REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 774 of 2003

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THECONSTITUTION OF KENYA FOR ENFORCEMENT OFFUNDAMENTAL RIGHTS

AND

IN THE MATTER OF SECTIONS 3, 82, 74 AND 84 OF THECONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF PERSONS ACT CAP107 LAWS OF KENYA

AND

IN THE MATTER OF GAZETTE NOTICE NO 5320 DATED 7thNOVEMBER 1989 ISSUED BY THE PRINCIPAL REGISTRAR OFPERSONS AND PUBLISHED IN THE KENYA GAZETTE OF 10thNOVEMBER 1989

BETWEEN

HERSI HASSAN GUTALE..... I st APPLICANT

ABDULLAHI MOHAMED AHMED..... 2nd APPLICANT

VERSUS

PRINCIPAL REGISTRAR OF PERSONS..... I st RESPONDENT

HON. ATTORNEY GENERAL..... 2nd RESPONDENT

JUDGMENT

On 9 July 2003 the Applicants herein took out an application by way of Originating Summons against the Respondents pursuant to the provision2 of *inter-alias* section 84 of the Constitution of Kenya. The said applicationwas taken out in respect of constitutionality of the Gazette Notice No 5320dated 7th November 1989 issued by the Principal Registrar of Persons the 2ndRespondent herein and published in the official Kenya Gazette of 10November 1989.

Under an earlier Gazette Notice Number 5319 dated 7th November1989 and published in the official Kenya gazette of 10th November 1989 thePrincipal Registrar of Persons appointed various senior public officers asregistrars to verify countrywide veracity of registration documents of allKenyan of Somali origin. Vide the said gazette Notice No. 5320 hereinafterreferred to as "the Notice") the Principal Registrar of Persons required allpersons of Somali ethnic community resident in Kenya who wereeighteen(l 8) years and above to attend before the said registration officers atcenters specified therein and furnish such documentary or other evidence ofthe truth of their registration between the 13th November 1989 and 4thDecember 1989. The said senior public officer constituting the saidregistrars countrywide came to be known in the local palace as the YusufHaji Special Task Force. (Hereinafter referred to as "the Task Force")appropriately so named against the Government officer who chaired theentire exercise.

The said Task Force proceeded amid considered documentary andother evidence availed to it and made findings in October 1991. Uponconsideration of the said documentary evidence, the said Task Forceproceeded and issued special verification certificate to the Kenyan Somalis,confiscated the identity Cards of those declared as non-Kenyan Somalis andordered that they be deported forthwith. The said Task Force also submittedto the Principal Registrar of Persons a list of all persons affected and whoseregistration records were endorsed as cancelled. Amongst that list were thenames of the Applicants herein.

The Applicants have therefore come to the court seeking ninedeclarations against the findings of the said Task Force summarized asfollows:-

1. That the order of the Principal Registrar of Persons under the saidNotice is unlawful illegal and discriminatory on the basis of ethnicity

2. That verification of truth of registration of Somali Community isillegal and discriminatory on ethnic ground.

3. That the order of the Principal Registrar of Persons was biased anddiscriminatory in demanding documentary proof of validity ofregistration and subsequently issuing special screening papers.

4. That section 8 of the Registration of Persons Act (Cap 107) does notconfer power on Principal Registrar of Persons to demand evidence ofproof of validity of registration and issuance of special screeningpapers and that therefore the said order is unlawful void and ultravires as it derives its authority from subsidiary legislation

5. That if section 8 of Cap 107 confer power upon Principal Registrar ofPersons to require furnishing of evidence, then it is discriminatory andoffends section 82 of the Constitution as being *ultra-vires.*

6. That the acts or omission done pursuant to the said Notice are illegalunlawful and void because the order itself was unlawful anddiscriminatory.

7. That the decision of Principal Registrar of Persons not to issue newI.Ds to the Applicants is illegal and unlawful because the said TaskForce was illegal and unlawful as verification exercise wasunconstitutional for being discriminatory.

8. That the Applicants are entitled to the new generation IDs because byvirtue of being holder of valid Kenyan passports and old generationIDs they are Kenyan citizens.

9. That the Applicants are Kenyan Citizens and the said Task Forcecould therefore not declare them non-citizens as it was itself illegalhaving being established via an illegal and unconstitutional order.

