



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 25 OF 2020

IN THE MATTER OF: ARTICLES 10 & 47 OF THE CONSTITUTION OF KENYA, 2020, THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011, SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT CAP 21

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 10, 22, 23, 47& 165 OF THE CONSTITUTION OF KENYA 2010 BY THE RESPONDENT

AND

IN THE MATTER OF: REFUSAL TO ISSUE CLASS ‘G’ ENTRY PERMITS TO SHAHBAZ KHAN MUHAMMAD, SAQIB SHAHBAZ AND AKHLAQ NAJAM BY THE RESPONDENT

AND

IN THE MATTER OF: WEDNESBURY UNREASONABLENESS BY THE DEPARTMENT OF IMMIGRATION SERVICES

BETWEEN

SHAHBAZ KHAN MUHAMMAD.....1ST PETITIONER

SAQIB SHAHBAZ.....2ND PETITIONER

AKHLAQ NAJAM.....3RD PETITIONER

VERSUS

DIRECTOR OF IMMIGRATION

SERVICES OF THE REPUBLIC OF KENYA.....RESPONDENT

JUDGMENT

The Petition

1. The Petitioners herein are Pakistan nationals residing in Kenya on the basis of class ‘G’ work permit since 1996 and carrying out business and own a limited liability company known as **Bolpak Trading Company Ltd**. On 5th March 2019 the Petitioners applied for renewal of their work permits and paid the requisite fee of Kshs 10,000 each but the Respondent refused to have the said permits renewed. The Petitioners state that they were instead issued with special passes which are valid for three months and that they are at the risk of being deported and losing the many investments that they have made in this country over the years. It is upon that background that they seek for the following prayers in the petition;

- a. A declaration that the refusal by the Respondent to renew the Petitioners class ‘G’ entry permits without giving any valid reasons is a contravention of natural justice rule and the said decision be quashed for all purposes through an order of certiorari.**
- b. A declaration that pending the hearing and determination of this matter, the Petitioners should not be harassed in any way by the**

police or officers from the Department of Immigration and that the Petitioners business and stay in Kenya should not be interfered with.

c. An order of Mandamus compelling the Respondent to issue to Petitioners Shahbaz Khan Muhammad, Saqib Shahbaz and Akhlaq Najam with class 'G' entry permit.

d. An order of declaration that henceforth, the Petitioners are entitled to a renewal of their work permits for as long as they continue to operate their business in Kenya provided that they have not been found guilty of committing any offence by any court of law in Kenya.

e. The Petitioners be awarded damages and costs of the petition.

2. The Petition is supported by an affidavit sworn by Shahbaz Khan Muhammad sworn on 7th April 2021.

Petitioners' Case

3. It is the Petitioners' case that the 1st Petitioner has been in this country from 1996 having come in as an adult while the 2nd Petitioner came in at the age of 6 years. The 1st Petitioner states that all his remaining 3 children were born, raised and schooled in Kenya.

4. The Petitioners aver that they carry out the business of car importation and sales with showrooms in Mombasa and Nairobi, and that they have in their show rooms in Mombasa and Nairobi combined vehicles valued of over Kshs. 250,000,000/= with approximated Kshs 62,000,000/= being with their clients on hire purchase terms.

5. Besides they have several other investments in real estate amounting to Kshs 100,000,000/=. Further, they pay taxes and contribute to Kenyan economy and have paid over Kshs. 34,000,000/= as taxes to Kenya Revenue Authority over the last four years.

6. However, their tribulations began way back in 2007 when the Respondent failed to renew the 1st Petitioner's entry permit, causing the Petitioners to file **Nairobi Misc. Civil Application No. 561 of 2007** in which a consent was recorded and the Respondent agreed to renew the permits on the basis that no claim for damages would be pursued. In 2015 the same scenario occurred and the renewal of the work permits was denied leading to the arrest of the 1st Petitioner and consequently his detention. This led to filing of **Mombasa High Court Petition No 62 of 2016 (Consolidated with 60 & 61)** in which the Petitioners were released and issued with a permit pursuant to court order. The same position occurred in 2019 leading to the filing of the current petition, seeking the grant of the aforesaid prayers.

The Response

7. In response to the petition the Respondent filed a replying affidavit sworn by one Jimmy Nyikuli. The deponent is the Senior Legal Officer in Investigations and Prosecution Section of the Respondent, and are mandated with the duties of enforcement and ensuring compliance with Kenya Citizenship and Immigration Act No 12 of 2011 and other enabling legislations.

8. It is the Respondent's case that on 5th March 2019 the Petitioners applied for a class 'G' permit as directors of Bolpak Trading Co Ltd and pursuant to Section 40 of the Kenya Citizenship and Immigration Act 2011 the application was forwarded to the Permit Determination Committee, which made recommendations to defer the Petitioners' applications after it received new adverse reports touching on the Petitioners activities in the country.

