Republic v Director of Immigration Services; N (Exparte); M (Interested Party) (Miscellaneous Application E043 of 2021) [2022] KEHC 11251 (KLR) (Civ) (30 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION E043 OF 2021

J NGAAH, J

MAY 30, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

DIRECTOR OF IMMIGRATION SERVICES ..... RESPONDENT

AND

ANN ..... EXPARTE

AND

NSTM ..... INTERESTED PARTY

JUDGMENT

1. The motion before court is dated 30 March 2021 and brought under Order 53 Rule 1 and 3 of the *Civil Procedure Rules* and it basically seeks one prayer which is couched as follows:

> That this honourable court be pleased to issue an order of mandamus directed to the respondent the Director of Immigration Services to revoke the Dependant's pass No. xxxx issued to the interested party, Nardos Simon Tesfa Micael."

2. According to the statement of facts dated 23 March 2021, the interested party is an Eritrean national with whom the applicant has a daughter.

   Without the knowledge or consent of the applicant, the respondent issued the interested party with a dependant's pass No. xxxx on 14 June 2019. This pass which ordinarily issued to foreigners under Kenya Citizenship and Immigration Regulations, 2012 was allegedly issued on the application made by the applicant.

3. The applicant denies that he made such an application and that in November 2018 when the application is alleged to have been made, he was in the United States of America; he only came back in January 2019.

   He denies having married the interested party and therefore the marriage certificate which was attached to the application for the dependant's pass was forged. It is the applicant's position that the respondent irregularly, fraudulently, illegally and procedurally issued the pass to the interested party.

4. On this question of marriage, the applicant denies ever attending the Registrar of Marriages on 27 September 2018 as indicated in the marriage certificate. He also denies the signature on this document purporting to be the applicant's signature.

   The statement of facts was verified by the applicant's own affidavit sworn on 23 March 2021.

5. The respondent did not file any sort of response to the application but the interested party did. She filed a replying affidavit in which she detailed her relationship with the applicant and chronicled the events that culminated in the instant application.

   To begin with, she admitted that she is an Eritrean national holding passport No. Kxxxxx and that she came to Kenya in the year 2010 to pursue her studies. She initially lived with her uncle before she moved in with the applicant in 2015.

6. It was while they were living together that the interested party conceived in 2016 and on 15 April 2017 she gave birth to a baby girl, A, who is named after the applicant's mother.

   The applicant and the interested party made up their minds to marry and to set off the process of marriage, the applicant and his elder brother, JN, travelled to Eritrea to officially seek the interested party's hand in marriage. This was in December 2016.

7. Once the applicant secured the blessings of the interested party's parents he married the interested party in June 2017 in a traditional Kikuyu customary marriage ceremony conducted at the applicant's home in [particulars withheld], Nakuru West. The interested party's mother, uncles, nieces and friends who were living in Nairobi at the time attended the ceremony.

8. As the interested party and the applicant were desirous of a monogamous marriage the couple resolved to celebrate their marriage in church. They obtained a special licence for this celebration at the instance of the applicant owing to the fact that the latter frequented the United States where his employers have their headquarters.

   As a prerequisite for the marriage, the applicant swore an affidavit indicating that he was engaged to the interested party and that he had never been married before and this affidavit was filed with the Registrar of Marriages. Their marriage was eventually solemnised in the presence of witnesses on 27 September 2018 when the applicant and the interested party were declared husband and wife.

9. On the question of application of the dependant's pass, the applicant deposed that the application for this document was made by the applicant himself. There is no way she could have made the application because only the applicant had access and log-in credentials to the Government portal or e-citizen through which an application of that nature could be made.

   The applicant took the initiative of obtaining the dependant's pass after the marriage considering that the interested party was unemployed then. The interested party's only involvement in the process was to handover her passport to the applicant and her visit to the passport office at Nyayo House for purposes of taking her fingerprints and photo. In fact, it was the applicant who was informed through the government portal that the pass was ready for collection and it was the applicant who collected it.

Everything was done through the applicant's own e-citizen account who is the only person who can access that account.

10. According to the interested party, the applicant's contentions against the pass and hence the present application arise from matrimonial differences that have bedevilled their marriage. The interested party has sworn that their marriage has been marred by violence, torture, mistreatment, threats and inhuman treatment. And to illustrate this point the interested party deposed that within a period of 2 ½ years, she has been to the police for more than ten times to lodge complaints against the applicant.

