiorari and mandamus which they have sought in this application.

As I have already stated, in her letter of 27th June 2005 to the Applicants, the Assistant Registrar of Societies advised the Applicants that:

“The Registrar has reasonable cause to believe that the interest of peace welfare or good standing in Kenya would be likely to suffer prejudice by reasons of your registration as a society.”

Did the Registrar have powers to refuse registration for the reasons given? If she had is her decision, on the principles set out herein above, nonetheless amenable to be quashed by an order of certiorari?

The Registrar appears to have acted under section 11 of the Societies Act. Sub-section (2) thereof, unlike sub-section (1) which is discretionary, is in mandatory terms. It states that: -

“(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 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 by reason of the registration of the society.”

Looking at this sub-section I have no doubt in my mind that if the Registrar had reasonable cause to believe that the registration of the society would be prejudicial to the interest of “peace, welfare or good order in Kenya” she was authorised, nay, obligated by the subsection to refuse the registration of the society.

Though the Registrar has statutory mandate to refuse the registration of the society did she have reasonable cause to believe that the registration of the society would be prejudicial to the interest of peace, welfare and good order in Kenya? In other words did she act unreasonably by taking into account matters she should not have taken into account or did she refuse or neglect to consider matters she should have considered?

As stated in the replying affidavit of Helen Koki and submitted by Mr. Adera, before refusing registration the Registrar had called for and obtained a confidential report on the application. The report must have been given by the National Security Intelligence Service as Mr. Oguk confirmed that before registration was refused the Applicants had been interviewed by the security personnel. The report revealed that the interim officials were all from one ethnic group. Mr. Adera submitted that the Registrar considers the registration of tribal parties a security risk and therefore prejudicial to the interest of peace, welfare and good order in Kenya.

Though they have denied belonging to one ethnic group and asserted that they come from all the provinces of this Republic, the Applicants have not addressed the issue of their ethnicity. I did specifically ask their Advocate to address me on that but he equivocated. One can reside in Western Province but does not come from any ethnic groups in that area.

Though the Applicants, like other Kenyans, have a constitutional right to associate with whoever they like I agree with Mr. Adera that that right is qualified. Section 80(2) of the constitution states that: -

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health.”

The law that makes provision for “public order” is section 11(2) (a) of the Societies Act which I have quoted herein above.

In view of this clear statutory authority the Registrar was, in my view, quite right in taking into account the ethnic background of the Applicants and in refusing registration of their party.

The Applicants arguments that the Registrar was influenced by the utterances of the Minister for Justice and Constitutional Affairs and that a tribal party in the name of Peoples Progressive Party has been registered hold no water. They did not provide any evidence in support of those allegations.

The Applicants also complained that they were not heard before registration of their party was refused. As already stated in the quotation from paragraph 83 of 1 Halsbury’s Laws of England 4th 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 mere confirmation of their ethnicity did not, in my view, require the Registrar to give the Applicants audience. They have had audience before this court but as I have said they have not given me their ethnic backgrounds. That confirms the Registrar’s claims. Even if she had given them audience they would most likely have behaved the same way they have done in this court.

Registration of tribal parties will balkanize this country into tribal enclaves and threaten national unity. This court cannot sanction such thing. Neither certiorari nor mandamus can therefore issue. This application is dismissed with costs.

DATED and delivered this 27th day of January 2006.

D. K. MARAGA

JUDGE