The Applicant's case is therefore that they are Kenyan citizens because they are holders of both the official Kenyan passport, the old generation IDs together with official Kenyan birth certificates. They

contend that they are victims of outright acts of discrimination through' illegal acts of the 2nd Respondent who has since 1996 declined to issue them with new generation IDs. Though the said task Force made its recommendations on 18th October 1991, the 2nd Respondent did not communicate with them until 24th June 2002 when he declined to accept the Applicants application for issuance of the said new generation IDs by reasons of the findings of the said Task Force. They admit to have participated in the screening exercise which commenced on 13th November 1989 and ended on 4th December 1989, andwhich screening lead to issuance of special screening cards to those whowere declared to be lawful Kenyan Somalis. They further contend that lackof new generation ID has caused them considerable inconvenience becausesuch IDs are mandatory items of identification in all official transaction andconduct of other day to day business activity. They therefore feeldiscriminated by being treated lower than second class citizens. They areaggrieved by the decision of the said Task Force whose findings ended up bydepriving them their constitutional rights as citizens of this country.

The said Applicant argue further that the said Principal Registrar ofPersons exceeded her powers in appointing the said Task Force andsubsequently accepting its findings. This is because the said 2nd Respondentis only empowered to undertake registration of persons and not deprivecitizenship. The order of the 2nd Respondent were thus inhuman anddegrading besides being ultra vires. The exercise of the said public duty bythe 2nd Respondent thus offended the provisions of section 82 of theConstitution. In all, the said screening exercise was therefore unlawfulillegal, void and in violation of the protection to equal treatment provided tothe Applicants under the Constitution and thus discriminatory.

In support of their application, the counsel for the Applicants cited various authorities. The said counsel cited the provisions of section 82 of the Constitution and contended the Applicants were by virtue of the said Notice and subsequent screening exercise they underwent treated in a discriminatory manner within the express definition of the said section which define the expression discriminatory to mean;

*"affording different treatment to differentpersons attributable wholly or mainly to theirrespective descriptions by race, tribe, place oforigin or residence or other local connection,political opinions, colour, creed or sex wherebypersons of one such description are subjected todisabilities or restrictions to which persons ofanother such description are not made subject orare accorded privileges or disadvantages whichare not accorded to persons of another suchdescriptions."*The said counsel argued that in accordance with the said special defination of what constitutes discrimination, the 2nd Respondent's issuance of the said Notice, the constitution of the said Task Force and subsequent screening exercise and denial of new generation ID cards to the Applicant amounted to discriminatory treatment because the entire process was based on ethnic classification of a community known as Somalis. The consequent declaration that The Applicants were not Kenyan and are not entitled to issuance of new generation ID cards was therefore *ultar-vires* the constitution and hence *null and void.* The said counsel summarized his argument by stating that the conduct of the 2nd Respondent amounted not only to subjecting the Applicants to disability and restriction but todeprivation of their constitutional rights. In support of this contention, thesaid counsel cited local and international authorities in support of the nine declarations sought in his Applicant's application certifying that hisApplicants were unlawfully categorized and classified in manner notenvisaged by or justified under the Constitution.

In reply, the counsel for the Respondents vehemently opposed the saidapplication and prayed for its dismissal with costs. She reiterated thecontents of both the Replying and Further Affidavits of the 2nd Respondent.She contended that the 2ND Respondent acted within the spirit of both theConstitution and the enabling legislation, and stated that the Applicants werenot entitled to be issued with new generation ID because the said Task Forcehad conclusively established and verified that they were not Somalis ofKenya origin. She further argued that issuance of birth certificates to theApplicants was not proof of their citizenship. She justified the conduct ofthe 2nd Respondent pursuant to the aforesaid Notice on the then prevailingborder security instability associated with illegal uncontrolled infiltration ofaliens who subsequently and fraudulent through unlawful means managed toacquire official Kenyan identification documents consequent to which it became increasingly difficult for the Kenyan authorities to

differentiateSomalis of Kenyan origin from other Somali aliens. She contended that theentire resulting screening exercise was conducted in utmost good faith in theinterest of insulating bona fide Kenya Somalis and also in the interest ofpublic security. She also argued that the said screening exercise was notisolated in execution because other screening exercise though on lower scaleis an ever- going exercise in all border districts and that all Kenyans wholive within such district must appear before the respective divisional anddistrict vetting committees for issuance of National ID Identification card.

The said counsel further argued that the 2 Respondent acted lawfullywithin the confines of sections 4(2) and 8 of the Registration of PersonsAct and that therefore in pursuance of S. 82 4 (d) of the Constitution, thesaid exercise of her legally vested statutory powers were lawfully exercisedunder the Constitution. Furthermore in view of the fact that the saidApplicant appeared before the said Task Force, were heard declared illegaland deregistered and never protested, they cannot be said to have come tothis court with clean hands especially after having acquired subsequently,official Kenyan identification papers through unexplained and unorthodoxmeans.

