**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A**

**CIVIL APPEAL NO. 73 OF 2015**

**BETWEEN**

**MORRIS JARHA MARO.....……..……..……1ST APPELLANT**

**THE COAST PEOPLES DEMOCRATIC MOVEMENT.....2ND APPELLANT**

**AND**

**THE REGISTRAR OF SOCIETIES…….…….1ST RESPONDENT**

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

***(Appeal from the ruling and order of the High Court of Kenya at Mombasa, (Emukule, J.) dated 18th March 2015***

***Const. Petition No. 73 of 2014)***

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**JUDGMENT OF THE COURT**

***Morris Jarha Maro (the 1st appellant)*** and the ***Coast Peoples Democratic Movement (the 2nd appellant)*** are aggrieved by the ruling and order of the High Court at Mombasa, ***(Emukule, J.)*** dated 18th March 2015 by which the learned judge dismissed their petition seeking, in the main, an order to compel the ***Registrar of Societies (the 1st respondent)*** to register the 2nd appellant under the ***Societies Act, cap 108 Laws of Kenya (the Act).***

Before delving into the merits of the appeal, it is apposite to briefly set out the background to the appeal.

By an application dated 3rd January 2014, the 1st appellant and others applied for registration of the 2nd appellant under the Act. The application was made in the forms prescribed under the Act and was accompanied by a copy of the 2nd appellant's constitution and rules, as well as a banker's cheque for Kshs 2,000/- in favour of the 1st respondent. According to a certificate of postage, the application was sent to the 1st respondent by registered mail on 3rd February 2014 via the postal address of the Office of Attorney General in Nairobi.

After failing to get a response from the 1st respondent regarding the fate of their application, the appellants wrote to the Attorney General on 2nd May 2014 seeking an update on the application for registration. On 5th June 2014, they sent a similar letter, through the same postal address in Nairobi, to the 1st respondent. It is common ground that the 1st respondent did not communicate to the appellants its decision regarding their application and neither of the respondents replied to the appellants' letters of 2nd May 2014 and 5th June 2014. On 28th November 2014 the appellant's lodged a petition in the High Court praying for a declaration that the failure by the 1st respondent to register the 2nd appellant was in violation of their constitutional rights and freedoms and an order compelling the respondents to register the 2nd appellant.

On the same day the appellant's filed a Notice of Motion in the High Court, whose purpose is not readily apparent, because it sought the same final remedies as those in the petition. Indeed from the record, it is the petition that was ultimately heard, rather than the Motion.

The respondents opposed the Motion and the petition vide a replying affidavit sworn 27th February 2015 by ***Joseph L. Onyango***, the Deputy Registrar General in charge of Societies. The 1st respondent contended that it never received any application from the appellants. In paragraph 7 of the affidavit, it was however deposed as follows:

> ***"7. <u>THAT</u> if indeed the respondents' (sic) received the application for registration then the same could not be approved as the name Coast Democratic Movement denotes that the same is a political party which the respondents have no mandate to act upon***."

The 1st respondent further took the position that the 2nd appellant could not be registered because it had an unconstitutional agenda of secession, which was prejudicial to the rights and freedoms of other Kenyans. In paragraph 15 of the replying affidavit, it was further deponed thus:

> ***"15. <u>THAT</u> the Registrar of Societies will be ready and willing to consider the application for registration of the intended society as and when the name is appropriate as society and not as a political party, when the objectives of the society have been declared to have good intention and do not limit and or interfere with the fundamental rights of other individuals."***

Upon hearing the parties, the learned judge concluded that there was no evidence that the 1st respondent had received the application for registration of the 2nd appellant. In that respect he delivered himself thus:

> ***"In this case, the Registrar of Societies denies having received the petitioner's application, and adds that such application would nevertheless be likely refused for the reason that its name denotes that of a political party, and its objects are undesirable to the interests of the State. The certificate of posting, and the cover letter are both addressed to the Attorney General, and not the Registrar of Societies. From the evidence at hand there is no proof that the Registrar has received and rejected the application as alleged."***

Having concluded that the 1st respondent had not received the application for registration of the 2nd appellant, the learned judge nevertheless proceeded, as he put it, ***"without prejudice to the decision that the Registrar of Societies may eventually make once an appropriate application is made before him"*** and held that the 2nd appellant had a political agenda which put it outside the ambit of the Act and that the appellant's secessionist agenda was illegal and unprotected by the Constitution and to that extent the 2nd appellant could not be registered under the Act.

The appellants now challenge that ruling of the High Court in this appeal, contending that it erred in holding that the 1st respondent did not receive the application for registration of the 2nd appellant. It was submitted that the office of the Registrar of Societies is an office within the Office of the Attorney General; that there was nothing amiss in sending the application trough the postal address of the Office of Attorney General; that the neither the application nor the reminders were ever returned undelivered to the

appellants; that under the Act the 1st respondent is obliged to notify the appellants of his decision refusing registration which he failed to do; and that the 1st respondent's failure to make a decision on the appellants' application constituted a violation of their right to fair administrative action guaranteed by ***Article 47*** of the Constitution.

The appellants further submitted that by concluding that the 2nd appellant could not be registered under the Act, the learned judge had irregularly taken over the role and function of the 1st respondent; that the 2nd appellant's objectives, including pursuit of secession and "self-determination" were not illegal or unconstitutional; and that the appellants wished to be registered so that they could pursue their agenda peacefully, lawfully and within the constitutional framework, including agitating for amendment of the Constitution.

The respondents opposed the appeal maintaining that neither the application for registration of the 2nd appellant nor the follow-up letters were received by the respondents; that there was no evidence that the banker's cheque sent by the appellants was ever encashed by the respondents; that by dint of the 2nd appellant's name, constitution and manifesto, it was a political movement which could not be registered under the Act; that the appellants' remedy was to seek registration under the Political Parties Act; and that the appellant's objective entailed changing the territory of Kenya and was therefore illegal and unconstitutional under ***Article 5*** of the Constitution.

We have duly considered the record of appeal, the grounds of appeal, the ruling of the High Court, the submissions by the parties, and the law. In our view, this appeal turns on two issues, namely first, whether the High Court erred by holding that the 1st respondent did not receive the application for the registration of the 2nd appellant and second, whether it erred by delving into the merits of the application for registration of the 2nd appellant when the 1st respondent had not made a decision as contemplated by the Act.

As regards the first issue, the starting point is Mr. Onyango's replying affidavit, which we have already quoted above. With respect, paragraph 7 of that affidavit is not a categorical statement that the 1st respondent never received the application for registration of the 2nd appellant. The deponent starts the paragraph with the words ***"...if indeed the respondents' (sic) received the application for registration..."*** Where the 1st respondent has not received the application, it is to be expected that he will say so forthrightly and categorically, and not to indulge in equivocation. Mr. Onyango's equivocal statement strongly suggests that indeed the respondents could have received the application. It is common ground that the postal address in Nairobi to which the application was sent by registered mail, namely ***P.O. Box 40112 Nairobi,*** is the postal address of the Office of the Attorney General. It is also common ground that one of the divisions in the Office of the Attorney General is the ***Department of the Registrar General***. In turn, one of the offices within the Department of the Registrar General is the office of the 1st respondent. The application was never returned to the appellants undelivered as would be expected regarding mail sent under certificate of postage. The same applies to the follow up letters by which the appellants sought to be updated on the application for registration. If these circumstances are taken into account together with the 1st respondent's equivocal statement regarding receipt of the application, we think that there is considerable merit in the appellants' contention that the respondents duly received the application for registration of the 2nd appellant.

The ***Section 50 (1)*** of the Act provides that any documents issued under the Act or the rules made thereunder may be validly served upon a society or an individual by registered post addressed to their postal address, and ***section 50 (2)*** adds that such document shall be deemed to have reached the person or society to whom it is addressed at the end of 96 hours after the time of posting. The Act is not explicit whether section 50 applies to a citizen who has sent an application to the 1st respondent by registered mail as happened in this case, although, without deciding the issue, we do not see why the same provision should not apply, so that in the absence of evidence of non delivery of the application, the 1st respondent is deemed to have received the application within 96 hours from the time of posting.

We would add too that, granted the 1st respondent's statutory duty to register societies on which, to a large extent, depends the appellants' ability to fully exercise their freedom of association, this Court will not allow the exercise and enjoyment of that freedom to be defeated on flimsy grounds such as those advanced by the 1st respondent regarding artificial distinction between the Office of the Attorney General and the office of the 1st respondent. As Laws J aptly stated in ***R. v. Somerset County Council ex parte Fewings & Others (1995) 1 ALL ER 513:***

> ***"A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose."***

Further ***Article 20(3)*** of the Constitution obliges courts, in applying provisions of the Bill of Rights to develop the law to the extent that it does not give effect to aright or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

In any event the 1st respondent is an office in public service which is obliged by ***Article 232 (1)*** and ***(2) (b)*** of the Constitution to render efficient, effective, responsive, prompt, impartial and equitable service. As such it cannot be easily allowed to avoid living up to its constitutional obligations. The 1st respondent has, to say the least, been aware of the application for registration of the 2nd appellant for more than one and half years since the filling and service of the petition, to which the complete application for the 2nd appellant's registration was annexed.

***Section 4(2)*** of the Act obliges the 1st respondent to consider an application for registration of a society and to communicate his decision thereon ***within 120 days***. ***Rule 6*** of the ***Societies Rules*** on the other hand requires the 1st respondent, where he has refused to register a society, to notify the applicant of his decision in ***Form E*** of the Schedule.

It is common ground that to this day the 1st respondent has never communicated its decision to the appellants or the reasons therefor. Artifice 47 of the Constitution further guarantees the appellants, where their rights or fundamental freedoms are likely to be adversely affected by an administrative action, the right to be given written reasons for the action. As the High Court aptly stated in ***Dry Associates v. Capital Markets Authority & Another, HC Petition No. 328 of 2011***:

> ***"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…but is to be measured against the standards established by the Constitution".***

Having satisfied ourselves that the 1st respondent received the application for the registration of the 2nd appellant and has in any event been aware of that application from the date the petition in the High Court was served upon him, the 1st respondent failed to consider and make a decision on the appellant's application as required by the Act and further failed to uphold the appellant's right to fair administrative action guaranteed by section 47 of the Constitution.

Under the Act, the legal duty to consider and determine whether or not to register a society is vested exclusively in the 1st respondent. With respect, it was not open to the High Court to usurp that role and purport to determine the merits of an application for registration of a society, even before the 1st respondent has taken a decision whether the society should or should not be registered. Where the 1st respondent has failed to discharge his duty and determine whether or not to register a society, the proper remedy that the court should issue is an order of mandamus compelling him to hear and determine the application for registration. (See ***Kenya National Examinations Council v Republic, ex parte Geoffrey Gathenji Njoroge & Others, CA No. 266 of 1996)***. The court cannot usurp the duty of the 1st respondent and purport to determine the merits of the application.

***Section 15*** of the Act sets out an elaborate procedure to be followed by a person who is aggrieved by the

decision of the 1st respondent denying registration of a society. In a case like the one before us, the aggrieved party is required to appeal to the Minister within 30 days of the decision refusing registration. The Minister is obliged to hear and determine the appeal within 90 days. Thereafter, if the party is still aggrieved, it has a further right of appeal to the High Court, within 30 days from the date of the decision of the Minister. As this Court stated in ***Mutanga Tea & Coffee Company Ltd v Shakira Ltd & Another, CA No. 54 of 2014,*** such prescribed procedure must be followed and the dispute can only came before the High Court by way of appeal.

Ultimately, we find that this appeal is meritorious. We accordingly allow it, set aside the order of the High Court dated 18th March 2015 dismissing Petition No. 73 of 2014. We substitute therefor an order directing the 1st respondent to hear and determine the application for registration of the 2nd appellant in accordance with the law. The appellants will have costs of the appeal. It is so ordered.

**Dated and delivered at Malindi this 1st day of July 2016**

**ASIKE-MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

**K. M'INOTI**

**……**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**