



**Republic v Ministry for Interior and Co-ordination of National  
Government & 3 others; Lina (Exparte) (Application E073 of 2021)  
[2022] KEHC 18056 (KLR) (Judicial Review) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 18056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E073 OF 2021  
J NGAAH, J  
OCTOBER 28, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MINISTRY FOR INTERIOR AND CO-ORDINATION OF NATIONAL  
GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

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

**DR. FRED MATIANG'I ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF IMMIGRATION SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**YANG LINA ..... EXPARTE**

**JUDGMENT**

1. The motion before court is dated June 7, 2021 and is made under order 51 (1) (2) and (4) of the [Civil Procedure Rules](#). It seeks the orders of certiorari and prohibition whose prayers have been framed as follows:

1. That this Honourable Court be and is hereby pleased to grant an order of *certiorari* to remove and quash the 2<sup>nd</sup> respondent’s declaration/deportation order against the ex parte applicant made on May 21, 2019 declaring that the ex parte applicant’s presence in Kenya is against national interest, that she is a prohibited immigrant and that she should be under police custody or prison pending her removal from Kenya.



2. That the honourable court be and is hereby pleased to grant an order of prohibition prohibiting the respondents from implementing or enforcing the 2<sup>nd</sup> respondent's declarations/orders against the ex parte applicant made on May 21, 2019 declaring the applicant's presence in Kenya as against national interest, that she is a prohibited immigrant and that she should be put under police custody or prison pending their(sic) removal from Kenya."
2. The application is based on the statutory statement dated June 2, 2022 and a verifying affidavit sworn by the applicant on even date.
3. It is apparent on the face of the application that it arises out of a deportation order made on May 21, 2019 by the Cabinet Secretary for the Ministry of Interior and Coordination of National Government. According to that order, the applicant's presence in Kenya was found to be contrary to national interest and she was to be immediately deported to China which, apparently, is her country of origin.
4. The applicant has deposed that although the reason for the deportation order was not given, she thought that it was linked to her business in gaming and casino industry through her company called Sky Casino Limited where she is a director.
5. The respondents opposed the motion and filed grounds of objection dated December 10, 2021. In the written submissions filed on their behalf by Ms Nyakora, the learned state counsel, they have also made reference to a replying affidavit said to have been sworn by one Jimmy Nyikuli on December 3, 2021. I did not get to find this affidavit either on the e-portal or in the court record.
6. Turning to the grounds of objection, what has been stated as grounds is to a great degree matters of fact which ought to have been covered in the affidavit.
7. The respondents admit that indeed a deportation order was made against the applicant but they contend that, contrary to the applicant's allegations, the order is sound in law. It is their case that prior to the deportation order, the 4<sup>th</sup> respondent had received information from the Betting Control and Licensing Board to the effect that the applicant was operating a casino without a work permit. The casino was along Wood Avenue, in Nairobi. Based on this information, the 4<sup>th</sup> respondent conducted an audit on the applicant's immigration status and established that she was indeed a director of a casino christened 'Dragon Casino'.
8. The immigration documents revealed that the applicant had been issued with a permit number 734668 as a chief operations manager with a company called DWG International Construction Limited. However, the applicant was found to have contravened the terms of her work permit and, consequently, her work permit was revoked pursuant to section 41(1)(c) of the *Kenya Citizenship and Immigration Act* 2011.
9. It is against this background that the 4<sup>th</sup> respondent made a recommendation to the 2<sup>nd</sup> respondent for the applicant's removal from this country. Accordingly, the 2<sup>nd</sup> respondent acted on the recommendation and issued a deportation order against the applicant on May 21, 2019.
10. The respondents urge that the deportation order was lawfully made and, in particular, the order conformed to the statutory powers with which the 2<sup>nd</sup> respondent is clothed under section 33(1)(f) of the *Kenya Citizenship and Immigration Act* 2011. Thus, the applicant was lawfully declared a prohibited immigrant by the 2<sup>nd</sup> respondent.
11. After the deportation order was made, the applicant wrote to the 2<sup>nd</sup> respondent seeking a review of the order pursuant to section 38(8) of the *Kenya Citizenship and Immigration Act* 2011. However, the



same was rejected and the applicant was duly notified. The respondents urge that the 2<sup>nd</sup> respondent was within his statutory mandate to reject the application for review.

12. It has also been urged on behalf of the respondents that the International Principle of Sovereignty of States presupposes that the right to enter and reside into the Kenya is a preserve of Kenya Citizens only and the State through its authorized agents, in this case the Department of Immigration Services, reserves the right of entry and residency to foreigners.
13. They have further urged that the judicial review orders sought against the respondents cannot issue since the application for Certiorari was filed after the expiry of six months after the making of the impugned decision. To this end, the applicant's application is said to contravene the provisions of Order 53 Rule 2 of the [Civil Procedure Rules 2010](#) and Section 9 (2) and (3) of the [Law Reform Act](#).
14. This last point was also captured in the notice of preliminary objection dated August 20, 2021 filed by the respondents. By its very nature, the objection calls for immediate attention.
15. The crux of this objection is that although the impugned decision was made way back in May 2019, it was not until June 2021, more than a year later, that the applicant filed this application.
16. Considering that the applicant seeks the order of certiorari, which ought to have been sought within six months of the date of the decision, the application is time-barred.
17. Section 9 (2) and (3) of the [Law Reform Act](#) provides as follows:

(2)

Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3)

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

18. Order 53 Rule 2 of the Civil Procedure Rules is more or less in the same terms as section 9(3) of the [Law Reform Act](#); it states as follows:
  2. Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.



