REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 276 OF 2019

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY FOR MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

DIRECTOR, DEPARTMENT OF IMMIGRATION SERVICES.....2ND RESPONDENT

***ex parte:* .....CARLO VANETTI**

JUDGMENT

Before court is the applicant's motion dated 14 October 2019 seeking a judicial review order of mandamus to issue against the respondents, jointly and severally, compelling them to process and issue all relevant and necessary documents for the registration of the applicant as a Kenyan citizen within seven days from the date of the order issued by this Honourable Court and in respect of the applicant's formal and official application for dual citizenship (under Immigration File Number R. 537430) made on 12 June 2019 and Form 3 of the Kenya Citizenship and Immigration Act 2011.

Prior to the hearing of the present motion, and in the interim period, the applicant sought a judicial review order of prohibition against the respondents, jointly and severally, prohibiting or restraining them, by themselves or their agents or officers from declaring the applicant as a prohibited immigrant; arresting, detaining, deporting or, in any manner, interfering with the applicant's peaceful and lawful right to entry, exit, stay, residence and working for gain in Kenya. This particular prayer is as good as spent and therefore the only substantive prayer for consideration at the moment is that of mandamus.

According to the applicant's statutory statement verified by his own affidavit, the applicant was born in Isiolo, in Kenya, in 1995. He was subsequently adopted by one Adriano Angelo Vanetti and Beth Muthoni Vanetti on 1 July 1998. Though he was born Abdi, his adoptive parents named him Carlo Vanetti which is the name by which he is officially recognised.

The applicant has been raised and is domiciled in Kenya but since his adoptive father is of Italian nationality, he holds an Italian passport; nonetheless, he has never renounced his Kenyan citizenship. Like the applicant, the applicant's adoptive parents are also settled and domiciled in Kenya. The applicant has lived with them and as at time of making the application he was 23 years old but because of the restrictions placed upon him as an Italian national, he is still dependent on his parents for his upkeep.

On 8 May 2019, he made an application for dual citizenship; however, four months down the line, the applicants have neither issued him with the relevant documents for citizenship nor responded to the applicant's application in any manner whatsoever. It is as a result of this I action on the part of the respondents that the applicant has filed the present suit.

The applicant contends that despite being a Kenyan citizen, he has been relegated to the status of a visitor and as at the time of filing the application, he had been granted a visitor's pass which was due to expire on 7 October 2019. As a 'visitor' he cannot engage in any gainful employment in Kenya or enroll for higher education at any of the local universities as this would violate the terms of his 'visitor' status.

The applicant is under the apprehension that the inaction of the respondents will eventually culminate in his expulsion from the country upon the expiry of his visitor's pass.

All that the respondents filed in response to the applicant's application are grounds of objection and, of course, written submissions apparently in elucidation of those grounds. It is the respondents' position that the application is frivolous, vexatious and an abuse of the due process of the court; that it does not meet the threshold for grant of the orders of mandamus and prohibition; that the application is meant to prevent the respondents from undertaking its statutory duties. Other grounds are that the application is based on contradictory allegations, speculations and suspicion and that judicial review is all about decision making processes and not the merits of the decision.

In his submissions, the applicant reiterated the factual basis of his application. He added that he has always lived in this country and despite holding an Italian passport he has never been to Italy.

It is upon attaining the age of majority that the Applicant made an application on the 12 June 2019 for endorsement of his Italian Passport No. YA8924664 with Kenyan Citizenship (Dual Citizenship) in accordance with the Kenya Citizenship and Immigration Act.

It is a requirement to make this application electronically through a portal run by the Government of Kenya under the platform called "e-citizen". The Applicant duly made the application under File Reference R537430 but the respondents have failed to respond to or act on his application.

Failure to act or lack of response, according to the applicant, is an infringement of his constitutional rights to fair administrative action that is expeditious, efficient, reasonable and procedurally fair. Again, it is improper, arbitrary, and inefficient exercise of administrative power, inordinate and unreasonable and in breach of the Applicant's legitimate expectation to fair administrative action as provided in the law.

On the law, it was submitted on behalf of the applicant that according to Article 14 of the Constitution of Kenya, he, the applicant is unequivocally a Kenyan Citizen by Birth by reason that he was not only born in Kenya but also because he has a Kenyan Certificate of Birth. He has never renounced his citizenship.

Since he obtained an Italian Passport before acquiring a Kenyan National Identification Card or Passport, the Kenya Citizenship and Immigration Act (Act No. 12 of 2011) requires the applicant to have his dual citizenship status endorsed on his Italian Passport. It was submitted that this procedure is set out in Section 8 of the Kenya Citizenship and Immigration Act and in Rule 8 of the Kenya Citizenship and Immigration Regulations, 2012.

