



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 308 OF 2016

ATHEISTS IN KENYA.....1ST PETITIONER

HARRISON MUMIA.....2ND PETITIONER

VERSUS

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

THE DEPUTY REGISTRAR OF SOCIETIES,

MUKULU KARIUKI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The 1st petitioner is a society registered under the Societies Act, Cap 108 Laws of Kenya, (the Act) under Registration Number 47958, and registered on the 17th February 2016, while the 2nd petitioner is its chairperson. Some of the objectives of the 1st petitioner society are to promote and practice the open, rational and scientific examination of the universe and the members place on it, advocate for ethical and meaningful morality based on rational and humanistic morals and values and promote skeptical inquiry among others.

2. The membership of the society is open to persons who have attained 18 years of age and above. The membership is subject to approval by the Executive Committee of the society on payment of membership fee of Ksh500/-.

3. The 1st and 2nd respondents are the Registrar and Deputy Registrar of Societies respectively, public officers under section 8 of the Act, while the 3rd respondent is the Attorney General of the Republic of Kenya, the Principal legal adviser to the national government, charged with the responsibility to protect and uphold the rule of law and defend public interest, an office established under Article 156 of the Constitution.

4. Upon registration, the 1st petitioner went about its activities as a society. However, by letter dated 29th

April 2016, the 2nd respondent threatened to suspend the 1st petitioner on grounds that its activities had **“generated great public concern which is prejudicial and incompatible with the peace, stability and good order of the republic”**. The aforementioned letter prompted the petitioner to file this petition stating that Atheisms is not unconstitutional, or illegal, that they have an inalienable right and fundamental freedom of conscience, belief and opinion, that the letter to the 1st petitioner was issued without due notice, or legal justification and that they were not given an opportunity to show cause why the 1st petitioner should not be suspended as required by law.

5. The petitioners averred that the suspension was summary and a breach of the Constitution and the law. The petitioners went on to state that the impugned letter was merely communicating a decision that had already been made without giving them a hearing as required by both the Constitution and the law.

6. Based on the above facts, the petitioners filed a petition dated 11th July 2016 seeking the following reliefs:

(i) A declaration that Atheisms is a constitutionally protected freedom and fundamental right

(ii) A declaration that Atheisms is not in any way unconstitutional.

(iii) A declaration that the respondents violated the constitutional and statutory rights of the petitioners as set out under Articles 24, 27, 32, 33, 36, 37, 47, 50 and 56 of the Constitution and Section 12 of the Societies Act.

(iv) An order quashing the deregistration of the 1st petitioner.

(v) A declaration that the 2nd respondent acted *ultra vires* and in bad faith.

(vi) Damages

(vii) Costs

(viii) Any other relief the Honourable Court may deem fit and just to grant.

Response

7. The respondents filed grounds of opposition dated 4th April 2017 and filed in Court on 5th of April 2017. The respondents averred that the 1st petitioner is no longer a registered society under the Societies Act, thus has no locus to institute the petition, that there are no constitutional issues raised for the Court's determination, that the petition does not raise any violation of the petitioners' rights and fundamental freedoms, that the 1st and 2nd respondents have at all times acted within their constitutional and statutory mandate and that the orders sought against the 1st and 2nd respondents are untenable.

8. The respondents further averred that the petitioners had not demonstrated how the 1st and 2nd respondents acted ***ultra vires*** the societies Act and that the petitioners' rights are not absolute but limited by Article 24(1) of the Constitution. The respondents finally stated that the petition is incompetent, misconceived, misplaced and an abuse of the Court process as the petitioners' rights and fundamental freedoms had not been violated.

Petitioners' submission

9. In their oral and written submissions, Mumia, the 2nd petitioner who also represented 1st petitioner, submitted that atheisms does not believe in the existence of God and therefore it is the opposite of religious beliefs.

