REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATIO NO. 350 OF 2018

In the matter of an application by Abdulahi Said Salad for Judicial Review Orders

of *Certiorari* and *Mandamus* against the decision of the Cabinet Secretary

in the Ministry of Interior and Co-ordination of National Government.

and

In the matter of section 57(1) of the Kenya

Citizenship and Immigration Act, Cap 172, Laws of Kenya

BETWEEN

REPUBLIC..APPLICANT

VERSUS

CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT..........1ST RESPONDENT

AND

ABULAHI SAID SALAD..*EX- PARTE* APPLICANT

JUDGMENT

1. Pursuant to the leave of the Court granted on **10th** September 2018, **Mr. Abulahi Said Salad**, the *ex parte* applicant filed a Notice of Motion dated **12th** April 2018 expressed under the provisions of Articles **27,28,29,31,35,39,40,45,47,50(1),53** and **165(3)(b)&(6)** of the Constitution, sections **8(2)** and **9(1)(b)** of the Law Reform Act,[1] sections **10** & **11** of the Fair Administrative Action Act,[2] Order **53** Rules **3 & 4** of the Civil Procedure Rules, 2010, and section **57(1)** of the Kenya Citizenship and Immigration Act[3] seeking the following Judicial Review orders:-

*a. An order of **Certiorari** to quash the Respondent's decision informally communicated to the ex*

*parte applicant on **8th** August 2018, declaring the ex parte applicant a prohibited immigrant, putting the ex parte applicant on the prohibited immigrant's list, and purporting to direct immediate deportation and or removal of the ex parte applicant from the country.*

*b. An order of **Mandamus** compelling the first Respondent to remove the ex parte applicant from the list of prohibited immigrants.*

*c. An order of **Mandamus** compelling the Respondent to allow and facilitate the ex parte applicant in regularizing his immigration status in the country.*

d. Costs.

2. The grounds in support of the application as far as I can be glean them from the face of the application, the statutory statement and the affidavits are that on **8th** August 2018, the *ex parte* applicant's advocates visited the department of Immigration services in Nairobi to apply for the *ex parte* applicant's regularization of his immigration status in the country, and, during the aforesaid visit, his advocate was informed by the immigration officers of a decision by the Respondent, declaring the *ex parte* applicant a prohibited immigrant, and, that, the *ex parte* applicant had been listed on the prohibited immigrant's list, and, lastly, a decision directing the *ex parte* applicant's immediate deportation or removal from Kenya.

3. The *ex parte* applicant further states that despite requesting to be shown and or served with the decision, he was notified that the reasons would be given after the deportation, and, that the *ex parte* applicant was not accorded due process.

4. The *ex parte* applicant contends that the said decision will force him to abandon his businesses, investments, properties and obligations to his children/family and other dependants, instead of allowing him to regularize his status, is highly disproportionate and irrational, biased, discriminatory and it will affect his livelihood and that of his dependants, yet he was not given a hearing.

5. The *ex parte* applicant states that the Respondent acted *ultra vires* and improperly exercised its discretion, and, unless the orders sought are granted, the *ex parte* applicant may be removed from Kenya in violation of the law, hence, it is in the interests of justice that the application be allowed.

6. Additionally, the e*x parte* applicant in his supporting affidavit avers that he has lived in Kenya for the last **27** years, that, he has two wives and children all of whom live in Kenya, and, that, he owns businesses employing 5,000 Kenyans. Further, he averred that his last business permit expired on **4th** November 2016 while in India for treatment, and, during his absence his business rivals plotted to take over his businesses. He also states that upon his return to Kenya in December 2016, he was denied entry without being given reasons. He further averred that on **22nd** September 2017, he was allowed into the country on a **3** month's visitor's visa which upon expiry was extended to **22nd** December 2017. He also averred that he lost his Ethiopian Passport and applied for replacement which was issued on **31st** July 2018. Lastly, he states that he subsequently sought regularization of his status, but, he was declared a prohibited immigrant vide the impugned decision.

