



REPUBLIC OF KENYA



KENYA LAW
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**Fidhow v Registrar of Births and Deaths & another (Application E111 of 2023)
[2024] KEHC 10161 (KLR) (Judicial Review) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E111 OF 2023
J NGAAH, J
AUGUST 16, 2024**

BETWEEN

HASSAN ADEN BIBLANE FIDHOW APPLICANT

AND

REGISTRAR OF BIRTHS AND DEATHS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The application before court is the applicant's chamber summons dated 18 October 2023 expressed to be brought under order 53 rule 1(1), (2) and (4) of the [Civil Procedure Rules](#). The applicant seeks the following orders:
 - “1. That this matter be certified as urgent to be heard *ex parte* in the first instance and on priori ty basis;
 2. That the Honourable Court be pleased to grant leave to the Applicant to file Judicial Review proceedings for an Order of *Mandamus* to compel the Registrar of Births and Death to rectify the name of Applicant's mother as Nadhifo Hassan Wariyo in the Applicant's Birth Records.
 3. That the Honorable Court be pleased to grant leave to the Applicant to file Judicial Review proceedings for an Order of *Mandamus* to compel the Registrar of Persons to register the Applicant as a valid Kenyan Citizen by Birth and thereupon to issue a national Identity Card to the Applicant.
 4. That the costs of this Application in the cause.”



2. The application is supported by an affidavit sworn by the applicant and “the applicant’s statutory statement”.

The purported statutory statement reads as follows:

“THE APPLICANT’S STATUTORY STATEMENT

My name is Hassan Aden Diblane Fidhow. I am the Applicant herein.

I was born on 21st February 2004 at Mother and Child Hospital at Eastleigh, Nairobi My parents are Nadhifo Hassan Wariyo (mother) and Adan Diblane Fidhow (father) who are Kenyan citizens and therefore I am a Kenyan citizen by birth .

I enrolled at Pumwani Child Survival Education Centre for KCPE and subsequently at Eastleigh High School for KCSE.

Upon attaining the age of majority I applied for a Kenyan National Identity Card but my Application was declined on the basis of incorrect name of my mother upon verification of my Certificate of Birth.

By a letter dated 1/10/2022, Mother and Child Hospital clarified that my mother’s name was erroneously recorded as Nadhifa Mohamed instead of Nadhifo Hassa N Wariyo at the time of admission for my delivery.

It is apparent that whereas the correct name of my mother was recorded in my Certificate of Birth, the primary Records at the Registry of Births were not rectified to reflect my mother’s correct name.

Attempts to get the Registrar of Birth to rectify the Records have not borne fruit and it has become imperative that the Registrar be compelled to effect the rectification by an Order of Mandamus as I have been advised by my Advocate on record-which advice I verily believe to be true.

Unless the Order sought is issued, I shall effectively remain unregistered and without a Kenyan National Identity Card, I shall be rendered effectively stateless and undocumented citizen unable to access or enjoy public services.

In the foregoing circumstances I shall suffer irreparable loss and damage for the rest of my life as an undocumented Kenyan Citizen.”

3. Order 53 Rules 1 (1) and (2) under which the applicant has made his application reads as follows:

- 1.

- (1) No application for an order of *Mandamus*, prohibition or *Certiorari* shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

Under Rule 1(2), the statement accompanying the chamber summons must contain such details as the name and the description of the applicant; the relief sought and the grounds upon which it is sought.



4. The name of the applicant is apparent in his statement. I am also able to gather from the statement the relief which the applicant would be seeking if leave is granted is the order of *Mandamus*. What is not apparent from the applicant's statement are the grounds on which the judicial review relief would be sought.
5. Without the grounds on which judicial review reliefs are sought, an application for judicial review would be fatally defective. I say so because, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.
6. As noted, Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. For emphasis sake I reproduce it here; it reads as follows:
 - (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

7. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of *Council of Civil Service Unions v Minister for the Civil Service* (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as “the grounds upon which administrative action is subject to control by judicial review”. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic



or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

8. To a great degree, though not expressly stated, these grounds are now codified in the [*Fair Administrative Action Act*, 2015](#) and in particular section 7(2) of the Act. This section reads:

7. Institution of proceedings.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;



- (i) the administrative action or decision is not rationally connected to-
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

9. Any of these grounds prescribed by the Act can easily be canvassed under any of three heads illegality, irrationality procedural impropriety and, of course, such other grounds that have gained traction with time as further grounds for judicial review. Even in enunciating the traditional grounds for judicial review, Lord Diplock was quick to add that further development of this area of law may yield further grounds on a case by case basis. The principle of proportionality, for instance, is an example of the later development of judicial review grounds. However, I would be hesitant to conclude that what we now refer as to the statutory grounds in section 7(2) of the Act could be seen in this light since, as I have noted, they are more or less, components of the traditional grounds of judicial review except that they now have a statutory underpinning.

10. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

11. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

“The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to ‘throw everything’ including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court.”

12. The ‘new order’ referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the *Civil Procedure Rules, 2010*. The point is, however, clear that courts will not entertain applications where grounds have not



been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. On this ground alone the applicant's application should fail.

13. In a similar application filed by the same applicant as No E051 of 2023, the applicant did not file the statutory statement at all and for that reason his application was dismissed. In the instant application, a statement has been filed but lacking in material particulars. Without belabouring the point, and for reasons I have given, leave is declined and the applicant's application is dismissed. I make no orders as to costs.

It is so ordered.

SIGNED, DATED AND POSTED ON CTS ON 16 AUGUST 2024

NGAAH JAIRUS

JUDGE

