



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 62 OF 2016

(CONSOLIDATED WITH NO. 60 & 61 OF 2016)

**IN THE MATTER OF: BOLPAK TRADING COMPANY LIMITED, SHAHBAZ KHAN
MUHAMMAD, SAQIB SHABAZ**

AND

**IN THE MATTER OF: AL-HUSNAIN MOTORS LIMITED, AFZAAL MUHAMMAD
SIDDIQUE MUHAMMAD, AHMED IFTIKHAR SIDDIQUE MUHAMMAD**

BETWEEN

- 1. BOLPAK TRADING COMPANY LIMITED**
- 2. SHAHBAZ KHAN MUHAMMAD**
- 3. SAQIB SHABAZ**
- 4. AL-HUSNAIN MOTOR LIMITED**
- 5. AFZAAL MUHAMMAD SIDDIQUE MUHAMMAD**
- 6. AHMED I. S. MUHAMMAD.....PETITIONERS**

VERSUS

- 1. CABINET SECRETARY FOR INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT**
- 2. DIRECTOR OF IMMIGRATION SERVICES**
- 3. HON. ATTORNEY-GENERAL.....RESPONDENTS**

JUDGMENT

The background

1. Before the court are Petition numbers 60, 61 and 62 of 2016 which have been consolidated with the leading file being Petition No. 62 of 2016. In all the three Petitions the Cabinet Secretary for Interior & Co-ordination and the Director of Immigration Services are parties. The Inspector General of Police and Director of Public Prosecutions are parties in Petition Nos. 60 and 61 of 2016. The Attorney-General is a party in Petition No. 62 of 2016. Petition Nos. 60 and 61 of 2016 were filed on behalf of the 2nd and 5th Petitioners in 62 of 2016 who had been arrested and later taken to Nairobi and were being investigated for amongst others suspected involvement in serious offences of money laundering, terrorism and drug trafficking on the basis of information the Police had purportedly received.

2. The Petitioners plight and alleged tribulations are common and that is the reason for the said consolidation.

The Petition

3. By a Petition filed herein on 28th December, 2016 under Articles 19-25, 258 and 259 of the Constitution of Kenya the Petitioners pray for the following orders:

(a) A declaration that the intended deportation without due process is unconstitutional, null and void for being in violation of Article 10(2)(a), 27(1)&(2), 31(a) & (b), 47(1) & (2) , 48, 49(1)(a)(i) and 50(1) & (2) (a) & (d) of the Constitution.

(b) A declaration that the Respondents refusal to give justifiable written reasons for refusal to renew or reissue work permits to the Petitioners is a violation of Article 47 of the Constitution hence null and void.

(c) A declaration that the refusal to renew or reissue work permits to the Petitioners on the basis of unsubstantiated, unverified and undisclosed allegations of involvement in suspected acts of money laundering, terrorism and drug trafficking is in violation of Article 50(2)(a) which presumes innocence until the contrary is proved as well as a violation of Article 10 and 27 of the Constitution.

(d) A declaration as unconstitutional, null and void the provisions and the exercise of power or decision to refuse or decline renewal of the Petitioners' Work Permits on the basis of allegations in respect of which the right to fair hearing was not accorded.

(e) An order of prohibition prohibiting the Respondents and their officers or servants from harassing and interfering with the Petitioners operations or work on account of work permits that have unlawfully been declined to be issued without subjection to due court process as contemplated in the criminal justice system under Article 10, 27 and 50 of the Constitution.

(f) A mandatory order of mandamus directing the Respondents to renew and or reissue the Petitioners with Work Permits unless there is a judicial determination by the court process finding/holding the petitioners guilty of acts/offences of money laundering, terrorism and drug trafficking or guilty in respect of any other offences in which refusal is justified within the law.

(g) Compensation by damages to be assessed by the court for the violation of the Bill of Rights and the Constitution.

(h) Costs of the Petition be awarded.

