



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW

JR. MISC. APPLICATION NO. 611 OF 2017

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY
VIRDI GURVEEN**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF REGISTRATION OF PERSONS ACT CAP 107

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACT 2015

AND

IN THE MATTER OF VIRDI GURVEEN

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDER OF MANDAMUS**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL REGISTRAR OF PERSONS.....1ST RESPONDENT

MINISTRY OF IMMIGRATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

RULING

Introduction

1. In this application, the applicant herein, **Virdi Gurveen**, seeks substantially an order of an order of Mandamus to compel the respondent to issue her with a valid Kenya National Identification Card. She also seeks a declaration that she is a Kenyan Citizen and deserves an Identification Card as enshrined in the Constitution and an order that the Respondent has infringed on her right. She in addition seeks the costs of the application.

Ex Parte Applicant's Case

2. According to the applicant, she was born on 27th January, 1991 in Aga Khan Hospital in Nairobi, to Kenya Parents of ID Nos. 214536439 and 210515163, being **Tarlok Singh** (father) and **Daljinder Kaur** (mother) respectively. She exhibited copies of both her parent's ID cards, passport, Registration Certificates, denounced citizenship documents and their personal identification documents.

3. According to the applicant, when she turned 18 years in the year 2009, she visited ID application office in Westlands within the same year as required by law with the intent of registering for an ID. She was however asked to comply with the law by submitting the required documents which she did and the respondent took her fingerprints upon being supplied with the applicant's full names, declared tribe/race, date of birth, place of residence and postal address and all the necessary documentation. Thereafter, the applicant was issued with a waiting card as the law requires.

4. However, the registering officer subsequently asked the applicant to submit her grandfather's birth or death certificate allegedly on the ground that during the time of the applicant's birth, neither of her parents were registered as Kenyans. The applicant explained that even though both her parents are Kenyan citizens, she did not have such documents as her grandfather died in the year 1974 and she exhibited a copy of her grandfather's death certificate.

5. The applicant disclosed that in the same year her passport was expiring and when she went to apply for renewal, she was asked if she had ever applied for or had a British passport, to which the applicant replied in the negative. She was thereafter requested to furnish a letter from the British High Commission to confirm her status. The British high Commission however responded the applicant was born in an independent Kenya to a mother who was also a Kenyan and hence qualifies for Kenyan citizenship.

6. It was the applicant's complaint that even after complying with all these requirements, she has been denied her right to have an ID as a Kenya Citizen, and to the contrary, the officers have referred to her as an alien.

7. The applicant further revealed that she got a scholarship and flew abroad for her further studies and since then, she never followed up on the identification until 2017, when she came back to Kenya and went back to Westlands office to complete the process. She was however compelled to restart the process afresh and her fingerprints were taken again for the second time and she was again issued with a waiting card. At the expiry of the stipulated 30 the applicant went to pick her ID card, but the 1st respondent's officers took away the 2nd waiting card without any valid reason whatsoever and refused to date to issue her with a valid ID card despite the applicant having labored to process and finally get the death certificate of her grandfather as was required which was the reason for delay. She was informed that the said document was no longer required.

8. It was the applicant's assertion that she grew and schooled in Kenya, having attended Loreto Convent Msongari and left in 2003. She later attended the Agha Khan Academy, Nairobi and left on 8th of June 2007 for IGCSE and IB DIPLOMA and since then she has been undertaking her studies in Canada and

initiated the process of acquiring duo citizenship.

9. The applicant averred that for her to finalize the process and her application for citizenship to be considered, she is required to get Police Certificates which are the equivalent of a certificate of Good Conduct, yet she cannot acquire this Police Certificate without a valid Kenya ID Card.

10. The applicant lamented that her passport is due to expire in less than one year and she will not be able to renew the same for reasons that she has been denied her right to possess a valid Kenya ID.

11. It was the applicant's case that her constitutional right to be recognized and respected as a Kenya Citizen is being violated. Her case was that despite follow up with the 1st respondent vide a letter dated 22nd September 2017 inquiring as to why they haven't released the her ID the respondent has been unresponsive.

12. In support of her submissions, the applicant relied on Article 12 of the Constitution and submitted that a passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria mentioned in Article 24. It was submitted that one of the rights, privileges and benefits mentioned under Article 12 (1) (a) is to be issued with "any documents of registration or identification issued by the State to citizens" and reference was made to the Preamble to the **Registration of Persons Act**, Cap 107 and section 2 thereof.

13. It was submitted that from the foregoing and without a doubt the Government of Kenya is under a duty to register all its citizens and to issue them with documents of registration or identification and that this is a statutory duty firmly anchored in the Constitution and the Act, which is an Act of Parliament. To the applicant, it is in the exercise of the statutory duty to register any applicant who presents himself for purposes of registration for issue of identity cards that the Respondents acted in compliance with section 6 of the Act. The *ex-parte* applicant presented herself as a Kenyan citizen, applied for issuance of an identity card and attached documents to show that he is a Kenyan citizen. She was subsequent to the said Application issued with a waiting card, which was an indication that all she had to do was to wait for the ID card to be processed, and that there was no question raised as to her citizenship at this point. To the extent that the 1st Respondents have refused to issue the Applicant with a valid ID Card, it was submitted that the provisions of the Constitution have been breached.

14. It was submitted that the applicant has been deprived her rights as stated above and has been discriminated upon by reason that she is an Asian of Kenyan origin. It was note that her siblings also born in Kenya just like her were all accorded the Kenyan ID card without any hitches.

15. The applicant's contention was that whereas the 1st Respondent has discretion to register the applicant, it is trite law that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised and reliance was placed on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** and **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

16. In the applicant's view, the 1st Respondent has declined to exercise a discretion placed on it by the law and the basis for the failure to do so are not grounded in law. Accordingly, the 1st Respondent has not lawfully exercised a power bestowed upon it since to decline to exercise a power on some extraneous grounds amounts to abuse of power.

17. It was therefore the applicant's case that the application ought to be granted.

Respondent's Case

18. The application was however opposed by the Respondent.

19. According to the Respondent, the National Registration Bureau is mandated to Identify, register and issue national identity cards to Kenyan citizens who have attained the age 18 years or over. In the process of Identifying the applicant, through the documents that were presented to the Registrar of Persons it was revealed that the applicant was born on the 27th January, 1991 in Nairobi while her father-**Tarlok Singh Virdi** was born on the 7th March, 1962 in Nairobi and was registered as a Kenyan Citizen in the year 1994. Her mother, **Daljinder Kaur Virdi**, on the other hand, was born in 1965 and was registered as a Kenyan Citizen in 1996. Therefore at the time of the applicant's birth in 1991, her parents were not Kenyan Citizens.

20. It was the Respondent's case that section 17 of the **Kenya Citizenship and Migration Act** provides for the applicable procedure where a person makes an application for registration of citizenship following the applicant's circumstances. In this case, however, the applicant has not demonstrated that she has presented an application to the Respondents to be registered as a Kenyan Citizen. Instead, the applicant in her application has only demonstrated that she has made an application to be issued with a National Identity Card which was not granted by the Respondent because the applicant is not a recognized Kenyan citizen under the **Kenya Citizenship and Migration Act** and this regard the Respondents relied on section 17 of the **Kenya Citizenship and migration Act No.12 of 2011**.

21. It was the Respondents' case that the law is very clear that the applicant ought to first make an application to the Respondent to be registered as a Kenyan Citizen thereafter she may apply to be issued with a National Identity Card. In this case, the applicant has not demonstrated that she has made an attempt to apply to be registered as a Kenyan Citizen first as is required by law.

22. According to the Respondents, the law is very clear on who is a Kenyan Citizen and who is not and as it has been demonstrated above, applicant herein is not a Kenyan Citizen. The applicant cannot purport to suggest that since both her parents acquired Kenyan Citizenship after she was born she automatically becomes a Kenyan Citizen while the law prescribe otherwise.

23. It was submitted that in this case, the applicant in her application has only demonstrated that she has made an application to be issued with a National Identity Card which was not granted by the Respondent because the applicant is not a recognized Kenyan citizen under the Act which is what the applicant is seeking in her second prayer. However to the Respondent, that prayer is not within the Jurisdiction of this Court, as that it is the statutory duty of the respondent to Identify, register and issue national identity cards to Kenyan Citizens. This Court has no capacity to vet, verify and confer Citizenship to the applicant.

24. It was submitted that the applicant has not demonstrated any efforts made to apply to be recognized as a Kenyan Citizen and subsequently issued with a National Identity Card. It is therefore untrue for the applicant to allege that the Respondent have acted unlawfully or illegally.

