



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION (JR) NO.393 OF 2016

IN THE MATTER OF: AN APPLICATION BY PLANET MOTORS COMPANY LIMITED AND MARATAB BASHIR FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE DECISION OF THE DIRECTOR OF IMMIGRATION SERVICES TO PLACE MR. MARATAB BASHIR ON THE IMMIGRATION WATCH LIST.

-AND-

IN THE MATTER OF: ARTICLES 22, 23, 27, 29, 39, 47, 50 (1) AND 165 (3) (b) OF THE CONSTITUTION;

-AND-

IN THE MATTER OF: KENYA CITIZENSHIP AND IMMIGRATION ACT, CAP 172 OF THE LAWS OF KENYA.

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

DIRECTOR OF IMMIGRATION SERVICES.....RESPONDENT

AND

PLANET MOTORS COMPANY LIMITED.....1ST EX PARTE APPLICANT

MARATAB BASHIR.....2ND EX PARTE APPLICANT

JUDGMENT

1. The 1stEx Parte Applicant **PLANET MOTORS COMPANY LIMITED** is a limited liability company incorporated in Kenya on 12th February, 2013 in accordance with the Companies Act, Chapter 486 of the Laws of Kenya (now repealed). The 1stEx Parte Applicant deals in importation and sale of motor vehicles; and, has its registered place of business at Planet Motors Place, next to Prestige Plaza, off Ngong Road - Nairobi.

2. The 2ndEx Parte Applicant **MARATAB BASHIR** is a male adult national of Pakistan and a

shareholding director (Managing Director) of the 1stEx Parte Applicant. The 2ndEx Parte Applicant holds a “Class – G” work/resident permit authorising him to enter, remain and work in Kenya, issued on 3rd December, 2015, as shown by “CR 12” dated 18.1.2016 at page 2 of annexures to the Verifying Affidavit sworn by Maratab Bashir on 29.8.2016; and Maratab Bashir’s work/resident Permit issued on 3.12.2015 at page 6 of annexures to the Verifying Affidavit sworn by Maratab Bashir on 29.8.2016.

3. It is alleged by the exparte applicants that on 5th July, 2016, while on a visit to the Department of Immigration Services at Nyayo House, Nairobi to follow up on an application by the 1stEx Parte Applicant for a permit on behalf of one of its directors a **Mr Sajjad Ahmad**, the Ex Parte Applicants were verbally informed by the Respondent that the 2ndEx Parte Applicant had been placed on the "immigration watch-list" for **“operating two separate files under his name at the Department of Immigration Services.”**

4. On 30th August, 2016 the exparte applicants obtained leave of this court vide chamber summons dated 29th August, 2016 to commence these judicial review proceedings which they dutifully filed on 15th September, 2016 within the stipulated timeframe.

5. The exparte applicants’ Notice of motion dated 14th September, 2016 seeks for judicial review orders of Certiorari, mandamus and prohibition against the respondent. The Motion further seeks for judicial review orders of declaration and compensation.

6. The Notice of motion was served upon the respondent on 16th September, 2016 as evidenced by the affidavit of service sworn on 3rd October, 2016 by Salmon Acholla. To date, the respondent has neither entered any appearance nor filed any response to the allegations levelled against that office of Director of Immigration Services.

7. The Motion is specifically brought under the provisions of Articles 22,23,27,39,47,50(1), 165(3)(b) of the Constitution; sections 8(8) and 9(1)(b) of the Law Reform Act Cap 26 Laws of Kenya; section 11 of the Fair Administrative Action Act No. 4 of 2015; Order 53 Rules 3,4 of the Civil Procedure Rules; the Kenya Citizenship and Immigration Act Cap 172 of Laws of Kenya; and all enabling provisions of the law.

8. The specific judicial review orders sought by the exparte applicants jointly and severally are:

- a. **Certiorari** to issue to bring into this court to be quashed the respondent’s decision placing the 2nd exparte applicant Maratab Bashir on the immigration watch list, communicated to the exparte applicants verbally on 5th July, 2016;
- b. **Mandamus** compelling the respondent to remove the 2nd exparte applicant Maratab Bashir from the immigration watch list
- c. **Prohibition** to prohibit the respondent acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the respondent, from arbitrarily arresting, detaining, harassing and or deporting the 2nd exparte applicant Maratab Bashir or in any manner whatsoever curtailing/impeding the 2nd exparte applicant’s liberty/freedom of movement with regard to the matters herein;
- d. **Declaration** declaring that the action of the respondent in placing the 2nd exparte applicant under the immigration watch list is unlawful, unfair and a breach of the exparte applicant’s rights to fair hearing, fair administrative action, freedom and security of the person of the 2nd exparte applicant; and the 2nd exparte applicant Maratab Bashir’s right to freedom of movement and secure protection of the law;

e. **Compensation** for violation of the *exparte* applicant's rights and fundamental freedoms to be assessed by the honourable court

f. costs

9. The *exparte* applicants' motion is grounded on the grounds on the face of the notice of motion, the statutory statement, verifying affidavit of MARATAB Bashir sworn on 29th august, 2016, which form the basis of the *exparte* applicants' claims against the respondent

