



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 152 OF 2017**

**BETWEEN**

**ESTHER M. PASSARIS .....APPELLANT**

**VERSUS**

**THE REGISTRAR OF POLITICAL PARTIES.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Njuguna, J.)  
dated 14<sup>th</sup> day of November 2016*

*in*

*Civil Appeal No. 626 of 2016)*

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**JUDGMENT OF THE COURT**

Since this appeal turns on the construction of the Constitution and statutes, we think it is apposite to set out the relevant portions of those provisions at this early stage of the judgment. But before we do so, we mention by way of background that this appeal was precipitated by the rejection of the appellant's application to the respondent in which the latter informed her that the name she had proposed, *Harambee* Democratic Party, did not comply with **Article 91** of the Constitution and an unspecified provision of the Political Parties Act.

Upon receiving the foregoing response and being aggrieved by it, the appellant sought the intervention of the Political Parties Disputes Political Parties Tribunal. The Tribunal for its part, in dismissing the appellant's appeal and upholding the decision of the Registrar, expressed its satisfaction with the latter's exercise of her powers under the law.

Dissatisfied once again by this, the appellant moved the High Court by way of an appeal. After hearing the arguments, Njuguna, J came to the conclusion that, by declining to reserve the name, *Harambee* Democratic Party, the respondent did not err in law. The learned Judge held that **section 8** of the Political Parties Act and **section 3** of the National Flag, Emblems and Names Act expressly prohibits the use of the name "*Harambee*"; that the appellant's right and fundamental freedom to register a political party was limited expressly by those statutes; that the limitation was restricted only to the choice of name of the proposed party; that any name with the word "*Harambee*" could only be used to register a political party if the Minister gave a written authorization. In conclusion the learned Judge said;

**“...it is the finding by this 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”.**

She found no merit in the appeal and dismissed it with no orders as to costs. For the third time, the appellant was not happy with this latest outcome and proffered this appeal. According to the appellant, the learned Judge was in error for failing to set aside the decision of the Tribunal; for failing to hold that the decision of the Tribunal violated her rights guaranteed under **Articles 36, 37 & 38**; by misdirecting herself in law and fact in not finding the Tribunal’s advice that the appellant should present a different name was given in excess of jurisdiction; for forming an erroneous opinion that *Harambee* Democratic Party was synonymous with “*Harambee*”; by upholding the decision of the Tribunal even after the Tribunal had found that the reasons for rejecting the name were not enough; and for failing to hold that the Tribunal did not give the appellant sufficient reason for rejecting the name.

With respect, like the learned Judge, we agree that the only question raised in this dispute is whether the respondent’s decision to reject the appellant’s application for reservation of the name, *Harambee* Democratic Party was lawful.

**Articles 36, 37, 38** and **91** of the Constitution have been cited by the appellant. While we shall consider the relevance of **Articles 37** and **91**, we have no doubt that by **Article 38**, every citizen is free to make political choices, which include the right to form, or participate in forming a political party. Because of the long list of limitations imposed on political parties by **Article 92**, this right is clearly not absolute. Parliament is indeed enjoined to enact legislation to provide for, *inter alia*, the registration and supervision of political parties; the regulation of political parties; the roles and functions of political parties; the establishment and management of a political parties fund; and the accounts and audit of political parties. A right or fundamental freedom in the Bill of Rights cannot be limited under **Article 24** except by law, and then only to the extent that the limitation is reasonable and justifiable. The limitation must take into account things like the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

**Article 36** provides for the right to freedom of association; that every person has a right to form, join or participate in the activities of the association; and that any legislation that requires registration must provide that registration may not be withheld or withdrawn unreasonably and there shall be a right to a fair hearing.

By **section 3** of the Political Parties Act, any citizen may, subject to the provisions of the Constitution and the Act, form a political party in Kenya to further purposes which are not contrary to the Constitution or any written law. Under **sections 2** and **3** as well as Part II of the First Schedule to the National Flag, Emblems and Names Act, the use of certain “*specified*” names to describe a political party is prohibited. *Harambee* is such specified name. But the prohibition under the Act is not total or absolute in that the Minister may, by a written permission grant the use of any of the specified emblems, names and likenesses.