The applicant submitted further that since it has been established that he is a Kenyan Citizen in accordance with the Constitution of Kenya, he is entitled to all rights accorded to every Kenyan Citizen without any discrimination. It was also submitted that according to Article 14 of the Constitution, Citizenship by Birth is provided for. Also, Article 16 of the Constitution clearly states that "*A citizen by birth does not lose citizenship by acquiring the citizenship of another country*."

The Applicant has a justifiable apprehension that the inaction on the part of the Respondents will culminate in his expulsion from the country and deportation to Italy, a country which he has never set foot in. This would, in effect, contravene Article 47 of the of the Constitution which provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and also that if a right or fundamental freedom of a person has been on is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The case of **Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 others Ex parte Patricia Olga Howson [2013] eKLR** which dealt with an application similar to the present application was cited. Also cited was the case of **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR,** on the consequences of not producing evidence.

In response to the applicant's submissions, it was argued on behalf of the respondents that this court's jurisdiction to grant orders for judicial review is found in section 8 of the Law Reform Act, cap. 26 and that there is a settled criterion for grant of these orders. It was urged the grounds upon which these orders can be granted were stated in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** where it was held as follows:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

As to what Judicial Review orders are all about, the case of **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** was cited for the proposition that judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself and that in every case, the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected; that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. The case of the **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR** was also cited for the same point.

And as to the parameters of the judicial review orders, the respondents cited the Court of Appeal decision in **Republic vs. Kenya National**

Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.

Also cited along the same lines, particularly as far as the order of mandamus is concerned, is the case of **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano Civil Appeal No.24 of 1985** and the case of **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543'**; other cases cited **are Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194; R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743; and Republic vs The Commissioner of Lands & Another, ex parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012.**

The conditions for the grant of the order of mandamus are that it must be shown that the pubic officer has failed to perform his duty and that the court would not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. **See Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C Misc. Application No 40 of 2000**.

According to the respondents, they do not owe any specific duty to the applicant in the manner and style portrayed in the pleadings and as such the order of mandamus cannot issue against them.

It was urged on behalf of the respondents that allowing the application as drawn would be interfering with the respondents' statutory mandate of grant or refusal of Kenyan citizenship which is not the business of the court. The court must allow statutory bodies to carry out their mandate without interference so long as they are acting in accordance with the law.

In the absence of a reply to the issues of fact raised in the statutory statement and verified by the applicant's own affidavit, it is reasonable to conclude that those issues are not controverted. As far as they are pertinent to the applicant's application, the salient elements of these facts would be that, the applicant was born in Kenya on 8 December 1995. Proof of this fact is a certificate of birth issued on 8 February 1996 showing that the applicant was born in Isiolo District in the Republic of Kenya.

Besides the birth certificate, there is an adoption order made on 16 June 1998 showing that the applicant was adopted by Beth Muthoni Mwangi and Adriano Angelo Vanetti. There are also copies of a national identification card and a passport exhibited to the applicant's affidavit showing that Beth Muthoni Mwangi, the applicant's adoptive mother, is a Kenyan citizen who was born in Kiambu, in the Republic of Kenya, in 1967.

The applicant was issued with an Italian passport on 21 April 2016 on the strength of his adoptive father's nationality. This document also shows that the applicant is not only a resident of Kenya but he is also domiciled in this Republic.

Based on this facts, it is the applicant's case that he is entitled to Kenyan citizenship. The respondents have not denied that the applicant is indeed entitled to this right; as noted earlier, none of them filed any affidavit controverting the applicant's depositions. The submissions filed on their behalf, on the other hand, are mainly focused on the law applicable in the quest for judicial review orders generally and the order of mandamus in particular. Nothing has been mentioned on the law on citizenship and most critically, whether based on the uncontroverted facts, the applicant would or would not be entitled to citizenship.

Chapter Three of the Constitution is dedicated to the question of citizenship; it spells out in fairly clear terms the right to citizenship and the entitlements that go with this right. It also provides for, among other things, the various means of acquisition and retention of the right to citizenship; the types of citizenship; revocation of citizenship; and legislation on citizenship.

Article 12, for instance, provides that every citizen is entitled to the rights, privileges and benefits of citizenship; he is also entitled to a Kenyan passport and any document of registration or identification issued by the State to the citizens; Article 13, on the other hand, in a way reassures those persons who were citizens before the promulgation of the Constitution that their status as citizens has not been derogated from. It further provides that citizenship is not lost through marriage or the dissolution of marriage.

Of particular relevance to the question at hand, this Article provides that citizenship may be acquired by birth or registration. See Article 13. (2). Articles 14 and 15 respectively expound further what citizenship by birth and by registration, respectively, entail.

Article 16 provides for dual citizenship which, as I understand the applicant, is the sort of citizenship he is looking for. Article 17 is on revocation of citizenship and finally, Article 18 commits parliament to enact legislation on citizenship to cater for, inter alia, procedures by which a person may become a citizen and generally giving effect to the provisions of Chapter Three of the Constitution.

Looking at the applicant's circumstances from this legal perspective, there should be no doubt that, having been born in Kenya, the applicant's citizenship status fits that provided for in Article 13. (2) of the Constitution; in other words, the applicant acquired Kenyan citizenship by birth. For better understanding it is necessary that I reproduce the entire Article here; it reads as follows:

> ***13. Retention and acquisition of citizenship***
>
> ***(1) Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.***
>
> ***(2) Citizenship may be acquired by birth or registration.***
>
> ***(3) Citizenship is not lost through marriage or the dissolution of marriage. (Emphasis added)***

And once he acquired this citizenship, Article 16 of the Constitution is clear that the applicant did not thereby lose this citizenship status after he acquired Italian citizenship; this Article effectively provides that one is capable of being a citizen of two countries, the status that is otherwise described as 'dual citizenship'. It states as follows:

> ***16. Dual citizenship***
>
> ***A citizen by birth does not lose citizenship by acquiring the citizenship of another country.***
>
> The Kenya Citizenship and Immigration Act, cap. 172 which came into force on 30 August 2011 and which, no doubt, is one of the legislations contemplated under Article 18 and which Parliament was enjoined to enact to give effect to Chapter Three of the Constitution follows on this theme of dual citizenship in section 8 thereof; that section provides as follows:
>
> ***8. Dual citizenship***
>
> ***(1) A citizen of Kenyan by birth who acquires the citizenship of another country shall be entitled to retain the citizenship of Kenya subject to the provisions of this Act and the limitations, relating to dual citizenship, prescribed in the Constitution.***
>
> ***(2) A dual citizen shall, subject to the limitations contained in the Constitution, be entitled to a passport and other travel documents and to such other rights as shall be the entitlement of citizens.***
>
> ***(3) Every dual citizen shall disclose his or her other citizenship in the prescribed manner within three months of becoming a dual citizen.***
>
> ***(4) A dual citizen who fails to disclose the dual citizenship in the prescribed manner commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.***
>
> ***(5) A dual citizen who uses the dual citizenship to gain unfair advantage or to facilitate the commission of or to commit a criminal offence, commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.***
>
> ***(6) A dual citizen who holds a Kenyan passport or other travel document and the passport or other travel document of another country shall use any of the passports or travel documents in the manner prescribed in the Regulations***
>
> ***(7) A dual citizen shall owe allegiance and be subject to the laws of Kenya. (Emphasis added).***

Of particular relevance to the applicant's application is sections (1) and (2) which put beyond doubt the fact that the applicant is not only a Kenyan citizen by birth, but also that he did not lose that status merely because he acquired Italian citizenship. As such, he is entitled to such documents as a passport or other travel documents and, generally, to such other rights a citizen would be entitled to.

It has not been demonstrated that there exist any of the limitations contemplated in these subsections, or any other law for that matter, that would deprive the applicant of his citizenship status and the appurtenant rights to boot.

Regulation 8 of the Kenya Citizenship and Immigration Regulations, 2012 would appear to the basis of the applicant's application; it states as follows:

> ***Endorsement of passport of other counties.***
>
> ***8. (1) The passport of any other country that is held by a dual citizen may, upon application by the holder, be endorsed to indicate that the holder is a citizen of Kenya.***
>
> ***(2) A dual citizen may apply for endorsement under paragraph (1) in Form 4 set out in the First Schedule.***
>
> ***3) A dual citizen whose passport of another country has been endorsed under paragraph (1) may use the passport to enter into or exit out of Kenya and shall be exempted from visa, pass or permit requirements.***

(4) An endorsement made under this regulation shall be in Form 5 set out in the First Schedule and be valid for the period that the dual citizen remains a citizen Kenya.

(5) An immigration officer may, after the holder of a passport that has been endorsed in accordance with this section has ceased to be a citizen of Kenya, cancel the endorsement.

The person charged with the task of 'endorsement' is not expressly specified in this regulation but going by regulation 8(5), it is an immigration officer working under the respondents. It is logical that if an immigration officer will cancel an endorsement, he can also endorse. In any event, section 5 of the Immigration and Citizenship Act expressly states that it is the immigration officers who are tasked with the duty of implementing the provisions of the Act; that section reads as follows:

5. Appointment of immigration officers

The Service shall appoint such immigration officers as may be necessary for the carrying out of the provisions of this Act.

'Immigration officer' is defined in section 2 of that Act to mean "*the Director and any of the persons appointed as an immigration officer under section 16 of the Kenya Citizens and Foreign Nationals Management Service Act (Cap. 174*)". The "director" is the person named as the 2nd respondent and he is himself defined in this very section as "*any person appointed as a director under section 16 of the Kenya Citizens and Foreign Nationals Management Service Act, 2011."*

As its name suggests, the Kenya Citizens and Foreign Nationals Management Service Act establishes the Kenya Citizens and Foreign Nationals Management Service; according to section 4(1) of the Act, the service operates under the general supervision of the 2nd respondent and is responsible for the implementation of, inter alia, laws and any other matter relating to citizenship and immigration; that section reads as follows:

4***. Functions of the Service***

(1) The Service shall, under the general supervision of the Cabinet Secretary, be responsible for the implementation of policies, laws and any other matter relating to citizenship and immigration, births and deaths, identification and registration of persons, issuance of identification and travel documents, foreign nationals management and the creation and maintenance of a comprehensive national population register. (Emphasis added).

And the cabinet secretary is defined in section 2 of the same Act as "the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals".

It is clear from these provisions of the law that the respondents are responsible for giving effect to the provisions of the Kenya Citizens and Immigrations Act and the regulations made thereunder and, for this reason, they have been properly joined in that capacity.

Although regulation 8. (1) and (2) do not set out specific timelines when an endorsement may be made on applicant's passport after such an application has been made, it should certainly be made within a reasonable time; and if, for any reason it cannot be made, then the applicant is entitled to be so informed and the reasons why it cannot be made, again within a reasonable time. The omission to act on an application for endorsement or communicate to the applicant on the decision made on such an application is certainly not option open to the respondents.

Turning back to the applicant's case, there should not be any dispute that he is on the right side of the law on citizenship and, accordingly, there should not be much debate whether he is entitled to the judicial review order of mandamus, in the terms sought in his motion dated 14 October 2019.

The learned counsel for the respondents cited and quoted excerpts from numerous decisions on this subject of judicial review and the prerogative order of mandamus in particular; I agree with the propositions of law made in those decisions to the extent that they are consistent with the law on the judicial review order of mandamus.

The whole purpose of the order of mandamus is to have public authorities get things done in, for instance, providing services, of whatever nature, to the community at large. By its very nature, it is an order that compels public authorities to carry out its duties and, where necessary, exercise its powers as by law provided.

The Constitution and the relevant statutes leave no doubt that the respondents are not only empowered but they are also authorised or entitled to act to give effect to the applicant's rights.

In **Julius versus Lord Bishop of Oxford (1880) 5 App. Cas 214**, it was held that in certain instances, a power may be coupled with a duty so that the donee of the power would be obliged to exercise it. Lord Cains said:

"There may be something in the nature of the thing empowered to be done, something in the object from which it is done, something in the conditions under which it is to be done, something in the titles of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

"Where a power is deposed with a public officer for the purpose of being used for the benefit of persons who are specifically

pointed out and with regard to who a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised." (See page 225).

And Lord Blackburn's words in the same case would resonate with the applicant's application; he stated as follows:

"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donnee of the power, to exercise it for the benefit of those who have that right, when required in that behalf." (See page 241).

Thus, this court will require of the respondents to undertake their duties and exercise their powers for the benefit of such persons as the applicant who are entitled to the citizenship rights as prescribed by the Constitution and the statutes. The appropriate tool to employ to ensure that this is done would be the prerogative order of mandamus.

Lest we forget, mandamus is an order which commands a person or body to perform a public duty. **R versus Poplar Metropolitan Borough Council, ex p LCC (No. 2) (1922) 1KB 95.**

Although mandamus enforces duties and not powers there are cases where a power may be coupled with a duty so that the donee of the power would be obliged to exercise it**. (See Foulkes Administrative Law, 7th Edition, page 368)**.

The grant of this order, like the other prerogative orders, is discretionary and one of the factors that the court will consider in exercising its discretion, one way or the other, is the availability of an equally convenient, beneficial and effectual remedy. However, it was never suggested that such an alternative remedy, or any remedy for that matter, other than the relief of mandamus exists in the applicant's case.

As far as standing is concerned, I am persuaded that the respondents not only owe the applicant a duty to performance of the duties in question but also that the applicant has a specific right in the performance of these duties. In other words, the applicant has demonstrated that he has sufficient interest in the matter to which the application relates.

In the final analysis, there is sufficient justification for grant of the judicial review order of mandamus in terms sought by the applicant; accordingly, this order is hereby issued compelling the respondents, jointly and severally, to issue and process all relevant documents necessary for the registration of the applicant as a Kenyan Citizen within seven days of the date of service this order upon them and in respect of the applicant's formal and official application for dual citizenship (under Immigration File Number R. 537430) made on 12 June 2019 under Form 3 of the Kenya Citizenship and Immigration Act, 2011.

The applicant will also have the costs of this application.

Orders accordingly.

Signed, dated and delivered this 12th day of February 2021

Ngaah Jairus

JUDGE