Case proceeded *Ex parte.*

7. This case proceeded *ex parte*. On several occasions, this case could not proceed for want of proper service, but, ultimately, the court allowed the matter to proceed *ex parte*. Further, despite the clear provisions of Article **156** of the Constitution, the *ex parte* applicant did not implead the Honourable Attorney General, even after the court pointed out the need to do so. Article **156(4)** of the Constitution provides that (a) the Attorney General is the principal legal adviser to the Government (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

8. The above position is replicated in section **5(1)** of the Office of the Attorney General Act[4] which

provides *inter alia* that "in addition to the functions of the Attorney-General under Article **156** of the Constitution, the Attorney-General shall be responsible for--representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act.[5]

9. In our constitutional order, the Attorney General is the Chief legal adviser to the Government, with authority to represent, defend and enforce the legal interests of the national government. Litigation on behalf of the national government is one of the attorney general's primary duties under the Constitution. The attorney general is typically authorized, to "appear for the national government in all causes in court wherein the national government is directly interested.

10. The Attorney General is empowered to defend the national Government when a component of the national government (e.g., a government Ministry as in this case) is named as a defendant in litigation. In matters of litigation, the Attorney General is the officer authorized by law to protect the interests of the national Government.[6]

11. It is my view that the Hon. Attorney General ought to have been enjoined as a principal Respondent in this suit. Failure to do so, offends both Article **156** of the Constitution and section **5** of the Office of the Attorney General Act.[7] The omission also casts doubts on the competence of these proceedings as against the government and whether under the above provisions a government Ministry is a juristic person. This court decries practice of suing government Ministries which has unfortunately taken root in our courts without enjoining the Attorney General as dictated by the above provisions.

Issues for determination.

12. I find that only one key issue falls for determination, namely, whether the *ex parte* applicant has established any grounds to qualify for the orders of *certiorari* and *mandamus.*

13. **Mr. Miyare,** counsel for the *ex parte* applicant argued that the *ex parte* applicant was not supplied with the impugned decision nor was he given reasons for the decision. He faulted the decision for being unreasonable, arbitrary and illegal. He argued that it is always a must that a decision must be communicated to the affected person.[8] He also argued that the decision was made without hearing the *ex parte* applicant.

14. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

15. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[9]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

16. 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.[10]The court cannot stop a lawful process. It can only intervene if is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the mandate of the first and second Respondent and public interest.

17. The Respondents are vested with powers to make the decision in question. An applicant has a duty to prove abuse of such powers or that the power was not exercised as provided under the law. It has to be

proved that the Respondent acted outside their powers or the decision was arrived at after taking into account irrelevant or extraneous matters. The right being enforced is not absolute. It can be limited in a manner provided under the law provided that the law meets the requirements of Article **24** of the Constitution.

18. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

19. Mandamus is a judicial command requiring the performance of a specified duty which has **not been** performed.' Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[11] *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[12]In the present case, the first Respondent has not refused to act. It acted and rendered a decision and provided reasons.

20. Mandamus and Certiorari are discretionary remedies, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

21. The discretionary nature of the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable, or, where the decision is taken in public interest. The *ex parte* applicant states that he was put in the list of prohibited immigrants.

22. The fact that this case proceeded *ex parte* makes it imperative for the court to be extra careful and scrutinize the material before it. The absence of the Respondent does not lighten the *ex parte* applicant's burden to establish its case on a balance of probabilities.

23. A core ground cited by the *ex parte* applicant is failure to be provided with reasons. There is nothing before me to show that the *ex parte* applicant ever requested to be supplied with reasons. It is started that the *ex parte* applicant's advocate visited the immigration offices and made "an oral request for reasons."He was given an oral answer. Before me is a version presented by the *ex parte* applicant. He wants the court to believe that his lawyer was informed orally and urges the court to fault the Respondent for not giving reasons. It is my view that nothing stopped the *ex parte* applicant from requesting for the reasons in writing. This would have put the court in a better picture of appreciating the truth and veracity of his assertion. Further, if the reasons were refused, the *ex parte* applicant had the option of moving the court under Article **35** of the Constitution and the Access to information Act.[13] Providing reasons is not an absolute right. In fact, section **6** of the Access to Information act[14] provides for limitation of rights to access information.