25. The Respondent therefore contended that the ex-parte applicant has not made a case for the issuance of the Orders sought against the Respondent and prayed for this Court to dismiss this application.

Determinations

26. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.

27. This application revolves around a determination of who is a Kenyan citizen and who is entitled to be registered as a Kenyan citizen. Article 13(2) of the Constitution provides that citizenship may be acquired through birth or registration. Article 14(1) of the Constitution provides that:

A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

28. Therefore for a person to be a citizen by birth one or both of his or her parents must have been a

Kenyan citizen on the day of his or her birth. In this case, it is clear that the applicant was born on on 27th January, 1991 in Nairobi while her father-**Tarlok Singh Viridi** was born on the 7th March, 1962 in Nairobi and was registered as a Kenyan Citizen in the year 1994. Her mother, **Daljinder Kaur Viridi**, on the other hand, was born in 1965 and was registered as a Kenyan Citizen in 1996. Therefore at the time of the applicant's birth in 1991, her parents were not Kenyan Citizens. Therefore as at the time of the birth of the applicant none of her parents were citizens of Kenya.

29. It follows that the applicant herein can only acquire citizenship by registration which is provided for in Article 15 of the Constitution as follows:

(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.

(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.

(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.

(5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.

30. In my view the only provision applicable to the applicant herein is Article 15(2) which provides that:

A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.

31. As to whether a person has been ***lawfully resident in Kenya for a continuous period of at least seven years, and satisfies the conditions prescribed by an Act of Parliament*** is a matter that ought in the first place to be determined by the Respondent. This was the position in **H.C.Petition No. 203 of 2012; Kapa Oil Refineries Limited –vs- The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General**, where the Lenaola, J (as he then was) had this to say at page 15:

“[E] ven if this Court has jurisdiction to determine a violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute.”

32. Section 13(3) of the ***Kenya Citizenship and Migration Act No.12 of 2011*** provides that:

(3) A child of a citizen by registration who was born before the parent acquired citizenship may on application by the parent or legal guardian be registered as a Kenya citizen upon—

(a) production of documents conferring Kenyan citizenship to any of the parents;

(b) production of the child's birth certificate; and

(c) proof of proof of lawful residence of the child in Kenya.

33. In my view the applicant falls within the aforesaid provision. She therefore may be registered as a

Kenyan citizen if she fulfils the provisions of the said section. However, the section expressly provides that the decision whether to so register her is to be made on application for the said registration. In this case there is no evidence that the applicant has made an application for registration. The applicant seems to be of the view that an application for registration is the same thing as an application for an ID Card which in my view only applies where a person is a citizen since under Article 12 of the Constitution only Kenyan citizens are entitled to a Kenyan passport and any document of registration or identification issued by the State.

34. The applicant seems to be of the view that once she applied for a national Identity Card and was issued with a waiting card, she was automatically entitled to be issued with a Kenyan National ID Card. With due respect to the applicant, a waiting card is just evidence that an application for a national Identity Card has been made and it does not automatically qualify as a confirmation that the Identity Card will actually be issued though where there is unexplained unreasonable delay in issuing the same the Court may intervene appropriately.

35. In this case however it seems that the applicant's application for issuance to her of the National Identity Card was premature. The position must have been clear to the applicant's legal advisers since the second prayer, she is seeking a declaration that she is a Kenyan Citizen. It is that declaration, in my view, that should have preceded the application for an Identity Card, assuming she had applied to be registered as a Kenyan Citizen in the first place.

36. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

37. It is therefore upon the applicant to satisfy the Court that the conditions precedent to the accrual of the benefits were fulfilled by him or her. The corollary to that is that **where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to whether the right to apply for an order of *mandamus* has matured, that dispute must first be dealt with and resolved in favour of the applicant before an order of *mandamus* can go forth.**

38. In this case, this Court cannot in these proceedings make a finding that the applicant fulfilled the conditions stipulated in section 13(3) of the Act in order for the Respondent to be compelled to

not only register her as a citizen of Kenya but to issue her with a National Identity Card. It must be noted that the registration a citizen does not necessarily qualify one to be entitled to a National Identity Card since the latter depends on such factors as the age of the applicant.

39. It is therefore my view and I hold that the application before me is premature. It was misconceived and hence incompetent.

Order

40. In the premises the Motion fails and is struck out but with no order as to costs.

41. Orders accordingly.

Dated at Nairobi this 20th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kahura for Mr Matundura for the applicant

CA Ooko