    Their disputes have also ended up in court. Apart from the instant application, the applicant has previously filed Civil Suit No. 112 of 2019, in the Children's Court in Nairobi. In that particular suit, the applicant obtained some orders which the interested party successfully challenged in this honourable court, in an Appeal Case No. 86 of 2019.

11. In this appeal, this honourable court ordered the applicant to, inter alia, either let the interested party live in their matrimonial home or, in the alternative, find an alternative accommodation for her.

    The applicant has since been trying to avoid his parental responsibilities towards his daughter while at the same time, he has been exerting undue pressure on the interested party. His ultimate desire, according to the interested party, is render the applicant destitute and probably have her repatriated.

12. I have considered the applicant's application and the interested party's response. I have also considered their respective submissions on the legal positions they have assumed.

    While assessing the applicant's application, I was keen on the grounds upon which the application is made. My attention would be drawn on this aspect of the application because one of the vital components of an application for judicial review is the grounds upon which it is made. They are important because 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. 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).

13. 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.

    The question then follows, what are these grounds?

    The grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410 in which 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 KB 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] AC 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."

14. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. I suppose it is in this spirit that the principle of proportionality as a further ground for judicial review has been developed.

15. Turning back to the applicant's application, it is not apparent from the statement accompanying the application which of the grounds of judicial review the applicant is relying upon. He has not stated in precise, specific and unambiguous terms the ground or grounds for judicial review upon which he seeks this honourable court's intervention in his bid for the order of mandamus to compel the respondent to act in a particular manner.

What has been presented as grounds is largely a regurgitation of the facts relied upon and what I consider to be legal arguments based on certain provisions of the *Constitution*, the *Fair Administrative Action Act* No 4 of 2015 and the *Kenya Citizenship and Immigration Regulations*, 2012. To appreciate

my point, it is necessary that I reproduce here what has been presented as grounds upon which the application has been made. They are stated as follows:

13. The respondent is obliged by law to observe the rules of natural justice to act lawfully, fairly and reasonably in exercise of their statutory mandate in the Kenyan law.

14. The applicant recently discovered the respondent had issued a dependants (sic) pass under regulation 38 (3) to the interested party Nardos Simon Tesfa Micael on June 14, 2019 on an application allegedly lodged by the (sic) him.

15. The applicant categorically states that he did not at any particular time make such an application for the interested party's dependants (sic) pass as required under the law.

16. That indeed on the dates the (sic) that the alleged application was made in November 2018, the applicant was not present in Kenya as he was in the United States of America from the month of September 2018 to January 2019.

17. The applicant affirms that he has never been married to the interested party and therefore the marriage certificate attached to the application for the dependants (sic) pass is fraudulent/ forged.

18. The applicant categorically states that at no particular point did he attended (sic) to the Registrar of Marriages on the September 27, 2018as indicated in the marriage certificate therefore his signature in the said certificate is a forgery.

19. The applicant maintains that the respondent irregularly, fraudulently, illegally and unprocedurally issued impugned dependent's pass to the interested party without his knowledge and authority in contravention of article 73 of the *Constitution of Kenya* and Regulation 27 and 38(3) of the *Kenya Citizenship and Immigration Regulations* 2012, allegedly on an application by the applicant.

20. Article 47 of *the Constitution* of Kenya which is echoed in section 4(2) *Kenya Citizenship and Immigration Regulation* 2012 on the right to fair administrative action and as implemented by the *Fair Administrative Action* No. 4 of 2015 is clear that (1)every person has the right to administrative action that is expedition (sic), efficient, lawful and reasonable and procedurally fair (2) if a right or fundamental freedom of a person has been on is likely to (sic) adversely affected by administrative action, the person has the right to be given written reasons for the action. From the above constitutional provisions as espoused in the Bill of Rights, the right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair has been elevated to a constitutional right and not just a roll of practice and a common law.

21. That in utter violation of the law the interested party continues to fraudulently and illegally use the dependants (sic) pass despite the same being illegally issued.