10. According to Mumia, they received a letter dated 29th April 2017 suspending the 1st petitioner. He submitted that according to the letter, the 2nd respondent stated that their office had received concerns from the public that the 1st petitioner's activities were prejudicial and incompatible with peace, stability and good order. According to Mumia, the letter neither contained specific reasons for suspending the 1st petitioner nor did the 1st and 2nd respondents give the petitioners any specific concerns said to have been raised by members of the public.

11. Mumia submitted that Section 12 of the Act requires the 1st respondent or its officers to give notice to a society to show cause why its registration should not be suspended or cancelled, and only then can the 1st respondent act if a society fails to show cause to his satisfaction.

12. The 2nd petitioner therefore submitted that they were not given a chance to respond before the 1st petitioner was suspended. He contended that the action taken by the respondents was against Article 47 of the Constitution. He also submitted that no written reasons were given hence the impugned letter was not in accord with the Constitution and the law.

13. The 2nd petitioner went on to contend that Article 32 of the Constitution grants the right to worship and belief hence their suspension violated their right under Article 32. He further contended that the 1st petitioner was registered with a view to impacting ideas under Article 33 of the Constitution hence their freedom of expression had also been infringed.

14. Regarding Article 27 of the Constitution, the 2nd petitioner submitted that their right to equality and freedom from discrimination was violated so was their right to equal protection and equal benefit of the law. He in particular submitted that their right against discrimination of conscience under Article 27(4) has been infringed. Submitting on Article 37, the 2nd petitioner contended that there is no state religion hence the respondents' submissions that their registration violates Article 8 of the Constitution is not correct.

Respondents' Response

15. Miss Wawira, Learned Counsel for the respondents, submitted both orally and through written submissions that the 1st and 2nd respondents properly exercised their mandate under the Act and argued that anything done outside a society's constitution is a ground for deregistration of such a society. Learned Counsel contended that the 1st and 2nd respondents issued the impugned letter to the petitioners who however raised no objection to the suspension. Counsel argued that the petitioners' rights are limited under Article 24 (1) of the Constitution and contended that the action by the respondents was reasonable and lawful.

16. Miss Wawira went on to argue that a person seeking to have his rights recognized, must not infringe others' rights. Counsel contended that if the petitioners were aggrieved by the respondents' action, they should have appealed as required by law which they did not. In Counsel's view, the letter of 29th April 2016 was a notice to show cause but the petitioners never showed any cause. Counsel contended that the 1st petitioner is suspended and not deregistered hence there is a right of appeal against such suspension under section 15 of the Act.

17. Learned counsel further contended that the petition does not meet the test laid down in ***Anarita***

Karimi Njeru v Republic (No. 1) [1979] KLR 154. Counsel also argued that the petitioners never adduced evidence to show the particular provisions of the Constitution that had been violated and relied on the case of **Nguku v Republic [1985] KLR412.** to buttress this submission.

18. Further reliance was placed on the decision in **Samuel Mainalema v the director of Public prosecution and Re the matter of Interim Independent Electoral and Boundaries Commission [2011]eKLR** on the need to recognize that the Constitution of a nation is not a statute which mechanically defines the structure of governance and the relationship between the government and the governed, but a mirror reflecting the national soul, and the articulation of the values building its people and disciplining its government.

Determination

19. I have considered this petition the response there to, submissions by both sides and authorities relied on. In my view, the petition raises only one issue for determination, that is; whether the 1st petitioner's suspension was procedural and lawful.

20. This petition challenges the decision by the respondents to suspend the 1st petitioner, ***the Atheists in Kenya society.*** The society was registered on 17th February 2016 under registration No. 47958. However, about two months later on 29th April, 2016, the 2nd respondent issued the impugned letter suspending it after the expiry of seven days of that letter..

21. The petitioners have argued that the suspension was unjustified, that it was done without notice or due process and was therefore illegal. The petitioners also contended that the suspension was contrary to Articles 47 and 50 of the Constitution and section 12(1) of the Act. They further contended that their rights and fundamental freedoms were violated. In particular they argued that their right to equality and freedom from discrimination under Article 27, freedom of conscience religion, belief and opinion under Article 32, freedom of expression under Article 33 and freedom of Association under Article 36 of the Constitution were violated.

