



**Republic v Director of Immigration Services & another; Mohamud (Exparte Applicant) (Judicial Review E154 of 2023) [2024] KEHC 9623 (KLR) (Judicial Review) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9623 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E154 OF 2023  
JM CHIGITI, J  
JULY 29, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF IMMIGRATION SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ABUBAKAR HAJI MOHAMUD ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Applicant is a Kenyan citizen by birth who has lived his entire life in Kenya. He is married with children and runs a business in Nairobi.
2. On 4<sup>th</sup> October 2023 at 7:25 AM, when he arrived at Jomo Kenyatta International Airport aboard a Qatar Airways flight from India with his valid Kenyan passport, he was arrested by the Respondents' officers.
3. The Applicant pleads that no reasons were given to him for his arrest. He pleaded that after spending 8 hours in detention, he was verbally informed by the Respondents Officers that the reason for his arrest was that he was allegedly an Ethiopian citizen.
4. He further pleads that he was not given any time to state his case before being released on bond on condition that he returns to the Department of Immigration Services on Friday 13<sup>th</sup> October 2023 with his one-way ticket to Ethiopia, so that he could be deported. He was not given any written reasons for the decision. This informed his need to file this suit.



## Ex-Parte Applicant's Case;

5. The application that is before this court for determination is the one dated 24<sup>th</sup> October 2023 wherein the applicant seeks the following reliefs:
  - a) This Honourable Court be pleased to issue judicial review orders of certiorari to bring to this Court and quash the decision of the 1<sup>st</sup> Respondent made on 4<sup>th</sup> October 2023, requiring the Exparte Applicant to "avail himself to the Department of Immigration on 13<sup>th</sup> October 2023 with his one-way ticket to Ethiopia", and the decision made on even date to expatriate the Applicant to Ethiopia on 13<sup>th</sup> October 2023.
  - b) Costs of this application be provided for.
6. The Applicant is challenging the 1<sup>st</sup> Respondents' decision to eject him from Kenya so as to repatriate or deport him to Ethiopia, yet he is a Kenyan citizen by birth.
7. The applicant has raised concerns against the said decision for being unconstitutional, illegal, unjustified and contrary to the rules of natural justice.
8. His case is predicated on the grounds as set out in the application for leave dated 12<sup>th</sup> October 2023 and the Statutory Statement and Verifying Affidavit of Abubakar Haji Mohamud sworn on 12<sup>th</sup> October 2023 attached thereto.
9. It is his case that for an administrative action to be considered as efficient, lawful, reasonable and procedurally fair, a person has to be given the right to be heard.
10. Article 47 of *the Constitution* codifies every person's right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
11. He further argues that the status of *Fair Administrative Action Act* in Kenya's Constitutional and Jurisprudential framework was discussed by Onguto J in *Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board* [2016] eKLR where the learned Judge expressed himself, inter alia, as follows:

“ a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justice are to be observed before a decision affecting his substantive rights or interest is reached”.
12. The principle of legality dictates that every administrative act of government must be anchored in law.
13. In *Republic v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 20thers Ex- parte Paresh Kamlakar Naik & another* [2018] eKLR the court held that,

“ An administrative decision is flawed if it is illegal. A decision is illegal if it:-(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.”
14. The Applicant argues that he has proven beyond reasonable doubt that he is a bona fide Kenyan Citizen with valid Certificate of Birth, National identity card and Kenyan Passport.



15. Consequently, he is entitled to citizenship rights under Article 12 of *the Constitution* and section 22 of the *Kenya Citizenship and Immigration Act*, such as the right to enter, exit, remain in and reside anywhere in Kenya.
16. It is his case that the 1<sup>st</sup> Respondent's decision is manifestly illegal and ripe for quashing by this court. Reliance is placed in the case of *Republic v Inspector General of Police & another Exparte Patrick Macharia Nderitu* [2015] eKLR, the learned Justice Odunga (as he was then) defined irrationality to arise "when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards."
17. It is his case that the 1<sup>st</sup> Respondents' decision to eject a bona fide Kenyan citizen by birth (the applicant) from Kenya and repatriate or deport him to Ethiopia is grossly unreasonable and contrary to logic.

