



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 626 OF 2016

ESTHER M PASSARIS APPELLANT

VERSUS

THE REGISTRAR OF POLITICAL PARTIES.RESPONDENT

J U D G M E N T

The appeal herein arises from the decision of the Political Parties Dispute Tribunal Appeal No. 4 of 2016 given on the 6th September, 2016 refusing to reverse the decision of the Registrar of Political Parties to reserve the name “**Harambee Democratic Party**” for registration, as a political party under the Political Parties Act.

The Appellant herein wishing to exercise her constitutional rights under Article 38 of the Constitution of Kenya 2010 by forming her own Political Party applied to the Respondent vide a letter dated the 6th June, 2016 for reservation of the name “**HARAMBEE DEMOCRATIC PARTY**” for use by her proposed party but vide a letter dated 10th June, 2016, the Respondent informed her that the name could not be reserved for use by a political party since the name “*was not in compliance with the Political Parties Act, 2011 and the Constitution of Kenya 2010 Article 91.*” It is, however, noted that in the said letter there was no explanation why the proposed name was said not to be in compliance with the Political Parties Act and the Constitution.

On the 22nd August, 2016 the Appellant issued a demand letter to the Respondent in which she demanded reservation of the name but the Respondent vide her letter dated 24th August, 2016 maintained her position but this time round, quoted the provisions of Section 8(c) of the Political Parties Act which provides that the registrar may refuse an application for the registration of a political party if the name or symbol that it wishes to use for the purposes of the Act, so nearly resembles the name or symbol or an abbreviation of the name of another political party registered under the Act or any other legal entity registered under any other written law.

It is this refusal by the Respondent that prompted the Appellant to move to the Political Parties Disputes Tribunal on 1st August, 2016 wherein she filed Political Parties Dispute Tribunal Appeal No. 4 of 2016 (**Esther M. Passaris Vs the Registrar of Political Parties**) in which she listed 20 grounds of appeal.

The appeal was heard by the Political Parties Dispute Tribunal and on the 6th October, 2016 the Appellant’s appeal was dismissed with no orders as to costs. Following the dismissal of the appeal, the Appellant on the 12th day of October, 2016, appealed to the High Court in Civil Appeal No. 626 of

2016 and in her Petition of Appeal, she has listed twenty two (22) grounds of appeal.

The appeal came up for hearing on the 1st day of November, 2016 when counsels for the respective parties made oral submissions. Counsel for the Appellant relied on the Petition of Appeal, written submissions and the list of authorities that the Appellant had relied upon in the Political Parties Disputes Tribunal. The learned counsel chose to argue all the grounds of appeal together. The gist of this appeal as pointed out earlier is the refusal by the Registrar of political parties to reserve the name “**Harambee Democratic Party**” because it did not comply with the provisions of the Political Parties Act and Article 91 of the Constitution of Kenya 2010. The learned counsel submitted that Article 91 of the constitution relates to an existing political party and the Registrar of Political Parties could not rely on that provision as it relates to an existing party. That the Registrar acted contrary to Section 8 of the Political Parties Act and though the letter dated 10th June, 2016 does not say much, counsel referred to the replying affidavit by Juliet Murimi which has given some insight on why the Respondent declined to reserve the name “**Harambee Democratic Party**” as requested by the Appellant.

It was submitted that according to paragraph 9 of the replying affidavit, what the registrar had a problem with was the use of the word “**Harambee**” and not the whole name. That the reason for the Registrar’s refusal to register was based on Section 3 of the National flag, emblems and Names Act Cap 99 Laws of Kenya. Counsel argued that the Registrar’s decision failed to take note of the fact that words “**HARAMBEE**”, “**JAMHURI**”, “**MADARAKA**” and “**NYAYO**” in conjunction with other words have lawfully been used in various instances and elsewhere without any offence to our Constitution and statutes. He gave examples of the giant Harambee Sacco Society Limited which was established back in the 1970’s, Harambee Stars, Harambee Starlets, Harambee Aircraft and Marine Vessels, Jamhuri Park, Jamhuri High School, Nyayo Estates among others.