22. For the respondents. it was contended that the suspension was lawful and was done in accordance with the law. According to the respondents, there was no violation of the petitioners' rights either under the constitution or the law.

23. The 1st petitioner is a society that was duly registered in accordance with the provisions of the Societies Act. In that regard, it acquired rights and therefore had a legitimate expectation that those rights would be respected, enhanced and protected, and that any action or decision affecting those rights would only be taken in accordance with the law.

24. The impugned letter which is the subject of this petition was in the following terms;

The Secretary

Atheist in Kenya

P O Box 6758 -00200

Nairobi

Re: Suspension of Registration of Atheist in Kenya Societies

Following your registration as a society, under the societies Act Cap 108, the office of Attorney General has received concerns relating to your society's advocacy and public pronouncements which have generated great public concern which is prejudicial and incompatible with the peace, stability and good order of the republic of Kenya and therefore a basis for suspension and or cancellation of a society under section 12(1) (b) of the societies Act.

Take notice therefore that at the expiry of 7 days from the date of this communication, your society stands suspended in line with section 12(1) (b) of the Societies Act and there by (sic) draw your attention to the requisite provisions of the Act.

Yours faithfully

Mukulu Kariuki.

25. The tone and effect of the letter was that the 1st petitioner would stand suspended after 7 days from the date of that letter.

26. Section 12 (1) (b) of the societies Act which is material to this petition provides that (1) Where, in respect of any registered society, the Registrar where he has reasonable cause to believe that the registration of a society should be cancelled or suspended on the ground that (b) the interests of peace, welfare, or good order in Kenya would, where he has reasonable cause to believe, be likely to be prejudiced by the continued registration of the society; the Registrar shall, give written notice in the prescribed form to the society **calling upon the society to show cause, within such period as is specified in the notice, why its registration should not be cancelled or, as the case may be, suspended;** and, if the society fails to show cause to the satisfaction of the Registrar within the time specified, the Registrar may cancel or suspend the registration of the society.

27. The law is also clear that where the registration of a society has been suspended, the society shall not take any action, nor permit any action to be taken, in furtherance of its objects except collection of subscriptions; payment of its debts; and such action as the Registrar may from time to time authorize. Any society that contravenes the above provisions shall be guilty of an offence. A suspension puts a society in a non- functional mode until it is lifted or the society's registration is cancelled.

28. According to section 12 (1) (b), the Registrar is required to give notice in the **prescribed form** to the society concerned **calling upon** such a society to show cause within a given time why its registration may not be cancelled or suspended. And only after failing to show cause to the satisfaction of the Registrar should the Registrar taken action either to cancel or suspend the society's registration as the case may be. The law leaves no doubt that the Registrar cannot take steps to cancel or suspend registration of a registered society without giving it a hearing. And where notice is given, until the society fails to show cause to the satisfaction of the Registrar, no lawful action can be taken against it. The question that arises is; did the 1st and 2nd respondents comply with the 1st law before taking the action of suspending 1st petitioner's registration"

29. I have perused the impugned letter dated 29th April 2016 and it is clear that the 2nd respondent as the author, did not call upon the petitioners to show cause why the 1st petitioner should not be suspended. The letter simply notified them that the 1st petitioner would stand suspended after expiry of seven (7) days from the date of that letter,

30. In their submissions, the respondents maintained that prior to the suspension, the petitioners were given notice to show cause which they did not do leading to the suspension of the 1st petitioner. It must

however be appreciated that there is a difference between giving a notice to show cause why some action should not be taken, and giving a notification that the action would be taken after a given period of time. In the present case, notification was to the effect that the society would stand suspended and did not call upon the petitioners to show cause why the action of suspending the 1st petitioner's registration should not be taken.