22. That this court has unfettered jurisdiction to grant the orders sought."

16. It is impossible to tell from these averments which, if any, of the grounds of judicial review that the applicant's application is based upon. If I was to proceed on the presumption that these averments represent any or all of the grounds of judicial review, I would simply be speculating.

17. But the court need not be put in a position where it has to decipher or speculate what is in the applicant's mind. It is the applicant's own obligation to state categorically the ground or grounds upon which he seeks a judicial review court to intervene and impeach the administrative action in issue.

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."

18. 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.

19. 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. I would dismiss the applicant's application on this ground.

    Assuming that the applicant had singled out the ground or grounds upon which his application is based, it would still fall short of the threshold necessary for this Honourable Court to grant an order for judicial review.

20. The applicant's application appears to be hinged on the allegations that the dependant's pass issued by the respondent is forged or fraudulent. Stretching this claim even further, the applicant also alleges that he has never been married to the interested party and a marriage certificate presented by the interested party in a dispute between the applicant and the interested party in the children's court is also a forgery or fraudulent. The signature on the certificate appended by the applicant is also said to be forged.

21. In evaluating these allegations, I must start by saying that this honourable court is not the proper agency to investigate the veracity of the applicant's allegations. The Directorate of Criminal Investigations would be better placed to carry out investigation whether the documents alleged to be forgeries are of that character and, if so, whether they were uttered by the interested party. Until that is done, it would be presumptuous for the court to proceed and make its decision as if the documents have been established to be forgeries. The same goes with the question whether the applicant and the interested party are legally married; that dispute can only be resolved by the family court.

22. Even if the applicant is taken at his own word I am not convinced that he would be entitled to the order or orders for the judicial review. I reach this conclusion because of the rather obvious inconsistencies in his own affidavit.

    In the verifying affidavit he swore on 23 March 2021, the applicant deposed, inter alia, as follows:

    3. (That I recently discovered the respondent had issued a dependants pass No. 023604 under regulation 38 (3) to the interested party Nardos Simon Tesfa Micael on 14th June, 2019 on an application allegedly lodged by me)."

    But in the same affidavit at paragraph 4 he states as follows:

    4. That having learnt the above I wrote a letter dated August 19, 2019 to the Director of Immigration and Registration of Persons requesting the honourable office to investigate the

circumstance (sic) under which the dependants pass was issued. That the respondent has to date failed to act on my letter necessitating this application."

23. It is clear from this deposition that the applicant was aware of the dependant's pass in issue at least by 19 August 2019 and if that is the case, he cannot be saying in March 2021, more than a year later, that "I recently discovered" that the respondent had issued the interested party with the pass in question.

24. On this same issue of the timing when the applicant chose to act after the alleged discovery of the pass, the report to the police is alleged to have been made on 9 January 2020. If he knew of the pass earlier than 19 August 2019, why did it take the applicant more than five months to report the fraudulent acquisition of the dependant's pass?

25. These questions are relevant when one considers the interested party's position that she was living with the applicant as his wife and that the present application was only filed as a result of the differences that subsequently arose in their marriage and the orders the interested party obtained in this Court against the applicant. There is a possibility, as the interested party has suggested, that this suit is meant to hit back, so to speak, at the interested party as a result of what has unfolded in their marriage. If that be the case, the suit is an abuse of the process of the court.

26. On this question of marriage, I have already noted that this honourable court, sitting as a judicial review court is not the proper forum to determine whether indeed a marriage exists or not. But there is an affidavit of marriage which the interested party exhibited to her affidavit demonstrating that the applicant swore it. In that affidavit the applicant is said to have sworn, inter alia:

    2. That I have never been married to any woman but I am currently engaged and ready to get married to one NS and we have one issue by the name AN was born on April 15, 2017.

    3. That I have been residing in the U.S.A and I wish to confirm that I have no woman there nor am I married to any other.

    4. That I would like to have our marriage registered as a monogamous marriage with the registrar of marriage (sic).

    5. That I wish to confirm that I have not conducted any other marriage before and therefore I confirm that I have no impediment to marriage."

27. I am minded that the applicant has denied being the interested party's husband but for purposes of disposal of this application, he has not denied having sworn this affidavit. In other words, this piece of evidence has not been controverted. Notably, the affidavit is not one of the documents that the applicant alleges to have been forged.

28. Again, although he never stated so in his verifying affidavit, the applicant admitted in paragraph 5 of the further affidavit he filed in response to the interested party's replying affidavit that he lived with the interested party from 2017 January 2019. It is logical to conclude that if their daughter was born in April 2017 the applicant and the interested party must have started relating much earlier. And this is true because in paragraph 6 of the further affidavit the applicant does not deny the interested party's deposition that it was while they were living together that the interested party conceived in 2016.

29. The applicant does not also deny that he accompanied the interested party to her country, Eritrea, although he states that he went there for a different purpose and not necessarily to get the interested party's hand in marriage.

    It may or may not be true that the applicant and the interested party were married or that their marriage still subsists but for purposes of this application, assuming it was properly before court, there is no

concrete evidence or material upon which the court can exercise its discretion in favour of the applicant and grant him the order for judicial review. Neither is there any sufficient evidence upon which the respondent can be faulted for granting the interested party the dependant's pass.

30. The application for that particular person is provided for under Regulation 27 of the *Kenya Citizenship and Immigration Regulations*, 2012; it states as follows:

Application for a pass.

27. (1) A person who is lawfully in or entitled to enter Kenya, by virtue of—

(a) being a citizen of Kenya;

(b) having been issued with a permit;

(c) being an exempted person;

(d) being a person to whom section 34 (3) of the Act applies; or

(e) being a permanent resident, may apply, on behalf of his or her dependant to an immigration officer, in Form 28 set out in the First Schedule, for a dependant's pass.

31. One thing that is clear from this regulation is that the dependant cannot make the application for the pass; it has to be made on his or her behalf by a person who falls under any of the prescribed categories. In this case, assuming the application was validly made by the applicant, he would fall into category of those persons who are citizens of Kenya.

The circumstances under which the pass would be issued are prescribed in Regulation 27(2) which states as follows:

(2) An immigration officer shall not issue a dependant's pass unless he or she is satisfied that—

(a) the person, on whose behalf the application is made, depends on the person making the application for his or her maintenance;

(b) the dependant is a spouse or child of the applicant or is by reason of age, disability or any incapacity unable to maintain himself adequately or for some other reason relies upon the applicant for his or her maintenance; and

(c) the applicant has an income sufficient to enable him or her to maintain and continue to maintain the dependant for the duration of the dependant's stay in the country.

(3) An immigration officer shall after considering an application made under paragraph (1) issue dependant's pass in Form 29 set out in the First Schedule.

(4) A dependant's pass shall, subject to the terms and conditions specified therein, entitle the dependant in respect of whom it is issued to enter into Kenya within the period specified in the pass and to remain in Kenya during the validity of the pass.

32. It is clear that once an application is made and an immigration officer is satisfied that the prescribed conditions have been met, he has obligation to issue the pass.

Regulation 28 prescribes the circumstances under which the pass may be invalidated. It states as follows:

Invalidation of a dependant pass.

(1) Where—

(a) the dependent has ceased to depend on the applicant;

(b) the person who applied for the dependants pass has failed or is unable to maintain the dependant;

(c) the person who applied for the dependants pass has left Kenya in circumstances which raise a reasonable presumption that his or her absence will not be temporary; (d) the dependant engages in employment or other income generating activity;

(e) the permanent residence status of the applicant ceases;

(f) the applicant dies; or

(g) the dependant was a child, the dependant attains the age of twenty-one years, the dependant's pass shall be deemed to have expired and shall be invalid.

33. Although the applicant is seeking to have the respondent 'revoke' the pass, he has not demonstrated that any of the prescribed grounds for 'revocation' obtain. But this is not to say that if a pass is obtained fraudulently it cannot be impeached. A fraudulently acquired pass would, in my humble view, be void *ab initio* so that there would be nothing to invalidate.

34. In the final analysis assuming the applicant's application was properly before court, I would have been hesitant to find fault with the respondent in issuing the dependant's pass and, in the same breath there is no sufficient material upon which this Honourable Court can compel him by way of a mandatory order, to invalidate the pass issued to the interested party. The applicant's application is dismissed with costs to the interested party. It also follows that the interim orders of stay which were made when leave was granted are also discharged. It is so ordered.

SIGNED, DATED AND DELIVERED ON 30 MAY 2022

NGAAH JAIRUS

JUDGE