In rejecting the application to reserve the name, the Registrar relied on the provisions of **Article 91** of the Constitution and as we have observed, an unspecified provision of the Political Parties Act. The relevance of **Article 91** of the Constitution is unclear to us because it only provides for basic requirements for political parties, such as the need to have a national character, a democratically elected governing body and to abide by the democratic principles of good governance. It also prohibits political parties not to, among other things, be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis; or to engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person. At the stage of reservation of a name of a political party, matters such as those listed in **Article 91** may not be relevant. They are only relevant after an application has been made for provisional or full registration of a political party.

The appellant’s application had not reached that stage. The appellant also relied on **Article 37** whose

relevance is similarly not apparent as it deals with the right to assemble, demonstrate and picket.

There is no similar provision to **section 48** of the Companies Act in the Political Parties Act. Under the former, the Registrar of Companies may, on application, reserve a name pending registration of a company. The respondent has instead, through *“A Guide to Political Parties Registration”*, directed promoters of political parties that before applying for provisional registration, they ought to, first, apply to the Registrar of Political Parties for the search of name of the proposed political party, who will consider it in light of **section 8** of the Political Parties Act; whether the proposed name is obscene or offensive, excessively long, or is an abbreviation of another political party that is already registered, or nearly resembles the name, or an abbreviation of the name of another political party already registered or any other legal entity registered under any other law. The requirements under **Article 91** only become relevant once the name chosen by the promoters has been accepted. Both the Tribunal and the High Court did not determine the relevance of **Article 91** to the Registrar’s decision.

From what we have said it should be obvious that Registrar misapplied the provisions of **Article 91**.

The respondent also argued that under **section 3** of the National Flag, Emblems and Names Act the appellant could not use a name bearing the word *“Harambee”*. That section prohibits the use of any *“specified”* names, likenesses and emblems. *“Specified”* names, in terms of **section 3** of that Act include any of the names and words specified in Part II of the First Schedule to the Act, namely;

**“1. The name of the President.**

**2. The words “Harambee”, “Jamhuri”, “Madaraka” and “Nyayo”.**

What the Act prohibits is the use of any of those names;

**“(a) ..... in furtherance of, or display the same as an advertisement for, any trade, business, calling or profession; or**

**(b) in the title of any patent, or in any trade mark or design.....”**

We think the prohibited activities are wide enough to include activities of a political party. It must be clarified however that, with the written permission of the Minister, any of the specified names may be used. But it is an offence to contravene the requirements of this section. A fine not exceeding five thousand shillings, or imprisonment for a term not exceeding six months, or both such fine and such imprisonment may be imposed on a person found guilty and liable for contravening it.

Although dealing with a company name, the parallel line drawn by this Court in **Zara Properties Limited (CPR/2010/24490) V. Zara Properties Limited (CPR/2010/24490) & another** [2017] eKLR between choosing a name for a natural person and for a juridical person is relevant in this appeal. The Court, with approval cited the following passage by Farwell, J. of the High Court of Justice of England in **Aerators Ltd v Tollit & Others** (1902) 2 Ch 319 where he figuratively made that distinction thus;

**“It will be observed that a Company has a greater right than an individual in respect of names that are identical, and a John Smith cannot prevent other persons of the same name from using their own names: but John Smith Ltd., can prevent the registration of another company as John Smith Ltd. I do not, however, consider that it follows that the Legislature has intended to give Companies any greater rights than individuals possess in respect of names which are not identical but only similar.”**

The choice of a name of a political party, therefore, like the choice of a name, a natural person is a delicate decision because people choose names that represent something to them.

The appellant, by choosing the name *“Harambee”*, did so conscientiously, perhaps because she was inspired by what the name represents, *“all pulling or working together”*, a Kenyan traditional slogan of

the first independent Government.

But more importantly, the Second Schedule to the National Flag, Emblems and Names Act, Part II explains that the scroll on which the coat of arms rest contains the word “*Harambee*” which is described as the official motto of the nation of Kenya.

In the matter before us, the appellant, in adopting the name *Harambee* for her future party was deemed in law to know the requirement before using it and it is immaterial that the word has been used in other instances, since the use of a specified name depends on the context of **section 3** of the Act and, of course whether the Minister has given an approval. We have no benefit of the background to the registration of those other entities.

So that even before applying to the Registrar of Political Parties to reserve the name, the appellant ought, first, to have approached the Minister for dispensation in the use of the name. That she did not do so is the fatal flaw that defeats her repeated quests before the courts.

For these reasons, we find no fault in the judgment of the High Court. The appeal has no merit and accordingly, we dismiss it with costs.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of February, 2018.**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**