4. The Petition is premised on the grounds that the Petitioners have operated in Kenya with government authorization for diverse periods since 1997. The Petitioners have made investments by way of real estate in Kenya in the names of the company and others in their individual names, and they have employed over 90 citizens of Kenya. The Petitioners have carried out lawful business and have continued to do so, but the Respondents have declined to issue a renewal of the work permit without giving any written reasons

as required by Article 47 of the Constitution. In 2007, election year, the Respondents acted in a similar capricious manner and it was only on instituting Miscellaneous Application No. 56 of 2007 that there was a renewal of the work permit. The Petitioners state that their businesses are thriving and in their absence, the same shall collapse for want of direction from proprietors managerial input. The Petitioners allege that on 21st December, 2016 the 2nd and 5th Petitioners were arrested on purported directions from above and it was only on the intervention of the High Court in Petition No. 60 and 61 of 2016 Mombasa that they were released on 23rd December, 2016. Arising out of the aforementioned arrest the Petitioners believe that the reasons for failure to renew the work permits are on account of purported, undisclosed and unverified adverse information. The Petitioners aver that the arresting officers verbally and orally indicated intention to deport the Petitioners on purported suspicion of involvement in terrorism, drug trafficking and money laundering which is unverified. The Petitioners state that refusal to renew a work permit on account of unverified allegations is an affront to the rule of law as it amounts to condemning a party without due process and without according a fair hearing before a court of law. Petitioners aver that money laundering, terrorism and drug trafficking are international crimes in all democracies and failure to subject suspects to justice is an abdication of constitutional responsibility on the part of government and therefore contrary to public interest or policy. It is alleged that the actions of the Respondents are arbitrary and capricious and should not be sanctioned by the court. In view of the conduct of the Respondent officers' arbitrary action of arresting the Petitioners and failing to renew the work permits, there is apprehension that their business operations, liberty and persons will be interfered with on account of refusal to renew work permit. Further, the Respondents have not given any written justifiable reasons for failure to renew the work permits.

5. The Petition is supported by affidavit of Afzaal Muhammad Siddique Muhammad sworn on 28th day of December, 2016. The deponent states in the said supporting affidavit that he is the 5th Petitioner and a Shareholder/Director of the 4th Petitioner thus duly competent to swear the Affidavit. The 5th and 6th Petitioners are co-shareholders and Directors in the 4th Petitioner Company. The 6th Petitioner was arrested on 21st December, 2016 and placed in custody of the Kenyan Police till the 23rd of December, 2016 when he was released by a Nairobi Court pursuant to the orders issued in Petition No. 61 of 2016 at Mombasa, which Petition is now consolidated herewith. The 5th and 6th Petitioners have since 1998 been operating a business by the name Al-Husnain Motors Limited, in Mombasa and in other places. **(True copies of parts of the Memorandum and Articles of Association and Transfer Shares are produced at pages 1- 4, Certificate of Incorporation and PIN Certificate for the Company at page 5, 5th Petitioner' Pakistan Passport No. BW1519652 and 6th Petitioner's PIN Certificate at page 6, 5th and 6th Petitioners' Certificate of Good Conduct at page 7-8, Tax Compliance Certificate for the 4th Petitioner at page 9, Tax Payment Slips at page 10-13, Financial Statement for the Period ended 31st December 2015 at page 14-23 of the bundle of exhibit).**

6. The 6th Petitioner is a Pakistan National holder of Pakistan Passport No.LV1150792 produced at page 24 of the bundle of exhibit. The 5th and 6th Petitioners have been in Kenya on authorization of the relevant departments of Government of Kenya and have relevant work permits **(true copies of relevant Work Permits, including Notification of refusal of renewal are produced at pages 25 – 30 and pages 31 -36 of the bundle of exhibit).**