24. Strictly speaking, reasons can be declined if they fall under the exceptions listed in section **6** of the Access to Information act.[15] The *ex parte* applicant made no attempts at all to apply to be provided with reasons (if at all they were declined). This would have assisted the court to weigh the refusal (if any) or appreciate that the request was made and declined.

25. It is my view that it does not suffice for a party to simply allege failure to be provided with reasons. There are many reasons why persons are declared prohibited immigrants ranging from security concerns to being undesirable aliens or persons on the police watch list. On the basis of the material before me, there are no sound grounds to fault the Respondent. The position is made difficult by the *ex parte* applicants failure to enjoin the Honourable attorney General in this case even after being prompted by the court to do so. I should also mention that on several instances the court kept on ordering proper service upon the Respondent and that the court ultimately allowed the matter to proceed at the insistence of the

applicant.

26. Even if the court were to fault the impugned decision, the remedies sought being discretionary in nature, the court would be reluctant to adopt a lenient exercise of its discretion in favour of the ex parte applicant. Also, discretion will not be exercised to impede an authority's ability to perform its functions or deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. This was a proper case for the *ex parte* applicant to move the court seeking the reasons for the decision. This is because reasons with a statutory underpinning can suffice to justify such a decision. The court would have eliminated any doubts whether the reason were outside the permissible exceptions under the law. Alternatively, if at all it is true the decision was never communicated, the *ex parte* applicant ought to have applied to be supplied with the decision. No written communication was provided in this case showing that indeed the *ex parte* applicant ever requested for the decision in writing. The alleged visit by the lawyer which is not documented cannot suffice.

27. Curiously, the *ex parte* applicant states that his lawyer went to the immigration offices and was verbally notified of the decision. It would have assisted the court if the *ex parte* applicant exhibited a written request by his advocate requesting for the decision. Alternatively, the *ex parte* applicant ought have included a prayer in this case asking for an order compelling the Respondent to be supply him with the decision. I find glaring omissions and gaps in the *ex parte* applicants case which raise more questions than answers on the veracity of the version presented by the *ex parte* applicant.

28. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved.

29. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself. When a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the order is sought. The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm.[16]

30. The high court cannot completely ignore the State's legitimate interest in the security of its borders and the integrity of its immigration systems which it achieves by regulating the admission of foreign nationals to reside or work in Kenya, and their departure from the Republic under the Act. This court cannot make an order in total disregard of the Respondent's powers and duties under the Act, unless it is demonstrated beyond doubt that the Respondent acted outside its statutory mandate. The need for courts to scrupulously guard against such intrusions cannot be overemphasized.

31. In view of my determination of the issue discussed herein above, the conclusion becomes irresistible that this application is fit for dismissal. The effect is that the orders sought herein are hereby refused and the application dated **12th** September 2018 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **17th** day of **December** 2018

John M. Mativo

Judge.

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[1] Cap 26, Laws of Kenya.

[2] Act No. 4 of 2015.

[3] Act No. 12 of 2011.

[4] Act No 49 of 2012.

[5] Cap. 40, Laws of Kenya.

[6] See Charles Scribner's Sons v. Marrs, 262 S.W. 722, 727 (1924).

[7] Act No. 49 of 2012.

[8] Counsel cited *R vs Minister of State for Immigration and Registration of Persons ex parte CO* {2013}eKLR, *R vs Director of Immigration Services & Another ex parte Planet Motors Company Limited & Sajjad Ahmad* {2017}eKLR and *Republic vs Director of Immigration Services ex parte Planet Motors Company Limited & Maratab Bashir* {2016}eKLR.

[9] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[10] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300.

[11]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[12] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[13] Act No. 31 of 2016.

[14] Ibid.

[15] Ibid.

[16] *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 CC.