



**Khan (Trustee and Coordinator of the Blue International Organization)  
v Attorney General & 2 others (Constitutional Petition E488 of 2022)  
[2023] KEHC 18691 (KLR) (Constitutional and Human Rights) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E488 OF 2022**

**M THANDE, J  
MAY 26, 2023**

**BETWEEN**

**NADEEM SHAKOOR KHAN (TRUSTEE AND COORDINATOR OF THE BLUE  
INTERNATIONAL ORGANIZATION) ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, INTERIOR AND NATIONAL COORDINATION ... 2<sup>ND</sup>  
RESPONDENT**

**DIRECTORATE OF IMMIGRATION SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed his Petition dated October 27, 2022 seeking the following reliefs:
  - a. A declaration be and is hereby issued that the petitioner’s constitutional rights under Article 47 of *the Constitution of Kenya* have been infringed by the 3<sup>rd</sup> respondent.
  - b. A declaration be and is hereby issued that to the extent that the 3<sup>rd</sup> respondent has refused to renew the petitioner’s work permit that such refusal is unreasonable, irrational, unprocedural, contrary to *the Constitution of Kenya* and applicable law and is therefore illegal and void.
  - c. An order prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from preventing the petitioner from returning to and remaining in the Republic of Kenya.



- d. An order of Mandamus directing the 3<sup>rd</sup> respondent to forthwith issue the petitioner with the class I Work Permit.
- e. An order of certiorari do issue calling to the High Court the decision made on July 18, 2022 is illegal and void and is hereby quashed.
- f. An order of mandamus be and is hereby issued compelling the 3<sup>rd</sup> respondent to consider and make a decision on the petitioner's application for renewal and/ or extension of his Work Permit on class I – Approved religious of Charitable activities and notify the petitioner of the outcome in writing.
- g. An order of *mandamus* be and is hereby issued compelling the respondents to remove the petitioner's name from the list of prohibited immigrants within 30 days from the date of service of the decision and notify the petitioner of the compliance in writing.
- h. An order of Mandamus be and is hereby issued directing the 3<sup>rd</sup> respondent to forthwith consider and issue the petitioner with appropriate Work Permit.
- i. An order be and is hereby issued prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent from removing the petitioner from the Republic of Kenya without justifiable cause, and contrary to and without following due process.
- j. An injunction be and is hereby issued restraining the respondents whether by their agents, servants or anyone acting under them from arresting and/ or deporting the petitioner unlawfully and/ or without proper and justifiable cause and / or without following due process.
- k. A declaration that the rights and fundamental freedoms of the petitioner have been denied, infringed, violate and/ or threatened.
- l. A declaration that the intended deportation is invalid, illegal, null and void for breaching the basic structure, values and principles of *the Constitution*.
- m. A declaration that the respondents' actions are invalid as they contravene Articles 27, 39, 159 of *the Constitution* as read with Article 2(4) of *the Constitution*.
- n. The court orders the respondents by themselves their agents, servants and / or whosoever be prohibited from deporting, harassing and / or doing anything prejudicial to the petitioner.
- o. Any other order, declaration, writ or remedy or redress the Honourable Court may deem fit and convenient taking all the exceptional circumstances of this case into account.
- p. Costs of the suit to be provided for.
- q. costs.

2. The Petitioner's case as set out in his Petition and affidavit sworn on even date is that he has legally lived in Kenya for 28 years, has heavily invested in the country and has never breached any law. He has been married for over 21 years to Mariam Abdul Aziz, a Kenyan citizen, with whom he has 3 children. He is therefore is eligible for grant of Kenya citizenship and permanent residence status, under Sections 13(1)



(a) and 37(b) respectively, of the *Kenya Citizenship & Immigration Act* (KCIA). He is equally eligible for grant of Kenyan citizenship and permanent residence status as per Sections 11 and 37(d) of the Act. Together with his wife, the Petitioner established Blue Heart International Organization Trust (Blue Heart) on 26.6.2018 whose main purpose was to assist victims of human trafficking, child abuse and gender-based violence in Kenya. Blue Heart has received many recommendations internationally and nationally. He also established Investigation Prosecution Monitoring Committee (IPMC) of which the Department of Immigration is a member, to monitor and assist victims of human trafficking with legal support whenever they testified in court. He used his personal funds to establish a water project for the supply of clean, safe and purified drinking water for locals and school children in Mombasa. He is also a key member of the Technical Working Group of the United Nations (IOM) as an experienced local non-state actor in the Counter Trafficking and Smuggling of Migrants field in Kenya.