The Appellant’s counsel made special reference to Madaraka Party that was registered in the year 2006 and wondered why the same was registered using the name “**Madaraka**” which name is also protected under the National Flag, Emblems and Names Act (I will revisit this item later on in the judgment.

The court was told that the Registrar’s refusal was erroneous and a complete misunderstanding of the constitution and in particular Article 23 and 24 of the Constitution.

Article 23 of the Constitution deals with the Authority of Courts to uphold and enforce the Bill of Rights and it gives the High Court the jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The Constitution also under Article 23(3) provides the reliefs that the court may grant in proceedings brought under Article 22 of the Constitution which provides for the Enforcement of Bill of Rights under Article 22 aforesaid and it provides:-

22 (1) Every person has the right to Institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The remedies available here include: -

a) A declaration of rights.

b) An injunction

c) A conservatory order:

d) A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24.

e) An order for compensation and

f) An order for judicial review.

Article 24 on the other hand, contains provisions on the limitation of rights and fundamental freedoms.

Article 24(1) provides

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonably justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom among others, but of importance is Article 24 (3) that provides: -

“The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

It was submitted that a person seeking to limit the rights has a burden to justify what she claim to be objectionable and according to the learned counsel, the registrar did not justify before the Tribunal and for the Tribunal to agree with her, it was erroneous.

He submitted that the letter dated 10th June, 2016 was so vague and it required an explanation by way of an affidavit which the Registrar did not provide. The letter related to the provision of Article 91 of the Constitution and Section 8 of the Political Parties Act which the registrar needed to explain further.

It was submitted that there is no other party registered in the name of Harambee Democratic Party as alleged by the Registrar and that as the Judgment of the Tribunal recognizes, the reasoning by the Registrar to refuse registration of the party is difficult to follow as there is no link between the provisions of the Political Parties Act and that of the National Flag, Emblems and Names Act. He referred to the judgment of the Tribunal where it was noted that the tribunal was not satisfied that the registrar should fail to register a political party for the reasons that she gave. That further in the same judgment the Tribunal observed that it would be manifestly unjust to prohibit the use of any or all such images by Political Parties simply because the names and/or images form part of the Coat of Arms.

Counsel for the Appellant concluded by submitting that if the tribunal addressed itself to the law, it should have come to a finding that there is nothing wrong in registering the name as desired by the Appellant. He urged the court, which under Article 165 of the Constitution has been given supervisory jurisdiction over the lower court and the Tribunal, to reverse the decision of the Political Parties Appeal Tribunal and allow the appeal so that the Appellant can enjoy her rights to belong to and register a political party of her choice.

In his response, counsel for the Respondent relied on the submissions he had filed before the Tribunal together with the replying affidavit sworn by Juliet Murimi.

In his opening remarks and in his view, the fundamental question of law that the Tribunal addressed, was whether the Respondent erred in law in making the decision of refusing to reserve the name “**Harambee Democratic Party**” to be registered as a political party. He made reference to Section 8(2) of the Political Parties Act and Article 91 of the Constitution of Kenya 2010 which defines a political party.

He submitted that the registrar has discretion with regard to registering a political party and that Section 8 of the Political Parties Act is clear that the Registrar cannot register a political party with a name that so nearly resemble the name or symbol of other parties registered under that Act or any other written law. According to him, though the Appellant has listed other entities registered in such names, Section 8 was still a legal provision and had to be followed. It was his submission that Harambee Society Sacco is registered under the Societies Act and that the difference between the Societies Act and Companies Act is that they do not have restrictions laid down under the Political Parties Act. He told the court that in refusing to reserve the name the registrar relied on the National Flag, Emblems and Names Act and in particular Section 3 of the said Act that prohibits the use of the name. That the said Section goes on to define what specified name is, and Part II of the schedule to that Act refers even to abbreviation. The

words listed in Part II are Harambee, Madaraka and Nyayo. He conceded that other entities may have made mistakes in registering names prohibited under the Act but two wrongs do not make a right.