7. The Petitioners aver that on 21st December, 2016 at around 11.30 a.m. a group of about five (5) people called on the 5th Petitioner at Messrs. Al-Husnain Motors Limited's premises in Mombasa, introduced and identified themselves as Police and Immigration Officers who arrested and bundled him into a car and drove to Nairobi where he was later released on 23rd December 2016 by a Nairobi Court on bond and pursuant to orders obtained from the High Court Mombasa in Petition No. 61 of 2016 lodged on his behalf. The 5th Petitioner avers that the officers who arrested and detained him indicated verbally that they had instructions to have the 5th and 6th Petitioners deported on fabricated allegations of money laundering, terrorism, drug trafficking and for failure to co-operate with undisclosed relevant power brokers to protect their investments. The Petitioners aver that they are entitled to all rights and protections under the Constitution of Kenya which include right to be subjected to rule of law, equality

before the law, right to information, fair administrative action, right of access to justice, right to be subjected to a fair hearing before a court of law or impartial tribunal.

8. Arising out of the alleged aforementioned arrest and utterances of the 1st and 2nd Respondent's officers who include the Police, the Petitioners now believe that the failure to renew the Petitioners' work permits to date is based on undisclosed and unverified purported adverse information or reports touching on terrorism, drug trafficking and money laundering all of which are crimes both nationally and internationally and to which a suspect should be subjected to due process and convicted if evidence is availed after according the right to fair hearing before a court of law. The Applicants state that no written reasons have ever been given for the refusal to renew the work permits to the Petitioners as contemplated under Article 47(1) & (2). The Petitioners believe that the failure to renew or re-issue work permits is purely on account of the Petitioners failure to associate or be connected with power brokers or refusal to give out favors for business protection, the Petitioners being foreigners, and also due to fabrications from business rivals who desire to have the Petitioners deported so that they may dominate the Kenyan market to the detriment of the Kenyan consumers. The Petitioners aver that they are simple business entity and men who operate from independent states subject to both international and national law thus in the event that anyone is possessed with any adverse evidence or information of criminal nature then the same should be subjected to rule of law as contemplated under Articles 10, 27, 48 and 50 of the Constitution of Kenya. The Petitioners state that Kenya being a country governed by the rule of law as enshrined in the Constitution it is only fair, just and proper that the Petitioners be denied work permits after a due process which is fair and impartial. The Petitioners' case is that the actions of the 1st and 2nd Respondents' officers in failing to re-issue or renew work permits on account of undisclosed and unsubstantiated adverse allegations that have not been subjected to the criminal justice process is arbitrary, capricious and unlawful contrary to Articles 10, 27, 47, 48 and 50 of the Constitution of Kenya. The intended deportation without being subjected to due process of the law is an infringement and violation of Article 10, 27, 47, 48, 49 & 50 of the Constitution and an abdication of Constitutional as well as Statutory responsibility by the Respondents contrary to public interest or policy. It is therefore fair and just that the Court intervenes so as to uphold and defend the Constitution of Kenya in compliance with Article 3 of the Constitution.

9. The 4th to 6th Petitioners have heavily invested in Kenya and there are over 300 vehicles for sale in Kenya and over 200 vehicles pending shipment from Japan to Kenya. **(A portion of the Bill of Lading is produced at pages 37- 40 of the bundle of exhibit).**

10. Further, the 4th to 6th Petitioners own Plot No. MSA/BLOCK/6/34 and MSA/BLOCK/XIX/275 all of which are targeted for unlawful takeover upon the Petitioners being denied work permit renewal and after deportation as contemplated contrary to Article 40 of the Constitution of Kenya. **(True copies of the Titles of the Plots are produced at pages 41- 47 of the bundle of exhibit).**

11. The Petitioners state that similarly in 2007, an election year, the Petitioners were harassed for refusing to associate with political brokers who were soliciting money for campaigns and had to resort to court process for protection and intervention so as to be re-issued with renewed work permits. **(A true copy of the Extracted Order is produced at pages 48-49 of the bundle of exhibit).** In the circumstances the Petitioners pray that the application and the Petition be allowed as prayed.

The Response

12. The 3rd Respondent opposed the application vide grounds of opposition filed on 10th February, 2017 and vide a replying affidavit sworn by **Alfred Abuya Omangi** filed on 1st March, 2017. The deponent states that he is a Chief Immigration Officer in the Investigations and Prosecution Section of the department of Immigration within the Ministry of Interior and Co-ordination of national government which is mandated with the duties of enforcement and ensuring compliance with Kenya Citizenship and Immigration Act No. 12 of 2011 and other enabling legislations. The section of the department is further charged with the duties of removal or deportation and or repatriation of foreign nationals who have been deemed or declared unlawfully present in Kenya by competent authorities. The Respondents' case is that

records held by the 2nd Respondent indicate that the 2nd and 3rd Petitioners herein were at various times issued with Class 'G' entry permits as Directors of the 1st Petitioner as per the averments contained in paragraph 3 of the 2nd Petitioner's affidavit of support. The above cited records also indicate that 4th and 5th Petitioners were at various times issued with Class 'G' entry permit as Directors of the 4th Petitioner. The 3rd Respondent states that issuance for or renewal of entry/work permits is pursuant to the provisions of Section 40 of the Kenya Citizenship and Immigration Act, 2011. The permit determination committee while making a determination and recommendation to the 2nd Respondent on suitability to issue or renew entry/work permit is strictly guided by clear legal parameters as provided under Part VI on Migration Control in the Kenya Citizenship and Immigration Act. The said provisions entail both a facilitative and national security aspects. In facilitation, the legal qualifications are set out detailing how an applicant may be issued with entry or work permit in the respective class. On meeting legal requirements the applications are further subjected to security vetting in order to ascertain that the applicants meet the national security criterion as set out under Section 33(1) and (2) of the Kenya Citizenship and Immigration Act on prohibited immigrants and inadmissible persons. National security considerations always take precedence over facilitation. The Respondents' case is that in respect of the 2nd, 5th and 6th Petitioners they submitted application for renewal of their entry/work permits on 11th September, 2014 and 21st July, 2014. However, there are no records that the 3rd Petitioner submitted an application for renewal of his entry permit. The said applications have met the first prong of facilitation in terms of the attached documents to the applications.

13. As for the second prong, the 2nd Respondent requested the National Intelligence Services to conduct security vetting on applications in line with their constitutional and statutory mandate. Pursuant to the said request, National Intelligence Service returned an adverse intelligence report on the applications by Petitioners. The gist of the said report was that Petitioners companies were fronts used by Petitioner's directors to carry out transnational narcotic trade. The said applications for renewal of entry/work permit for the 2nd, 5th and 6th Petitioners were placed before the Permit Determination Committee on 11th June, 2015. However, the committee recommended to the 2nd Respondent that the applications be rejected on account of the said national security concerns raised in the National Intelligence Service adverse report, a recommendation that was upheld by 2nd Respondent.

14. Subsequently notifications of refusal were sent to addresses of the Petitioners. Subsequent to refusal to renew the Petitioners entry/work permit the 5th and 6th Petitioners made an appeal to 1st Respondent having been aggrieved by the decision of the 2nd Respondent not to renew their entry/work permit. Pending the decision on the appeal they were issued with special passes. After due consideration their appeal to the 1st Respondent was rejected based on aforementioned adverse intelligence reports. The Respondents state that the arrest of the 2nd, 3rd, 5th and 6th Petitioners alleged to have occurred on the 21st of December, 2016 was not by officers of the 2nd Respondent but by officers from the National Police Service who acted independently under their statutory mandate and not on instructions by the 2nd Respondent.