3. The Petitioner stated that on May 12, 2021, he made a formal application to the Director of Immigration for renewal of his work permit; that on June 16, 2022, the Permit Determination Committee invited Blue Heart to provide its organisational profile, registration documents, MOUs with other agencies, etc, for purposes of making a determination on the application; that they were also required to appear before the Committee; that on June 23, 2022, representatives of Blue Heart attended the meeting and provided the required documentation; that vide an email of June 30, 2022, more information was on Blue Heart's work was requested by the Director; that this application was declined on July 18, 2022; that this was despite sending representatives to appear before the Committee on its request and responding positively by providing the information and documentation required and further sending through advocates Blue Heart's profile.
4. The Petitioner denied that Blue Heart has ever been engaged in any unlawful enforcement activities as alleged by the permit determination committee in rejection of his work permit.; including recommendations on June 28, 2022; and requesting vide email dated July 5, 2022 that their request of June 30, 2022 had been forwarded for deliberation to the executive committee and the information sought would be forwarded to the department and a schedule of visiting the organization's office would also be availed to the department. He further claimed that one Mrs. Pamela Otenyo who chaired the Committee never disclosed that there was a conflict of interest between herself and him in Civil Case No. E 230 of 2022 at Milimani Law Courts. He has since appealed against the decision to the respective Cabinet Secretary but the same is yet to be heard and determined due to the changes in leadership owing to the transition of the new government after the general elections on August 9, 2022.
5. The Petitioner further stated that he applied for extension of his visitor's pass on May 26, 2022 to allow him to remain in Kenya as he awaited issuance of the work permit. This was however rejected on July 18, 2022. He subsequently applied for another extension of his visitor's pass on July 25, 2022 as he pursued the appeal to the Cabinet Secretary. On July 27, 2022 he applied for a special pass for purposes of challenging the denial to renew his work permit. The visa department at the Ministry of Immigration delayed its response to his application thereby exposing him to serious risks that could have led to his unfair and unlawful deportation. On August 22, 2022, through Blue Heart, he made an application challenging the Committee decision to deny renewal of his work permit and has not received any response to date. On September 29, 2022, he applied for another special pass which was denied on October 3, 2022. It is thus the Petitioner's case that this denial of status in Kenya will result in the permanent closure of Blue Heart and counter human trafficking efforts, clean water projects and free sanitation amongst other activities in Mombasa which would be detrimental to this country. He contended that he was unjustly accused and denied fair opportunity to provide information to the committee and the intended deportation is discriminatory, brought in bad faith and intended to harass him. Consequently, Articles 19(1), 20(1), 21(1), 27(1), (2), (3) and (4), 28, 36(1), 39(1) and (2), 45(1)



- and (2), 47 (1) and (2), 50(1), and right to legitimate expectation contemplated under Articles 10(1) and (2) of *the Constitution* have been violated.
6. In a replying affidavit sworn on December 6, 2022, the Respondents urged that the Petition be dismissed. It was deposed that the Petitioner's work permit application dated May 12, 2022 was premised largely on the charitable activities of Blue Heart and his role as trustee and coordinator thereof. The Petitioner's work permit expired on May 26, 2022 and he was summoned to appear before the Permits Determination Committee (the Committee) on June 9, 2022, June 16, 2022 and June 23, 2022. He declined to honour the summons but instead chose to send Michael Nganju and Tony Mogaka who were neither employees nor members of the executive committee of the Blue Heart, on June 23, 2022. These representatives were unable to answer the questions put to them, namely how Blue Heart was funded, the location of its registered office and how the Petitioner survived without a salary. They also stated that they sold water for sustainability.
  7. It was further deposed that the Petitioner admitted to participating in the sale of motor vehicles, which said activity is permitted under Class G, yet his work permits related to Class I activities, thereby violating his permit. This also contravened section 41(1) (c) of the *KCIA*. A verification visit was made to the location in Kongowea, Mombasa indicated by the two representatives to be the premises of Blue Heart but the same was not found. The Committee therefore made the decision to reject the renewal of the Petitioner's work permit and the same was communicated to him on July 14, 2022. The Respondents contended that the Petitioner has not demonstrated any violation and threatened violation of his fundamental rights and freedoms. More so because the 3<sup>rd</sup> Respondent did everything to ensure that the Petitioner enjoyed his rights by giving him a fair hearing before the Permit Determination Committee.
  8. I have given due consideration to the parties' respective submissions and find that the following issues arise for determination:
    - i. Whether this Court has jurisdiction to entertain the Petition herein.
    - ii. Whether the Petitioner's constitutional rights under Article 47 of *the Constitution* were violated and if so whether the reliefs sought should be granted.

#### **Whether this Court has jurisdiction to entertain the Petition herein**

9. It is the Respondents' case that by virtue of Section 40(10) of the *KCIA*, the Petitioner has approached the wrong forum and the Court should decline to entertain the matter.
10. It is a truism that jurisdiction is everything and gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction is the oft cited case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1., where Nyarangi, JA. famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.
11. It is an established principle of law that a court may only exercise such jurisdiction as has been conferred upon it and cannot arrogate to itself jurisdiction not so conferred upon it. In the case of *Samuel Kamau*



*Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as follows:

(68). A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

12. The jurisdiction of this Court stems from *the Constitution* and certain statutes. Article 165(3) of *the Constitution* stipulates the jurisdiction of this Court as follows:

- (3) Subject to clause (5), the High Court shall have—
  - a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



13. Article 23(1) of *the Constitution* provides:

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

14. As can be seen from the above provisions, this Court has the jurisdiction to inter alia determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and to hear and determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

15. It is well settled that the jurisdiction of this Court may be limited, ousted or restricted by statute, in particular matters or instances. In the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:

11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In Halsbury's Laws of England, Volume 10 at paragraph 319, the learned authors state:

“The subject's right of access to the courts may be taken away or restricted by statute.”

...

Paragraph 723 states:

“Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

12. In *Narok County Council V Trans-mara County Council* (supra) this Court held that:

“... though section 60 of *the Constitution* gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”

13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of *the Constitution* only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in *The Matter Of The Interim Independent Electoral Commission* [2011] Eklr:

“[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent.”

14. Similarly, in *Suleiman Ibrahim v Awadh Said* [1963] E. A. 179, Windham, C. J. held that section 33 of the *Rent Restriction Act* of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.

16. Flowing from the above decision, it is evident that where an alternative mechanism for resolution of disputes or claims has been specified by statute, the Court's jurisdiction to deal with such disputes and claims is ousted.



17. Our courts have in a long line of authorities repeatedly stated that where a clear sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to the letter. One such case is *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

18. Similarly, in *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR, a 5 Judge bench of this Court rendered itself thus:

Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.

19. It is not disputed that the Petitioner has lived and worked in Kenya for many years and has always been issued with a work permit. He is now aggrieved by the failure by the 3<sup>rd</sup> Respondent to renew his work permit which expired on May 26, 2022. The 3<sup>rd</sup> Respondent's reason for declining to renew the Petitioner's permit is that he was found to have violated the terms of the permit that had been issued to him for charitable work, by engaging in business. It has been demonstrated that the Director declined to renew the Petitioner's permit pursuant to his powers under Section 40(7) of the *Kenya Citizenship and Immigration Act*. The procedure for redress for a party aggrieved by the decision of the 3<sup>rd</sup> Respondent, has been provided and is clearly set out in Section 40 of the *KCIA*. Section 40(10) provides that a person who is aggrieved by a decision of the Director as the Petitioner is, may apply to the Cabinet Secretary for review. Under Subsection (12) an applicant may appeal the decision of the Cabinet Secretary to the High Court. The Petitioner therefore ought to have invoked the said provisions which provide a sufficient and adequate mechanism to address the issues raised instead of approaching this Court by way of a constitutional petition.

20. The decision by the 3<sup>rd</sup> Respondent to decline to renew the Petitioner's work permit constitutes an administrative action within the definition set out in Section 2 of the *Fair Administrative Action Act* (FAAA) which provides that an "administrative action" includes–

- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

21. Section 9 of the *FAAA* sets out the procedure for judicial review of an administrative action as follows:

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
  4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
  5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
22. Section 9(2) of the *FAAA* is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion, which encourages alternative dispute resolution mechanisms, in line with Article 159 of *the Constitution*. This was elucidated by the Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR as follows:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

23. The law empowers the Court to exercise its discretion to exempt a party from the obligation to exhaust all available remedies, before applying for judicial review of any administrative action. Section 9(4) of the *FAAA* provides:
- Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
24. For the Court to exercise its discretion in favour of a party however, it must be demonstrated that exceptional circumstances exist to warrant such exemption and that such exemption is in the interest of justice. Notably, such exemption is made on application by the party desiring the same.
25. In the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (supra), the Court considered the exceptions to the doctrine of exhaustion and stated:

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & Others Ex Parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:



What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

26. By dint of Section 9 of the *FAAA*, the first port of call for the Petitioner in seeking redress for the rejection of his application for renewal of his permit was the Cabinet Secretary under Section 40(10) of the *KCIA* and thereafter, this Court by way of appeal pursuant to Section 40(12) of that Act. In light of this, the jurisdiction of this Court ought not to have been invoked until that mechanism available under Section 40 of the *KCIA* had been exhausted. The Petitioner stated that he applied to the Cabinet Secretary for review of the decision in question. This being the case, the Petitioner could only move to the High Court by way of appeal of the Cabinet Secretary’s decision, and not by way of a constitutional petition. Accordingly, this Court lacks the jurisdiction to entertain the Petition. It follows therefore that the Court cannot interrogate whether the Petitioner’s constitutional rights were violated by the Respondents.

27. In the end and in view of foregoing, the Court finds that the Petition dated October 27, 2022 lacks merit and the same is hereby dismissed with costs.

**DATED AND DELIVERED IN NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Petitioner



.....for the Respondents

.....Court Assistant