9. The Respondent avers that on 20th August 2020 the Petitioners were granted audience and were informed of the reasons why their application for work permits had been deferred. They were asked to provide additional information to the committee to enable it make a determination on their applications. The Petitioners complied and provided the additional information at their meeting with the Respondent on 26th August 2020.

10. The Respondent depones that a multi-agency team consisting of various government entities was established to conduct fresh background check on the Petitioners activities in the country and the Petitioners were issued with special passes. That the investigations by the multi-agency team discovered that the Petitioners had outstanding tax obligations of over Kshs 100 Million and have been served with a tax demand notice by the Kenya Revenue Authority.

11. The Respondent avers that the Petitioners have vide a letter dated 15th February 2021 been invited to appear before the multi-agency to shed light on issues revealed in the investigations. That following the Covid- 19 outbreak the Respondent stopped issuing permits and granted amnesty to all foreigners within Kenya and the delay in processing the Petitioners work permits has been occasioned by the Petitioners noncompliance of statutory and security checks. Therefore, the Respondent states that the petition herein is premature as the Petitioners have not exhausted all the local remedies available to them and are using the court to avoid being scrutinized. The Respondent urged the court to dismiss the petition with costs.

Submissions

Petitioner's Submissions

12. The Petitioners filed their submissions on 15th March 2021. Mr. Gikandi learned counsel submitted that the Petitioners various constitutional rights had been violated by the Respondent. In highlighting the violation of the Petitioners' right to renewal of work permit,

counsel stated that under the confines of section 40 of the Kenya Citizenship and Immigration Act, the Respondent's failure to renew the said permits without giving valid reasons was unconstitutional. Counsel submitted that the Respondent failed to explain to the Petitioners why a determination had not been made by the Permit Determination Committee over their application as required by the law and further that the Multi Agency team assembled by the Respondent to investigate the Petitioners did not have jurisdiction to deliberate on the Petitioners' application.

13. Counsel submitted that the claim that the Petitioners had defaulted in tax payment was not true as no evidence on service had been tendered before this court on the alleged tax demand notice served upon the Petitioners. There was in fact no such demand notice.

14. Mr. Gikandi submitted that the failure by the Respondent to issue the permit was unprocedural and therefore invalid and was in violation of Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act by failing to give the Petitioners a chance to be heard before arriving at the decision to deny them renewal of their work permits. This resulted in loss of Petitioners' legitimate expectation that their work permits would be renewed as required by law. Mr. Gikandi urged the court to allow the petition as prayed.

Respondent's Submissions

15. The Respondent filed their submissions on 17th March 2021. It was submitted that the Respondent being a public office established by statute is guided by the principals of the Constitution of Kenya 2010. That the Petitioners had been issued with several notices and invitations to attend interviews and meetings by the Respondent during the process of reviewing their business activities in the country. It was submitted that the Permit Determination Committee which was tasked with clearing the Petitioners for licence delayed its proceedings for reasons including Covid-19 pandemic.

16. Mr. Makuto learned counsel for the Respondent submitted that the delay to re issue the work permits had been occasioned by the Petitioner's non-compliance of statutory and security checks and the process to be followed by the Respondent in issuing the permits had been clearly followed.

17. Counsel urged the court not to issue the orders sought by the Petitioners as they would deny the Respondent an opportunity to consider the recommendations set by the committee under Section 40 of the Immigration Act.

18. Counsel further submitted that the petition is premature and an abuse of the court process as the Petitioners were using the court to avoid scrutiny of their business activities by the Respondent.

Determination

19. I have carefully considered the submissions together with the petition. In my view, the following are the issues to be determined by this Court.

a. Whether the Petitioners rights and fundamental freedoms have been violated.

b. Whether the Petitioners are entitled to the remedies sought.

(a) Whether the Petitioners rights and fundamental freedoms have been violated.

20. The Petitioners have submitted that their rights as envisaged under Articles 10 and 47 of the Constitution of Kenya 2010 have been violated by the Respondents. Article 10 of the Constitution provides for the national values and principles of governance. It is envisaged therein that the said values include good governance, integrity, transparency and accountability and sustainable development. It further advocates for human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized. Article 10 of the Constitution outlines the requisite threshold on how state organs, state officers, public officers and all state corporations in dispensing their duties and exercising their powers, are expected to apply the national values and principles of governance. That they should treat every person humanely and with dignity. In the process they should uphold fundamental rights. This includes adherence to the laid down procedures in administrative action which should be expeditious, efficient, lawful, reasonable and procedurally fair.

21. Article 47 of the Constitution provides that;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall—

a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. Promote efficient administration.”