It was his further submissions that though the High Court under Article 23 of the Constitution, has authority to uphold and enforce the Bill of Rights, Article 24 limits some rights and fundamental freedoms. He appreciated that under Article 24(3) the state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article has been satisfied and he contended that in recognition of that subsection he made reference to Article 25 and justified the limitation by making reference to the provisions of the law. According to him, the Appellant's rights are not among those listed in Article 25 and having justified the limitation by quoting the relevant legal provisions, the registrar is justified in her failure to reserve the name "**Harambee Democratic Party**". He submitted that formerly, Political Parties were being registered under the Societies Act which did not restrict registration of parties but with the enactment of the Political Parties Act, there are some restrictions and that is what guided the Registrar. He urged the court to dismiss the appeal.

In his brief response, counsel for the Appellant submitted that Article 24(2) relates to legislation enacted after the New Constitution 2010 and that the Political Parties Act has not complied with the Constitution, Article 24.

This court has seriously considered the material before it and the oral submissions by the learned counsels for the respective parties. The appellant in her Memorandum of Appeal had sought 3 Orders but when counsel for the Appellant rose to submit, he informed this Honourable Court that he was abandoning prayer (b) and therefore, the same stood abandoned following that application. In that regard, my determination will be confined to prayers (a) and (c) of the Petition of Appeal.

Having set out the submissions by the respective parties, I now embark on identifying the issues in this appeal and in my view, there is only one issue for determination which is

- 1) Whether the Respondent erred in law in refusing to reserve the name "**HARAMBEE DEMOCRATIC PARTY**" for registration as a Political Party.

It is important to note that the office of the Registrar of Political Parties is established under Section 33 of the Political parties Act, 2011 Act No. 11 of 2011.

Section 33(1) reads: -

"There is established the office of the Registrar of Political Parties which shall be a body corporate with perpetual succession and a seal and which shall be capable of suing and being sued in its corporate name."

The functions of the Registrar are set out in Section 34 of the same Act. Among those functions are to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act (Political Parties Act). The procedure for registration of Political Parties is provided for under Section 6 of the Political Parties Act, while Section 7 provides the conditions of full registration.

Section 6 provides: -

"An application for the provisional registration of proposed political party shall be in writing and be signed by the applicant."

2. An Application for provisional registration shall

- a) Include signed minutes of the first meeting of the founding members of the political party.***
- b) set out the names of political party***

c) If the political party wishes to use an abbreviation of its name for the purposes of this Act, set out that abbreviation.

d) Be accompanied by a copy of the constitution of the proposed political party which shall comply with the provisions of Section 9.

e) Include an undertaking to be bound by this act and the code of conduct set out in the first schedule: and

f) Be accompanied by the prescribed fee.”

Section 5 provides as follows: -

(1) An association of persons or organization applying to be registered as a political party may apply to the Registrar for provisional registration.

(2) Upon application for registration under subsection (1), the Registrar shall, within thirty days of the association or organisation fulfilling the conditions prescribed in section 6, issue that association or organisation with a certificate of provisional registration.

(3) A political party that has been provisionally registered under subsection (2) shall, not later than one hundred and eighty days from the date of provisional registration, apply to the Registrar for full registration.

(4) The Registrar shall, within seven days of receipt of an application under subsection (3), publish a notice in the Gazette and in at least two newspapers having nationwide circulation, inviting objections from any person or any other political party concerning the registration of the name, symbol or colour of the party or any other issue relating to the registration of the political party.

(5) The provisional registration of a political party which has not applied for full registration shall lapse at the expiry of one hundred and eighty days from the date of issue of the certificate of the provisional registration.

(6) The provisional registration of a political party which has applied for full registration shall be valid until the political party is issued with a certificate of full registration, or until the application of the political party to be registered has been rejected.

(7) A political party that has been provisionally registered under subsection (2) shall not be entitled to participate in an election.

In exercising those functions, her conduct is governed by the provisions of the Constitution of Kenya. The Constitution contains several provisions governing the conduct of the state officers. Article 10 for instance enjoins all state organs, state officers to abide by the national values and principles and the rule of law, inclusiveness, human rights, good governance, transparency and accountability.

Under Article 20 (1) of the Constitution, the Bill of Rights applies to all law and binds all state organs and all persons.

