**Republic and others v Attorney General and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 4 March 2005

**Case Number:** 769/04

**Before:** Nyamu and Ibrahim JJ

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Judicial review – Grounds for judicial review – Procedural fairness – Legitimate expectation –*

*Irrelevant consideration – Illegality – Unreasonableness – Bias – Abuse of Power – Bad Faith –*

*Procedural Impropriety – Duty to act fairly.*

**JUDGMENT**

**Nyamu and Ibrahim JJ**: This is an application for Judicial Review. It seeks an order of *certiorari* to remove into this Court for the purpose of being quashed the decision made by the Registrar of Societies on 6 February 2004 under section 12 of the Societies Act Chapter 108 cancelling the registration of the applicant’s certificate of Registration number 23080 and registering in their place, the Kenya Schools Head Teachers Association. Also sought is an order of mandamus to compel the Registrar of Societies to reinstate the applicant’s certificate of Registration number 23080. The third order sought is the usual one on costs. This application is only partially opposed the first respondent and second respondent having failed to file any replying affidavits. Although there is no provision for the filing of grounds of opposition the interested party did file them on 9 December 2004 after they had been enjoined as parties. There was no representation on the part of the two respondents and the interested party during the hearing on 22 February 2005. The grounds of oppositions are:

(1) That the application is incompetent and incurably defective.

(2) That the application is bad in law.

(3) That the orders sought by the applicants cannot be issued by the Honourable Court against the

second respondent.

(4) That the applicant has no statutory duty to reinstate deregistered Societies hence orders sought by

the applicants will be ultra vires the Societies Act Chapter 104 the Laws of Kenya.

(5) The allegations contained in the supporting affidavit and the statement dated 16 June 2004 are

baseless and misleading.

A brief outline of the facts is that on 12 June 2003 the applicants founded the Kenya National

Association of Primary School Head Teachers (KNAPSHET) and applied for registration.