### **Respondent's Case**

18. The 1<sup>st</sup> Respondent, filed a replying affidavit sworn by one, Ronnie Akedi, and dated 26<sup>th</sup> January 2024 in opposition to the said application.
19. The 1<sup>st</sup> Respondent argues that it issued a directive to the ex-parte applicant, requiring him to appear before the Department of Immigration on the 13<sup>th</sup> October, 2023.
20. This directive followed the discovery that the applicant was in possession of illegally obtained immigration documents.
21. Despite the 1<sup>st</sup> Respondent's compliance with statutory provisions and the issuance of this directive, the applicant chose to bypass the administrative process and filed an application before the court seeking an order of certiorari to quash the 1<sup>st</sup> Respondent's decision.
22. It is its case that the Applicant's actions are based on claims of purported violations of due process.
23. According to the 1st Respondent, Section 4 of the Citizenship and Immigration *Act, No. 12 of 2011* details the functions of the 1<sup>st</sup> Respondent as follows:

“ 4.

- (1) The Service shall appoint a Director to be in charge of citizenship and immigration matters.
- (2) The Director shall subject to such directions as may from time to time be given by the board perform the following functions-
  - (a) advising the Cabinet Secretary on matters relating to grant and loss of citizenship;
  - (b) the issuance of passports and other travel documents;
  - (c) .....
  - (d) .....



border management including the control and regulation of entry and exit of all persons at ports and points of entry and exit;

- (e) .....
- (f) advising the Cabinet Secretary on the declaration and removal of prohibited immigrants and undesirable persons;
- (g) .....
- (h) .....
- (i) conducting research, collection, and analysis of data, and management of records; and
- (j) .....

24. This section confers upon the Director the authority to oversee citizenship and immigration matters, thereby imbuing the Director with the responsibility to ensure compliance with immigration laws and regulations.

25. Section 48(1) provides that Subject to and for the purposes of this Act an immigration officer shall have the power to: -

- “(a) .....
- (b) require any person seeking to enter Kenya to answer any question or to produce any document in his possession for the purpose of ascertaining whether that person is or is not a citizen of Kenya and, in the case of any person who is not a citizen of Kenya, for the purpose of determining whether that person should be permitted to enter Kenya under this Act;
- (c) .....
- (d) ;or
- (e) arrest, restrain, stop or deny departure to any person against whom a warrant of arrest has been issued by a competent Kenyan court and hand over the person for custody to the nearest police officer.
- (2) An immigration officer may investigate any offense or suspected offense under this Act and shall have all the powers and immunities conferred by law on a police officer for the purpose of the investigation.

26. Section 33(s) of the Citizenship and Immigration Act categorizes individuals as prohibited or inadmissible if they seek to enter Kenya illegally.

27. Section 54 of the Citizenship and Immigration Act outlines offenses within the jurisdiction of immigration officers for investigation, guiding the Director's actions in this case. It states as follows:

- “.....b) forges, alters, destroys or willfully defaces a passport, travel document, certificate of registration, visa, work permit, residence permit, pass, written authority, consent or approval, or a copy of any written authority, work or residence permit, pass, written



authority, consent or approval, or any entry or endorsement in or passport or travel document, issued or granted by a lawful service;

(c) knowingly uses or has in his possession a forged passport, certificate of registration, visa, foreign person certificate work permit, residence permit, pass, written authority, consent or approval, or a passport, work permit, residence permit, pass, written authority, consent or approval which has been altered or issued without lawful authority, or a passport or travel document or similar document in which a visa or endorsement has been forged, or altered or issued without lawful service;.....”

28. Section 43(1) of the Citizenship and Immigration Act grants the Cabinet Secretary the authority to issue written orders for the removal of individuals unlawfully present in Kenya. It states:

“The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order .....shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person against whom an order has been made under this section shall-

a. be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence, or citizenship.....; or (b) if the cabinet secretary so directs, be kept and remain in police custody, prison, or immigration holding facility or until his departure from Kenya,

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.

29. Crucially, subsection (5) acknowledges immigration officers' authority, including the Director's, to exercise powers conferred by the Cabinet Secretary in cases of illegal entry.

30. The 1<sup>st</sup> Respondent argues that it has diligently adhered to the provisions stipulated in the relevant sections of the Citizenship and Immigration Act as set out in the affidavit sworn and submitted by the 1<sup>st</sup> Respondent.

31. Reliance is placed in the case of *R v Commission for Higher Education ex-parte Peter Shitanda* [2013] eKLR as follows:

“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”

32. The 1<sup>st</sup> Respondent believes that it has not acted ultra vires the law and has adhered to the principles and correct procedures as stipulated in the Citizenship and Immigration Act.