15. The Respondents state that the decision to enter consent in High Court orders of 22nd June, 2007 referred to in paragraph 21 of supporting affidavit by 2nd and 5th Petitioners was based on realization by the department of Immigration that majority of Pakistani businessmen in the country whose entry/work permits were rejected were rushing to High Court where they obtained ex parte orders. Those orders operated to technically exempt the Applicants therein from immigration controls a fact that was compounded by the Applicants' failure to prosecute their petitions. The Respondents' case is that this trend was calculated not only to cripple the statutory mandate of the department but also to deny the Government revenue through nonpayment of permit fees. The Respondents state that it is not true that the decision of the 2nd Respondent to refuse to renew entry/work permit was premised on political exigencies as alleged but purely on reliable intelligence reports on the Petitioners generated by a competent constitutional and statutory agency mandated to carry out security vetting namely, The National Intelligence Service. The decisions of the Respondents meets the Constitution parameters under Article 47(1) of the Constitution as read with the provisions of the Fair Administrative Actions Act

because the Petitioners were notified of refusal to renew their permits and allowed the 5th and 6th Petitioners herein to pursue internal appeal mechanisms to the 1st Respondent.

16. The Respondents state that the rights of the Petitioners under Article 47(2) as read with provisions of Fair Administrative Actions Act is not absolute. Section 6(5) of the said Act allows the department to depart from the requirement of furnishing the Petitioners adequate reasons for the adverse action of refusing to renew their entry/work permits on reasonable and justifiable circumstances. The Respondents state that in instant case although the Petitioners have not made a formal request in line with the provisions of Section 6(1) of the Act, disclosure of information as envisaged under Section 6(2) (a) and (b) of the Act is classified intelligence reports within the meaning of Section 37 of the National Intelligence Service Act on limitation of the right to access information and Section 61 on prohibition of unauthorized disclosure of information. The Respondents state that for the Petitioner to enjoy their property rights under Article 40 of the Constitution as foreign nationals, the said rights are not absolute and are subject to the provisions of Kenya Citizenship and Immigration Act in respect to entry and residency.

17. The Respondents aver that the Petition is made in bad faith in order to coerce and cajole the 1st and 2nd Respondents to sanitize and overlook clear national security concerns that touch on the activities of the Petitioners in the country into renewing their entry/work permits. The Petition is therefore baseless, misconceived and devoid of any merit and the orders sought should not be granted, because if granted the functions, operations and independence of the 2nd Respondent will be prejudiced.

18. As for grounds of opposition, the 3rd Respondent states that the application is misconceived, frivolous, vexatious and an abuse of the process of the court, the orders sought are untenable and a nullity and that the Applicants are the authors of their own misfortunes and are guilty of laches.

Reply

19. In reply to the Respondents affidavit both the 2nd and 5th Petitioners have filed similar, but separate affidavits, stating that upon being arrested and taken to Nairobi on account of undisclosed offences, the deponents became aware that the Police have indicated to the subordinate court in Misc. Application No. 4114 of 2016 that the Police have no issues of criminality against the Petitioners. **(True copies of the order, affidavit, proceedings and ruling in Misc. Case No. 4114 of 2016 are produced and annexed to the supplementary affidavit of the 2nd Petitioner).**

20. In further support of the Petitioner's case **Mr. Gikandi Ngibuini** Advocate filed an affidavit sworn on 8th March, 2017 stating that he acts for the 1st, 2nd and 3rd Petitioners herein in other matters. In particular, in Mombasa Misc. Criminal Application No. 131 of 2016 between **Mohamed Afzaal Khan & Another vs. Inspector General of Police and Others**. Mr. Gikandi states that the statement by Alfred Abuya Omangi and filed herein on 1st March, 2017 wherein he alleged that the 3rd Petitioner did not submit his application for renewal of his entry permit is incorrect as indeed on behalf of the 3rd Petitioner, Mr. Gikandi stated that he submitted the application for the renewal of the entry permit and paid the processing fee for the same. The 3rd Petitioner had deposited with Mr. Gikandi a banker's cheque of KShs. 1,000/= issued on 21st November, 2015. Mr. Gikandi confirmed that the 3rd Petitioner applied for the renewal of his entry permit on or about 21st November, 2015 and any allegation to the contrary is untrue.

21. On the part of Respondents in Petitions No. 60 and 61 of 2016 Mr. Ayodo relied on an affidavit sworn by his client and submitted that his role was merely to confirm that investigations were carried out. Mr. Ayodo confirmed that indeed the Petitioners were arrested and investigations done and that the Petitioners were eventually cleared and released. Counsel submitted that Petition Nos. 60 and 61 of 2016 are already overtaken by events while in Petition No. 62 of 2016, counsel submitted that his clients are not party.