31. In my view, as is also clear from the letter, the 2nd respondent merely notified the petitioners that after 7 days, the 1st petitioner would stand suspended and did not ask them to do anything to counter the intended action. The author only drew their attention to the provisions of section 12 of the Act without asking them to do anything in terms of those provisions. That is not the import of section 12 of the Act.

32. The action of suspending a duly registered society is serious and would have grave consequences on the operations of such a society. It is on the recognition of the magnitude of the effect and or consequences of such an action that the legislature made it clear that the Registrar would have to give notice in the prescribed form calling upon the affected society to show cause why its registration should not be cancelled or suspended; and only after failing to satisfy the Registrar on the contrary, would the Registrar go ahead and take the action to cancel or suspend that society's registration.

33. Following proper procedure is important because it then allows section 15 of the Act to kick in in terms of appeals against decisions to suspend or cancel registration of a society and determination of such appeals and what follows next. Section 15 of the Act provides ;

“(1) Any society aggrieved by the Registrar’s refusal to register it, or by the cancellation or suspension of its registration under section 12 may—

(a) in the case of a political party, appeal to the High Court within thirty days of such refusal, cancellation or suspension; or

(b) in the case of any other society, appeal to the Minister within thirty days of such refusal, cancellation or suspension and the Minister shall determine and communicate his decision on the appeal within ninety days of the appeal.

(2) A society aggrieved by the decision of the Minister under subsection (1)(b) may appeal to the High Court within thirty days of the decision.

(3) Notwithstanding the provisions of subsection (1) of section 4, where a society other than a society specified in paragraphs (i), (ii) or (iii) of the proviso to section 4(1), lodges an appeal under subsection (1) of this section, such society shall not, pending the decision on the appeal, be an unlawful society.” (emphasis)

34. Where a statute imposes a duty on a statutory body to act in a particular manner, the statutory body has no option but to act lawfully and in accordance with the mandate bestowed on it by law. It does not have to act capriciously and whimsically and trample upon rights and fundamental freedoms of those it is supposed to serve in the course of performing its statutory obligations without giving them a hearing.

35. As stated above section 12 (1) (b) requires the Registrar to give the affected society a hearing before taking any action against it. The right to fair hearing is not only a legal requirement but also a constitutional right. **Article 47** of the Constitution provides that (1) ***every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair,*** and that (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.

36. The right to fair administrative action is now firmly embedded in our constitution as an integral part of our Bill of Rights which cannot be abrogated by administrative bodies whenever they take administrative actions. In the case of **Judicial Service Commission v Mbalu Mutava & another** [2014] eKLR the Court of Appeal observed;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”(emphasis)

37. The Court was clear that the test in administrative actions is that of the legality and lawfulness of such administrative actions. That is why Article 47(1) emphasizes on the right to administrative actions that are ***expeditious, efficient, lawful, reasonable and procedurally fair***. The above attributes demand that administrative actions be not only legal but also constitutional. It is also for that reason that the Court stated in the case of **Dry Associates Ltd v Capital Markets Authority and Another**, [2012] eKLR that **Article 47** is intended to subject administrative processes to constitutional discipline so that relief for administrative grievances should no longer be left to the realm of common law or judicial review under the ***Law Reform Act (Cap 26 of the Laws of Kenya)*** but be measured against the standards established by the Constitution.

38. It is also a fact that once the Registrar makes a decision to suspend or cancel registration of a society, such a decision should be communicated to the affected society to set in motion the operation of the provisions of section 15 of the Act. No such communication was made to the petitioners if at all and it is not known when time started running for purposes of section 15 of the Act which requires that an appeal against suspension or cancellation be filed within 30 days. I say so because the respondents have taken two contradictory positions on this matter. Whereas the letter of 29th April stated that the society would stand suspended after 7 days, in their response to the petition, the respondents contended the 1st petitioner is no longer a registered society under the societies Act and therefore had no ***locus standi*** to institute the petition, implying that the 1st petitioner's registration had been cancelled. Yet again in their submissions, counsel for the respondents submitted that the 1st petitioner was only suspended.