On 11 December 2003 the Society was duly registered under the Societies Act Chapter 108 and a certificate of Registration number 23080 issued. On 6 February 2004 the Registrar of Societies in purported exercise of powers vested in her under section 12 of the Societies Act cancelled the registration of the Society by a Notification of cancellation. The applicants contend that at no time prior to the said cancellation was any communication made to the applicants of the intended cancellation nor were the applicants given any notice calling upon it to show cause why it should not be deregistered. In addition at no time prior to the said cancellation were the applicants afforded an opportunity to be heard or to make representations on the issue of recognition by the Ministry of Education Science and Technology which was the basis for the deregistration of the applicant’s society and the registration of a rival organization by the name of Kenya Primary Schools Head Teachers Association which the applicants and their members were advised to join. The rival association which had applied for registration much later was registered on 9 February 2004 barely 3 days after the deregistration of the applicants. The applicants claim that the decision to deregister their society was arbitrary, unfair, unreasonable and without any basis in law or fact as the applicants Association was duly recognised by the Ministry of Education Science and Technology but which recognition was not in any event a legal requirement for registration of such a society. Finally the applicants argue that their entire membership of over ten thousand primary school head teachers have been adversely affected by the said decision which has violated their rights of freedom of association guaranteed under the Constitution. (1) It is clear to the court that although the registrar had a discretion under section 12 to give notice to the applicants to show cause why their society should not be deregistered he did not exercise that discretion. The applicants were not notified at all. No hearing was afforded to the applicants or reasons given prior to the deregistration (2) It is also clear from the correspondence that although the notification of cancellation dated 6 February 2004 is endorsed with the following reasons for cancellation, “The interest of peace welfare or good order in Kenya would be likely to be prejudiced by continued registration of the society.” T he real reason for deregistration is contained or expressed in the letter dated 17 May 2004 from the registrar of Societies to the effect that the applicants did not have “an approval by the Ministry of Education which is the rightful authority regarding matters of forming associations within the teaching profession”. The respondents did not file any affidavit even after the grant of leave by this Court for them to do so out of time. The applicants having been the first to apply for registration and the same having been effected it appears odd for the same registrar to deregister it purporting to cite reasons set out under section 12 and endorse them on the Notice of cancellation. The respondents had an opportunity to satisfy the court that the only grounds which they relied on in deregistering are those set out in section 12 of the Society’s Act but they failed or have declined to do so. It is not clear to the court why an association which is supposed to have been vetted for security and on other relevant grounds long before registration would be deregistered about two months later citing considerations which would normally be expected to precede registration. (3) The applicants have also alleged that the Registrar of Societies in deregistering the society was arbitrary, unfair, unreasonable and without any basis in law. We find that the Registrar’s act of registering a rival society only 2 days after the unexplained deregistration of the applicant’s is indicative of bias and an element of bad faith and abuse of power on the part of the Registrar of societies. (4) We have also considered the applicant’s contention that after registration the Society’s operations and programmes involving expenditure of money were paralysed and that their claim to a membership of about 10 000 primary school heads has not been denied by the respondent and for this reason we find that the applicants after registration would immediately have legitimate expectation to proceed with the implementation of their Society’s objectives without hindrance. The deregistration appears to have thwarted their legitimate expectation to a hearing. In addition the deregistration did take away a benefit or an advantage which is also a legitimate expectation. (5) Arising from the above situation we consider it important to consider whether the Registrar of Societies did owe any duty to the applicants to act fairly in the circumstances and whether even without that duty being expressed in the Act whether such duty can be implied. 1. Procedural Fairness Protected Interest and Legitimate Expectation The first item above which can generally be said to cover the requirements of fairness it is clear to us that no notice of deregistration was given prior to the deregistration and no reasons were given or the right of hearing accorded to the applicants. Although section 12 does confer on the registrar with a discretion to issue a notice to show cause before deregistering a society we note that he did not do so. The question to pose is whether failure to do so was reasonable taking into account that the registration had been effected at least two months before the deregistration and the applicants had embarked on their programmes. The answer is a clear “NO”. It was unreasonable on the part of the Registrar not to have issued the notice and we hold that the unreasonableness of such a decision brings it within the purview of Judicial Review. The Registrar had a Judicial or administrative discretion to be exercised judicially and reasonably. The registration and the award of a certificate did create a protected interest in favour of the applicants to remain a registered society and we hold that they are perfectly entitled to safeguard that interest. That protected interest was unreasonably taken away and that decision by the decision maker namely the Registrar is