



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MAPPLICATION NO. E1154 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND ROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**DR. FRED MATIANG'I, PHD, EGH.....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANTS:**

**1. BAO AIWU**

**2. WANG PING**

**3. YANG YING**

**RULING**

**The Application**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants herein are Chinese nationals and citizens, and they have filed an application by way of a Chamber Summons dated 14<sup>th</sup> December 2020, seeking the following orders:

**1. This application be certified urgent and heard ex-parte.**

**2. The Applicants be granted leave to apply for an order of certiorari in the High Court to remove and quash the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> December 2020 declaring that the Applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.**

**3. The Applicants be granted leave to apply for an order of prohibition, prohibiting the Respondents from implementing or enforcing the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> December 2020 declaring that the applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.**

**4. The grant of leave du operate as stay of implementation or enforcement of the 2<sup>nd</sup> Respondent's declarations/orders**

against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> of December, 2020 declaring that the applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.

**5. The costs of this application be provided for.**

2. The grounds for the application are stated in a statutory statement dated 14<sup>th</sup> November 2020, and a verifying affidavit sworn on the same date by the 1<sup>st</sup> *ex parte* Applicant. In summary, the main grounds are firstly, that decision made by the 2<sup>nd</sup> Respondent on 1st December, 2020 is illegal for the reasons that the 1<sup>st</sup> Applicant is a holder of a valid resident/work permit which was issued by the Department of Immigration Services after she complied with section 36 and 40 of the Kenya Citizenship and Immigration Act and thus cannot be deported under the provisions of section 43 of the Kenya Citizenship and Immigration Act.

3. In addition, that the 1<sup>st</sup> Applicant has not been convicted of any criminal offence that bears a punishment of over 12 months in prison. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were declared prohibited based on section 33(1) of the said Act despite the fact that they have never committed any offence or done any action that puts them under the category of prohibited immigrants.

4. Secondly,, that the said decision is irrational and unreasonable for the reasons that the 1<sup>st</sup> and 3<sup>rd</sup> *ex parte* Applicants are long standing business persons within Nairobi Kenya since the year 2016, and the 2<sup>nd</sup> *ex parte* Applicant is a holder of dependant's pass as a result of the fact that her son is working in Kenya for Oppo Kenya under a valid work permit. Lastly, that the impugned decision is flout with procedural impropriety for the reasons that there was no recommendation by any authority or court as required by the provisions of section 43 of the said Act for the removal of the 1<sup>st</sup> Applicant, and there was unlawful detention of all the applicants without charges.

5. The *ex parte* Applicants annexed copies of their passports, residents/work permits and dependant's pass; business permits and documents; the proceedings of their Habeas Corpus application at the **High Court of Kenya in Nairobi HC Miscellaneous Criminal Application No. E307/2020**; and of the impugned declaration/order made on 1<sup>st</sup> December 2020 by the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government.

**The Determination**

6. I have considered the application dated 14<sup>th</sup> December 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reason that the *ex parte* Applicants face imminent deportation from Kenya and threats to their liberty.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the 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.

8. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make a cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this regard 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.

9. In the present application, the *ex parte* Applicants have provided evidence of the impugned order made against them dated 1<sup>st</sup> December 2020, as well as evidence of permits to reside and work in Kenya. To this extent I find that the *ex parte* Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

10. On the question of whether the said leave can operate as a stay of the impugned report, 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.”**

11. 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.

12. 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** .

23. 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.”

14. 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.

15. In this regard, the order against the *ex parte* Applicants require certain actions to be taken by the Respondents in relation to their deportation, and the decision of 1<sup>st</sup> December 2020 is therefore amenable to stay. In addition, if a stay is not granted, the *ex parte* Applicants' application will be rendered nugatory. The stay orders are merited to this extent.

### **The Orders**

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 14<sup>th</sup> December 2020 is found to be merited to the extent of the following orders:

i. The *ex parte* Applicants' Chamber Summons application dated 14<sup>th</sup> December 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.

ii. The *ex parte* Applicants are granted leave to apply for an order of Certiorari to remove and quash the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> December 2020 declaring that the Applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.

iii. The *ex parte* Applicants are granted leave to apply for an order of prohibition, prohibiting the Respondents from implementing or enforcing the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> December 2020 declaring that the applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.

iv. The grant of leave herein shall operate as a stay of any further implementation or enforcement of the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants made on 1<sup>st</sup> of December 2020 declaring that the applicants' presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya, pending the hearing and determination of the substantive judicial review application herein or until further orders by this Court.

v. The *ex parte* Applicants shall file and serve the Respondents with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 14<sup>th</sup> December 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

vi. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

vii. The hearing of the substantive Notice of Motion shall be held on 28<sup>th</sup> January 2021.

viii. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

ix. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

x. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

xi. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

xii. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 28<sup>th</sup> January 2021.

xiii. 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 Thursday, 17<sup>th</sup> December 2020.

xiv. Parties shall be at liberty to apply.

17. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020**

**P. NYAMWEYA**

**JUDGE**