Article 38 provides: -

“(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum;

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Article 47 of the Constitution governs the right to fair administrative action and it provides

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The significance of this provision was expounded in the case of **Dry Associates Limited Vs Capital Markets Authority and Another** in Nairobi Petition No. 328 of 2011 (UR) where the court held: -

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act but is to be measured against the standard established by the Constitution.”

Having considered the above legal provisions, I now revert to the issue at hand. The Registrar’s refusal to reserve the name **Harambee Democratic Party** was based on the provisions of Political Parties Act and Article 91 of the Constitution. Counsel for the Respondent argued that the Registrar’s refusal was based on Section 3 of National Flag, Emblems and Names Act which prohibits the use of the word **Harambee** on the ground that it is a specified name. Under the interpretation section of that Act, a specified name means: -

“Any of the names or words specified in Part II of the first schedule to the Act and includes any abbreviation of any such name: Part 11 of the first schedule lists the word “Harambee” among the specified names together with the words “Jamhuri”, Madaraka” and “Nyayo”.”

The word used in Section 3(1) is **SHALL** but there is a proviso; except with the written permission of the Minister.

With regard to the submissions that there are other entities which have been registered using similar names, counsel for the Respondent argued that the others are registered under either the companies Act or the Societies Act which do not have any such restrictions as the Political Parties Act. He further submitted that for any other name registered using the specified names, the same must have been done by mistake and two wrongs do not make a right. This would, therefore, explain why Madaraka Party registered in the year 2006 was registered as a political party notwithstanding the use of a specified name **“Madaraka”**. By this time the Political Parties Act had not been enacted and Political parties were being registered under the Societies Act.

I am persuaded by that argument and the basis of the persuasion lies in Section 8 of the Political Parties Act and Section 3 of the National Flag Emblems and Names Act.

The learned counsels addressed the court at length on the provisions of Article 23, 24, 25 of the Constitution of Kenya 2010. The Appellant has contended that the registrar’s refusal to reserve the name of her intended party is a breach of her Constitutional right as set out in Article 38 of the Constitution.

Under Article 23, this court has jurisdiction in accordance with Article 165, to uphold and enforce the Bill of Rights. However, Article 24 provides for Limitation of Rights and Fundamental Freedoms but such limitation can only be limited by law and only to the extent that the limitations are reasonably justifiable in an open and democratic society based on human dignity, equality and Freedom. The Appellant’s right under Article 38 of the Constitution is not among the rights that may not be limited Under Article 25 of the Constitution but it squarely falls under the provision of Article 24. Section 3 of the National Flag, Emblems and Names Act expressly prohibits the use of the name “**Harambee**” which in essence means that the provision limits the right and fundamental freedom of the Appellant to register a party using a name prohibited under the specified names. Whereas it can be argued that it is her right to register and to belong to any political party, when it comes to the registration of the party, there is a limitation with respect to the name that she can use for the party under the provisions of the National Flag, Emblems and Names Act.

The word Harambee is among the names listed in Part II of the first schedule of Cap. 99 and being a specified name, it cannot be used except with the written permission of the Minister. Such permission has not been sought for and granted by the Minister and in the premises, the Appellant cannot use the name **HARAMBEE DEMOCRATIC PARTY** to register her political party.

Before I conclude, let me confirm that I have perused through the case of **Hellen Atieno Magudha & 2 Others Vs Registrar of Political Parties (2013) eKLR** which was cited to the court by the Appellant and which is annexed in the list of authorities.

The facts of that case are very different from the facts of the case before the court and even then, the learned Hon. Lenaola, J directed the Registrar of Political Parties to consider for registration the petitioner’s party but he did not order for registration.

In view of the foregoing, it is the finding by this Honourable court that the Appellant’s right to register a Political Party in the circumstances of this case, were not infringed and the Political Parties Dispute Tribunal was right in upholding the decision of the Registrar of Political Parties to refuse to reserve the name “**Harambee Democratic Party**”.

Ultimately, I am satisfied that this appeal has no merit and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence

..... *for the Appellant*

..... *for the Respondent*