19. The two provisions are clear that where the prerogative order of certiorari is sought, the application for leave must be made within six months of the date of making the impugned decision or other proceedings.
20. It is obvious that the applicant's application for certiorari was made way out of time and so her answer to this pertinent question is of much interest to this honourable court.
21. According to the submissions filed on the applicant's behalf, while it is conceded that indeed the impugned decision was made on May 21, 2019, the applicant still sought for review for the 2<sup>nd</sup> respondent to reconsider the deportation order. It is only on May 26, 2021 that she received the respondent's decision on the application for review.
22. I am not so certain which provision in the Act that the applicant invoked to seek for review of the 2<sup>nd</sup> respondent's decision from the 2<sup>nd</sup> respondent himself. The learned counsel for the respondents made reference to section 38(8) of the Act as the provision which the applicant must have relied upon to seek review. This particular provision does not exist in the Act. The available provision is section 38 (a) to (i) and even then it only deals with the rights and obligations of permanent residents. The rights enumerated in this section do not include the right seek for review or appeal against the order of the cabinet secretary or any other public officer, for that matter.
23. Section 57 of the Act which provides for the appeal and review of the decisions made by the cabinet secretary or public officers does not say that a review or appeal against these orders can be made to either of these persons. Instead, it states the application for review or appeal can only be made to this Honourable Court. That provision reads as follows:
  57. Review and Appeal
    - (1) Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.
    - (2) An appeal against the decisions of the Cabinet Secretary or of the Service under this Act may be made to the High Court.
24. In the absence any legal basis upon which the applicant sought for review to the cabinet secretary, the purported application for review was of no consequence and so there is no justification for filing the application for the order of certiorari outside the limitation period.
25. But even if the applicant was entitled to seek review of the 2<sup>nd</sup> respondent's decision from the 2<sup>nd</sup> respondent himself, the decision purporting to reject the review and which decision was given on 26 May 2021 is the decision that ought to have been the subject of these proceedings. The applicant herself has intimated that the delay in filing the present proceedings was because of this latter decision and therefore it is the decision of 26 May 2021 that ought to have been impeached assuming that it was legally made.
26. The applicant's application is, however, clear that the decision by which the applicant is aggrieved is the decision of May 21, 2019.
27. For the avoidance of doubt, prayer 1 of the notice of motion reads as follows:
  1. That this Honourable Court be and is hereby pleased to grant an order of *certiorari* and quash the 2<sup>nd</sup> respondent's declaration/deportation order against the ex parte applicant made on May 21, 2019 declaring that the applicant is against national interest, that she is a prohibited immigrant and that she should be under police custody or prison her removal from Kenya."



28. This prayer is inconsistent with the suggestion that it may well be the decision of May 26, 2021 and not that of 21 May 2019 that the applicant seeks to impeach.
29. For the reasons I have given, I hold that there is merit in the respondent's preliminary objection that the application is fatally defective as far as the prayer for certiorari is concerned.
30. As for the prayer for the order of prohibition, it will also fail, not necessarily because the application was not made within six months after the decision was made but because there was a delay in filing the application. A delay of one year in seeking any of the prerogative orders would, in these circumstances, be considered inordinate. In any event, the explanation given for the delay has been found wanting.
31. Even if the applicant was to be taken at her word that the decision of May 21, 2019 was the subject of the appellate procedures provided in the Act, then the appropriate decision to be interrogated at this level would be the decision of May 26, 2021 which, as noted, was the purported outcome of the application for review.
32. Logically, therefore, if the decision of May 21, 2019 was subjected to the internal mechanisms of dispute resolution and it is out of those proceedings that the final decision that the applicant is not in agreement with, it is the latter decision that ought to have been the subject of the judicial review proceedings. The applicant's application would therefore fail to the extent that it has targeted the wrong decision.
33. Be that as it may, the applicant moved this Honourable Court on the presumption that she had a foreigner certificate entitling her to stay in Kenya. The uncontroverted evidence on record shows that the certificate expired on November 8, 2020. There is no evidence, and it has not been suggested, that the certificate was ever renewed. It follows that the applicant cannot claim a right to resident status on an expired foreigner certificate. So that even if the deportation order was to be taken out of the equation, the applicant would still be considered a prohibited immigrant by operation of the law.
34. For the reasons I have given, I uphold and sustain the respondent's preliminary objection dated October 21, 2021 and strike out with costs the applicant's motion dated 7 June 2021. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 28 OCTOBER 2022**

**NGAAH JAIRUS**

**JUDGE**

