



Jetha v Cabinet Secretary, Ministry of Interior & National Administration & another (Judicial Review Application E012 of 2023) [2023] KEHC 18267 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E012 OF 2023**

OA SEWE, J

MAY 31, 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER ARTICLES 22, 23, 25, 27, 29, 39, 45, 47, 50 AND 165 OF THE CONSTITUTION OF KENYA 2010, SECTIONS 8 & 9 OF LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA, ORDER 53 OF THE CIVIL PROCEDURE RULES AND ARTICLE 13 OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND

IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015 AND

IN THE MATTER OF SECTION 33 & 43 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT, NO. 12 OF 2011 AND

IN THE MATTER OF MCCR NO. 595 OF 2019 AT THE SHANZU LAW COURT AND HCCRA NO. E103 OF 2021 AT THE HIGH COURT IN MOMBASA

BETWEEN

ASIF AMIRALI ALIBHAI JETHA APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The applicant, Asif Amirali Alibhai Jetha filed the ex parte Chamber Summons dated 23rd May 2023 pursuant to Article 47(1) and (2) of *the Constitution* of Kenya, Sections 8 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Order 53 Rules 1(2) of the *Civil Procedure Rules* for the following orders:



- (a) Spent;
 - (b) that leave be granted to the applicant to apply for judicial review order of Certiorari to bring before this Court to be quashed the respondent's decision declaring the applicant to be a member of the prohibited class hence a prohibited immigrant and the further directives to have the ex parte applicant arrested and placed in either police or prison custody pending his removal from Kenya to Canada/United Kingdom dated the 16th November 2022 but brought to the attention of the ex parte applicant on the 19th May 2023 at 10.04 a.m. for the first time;
 - (c) That leave be granted to the applicant to apply for judicial review order of Mandamus compelling the respondent to un-declare the ex parte applicant to be a prohibited immigrant;
 - (d) That leave be granted to the applicant to apply for judicial review order of prohibition to prohibit the respondent acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the respondent, from arbitrarily arresting, detaining, continuous detention, harassing and or deporting the ex parte applicant or in any manner whatsoever curtailing/impeding the ex parte applicant's liberty/freedom of movement with regard to the matters herein;
 - (e) That leave be granted to the applicant to apply for a declaration declaring that the action of the respondent in placing the ex parte applicant to be a member of the prohibited class hence a prohibited immigrant and ordering for his arrest, detention, continuous detention is unlawful, unfair and a breach of the ex parte applicant's rights to fair hearing, fair administration action, freedom and security of the person of the ex parte applicant; and ex parte applicant's right to freedom of movement and secure protection of the law;
 - (f) That the Court be pleased to order for compensation to the ex parte applicant for the inconvenience and stress caused leading to his hospitalization and for the violation of the ex parte applicant's rights and fundamental freedoms to be assessed by the court and awarded to the ex parte applicant;
 - (g) That the leave granted do operate as a stay of the impugned decision in Prayer [b] above; and,
 - (h) That the respondents be condemned to bear the costs of the application.
2. The application was served on the respondent and when the matter came up for hearing inter partes on 30th May 2023, counsel for the respondents indicated that he has no objection to leave being granted; and pointed out that, with the coming into force of the *Fair Administrative Action Act*, leave is no longer a requirement. However, Mr. Makuto opposed the application for leave and submitted that the applicant has relied on misrepresentations as well as material non-disclosure.
3. I am in total agreement that since judicial review reliefs are now anchored in *the Constitution* it is no longer necessary, where an approach is made under the *Fair Administrative Action Act*, to apply for leave. It is however equally true that Sections 8 and 9 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules* are yet to be repealed. While there is a school of thought that propounds the view that the latter provisions be read with the necessary adaptations provided for in Section 7 of the Sixth Schedule of *the Constitution* of Kenya, there is yet another school of thought that favours co-existence of the provisions. Hence, in *Matagei v Attorney General; Law Society of Kenya (Amicus*



Curiae) (Petition 337 of 2018) [2021] KEHC 460 (KLR) Hon. Korir, J. (as he then was) acknowledged that:

“...the tension between the common law judicial review and the judicial review founded on *the Constitution* is apparent. The application of the rules of order 53 of the CPR to judicial review applications brought under sections 8 and 9 of the *LR Act* and the non-application of the rules to judicial review applications premised on *the Constitution* has resulted in what appears to be a two-track judicial review process; one under common law and another under *the Constitution*”

4. Hence, the guidance given in *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR by a 5-judge bench of the Court of Appeal is as hereunder:

“In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of *the Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and *rules* is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of *the Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both...We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.”

5. With the foregoing principles in mind, I have looked at the application for leave and the accompanying statement from the prism of Order 53 of the *Civil Procedure Rules*. There is no gainsaying that the application has been made within the 6 months’ period stipulated in Order 53 Rule 2 of the *Civil Procedure Rules*; and that the applicant is presently in custody pending deportation courtesy of the impugned decision. I am therefore convinced that he is entitled to leave.
6. As to whether leave should operate as stay I have taken into account the position taken in *Taib A. Taib v The Minister for Local Government & Others Mombasa* HCMISCA. No. 158 of 2006 that:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken...”

7. Accordingly, it would be of no consequence to grant the applicant leave and yet deny him the opportunity of meaningfully challenging that decision by permitting enforcement of the impugned decision while his judicial review application is pending. The question as to whether or not that decision ought to be quashed belongs to the substantive application and cannot be determined at this



ex parte stage. Likewise, prayers 5 and 6 of the Chamber Summons have been prematurely sought and are therefore hereby declined.

8 In the result, the application dated 23rd May 2023 is hereby allowed in part and orders granted as hereunder:

- (a) that leave be and is hereby granted to the applicant to apply for judicial review order of Certiorari to bring before this Court to be quashed the respondent's decision declaring the applicant to be a member of the prohibited class hence a prohibited immigrant and the further directives to have the ex parte applicant arrested and placed in either police or prison custody pending his removal from Kenya to Canada/United Kingdom dated the 16th November 2022;
- (b) That leave be and is hereby granted to the applicant to apply for judicial review order of Mandamus compelling the respondent to un-declare the ex parte applicant to be a prohibited immigrant;
- (c) That leave be and is hereby granted to the applicant to apply for judicial review order of Prohibition to prohibit the respondent acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the respondent, from arbitrarily arresting, detaining, continuous detention, harassing and or deporting the ex parte applicant or in any manner whatsoever curtailing/impeding the ex parte applicant's liberty/freedom of movement with regard to the matters herein;
- (d) That the leave thus granted do operate as a stay of the impugned decision in Prayer [a] above; and,
- (e) That the costs of the application be costs in the main cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF MAY 2023

OLGA SEWE

JUDGE