amenable to judicial review. In addition failure to give notice was an improper exercise of the discretion conferred on the Registrar. We hold that section 12 did not exclude the application of rules of natural justice and in particular the *audi alteram partem* rule ie the right to a fair hearing see *Ridge v Baldwn* [HL 1964]. We further hold that the Registrar should have given reasons for his action and was under a duty to do so, more so because the applicants after registration had also acquired a legitimate expectation duly induced by the Registrar by virtue of the issue to them of a certificate of registration. We venture further to suggest as Lord Scarman said in the case of *CCSU v The Minister for Civil Service* [HL 1984] that there was an implied duty of fairness attached to all administrative acts. We also associate ourselves with Lord Mustill’s holding in the case of *Doody v The Home Secretary* [HL 1993] that where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair. 2. Irrelevant Considerations and Illegality The Registrar of Societies having failed to file an affidavit or to appear to defend his position we find that the reasons or grounds of cancellation endorsed on the Notification were not the real reasons because a vetting process always precedes registration. There was no proven grounds for deregistration under section 12. Instead in his letter cited above the Registrar did give the real reason for deregistration which is that the applicant’s society did not enjoy the Ministry of Education’s recognition. We note that recognition is not one of the grounds for deregistration under section 12 of the Act. We find that the Registrar of Societies did take into account an irrelevant consideration in the decision making process. We again hold that the taking into account an irrelevant consideration invites this Court’s intervention in Judicial Review. Irrelevant consideration is one of the recognised grounds for intervention and again on this ground alone the deregistration decision ought to be brought up and quashed. In support of this finding the famous case of *Associated Provincial Picture Houses Limited v Wednesbury Cop* civil appeal 1948 enumerated the principle of a challenge in Judicial Review based on irrelevant considerations. Also in the case of *Padfield v Minister of Agriculture and Fisheries* [HL 1968] the Minister had the power to refer complaints about the operation of the Milk Marketing Board scheme to a committee. He refused to refer a complaint of substance to the committee. It subsequently emerged that one reason for his decision was that he had taken into account the fact that publicity about the complaint would be politically damaging for the Government at that time. The court found that, that was an irrelevant consideration which rendered the decision unlawful. In this case Lord Upjohn held that unlawful behaviour might be constituted by: (*a*) An outright refusal to consider the relevant matter. (*b*) A misdirection on a point of law. (*c*) Taking into account some wholly irrelevant or extraneous consideration. (*d*) Wholly omitting to take into account a relevant consideration. Applying the facts of the case before us to the above tests items (*a*), (*b*) and (*c*) were patently ignored by the registrar and the court is perfectly entitled to intervene. Indeed in the case of CCSU cited and considered elsewhere in this judgment Lord Diplock defined illegality as under: “By illegality as a ground for Judicial Review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.” It cannot rightly be said that the Registrar did so understand the law or give effect to it in the circumstances described above. There is therefore a strong case for intervention by this Court. 3. Unreasonableness, and Bias, Abuse of Power, Bad Faith and Procedural Impropriety In the development of this branch of the law bias and unreasonableness have been recognised as grounds which stand alone in assisting the courts to deal with the challenged decisions. The deregistration of the applicants and the registration of main rivals within two days is indicative of both bias and unreasonableness on the part of the decision maker. Failure to give reasons for what is patently lack of evenhandedness on the part of this decision maker does in our view constitute procedural impropriety. In addition we hold that there is certainly evidence of bad faith on the part of the decision maker and the court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument. We find that the Registrar decision does fall squarely under attack on these grounds as well. 4. Legitimate Expectation and Protected Interests The fact that the applicants had been registered for over two months and issued with a registration certificate did create in their favour a protected interest which ought not to have been taken away at the whim of the Registrar without a hearing and the giving of reasons. That interest as stated above is to remain in the registration register and that this interest is protected under judicial review. They had also in reliance of the certificate of registration designed and formulated a programme of action and had started spreading their wings to enroll members and had also started to expend moneys in respect of their programmes. As stated in item (1) above the issue of the Certificate does in our view constitute inducement from the Registrar. We find that he did induce a legitimate expectation in the applicants as well, and therefore hold that this Court’s intervention would be justified on these grounds as well. Legimate Expectation This principle which justifies the imposition of procedural protection has come to be known as legitimate expectation. Such an expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the courts have held that the expectation ought not to be summarily disappointed. The principle appears to have had recent origins in the English case of *Schmidt v Secretary of State fFor Home Affairs* [1969] 2 Ch 149 in which a foreign student sought review of the Home Secretary’s decision not to grant an extension of his temporary permit to stay in the UK. However what gave the principle bigger exposure was its definition by Lord Diplock in the leading English case of *Council of Civil Services Unions v Minister For Civil