Submissions

22. Parties made oral submissions and also submitted skeleton written submissions, which I have carefully considered. The main issue for determination is whether the Petitioners various constitutional rights and in particular, whether the following rights have been violated:

- (i) The right to renewal of work permit.
- (ii) The right to due process of the law.
- (iii) Whether the Petitioners' right to property is abrogated.

23. The Petition is founded upon the Constitution of this country. The Petitioners' stay in Kenya, and their businesses in Kenya, are regulated by the laws of this land. The property that the Petitioners acquire are acquired pursuant to the laws of this land, and the same law offers protection to the Petitioners. It is therefore important to weigh the Petitioners alleged grievances against this constitutional backdrop. **Mr. Mogaka** for the Petitioners and **Mr. Ngari** for the Respondents filed detailed submissions which I have carefully considered.

24. Mr. Mogaka delved substantively into various constitutional provisions which protect rights of citizens. Counsel quoted Article 2(1) of the Constitution which states thus:

“this Constitution is the supreme law of the republic and binds all persons and all State organs at both levels of Government.

(2) no person may claim or exercise state authority except as authorized under this Constitution”

Article 20 (1) The Bill of Rights applies to all law and binds all state organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(4) In interpreting the Bill of Rights, a Court Tribunal or other Authority shall promote-

a. The values that underlie an open and democratic society based on human dignity, equality, equity and freedoms.

b. The spirit, purport and objects of the Bill of Rights.

(21) (1) It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”

25. Mr. Mogaka submitted that Article 259 (1) this Constitution shall be interpreted in a manner that –

- a. Promotes its purposes, values and principles;**
- b. Advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;**
- c. Permits the development of the law; and**
- d. Contributes to good governance.**

26. Counsel further referred to Article 10 of the Constitution which provides:-

“ (1)The National Values and Principles of Governance in this Article bind all State organs,

State officers, public officers and all persons whenever any of them:-

(b) enacts, applies or interprets any law, or

(c) makes or implements public policy decisions

(2) The National Values and Principle of Governance include:-

a.rule of law ...,

b. Human dignity, equity ..., human rights, non- discrimination ...

c. Good governance, integrity, transparency and accountability.”

27. Mr. Mogaka submitted that Section 40 of the Kenya Citizenship and Immigration Act No. 12 of 2011 provides for the Permit Determination Committee established under Section 7 of the Kenya Citizens and Foreign Nationals Management Service Act, 2011. The said Committee is vested with the power to amongst others consider applications for permits and make recommendations and resolutions to the Board for adoption under Section 7 (5) of the Act. Counsel pointed out that under Section 40 (4) of the said Act the Director of Immigration issues or revokes a permit on recommendations of the Committee which under Section 40 (5) is empowered to seek additional information and where necessary summon applicants and require production of supporting documents. Under Section 40 (7) of the Act the Director is statutorily required to give reasons in writing to both the applicant and the Committee in situations where he refuses to issue a permit to an applicant having formed an opinion that it is not in the interest of the country or for any other sufficient reason, and under Section 40(10) of the Act the aggrieved party is entitled to an appeal to the High Court in respect of any decision made under the Section.

28. Mr. Mogaka submitted correctly in my view that the totality of the provisions of Section 40 of Act No. 12 of 2011 and Section 7 of the Kenya Citizens and Foreign Nationals Management Service Act is that it is contemplated a process where written proceedings/minutes are taken and a hearing of the applicant and written reasons given by the Committee particularly where a decision adverse to the applicant's interest is contemplated to be made. Indeed transparency and accountability under Article 10 of the Constitution dictates that recommendations and/or resolutions made together with reasons thereof in the circumstances of the matter ought to have been conveyed in writing to the Petitioners after according them a fair hearing before the Permit Determination Committee and the National Intelligence Service as contemplated by the rules of natural justice, the Fair Administrative Actions Act, Article 47, 50, 238 (2) (b) of the Constitution as well as Section 3 of the National Intelligence Service Act No. 28 of 2012.