22. From the evidence before this Court, it is clear that the application to renew the said permits was indeed made on 5th March 2019. The Respondent alleges that after receiving the application the same was forwarded to the Permit Determination Committee; that the said committee made recommendations on deferring the Petitioners applications after receiving adverse reports about their activities in the country. However, no evidence was tendered to this Court about alleged adverse report; and its contents have not been revealed. The Petitioners have not been given the opportunity to defend themselves on the contents of the said adverse report and or offer any explanation with regard to the allegations.

Section 107 of Evidence Act succinctly states:

a. “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

And **Section 108 of Evidence Act**, further states thus:

b. “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

23. The Respondent further alleges that after the recommendations from the Permit Determination Committee a multi-agency team was formed to conduct fresh background check on the petitioners’ business activities in the country. **Section 40 of the Kenyan Citizenship and Immigration Act (the Immigration Act) deals with issuance of work permits in the following terms;**

“(1) In this section—

“Committee” means the Permit Determination Committee established under section 7 of the Kenya Citizens and Foreign Nationals Management Service Act, 2011.

(2) An application for a permit shall be made to the Director in the prescribed manner.

(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—

i. refer the matter back to the Committee for further consideration; or

ii. 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.

(10) Any person who is aggrieved by a decision made under this section may appeal to the High Court.”

24. From the above there is no indication in the Act that an agency is to be formed to conduct further investigations in the event that issues arise from an application. The formation of the said multi-agency by the Respondent was therefore unprocedural.

25. The **Fair Administrative Action Act 2015 at Section 7** provides the relief available to any litigant that has been aggrieved by an administrative action. It brings into operation the provisions of **Article 47** of the constitution. **Section 7 of the Fair Administrative Action Act 2015** provides as follows:

“Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

i. A court in accordance with Section 8; or

ii. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

A court or tribunal under subsection (1) may review an administrative action or decision, if-

a. The person who made the decision-

i. Was not authorized to do so by the empowering provision;

ii. Acted in excess of jurisdiction or power conferred under any written law;

iii. Acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. Was biased or may reasonably be suspected of bias; or

- v. *Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;*
- b. *A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- c. *The action or decision was procedurally unfair;*
- d. *The action or decision was materially influenced by an error of law;*
- e. *The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;*
- f. *The administrator failed to take into account relevant considerations;*
- g. *The administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions;*
- h. *The administrative action or decision was made in bad faith;*
- c. *The administrative action or decision is not rationally connected to-*
- d. *The purpose for which it was taken;*
 - ii) *The purpose for which it was taken;*
 - iii) *The purpose of the empowering provision;*
 - iv) *The information before the administrator; or*

The reasons given for it by the administrator;

- e. *There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;*
- f. *The administrative action or decision is unreasonable;*
- g. *The administrative action or decision is not proportionate to the interests or rights affected;*
- h. *The administrative action or decision violates the legitimate expectations of the person to whom it relates;*
- i. *The administrative action or decision is unfair; or*
- j. *The administrative action or decision is taken or made in abuse of power.*

The court of tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

- a. *The administrator is under duty to act in relation to the matter in issue;*
- b. *The action is required to be undertaken within a period specified under such law;*
- c. *The administrator has refused, failed or neglected to take action within the prescribed period.*

26. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others**^[62] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

a. **“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”**

In the case of **Judicial Service Commission v Mbalu Mutava Musyimi**^[2015] eKLR the Court of Appeal stated that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed”.

27. The Respondent has clearly breached the provisions of Article 47 of the constitution and the provisions of the Fair Administrative Actions Act. The relevant procedure in issuing of the permits has been breached and the same has no fairness and can be termed as being illegal. The Petitioners’ rights and fundamental freedoms as envisaged under Articles 10 and 47 of the constitution have been violated.

(b) Whether the Petitioners are entitled to the remedies sought.

28. From the foregoing, it is clear that the Respondent’s action did violate the rights of the Petitioners. This Court is satisfied that the petition has been proved on a balance of probability. The Petition is allowed as follows:

(a) A declaration is hereby made that the refusal by the Respondent to renew the Petitioners’ Class “G” Entry Permits without giving any valid reasons is a contravention of natural justice rule and the said decision be and is hereby quashed for all purposes through an order of certiorari.

(b) An order of mandamus is hereby issued compelling the Respondent to issue the Petitioners, Shahbaz Khan Muhammad, Saqib Shahbnaz and Akhalaq Najam with a Class “G” Entry Permit.

(c) It is hereby declared that henceforth, the Petitioners are entitled to a renewal of their work permits for as long as they continue to operate their business in Kenya provided that they have not been found guilty of committing any offence under the laws in Kenya.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 26TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gikandi for Petitioners

Mr. Makuto for Respondent

Ms. Peris Court Assistant