



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E001 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS, PROHIBITION AND A DECLARATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF IMMIGRATION SERVICES.....1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE APPLICANT:

ZARKO KNEZEVIC

RULING

1. On 4th February 2020, this Court reserved a ruling date on the *ex parte* Applicant's Amended Chamber Summons, which is due for delivery on 18th May 2021. The *ex parte* Applicant subsequently filed a Notice of Motion application dated 18th February 2021, seeking orders that this Court orders the 1st Respondent to renew the *ex parte* Applicant's special pass which is expiring on 20th February, 2021, until this matter is heard and determined.

2. The said Notice of Motion is supported by an affidavit sworn by the *ex parte* Applicant on 18th February 2021, and the grounds as stated therein are that the *ex parte* Applicant is a holder of Special Pass number 155516 entitling him to work at Sika Kenya Limited for three months from 20th November 2020 to 20th February, 2021. Further, that on 17th November 2020, the Applicant's appeal for review of his work permit approval was rejected by the 1st Respondent without giving any reasons for the rejection of his appeal. In addition, that the *ex parte* Applicant's Advocates on record received a Replying Affidavit from the Respondents dated 15th February, 2021 wherein the deponent, one Alfred Omangi, depones that the 1st Respondent cannot extend the Applicant's special pass further.

3. Therefore, that owing to the fact that the current special pass is expiring on 20th February 2021, the *ex parte* Applicant is apprehensive that he may not get a further extension for a special pass from the 1st Respondent pending the hearing and determination of this matter. In addition, that the appeal before this Court is informed by the provision of Section 40(12) of the Kenya Citizenship and Immigration Act No.12 of 2011, which is an indication that the 1st Respondent can further extend the *ex parte* Applicant's special pass pending hearing and determination of this matter.

4. The *ex parte* Applicant averred that he shall suffer prejudice since he may be removed from Kenya by the Respondents for lack of valid status if he does procure a renewal of his current special pass from the 1st Respondent pending hearing and determination of this suit. In addition, that he will also be barred from continuing with his duties at Sika Kenya Limited if he lacks a special pass allowing him to work, and his appeal to this Court will be rendered moot and nugatory in the event that the Applicant is removed from Kenya by the Respondents

before this matter is heard and determined. Consequently, that the *ex parte* Applicant's right to a fair hearing as enshrined by Article 50(1) of the Constitution of Kenya will be prejudiced.

Determination

5. It is notable that leave to commence judicial review proceedings is yet to be granted in this matter, and is the subject of the *ex parte* Applicant's pending Amended Chamber Summons application. The *ex parte* Applicant had been directed in this regard to canvass the issue as to whether he has exhausted the available statutory mechanisms provided for in section 40 of the Kenya Citizenship and Immigration Act, which *inter alia* provides that his remedy is an appeal to the High Court. Section 40 in this respect provides for the procedure of issuance of residence and work permits as follows:

- “(1) In this section— “Committee” means the permits determination committee appointed by the Cabinet Secretary.**
- (2) An application for a permit shall be made to the Director in the prescribed manner.**
- (3) The Director shall issue a permit of the required class to a person who is not a prohibited immigrant or inadmissible person, who has—**
 - (a) made an application in the prescribed manner before entry into Kenya; and**
 - (b) satisfied the Committee that he has met the requirements relating to the particular class of permit.**
- (4) The Director shall issue or revoke a permit on recommendations of the Committee.**
- (5) The Committee shall have power to request for additional information and where necessary, summon the applicants, require production of production supporting documents.**
- (6) The Director shall, within fourteen days of receipt of recommendations of the Committee, cause to be issued a permit to an applicant who so applies and qualifies.**
- (7) Where the Director is of the opinion that the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason, the Director may upon giving reasons, in writing, to both the applicant and the Committee—**
 - (a) refer the matter back to the Committee for further consideration; or**
 - (b) decline to issue the permit to the applicant.**
- (8) Where the application has been referred back to the Committee, the Committee shall, within fourteen days, make its findings to the Director and such findings shall be limited to the reasons given for the referral.**
- (9) Subject to the provisions of this Act, the Committee shall regulate its own procedures.**
- (10) Any person who is aggrieved by a decision made under this section may apply to the Cabinet Secretary for review in the prescribed manner.**
- (11) A notice of approval or rejection as the case may be, of an application under this section shall be issued to the respective applicant in the prescribed manner.**
- (12) Where the notification issued under subsection (11) is for the rejection of the application, an aggrieved applicant may apply for a review of the Cabinet Secretary's decision within a period of ninety days from the date of receipt of the notification and may appeal the decision of the Cabinet Secretary to the High Court.”**

6. In this regard, what is before this Court is not an appeal as the *ex parte* Applicant avers, but an application for judicial review. In addition, the order the *ex parte* Applicant is seeking in the application dated 18th February 2021 is a final order, and is also the subject of the prayer for leave in his Amended Chamber Summons, and cannot therefore be granted at this stage.

7. The only orders that the Court can grant at this stage in exercise of its inherent jurisdiction and in the interests of substantive justice pursuant to the provisions of Article 159 of the Constitution and section 3A of the Civil Procedure Act are as regards the *status quo* to be maintained, so as to ensure that the *ex parte* Applicant's application for leave to commence judicial review proceedings is not rendered nugatory. In addition, given that the *ex parte* Applicant's Special Pass is due to expire on 20th February 2021, this Court shall hear and determine the application dated 18th February 2021 on an *ex parte* basis.

8. In the premise, the *ex parte* Applicant's Notice of Motion dated 18th February 2021 is dispensed with on the terms of the following orders:

- I. The Respondents herein be and are hereby restrained from removing the *ex parte* Applicant from Kenya pending the**

hearing and determination of the *ex parte* Applicant's Amended Chamber Summons, or until further orders of this Court. For the avoidance of doubt the order granted herein shall not be construed as compelling the Respondents to issue the *ex parte* Applicant with a Special Pass.

II. The *ex parte* Applicant shall serve the Respondents with the Notice of Motion dated 18th February 2021 and a copy of this ruling within (5) five days of today's date.

III. There shall be no order as to the costs of the Notice of Motion 18th February 2021.

IV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Monday, 22nd February 2021.

V. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for judgment on 18th May 2021.

VI. Parties shall be at liberty to apply.

9. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE