



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 GENERAL3RD RESPONDENT

EX PARTE APPLICANT:.....ZARKO KNEZEVIC

RULING NO 2

The Application

1. Zarko Knezevic, the *ex parte* Applicant herein, filed an application by way of an undated Amended Chamber Summons seeking the following orders;

- i) **THAT**, this Application be certified urgent and be heard ex-parte in the first instance by the duty Judge during the current High Court vacation.
- ii) **THAT**, the Applicant be granted leave to have the Application herein heard by the duty Judge during the current High Court vacation.
- iii) **THAT**, the Applicant be granted leave to apply for:
 - a) An Order of certiorari to remove to this Honourable Court to be quashed the decision of the 2nd Respondent transmitted by the 1st Respondent to the Applicant on 17th November,2020, rejecting the Applicant’s Appeal without giving any reasons, and failing to consider the supplementary information presented by the Applicant voluntarily which information indicated that the Applicant had been seconded by Sika AG to Sika Kenya Limited to streamline the operations, build the capacity of Sika Kenya Limited and train the Kenyan employees on international best practices.
 - b) An Order of Mandamus compelling the 1st Respondent to issue the Applicant with a Class D work permit.
 - c) An Order of Mandamus compelling the 1st Respondent to issue the Applicant with another Special Pass when the current Special Pass held by the Applicant expires on 20th February,2021 pending the hearing and determination of this matter.

d) **An Order of Prohibition to prohibit the Respondents acting either in their person or through their servants, agents, police officers, employees or anyone claiming to derive authority from the Respondents from arbitrarily arresting, detaining and or impeding the Applicant's freedom of movement with regard to the matters herein.**

e) **An order of declaration that 2nd Respondent's rejection of the Applicant's Appeal without considering the supplementary information voluntarily presented by the Applicant, and failure to give reasons of rejection of the Applicant's Appeal as contemplated by Section 5(1) of the Fair Administrative Action Act,2015 is a violation of the constitutional right of fair administrative action.**

iv) **THAT, the grant of leave herein does operate a stay of the decision by the 1st Respondent and the 2nd Respondent from issuing any further orders restricting the Applicant from obtaining an extension of his current Special Pass pending the hearing and determination of this matter.**

v) **THAT, the Respondents be ordered to pay the Applicant the costs of this Application.**

2. The application is supported by the grounds on its face, an amended Statutory Statement and an amended Verifying Affidavit sworn by the Applicant on 15th January 2021. It was averred therein that the Applicant is a Special Pass holder of pass number 155516 issued on 20th November 2020, that entitled him to work at Sika Kenya Limited for three months from the date of issue. Further, that the Applicant has been employed by Sika AG since March 2012 and that he has acted in different capacities including as head of procurement in a subsidiary operating in Serbia where some of his duties included demand planning, inventory management, master data, on-product inventory planning and pricing using the software MS Axapta.

3. The Applicant contended that he has been a law abiding citizen, and that he applied for a Class D work permit from the 1st Respondent to work as a technical operations manager, which application was denied on 18th November 2019. Subsequently, that an appeal to the 2nd Respondent was lodged by Sika Kenya Limited on behalf of the Applicant on 13th February 2020 and a further supplementary appeal on 24th June 2020 by Luchiri & Company Advocates providing further information for consideration by the 1st Respondent.

4. The Applicant's case is that the 2nd Respondent's failure to furnish him with reasons for rejecting his appeal, and the 1st Respondent's disregard to consider the further information voluntarily submitted by the deponent why he was seconded by Sika AG to Sika Kenya Limited was in total disregard of fair administrative action as provided for by the Constitution of Kenya. Further, that the administrative action by the 2nd Respondent to reject the deponent's appeal and deny him a Class D work permit was not proportionate to the interests of Sika Kenya Limited and the Kenyans employed therein. In addition, that the decision was unreasonable and that the Applicant's contribution to Sika Kenya Limited using his seven (7) years international experience and intended goal of building the capacity of the Company and the Kenyan employees will not be achieved

5. In conclusion, the deponent deposed that during his stay in Kenya he had met Hyline Akinyi Odero, with whom they are blessed with one issue, born on 22nd November, 2020.

The Response

6. The Respondents filed a Replying Affidavit sworn on 15th February 2021 by Alfred Omanigi, a Principal Immigration Officer in the Investigations and Prosecution Section of the Department of Immigration within the Ministry of Interior and Co-ordination of National Government. He deposed that the Applicant's application for a class D work permit was received on 19th September 2019, and that pursuant to section 40 of the Kenya Citizenship and Immigration Act 2011, the said application was forwarded to the Permit Determination Committee (PDC) for consideration upon which the PDC recommended to the Director of Immigration that the Applicant's application be rejected on grounds that the job can be done by a Kenyan. It was averred that the Applicant was notified of the decision and the grounds thereof on 18th October, 2019 which was transmitted to him through the e-fns system for him to access.

7. The Respondents averred that the Applicant appealed the decision to the Cabinet Secretary on 13th February 2020, and that the Cabinet Secretary agreed with the decision of the directorate and this decision was communicated to the Applicant on 17th November, 2020 through the e-fns. The Respondents' case is that the authority to determine the suitability of a foreign national to work in Kenya is donated by statute to the PDC, Director of Immigration Services and Cabinet Secretary who all agreed that the Applicant does not meet the criteria to be given a job in Kenya. Further, that the Applicant's appeal did not disclose any new evidence to warrant a different outcome, and that at all times the Applicant's work permit application was processed expeditiously and that he was notified of the decisions of both the PDC and the Cabinet Secretary in rejecting his application.