It was the said counsel's contention that the application before thecourt was defective as it failed to make any specific reference of violation ofthe Bill of Rights under the Constitution. The said application, she argued,raises statutory matters as opposed to interpretation of the Constitution andenforcement of fundamental rights. Thus the Task Force that conducted thescreening process and made findings should be taken to task directly and theremedy sought ordinarily rightly belongs in the realm of judicial review notthe Constitution because a Constitutional Court cannot issue an ID card. Insupport of some of her arguments the said counsel cited various authorities.

The said notice reading is clear and unambiguous, it required and I quote,

"all persons of the Somali ethnic communityresident in Kenya who are aged eighteen(18) yearsand above to attend before registration officers atthe centers specified in the second column of theschedule and furnish such documentary or otherevidence of the truth of their registration betweenthe 13th November 1989 and 4th December 1989 "

The said notice was issued by the 2nd Respondent in pursuance of powers conferred unto her by the provisions of S.8 of the Registration of Persons Act (Cap 107), which provide that;

"A registration officer may require any personwho has given any information in pursuance of thisAct or rules made there under to furnish suchdocumentary or other evidence of the truth of that information as it is within the power of that personto furnish."

The applicants did proceed and voluntarily attend the respective Registration officers separately comprising the aforesaid Task Force and which Task Force was constituted pursuant to the appointment made by the 2 Respondent under the provisions of section 4(2) of Cap 107. Accordingly therefore, I find that the said Task Force that proceeded and conducted the screening exercise and made a decision against the Applicants was lawfully constituted and that the Registration of Persons Act (Cap 107) is one such class of law envisaged and given cognizance by the provisions of section 82(4) of the Constitution.

The said notice did however clearly categorize and classify on basis of ethnicity a community of citizens of Kenya known as Somali specifically forpurpose of conducting a screening and verification exercise to enable the 2Respondent issue identity cards against special Kenya Somali verificationcards. This no doubt amounted to classification which result, unlessjustified, has been held to be discriminatory.

In the famous case of ***Regents of the University of California -v-Bakke (438 vs 265, 98 S. ct 2733 L Ed 2d 7501978)*** it was held by SupremeCourt of U.S.A that the special admission programme of the MedicalSchool of the University of California, and which programme was designed to assure the admission of a specified number of students from certain minority groups, was invalid under the Constitution because it was hinged on ancestry or colour and that the said Medical School failed to

demonstrate that admission classification was necessary to promote substantial State interest. Said Mr. Justice Powell;

"Racial and ethnic distinctions of any sort areinherently suspect and thus call for most exactingjudicial examination " p.498.

The said Court however also held that if such special programme admission programme was properly devised to involve competitive consideration of race and ethnic origin then the State would have demonstrated substantial State interest and thus such programme would not be unconstitutional. Said Mr Justice Powell.

" *in order to justify the use of a suspect classification a State must show that its purpose orinterest is both constitutionally permissible andsubstantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest. "P. 500*

This complex and sensitive issue of classification was at length alsoconsidered in the South African case of ***Harksen -v- Lane and Others (CCT9/971997 (11) BCLR CC 1998(1) SA 349 CC).***

The said case stipulated the test of what would constitute unconstitutional differention or categorization in treatment and held that if such differention was upon application of the test found not to be unfair then such differention would not be in violation of the constitution. The said test is paraphrased as follows: first, does the provision differentiate between people or categories of people? If there is differentiation does it bear a rational connection to a legitimate government purpose? If it does have rational connection, then there is no violation of fundamental rights; secondly, if the differentiation amounts to discrimination does it amount to unfair discrimination? If such differentiation is on specified grounds then unfairness will be presumed but if on unspecified grounds, unfairness will have to be established by the complainant. If at the end of the two stages differentiation is found not to be unfair then there will be no violation of the fundamental rights.

The above South African experience on differentiation and categorization has broadly also been analysed in Introduction to the Constitution of India by Durga Das Basn at pp82-89. On equal protection of the laws the said writer opines at page 85;

"None should be favoured and none should beplaced under any disadvantage, in circumstancesthat do not admit of any reasonable justification fora different treatment".

In the same page he continues;

"The principle of equality does not mean thatevery law must have universal application for allpersons who are not by nature, attainment orcircumstance in the same position as the varyingneeds of different classes of persons often requireseparate treatment. The principle does not takeaway from the State the power of classifyingpersons for legitimate purposes. A Legislaturewhich has to deal with diverse problems arisingout of an infinite variety of human relations mustof necessity, have the power of making speciallaws to attain particular objects; and for thatpurpose it must have large powers of selection orclassification of persons and things upon whichsuch laws are to operate."

The screening exercise was necessitated by extraneous circumstances associated with the gradual social and political upheaval in the then neighbouring state of Somali. Consequently, it was paramount in the interest of good governance and protection of the sanctity of state sovereignty that the Government undertakes the said exercise for purpose of arresting illegal infiltration of alien Somalis. There was need to differentiate and hence classify Somalis of Kenyan origin as against those of other neighbouring regions. There were and have been reported cases of sporadic banditry associated with poaching within the area bordering the then Somali State because of uncontrollable border porosity. In addition, vetting for issuance of new generation ID cards is known to have commenced sometime in 1988 and it is an established fact that special border district vetting committees are in place even presently in respect of all border districts. The said vetting is a continuous process country-wide.

The contents of the said Notice were clear and unambiguous. They classified and categorized but did not in any whatsoever even insinuate intended deprivation of fundamental rights upon those duly entitled to such rights. It did not for instance declare that Somalis in Kenya were deemed as non Kenyan unless proven otherwise and hence not entitled to equal protection. The notice simply called forth members of the Somali community in Kenya to come forward and authenticate their registration papers. The said Notice was not perpetual nor oppressive as it was configured to operate for a very limited duration. Nor, therefore, was the subsequent issuance of special Kenya Somali verification card, it being an expected by-product of the said screening exercise. I thus adopt the findings of Mr. Justice Blackmun in Bakke's case (supra) when he said;

" *And in order to treat some persons equally, wemust treat them differently"p.508* I therefore hold that in applying the internationally recognized South African experience as analyzed by Ziyad Motala and Cyril Ramaphosa in their writer-up entitled Constitutional Law - Analysis and Cases, classification and categorization of the Somali Community in Kenya was justified by the existence of "a rational connection to a legitimate government purpose" p. 278.

The test for discrimination as laid out in the said case of ***Harksen* -v- *Lane*** (supra) succeeds in favour of the Respondents in that the specified grounds upon which the said Notice was founded were not unfair and did not constitute a violation of fundamental rights as enshrined in the Bill of Rights. The aforesaid writers have after all clearly stated that:

" *An essential criterion in many discriminationchallenges is whether the fundamental dignity of ahuman being is affected by the classification." P.259*and that

"when the court finds that the categorization willdehumanize a group or perpetuate and reinforcenegative stereotypes, it will rule that thecategorization constitutes unfair discrimination. "P. 266.

The said screening exercise as aforestate did not subject the Somali Community in Kenya to indignity nor inhuman treatment. Those who were unsuccessful and including the Applicants would not qualify in claiming unfair and discriminatory treatment especially after having been heard, because of the aforesaid state legitimate purpose. I thus concur with *Sachdeva J. in* ***Mutunga* -v- *Republic (1986 KLR 167*** when he said of protection of fundamental rights;

" *It is I think worth emphasizing that section 70 ofthe Constitution, with which Chapter V beginsmakes such rights subject to respect for the rights and freedoms of others and for the public interestand again subject to limitations designed to ensurethat the enjoyment of the said rights and freedomsby any individual does not prejudice the rights andfreedoms of others or the public interest.... Itcannot be stressed to often that such rights existand are enforceable, only where law and orderprevails. Once peace and stability disappear suchrights also go overboard without a whipper."P.169/170.*

Consequently and by virtue of the provisions of section 8 of the Registration of Persons Act (Cap 107) the provisions of S. 82(1) of the Constitution are duly qualified by the provisions of S.82 (4) (d) which clearly provides that the aforesaid S.82 (l) shall not apply to any law so far as that law makes provision:

"whereby persons of a description mentioned insub section (3) may be subjected to a disability orrestriction or may be accorded a privilege oradvantage which, having regard to its nature andto special circumstances pertaining to thosepersons or to persons of any other suchdescription, is reasonably justified in a democraticsociety."

I hold therefore that if a State demonstrates as it has done in this case,substantial interest that may legitimately be justified by such factors assecurity and maintenance of law and order, consideration of ethnicitynotwithstanding, whatever actions it takes in furtherance thereto will not bein violation of the Constitution. I further hold therefore that the said Notice was lawfully issued and that the 2nd Respondent acted within powerslawfully provided and by a statute and consequently the resulting screeningexercise and issuance of special verification cards was not unconstitutionalnor discriminatory. I consequently

decline to grant the eight declarationssought herein. I further decline to grant the ninth declaration herein as thedeclaration sought there under was not within the purview of the said Noticeand the resulting screening exercise nor was the 2 Respondent the authoritycharged with issuing or granting certificate of citizenship. In thecircumstances, the application herein is dismissed with costs.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 24th DAYOF MAY, 2004

P. J. KAMAU AG.

JUDGE