29. Although **Mr. Ngari** for the Respondents submitted that the Petitioners were subjected to Fair Administrative Action, it is clear that in the present matter the Petitioners were never heard or notified about existence of adverse reports nor were written reasons given to the Petitioners. There is also no evidence of adverse report. No report was attached to the Replying Affidavit of Alfred Abuya Omangi to disclose any hearings. Even if meetings took place it appears that the Applicants were excluded from those meetings or determinations. In **Nyeri Civil Appeal No. 101 of 2000 Maria Clabaitaru M' Mairanyi and Others vs. Blue Shield Insurance Co. Limited**, the Court of Appeal in reference to Section 112 of the Evidence Act held that:-

“So one may ask why the insurer declined to produce the very document that could have resolved the issue with finality. An insurer who thus pleads and declines to prove the assertion may well attract against it the presumption of law that evidence that could, but is not produced, would, if produced, be prejudicial to the party who withholds it.”

30. In his submissions, Mr. Ngari stated that there was an adverse report, but he failed to disclose the same to the court, even after the court indicated willingness to see the report privately in the chambers. Mr. Mogaka for the Petitioners submitted correctly in my view that in any event existence, if any, of the

purported adverse National Intelligence Report against the Petitioners does not validate the violation of the natural justice principle as to fairness, the right to fair hearing under Article 50 and the right to fair administrative action Article 47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015.

31. Indeed, Article 20 (1) of the Constitution provides that the Bill of Rights applies to all and binds all State organs and all persons while Article 238(b) reiterates the same position as is Section 3 of the National Intelligence Service Act. In the present Petition it is contended by the Respondents in the Replying Affidavit of Alfred Abuya Omani aforesaid that the rejection to issue permits is grounded on purported adverse report from the National Intelligence Service suspecting the Petitioners as being involved in transnational narcotic trade/drug trafficking. Paragraph 6 and 7 of the Replying Affidavit of Alfred Abuya Omani contend that there was security vetting of the applicants/Petitioners by the National Intelligence Service in line with their constitutional and statutory mandate. It is now indisputable, and it is the finding of this court, that the Petitioners were never summoned to appear before the Permits Determination Committee nor the National Intelligence Service for a hearing, vetting, interrogation, examination or verification of any of the aforementioned reports or information that influenced the decision made to reject the Petitioners application for permits. The failure by the Permit Determination Committee, 2nd Respondent and the National Intelligence Service to summon the Petitioners Number 2, 3 5 and 6 for a hearing, vetting, interrogation, questioning and examination as to the purported adverse information or reports which formed the basis of rejection of their permit applications as alleged in paragraph 8 of the aforesaid Replying Affidavit sworn by Alfred Abuya Omani violated the principles of natural justice of fairness, Section 3 of the National Intelligence Service Act No. 28 of 2012, rule of law under Article 10 of the Constitution and the Bill of Rights. Article 238 (2) (b) of the Constitution provides that – National Security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Section 3 of the National Intelligence Service Act No. 28 of 2012 mandates the service to observe and uphold:-

- i. the bill of rights;
- ii. values and principles of governance under Article 10(2);
- iii. promote and practice transparency and accountability;
- iv. comply with the Constitutional standards of human rights and fundamental freedoms.

32. In **Republic vs. National Police Service Commission Ex parte Daniel Chacha Chacha [2016] eKLR** the Court in respect of Article 47 of the Constitution on the right to Fair Administrative Action at page 11 of the case stated:-

“50. Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly.

52. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker v Canada [Minister of Citizenship & Immigration] 2 S.C.R. 817 6 where it was held:-

“The value underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

54. Therefore, the principles of natural justice concern Procedural fairness and ensure a fair

decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

33. In Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para. 639 is found thus:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard [the audi alteram partem rule] is a fundamental principle of justice. This rule has been reined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

34. The foregoing Holdings buttresses the legal and constitutional position that a person accused of anything should be made to know the nature of the accusation and be granted a fair opportunity to comment, correct or contradict the accusations prejudicial to his interest. Otherwise a decision arrived at without a fair hearing is in bad faith and constitute irrationality. The said decision can only be described as having been made arbitrarily.

35. It is indisputable that the Investigating Officer Corporal Geoffrey Busolo in his Affidavit sworn of 24th February, 2016 filed in **Misc. Criminal Appl. No. 4114 of 2016** at Nairobi annexed to 2nd Petitioner’s Supplementary Affidavit sworn on 6th March, 2017 filed on **7th March, 2017** categorically averred on oath that the allegations against the Petitioners were suspicion of being involved in financing terrorism activities, money laundering and drug trafficking.

36. In paragraph 5 of Corporal Busolo’s Affidavit it is averred that after thorough investigations no concrete evidence was found to link the Petitioners to the aforementioned crimes. The Magistrate’s Criminal Court in Misc. Application No. 4114 of 2016 accepted the Investigator’s position and closed file on the basis that investigations yielded no inculpatory evidence against the Petitioners. **(See 2nd Petitioner’s Suppl. Affidavit filed on 07.03.2017 annexure “SKM-2”).**

37. It is critical to note that Office of Director of Public Prosecutions established under Article 157(1) of the Constitution is empowered under Article 157(4) to direct the Inspector General of the National Police Service **to investigate** any information or allegation of criminal conduct and under Article 157 (6) (a) may institute and undertake criminal proceedings against any person before any Court (other than a court martial) in respect of any offence alleged to have been committed. The office of the Director of Public Prosecution in exercise of its mandate confirmed to this Court that the thorough investigations against the Petitioners on suspected allegations of involvement in money laundering, terrorism and drug trafficking yielded no evidence linking them to the offences and therefore they are clean.

38. In the case of **Law Society of South Africa & Others vs. Minister for Transport & Another [CCT 38/10] [2010] ZACC 25;2011 (1) SA 400 [CC];2011 (2) BCLR 150 (CC) November 2010** the Constitution Court of South Africa at paragraph 32 stated:-

“...the rule of law... is a founding value of our constitution.-the rule of law requires that all public power must be sourced in law – this means that state actors exercise public power within the formal bounds of the law.”

39. In **Fedsure Life Assurance Ltd & Others vs. Greather Johannesburg Transitional Metropolitan Council & Others [CCT7/98] [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14th**

October, 1998) the Constitutional Court of South Africa at paragraph 56 stated:-

“it is a fundamental principle of the rule of law, recognized widely that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognized in other jurisdictions. In The matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that:-

“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. V. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”

40. A reading together of Articles 2(1), (2), 10, 20 (1), (2), (4), 21(1), 47, 50, 238 (2) (b) 259 (1), of the Constitution with Section 40 of Act No. 12 of 2011, Section 7 of Act No. 31 of 2011 and Section 3 of Act No. 28 of 2012 is demonstrative that the Petitioners being persons prejudiced by a decision of an administrative body as contemplated in the Constitution are without discrimination entitled to the full benefit of the Bill of Rights and the Constitution.

41. From the foregoing it is the finding of this court that this is a proper matter in which the court should intervene by granting the reliefs sought in the Petition No. 62 as well as No. 60 and 61 of 2016.

Final Orders

42. This court is satisfied that the Petitioners have proved their Petition on a balance of probability and are entitled to the reliefs sought under paragraphs 16(i) to (viii) of the Petition, which are herewith accordingly, granted.

43. Should the Petitioners prefer to pursue damages under paragraph 16 (vii) of the Petition the parties will set a date to submit on the same.

That is the Judgment of the court.

Dated, Signed and Delivered in Mombasa this 30th day of May, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mogaka for Petitioners

Mr. Ngari for Respondents

Mr. Kaunda Court Assistant