Service* 1985 AC 374, the brief outline of facts is that a majority of the judges in the case based their conclusion on the fact that, but for national security, there would have been a duty on the Minister to consult on the ground that the civil servants had a legitimate expectation that they would be consulted before their trade union rights were taken away. Lord Diplock at 406–409 stated that for a legitimate expectation to arise the decision. “Must affect (the) other person. . .by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or ( ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn.” Lord Fraser in the same case put it in these words: “A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.” We hold that the matter before us is clearly covered by both Lord Diplock’s definition and that the protected interest acquired by registration and the issue of a certificate of registration should not be thwarted by the registrar and that his decision to deregister should be brought into this Court for quashing on this principle as well. Indeed, in a recent case involving Nairobi Hawkers (street traders) who had been allocated street sites by the City Council and who had valid permit licences issued to them for value benefited from this principle when one of the member of this Panel, Mr Justice Nyamu gave them leave to apply for an order to quash the Minister decision to evict without proof of reallocation to another site 5. Duty to Act Fairly Although there is an overlap between this ground and the first ground above, we find that failure by the registrar to give reasons for his decision and to explain why she had to act the way she did is fatal to her decision. The applicants have no other known relief in law and the registration of their later day rival jeopardised their interests in a prejudicial manner and although we are aware that judicial review remedies are discretionary where an applicant has no other way of obtaining or accessing relief the court must let the law take its course regardless of the consequences. Here we are mindful of the fact that our decision might regrettably lead to the establishment of two rival groups in the same area of operation but the court is compelled to leave this aspect addressed by the market forces if any exist in this area to determine who survives and who goes under. A registrar who perverts the rule of law by his act must be made to shoulder the consequences of his act although what is under attack is her decision and not the person. In the case of *R v Higher Education Funding Council ex parte Institute of Dental Surgery* civil appeal 1994 the court held that giving reasons was one requirement of fairness and that it could depending on circumstances be an implied duty. The same theme was repeated in the *R v Secretary of State, ex parte Doody* which we have cited above. A duty to give reasons would be implied in the following situations: (*a*) Where the decision involved an interest which was highly regarded in law, in our case freedom of association is not only highly regarded but it is also a constitutional right. (*b*) Where the nature of the process required reasons to be given. In this case the nature of the process does so require hence the statutory provision for a notice to show cause. (*c*) From the circumstances of the individual case. Yes the circumstances of deregistration are such that it would be necessary to give reasons. Giving reasons after the event, and for that matter giving reasons based on an irrelevant consideration is in our view a mockery of the rule of law. Conclusion This is a case that has compelled the court to go through or review nearly the entire spectrum of grounds for intervention in Judicial Review as clearly outlined above (one to five) which include the 3R’s namely illegality, irrationality and impropriety of procedure. But we would venture to suggest that the law has not yet reached the farthest or the last frontier and that the courts must endevour to expand the grounds of intervention depending on the circumstances before them. Although not in the context of the facts in this case and this is obiter we must add that in a fitting case this Court would be prepared to extend the ground of intervention to decisions made under the shadow of corruption or abuse of office. Indeed, nothing subverts the rule of law more than decisions induced by corruption or abuse of office. Obviously absence of reasons or irrationality of a decision could suggest such a conclusion. We do accept however that grounds of intervention in Judicial Review do overlap and the facts of each case must either define the ground or suggest a new ground. On the facts of the case before us we have found that the applicants had a right of hearing provided by the relevant law vide a notice to show cause which was not served following improper exercise of discretion by the Registrar and we have also found that quite independent of the statutory right to hearing the very act of registration and the issue of a certificate of registration by the decision maker, namely the Registrar gave the applicant a legitimate expectation to a hearing which is not to be thwarted. Unlike Lord Diplock we would not confine the principle only to past advantage or benefit but we would extend it to a future promise or benefit yet to be enjoyed. It is a principle which in our view should not be so restricted because it has its root in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity predictability, certainty and we dare add with confidence. As outlined above the principle has been very ably defined and applied in public law in the last century but it is clear to us that it has its cousins in private law of honouring trusts and confidences. It is a principle which has origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine. The upshot of the above is that this Court is perfectly entitled to quash the decision on any of the enumerated grounds (one to five) are above. We therefore hereby bring up to this Court the decision to deregister and quash the same forthwith and further issue an order of mandamus as prayed compelling the registrar to restore to the applicants the certificate of registration. For the appellant: *Information not available*

For the respondent:

*Information not availabl*