8. Mr. Omanigi further deposed that the Chairman of the PDC stated that at the time of making the determination the PDC had received reliable intelligence that the said position had earlier been held by a Kenyan who was sacked to pave way for the subject to take the job and that the applicant had willfully failed to disclose to both the PDC and the Cabinet Secretary the fact that the job he sought to do was initially held by a Kenyan.

9. It was deposed that the role and duty of the government, through its various state agencies was to protect jobs for its citizens (Kenya) especially with the Covid-19 pandemic ravaging the economy and that the doctrine of Sovereignty of Nations connotes that the right to enter, live and work in Kenya is a preserve of Kenyan Citizens only and only jobs whose skills cannot be availed locally should be considered to foreign nationals. It was averred that the position of Technical Operations Manager cannot be said to require unique skills not available in Kenya, and that there was no demonstration of how Axapta software, which the Applicant has alluded to in his pleadings, is unique to the foreigner and that it cannot be used locally.

10. Lastly, it was averred that the Directorate cannot legally process any further special passes for the Applicant as pleaded since the subject has already exhausted the 6 months' limit provided under regulations 34 (2) and (3) of the Kenya Citizenship and Immigration Regulations, 2012. Further, that to issue a work permit to the Applicant would be prejudicial to the many qualified Kenyans who are jobless and have the same or better qualifications than the Applicant.

The Determination

11. I have considered the pleadings and arguments by the parties herein, and note that the requirement for leave to commence judicial review proceedings, is provided in *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the said leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

12. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) **whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;**
- (2) **whether the claimant has capacity to bring a claim for judicial review;**
- (3) **whether the claimant has a sufficient interest to bring a claim for judicial review;**
- (4) **whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;**
- (5) **whether the claim is otherwise an abuse of process;**
- (6) **whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;**
- (7) **whether the claim has been brought promptly;**
- (8) **whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.**

13. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Other grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

14. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

15. In the present application, the Applicant was 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. Luchiri & Company Advocates, who are on record for the Applicant, in this respect filed submissions dated 19th January 2021, wherein they reiterated the averments made in his pleadings. The counsel submitted that the 1st Respondent has allowed the Applicant extensions of his special pass from 11th October 2019 to date, and that this demonstrates that the Respondents will not suffer any prejudice if the court grants the Applicant leave to file a substantive motion. Further, that this Court's discretion to order that leave should operate as a stay is couched under the provisions of Order 53 Rule 1(4) of the Civil Procedure Rules and that if stay is not granted these proceedings may be rendered nugatory. The Applicant in this respect cited the case of **Republic vs National Hospital Insurance Fund Management Board Ex parte Patanisho Maternity and Nursing Home [2019] eKLR** for the position that the implementation of a decision of a continuing nature can be suspended.

16. Section 40 of the Kenya Citizenship and Immigration Act 2011 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."

17. An ordinary reading of the said section leads to the conclusion that an aggrieved person has two options of either seeking a review or appealing the Cabinet Secretary's decision. The Applicant has in this regard given the reasons why he seeks to review the Cabinet Secretary's decision to reject his appeal. To this extent, I find that the Applicant has shown an arguable case, and leave to apply judicial review orders is merited.

18. On the question of whether the said leave can operate as a stay of the decision by the 1st Respondent and the 2nd Respondent restricting the Applicant from obtaining an extension of his current Special Pass, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

19. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

20. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

21. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

"As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its

implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

22. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

23. In this regard, I note that the Respondents have indicated that the law places a month’s limit as regards the duration for which special passes may be extended which has expired in the case of the Applicant. On the other hand, as noted in the ruling delivered herein on 19th February 2021, this Court can grant orders 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. The stay orders are therefore merited to this extent.

The Orders

24. In light of the foregoing observations and findings, the Applicant’s Amended Chamber Summons is found to be merited to the extent of the following orders:

I. The Applicant is granted leave to apply for an order of certiorari to remove to this Court to be quashed the decision of the 2nd Respondent transmitted by the 1st Respondent to the Applicant on 17th November,2020, rejecting the Applicant’s Appeal.

II. The Applicant is granted leave to apply for an order of Mandamus compelling the 1st Respondent to issue the Applicant with a Class D work permit.

III. The Applicant is granted leave to apply for an order of Mandamus compelling the 1st Respondent to issue the Applicant with another Special Pass when the current Special Pass held by the Applicant expires on 20th February,2021.

IV. The Applicant is granted leave to apply for an order of Prohibition to prohibit the Respondents acting either in their person or through their servants, agents, police officers, employees or anyone claiming to derive authority from the Respondents from arbitrarily arresting, detaining and or impeding the Applicant’s freedom of movement with regard to the matters herein.

V. The Applicant is granted leave to apply for a declaration that 2nd Respondent’s rejection of the Applicant’s Appeal without considering the supplementary information voluntarily presented by the Applicant, and failure to give reasons of rejection of the Applicant’s Appeal as contemplated by Section 5(1) of the Fair Administrative Action Act,2015 is a violation of the constitutional right of fair administrative action.

VI. The costs of the Applicant’s Amended Chamber Summons application shall be in the cause.

VII. The Applicant shall file and serve the Respondents with the substantive Notice of Motion within twenty-one (21) days from the date of this ruling.

VIII. The Respondents herein are hereby restrained from removing the Applicant from Kenya pending the hearing and determination of the Applicant’s substantive Notice of Motion, or until further orders of this Court. For the avoidance of doubt the restraining order granted herein shall not be construed as compelling the Respondents to issue the Applicant with a Special Pass.

IX. Further directions on the Applicant’s substantive Notice of Motion shall be given by the Judge seized of this matter.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021

J. NGAAH

JUDGE