39. Going by the above contradictions, one is left unsure what the actual status of the 1st petitioner is given that the letter talked of suspension and if that be the case, then the respondents were required to inform the petitioners when it was suspended to enable them decide whether or not to exercise their right under section 15 of the Act. As it is, it is not clear whether indeed the 1st petitioner's registration was suspended or cancelled or suspended and if so, when actual suspension or cancellation was done.

40. It was a constitutional as well as legal requirement that the respondents act legally and where necessary, call upon the 1st petitioner to show-cause why it could not be suspended or any other action taken against it as may be necessary. It was contrary to law to simply notify the petitioners that the society it would stand suspended after 7 days as the 2nd respondent purported to do. That was against the letter and spirit of section 12 of the societies Act and made a mockery of the existence of section 15

of the same Act. Moreover it violated the petitioners' right to fair administrative action under Article 47 of the Constitution and the Fair Administrative Act, 2015.

41. Even if it were to be assumed that the impugned letter was a notice to show cause, the same did not constitute sufficient notice. The letter notified the petitioners that the society would be suspended in 7 days of that letter. The respondents did not say when the letter was dispatched to the petitioners to enable the Court determine when it was possibly received. Where the law demands that notice to show cause be served, such notice should be for a reasonable time. No reasonable person would expect the petitioners to substantively respond to a notice to show cause in 7 days even where it was received on the same day it was written. In such circumstances the respondent would simply be purporting to technically comply with the law which is not the purpose of the Article 47 of the Constitution, the Fair Administration Act and section 12 of the societies Act.

42. The impugned action also rendered the requirement that no one should be condemned unheard valueless and threw the principles of natural justice out of the window. They condemned the petitioners unheard in violation of both the Constitution and the Law and therefore their action amounted to nothing. It is illegal null and void.

43. The respondents' action was also unreasonable for reason of failing to observe the law and procedural fairness. It failed the test of legality as stated in the case of **Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300** thus;

"..Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

44. And as **Lord Denning** put it in **Selvarajan v Race Relations Board [1976] 1 ALL ER 12,**

"... The investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. (emphasis)

45. It is therefore clear to me beyond doubt that the respondents violated the petitioners' rights and failed to act in accordance with the Constitution and the law by according them a hearing before suspending registration of the 1st petitioner as a society. Article 2(1) of the Constitution proclaims the Constitution as the Supreme law of the Republic and binds all persons and all state organs at all levels of government. Further, national values and principles governance in Article 10 of the Constitution also bind all state organs, state officers, public officers and all persons whenever they **apply or interpret the Constitution or enact apply or interpret any law.** The national values and principles of governance include (2) (b) human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. To that extent, the petitioners' rights must be valued, respected and protected.

46. In the circumstance, I find and hold that the respondents' action is untenable for violating the

Constitution and the law. If the respondents have reason to believe that the 1st petitioner's registration or its activities are questionable, they must act in accordance with the Constitution, the Fair Administrative Act and section 12 of the Societies Act and give the petitioners an opportunity to respond to any misgivings about its activities before taking any drastic action against them.

47. For those reasons, I find that the petition has merit and must succeed. As to damages, I do not think the petitioners laid a basis for such an order. The request is therefore declined. Ultimately, the orders that commends themselves for granting are as follows;

i. A declaration is hereby issued that the respondents violated the petitioners' constitutional and statutory rights as set out under Articles 47 of the Constitution, the Fair Administrative Act and Section 12 of the Societies Act.

ii. An order is hereby issued quashing the letter by the 2nd respondent dated 29th April 2016 purportedly suspending registration of the ATHEISTS SOCIETY IN KENYA the 1st petitioner herein.

iii. Each party do bear their own costs.

Dated Signed and Delivered at Nairobi this 25th Day of January, 2018

E C MWITA

JUDGE



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