33. The 1<sup>st</sup> Respondent's decision to release the Applicant on bond highlights their commitment to due process and legal principles.
34. By scheduling the individual's appearance before the Department of Immigration, the 1<sup>st</sup> Respondent facilitates adherence to administrative processes outlined in the Act.
35. This reflects the 1<sup>st</sup> Respondent's dedication to ensuring the individual's case follows legal procedures and safeguards their rights throughout the adjudication process.
36. Notwithstanding the fact that the 1<sup>st</sup> respondent adhered to proper procedural protocols and expressed a readiness to hear the applicant's grievances, the applicant disregarded this invitation by the first respondent and instead initiated legal proceedings before this honorable court thereby undermining the very due process that the applicant alleges has been neglected by the first respondent. In *Republic v Otieno Kajwang Ex-parte Mohmud Siras* [2009] eKLR Dulu Judge stated that:
 

“ A suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him”.
37. It argues that the applicant's non-compliance with this directive indicates a failure to cooperate with the administrative procedures prescribed by law.
38. The decision of the first respondent was susceptible to review and appeal within the administrative framework of the Department of Immigration.
39. By circumventing these internal mechanisms, the applicant has prematurely sought redress from this Court. In *Speaker of the National Assembly v Njenga Karume* [2000] I KLR 425 the Court stated;
 

“In our view there is considerable merit that where there is clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed”.
40. Granting the order for certiorari would disrupt the administrative functions of the Department of Immigration by enabling litigants to bypass established procedures and seek judicial intervention at their discretion.

**Analysis and determination;**

41. The issue for determination is whether or not the Applicant has made out a case warranting the grant of the orders sought.
42. In *Republic v Otieno Kajwang Ex-parte Mohmud Siras* [2009] eKLR Dulu Judge stated that:
 

“ A suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him”.
43. Adherence to administrative orders is imperative to uphold the integrity of the immigration process and maintain orderly proceedings.
44. According to the 1<sup>st</sup> Respondent, the decision of the first respondent was susceptible to review and appeal within the administrative framework of the Department of Immigration. It was upon the 1<sup>st</sup> Respondent to bring out the applicable law which it failed to do.



45. The applicant's non-compliance with this directive indicates a failure to cooperate with the administrative procedures prescribed by law.
46. This court finds no problem with the fact that the Applicant was released on bond by the Respondent on condition that he returns to the Department of Immigration Services on Friday 13<sup>th</sup> October 2023.
47. However, this court is troubled by the fact that he was asked to go with his one-way ticket to Ethiopia, so that he could be deported. This amounts to a procedural irregularity.
48. This condition generates an inference that the 1<sup>st</sup> Respondent had already pre-determined that it was going to deport the Applicant to Ethiopia. The presumption that the Applicant is innocent until proven guilty has been eroded and taken away by the bond terms.
49. The terms of the bond amount to a threat, infringement and a violation of the right to fair hearing under Article 50 of *the Constitution*.
50. Article 24 of *the Constitution* has laid a very procedure that a duty bearer must embrace, uphold and promote whenever it is interfering with citizens' right to fair administrative action and due process accords with Article 24 of *the constitution*.
51. This court appreciates the importance of the power and the duty of the 1<sup>st</sup> Respondent to protect Kenyans from persons who are not legally in Kenya under Section 43 of the Citizenship and Immigration Act which grants the Cabinet Secretary the authority to issue written orders for the removal of individuals unlawfully present in Kenya.
52. The duty to respect is more strict when it comes to administrative action that has the effect of taking away the fundamental right of citizenship. No one's right to citizenship should be taken away capriciously and or whimsically.

### **Disposition;**

53. He that comes to equity must come with clean hands and must also do equity. The conduct of the Applicant in refusing to avail himself to the Department of Immigration on 13<sup>th</sup> October 2023 in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Applicant has not done that.
54. The reasons as fronted through the application for the failure to honor the 1<sup>st</sup> Respondent's summons amount to an unfounded fear and I so hold.

### **Order**

- a. The application dated 24<sup>th</sup> October 2023 lacks merit and the same is hereby dismissed with no orders as to cost.
- b. The applicant shall present himself at the 1<sup>st</sup> Respondent's offices within 7 days of today's date unconditionally.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2024.**

.....  
**J. CHIGITI (SC)**

**JUDGE**