10. In the grounds as replicated in the 2nd *exparte* applicant's depositions, it is alleged that on 5th July, 2016, while on a visit to the Department of Immigration Services at Nyayo House, Nairobi to follow up on an application by the 1st Ex Parte Applicant for a permit on behalf of one of its directors a **Mr Sajjad Ahmad**, the Ex Parte Applicants were verbally informed by the Respondent that the 2nd Ex Parte Applicant had been placed on the "immigration watch-list" for **"operating two separate files under his name at the Department of Immigration"** Services

11. It is averred that the 2nd Ex Parte Applicant is neither a prohibited immigrant nor a security threat to anybody. That as a result of the decision by the Respondents to "watch-list" the 2nd Ex Parte Applicant and his co-director Mr Sajjad Ahmad (who was to be in charge of operations) but who had been denied entry into the country vide a similar decision of the Respondent, it is claimed that all directors of the 1st Ex Parte Applicant have been unfairly and unlawfully restrained from travelling in and out of the country without being heard.

12. THAT Mr Sajjad's visa meant to expire in July 2016 was confiscated and varied and that he was directed to leave the country immediately for reasons that he was **"suspected of working in the country without a work permit."**

13. It is deposed that Mr Omangi of the Immigration Department directed the 2nd *exparte* applicant to make a written explanation to the respondent which he did but that since July, 2016 no response has been received. It is alleged that the respondent's actions have disabled the 2nd *exparte* applicant from travelling outside the country which the *exparte* applicants consider unlawful and unreasonable actions intended to have the 2nd applicant deported for an offence for reasons which are unknown in law.

14. The 2nd *exparte* applicants maintain that he is neither a prohibited immigrant nor a security threat to this country and that therefore there is no reasonable cause or justification whatsoever for his placement on the immigration watch list.

15. It is claimed that as a result of the said tag of being watch listed by the respondent, the 2nd applicant herein is completely unable to travel freely within and outside this country as he routinely did to source for business, network and arrange for merchandise/goods for the 1st applicant company's business; and that neither can Mr Sajjad the co director to be in charge of operations travel into the country due to similar decision by the respondent against Mr Sajjad.

16. The *exparte* applicants assert that the impugned decision of the respondent is erroneous and not premised on any law hence it is illegal, unreasonable, and malicious, made in bad faith, and is intended for extraneous ends that are not contemplated under the Kenya Citizenship and Immigration Act Cap 172 of laws of Kenya and therefore it amounts to abuse of power.

17. The applicants further claim that prior to making the impugned verbal decision, they were never accorded any hearing. Further, that as a consequence of all the above, the respondent has refused to approve the 2nd applicant's dependant's pass application on behalf of his wife who depends on him fully and who lives with him in the country and that neither can he return her because of the travel ban imposed on him.

18. According to the Ex Parte Applicants the real objectives behind the impugned decision/conducts is to harass, frustrate and force the 1st Ex Parte Applicant to close its business and exit the Kenyan market in favour of the 1st Applicant's competitors.

19. The impugned decision is thus said to be unlawful, based on irrelevant considerations, manifestly oppressive; and, violates the Applicants' rights to fair administrative action and the freedom of movement and security of the person.

20. The 1st Ex Parte Applicant also claims that it has been highly prejudiced by the Respondent's actions and is faced with imminent loss of business and threats of closure or total collapse due to failing operations; which is likely to lead to loss of employment/livelihoods by the 1st Ex Parte Applicant's employees; and or unlawful deportation of the 2nd applicant unless the orders herein are urgently granted as sought.

21. Annexed as evidence in support of the motion are the following documents:

a. Certificate of incorporation of the 1st applicant Planet Motors Company Limited No. CPR/2013/94047;

b. CR12 dated January 18th, 2016 showing the directorship and shareholding of the 1st applicant company;

c. Letter dated 5th July, 2016 requesting the respondent to remove the 2nd applicant from the immigration watch list;

d. Work/resident permit No. 045286 dated 3/12/2015 issued to the 2nd applicant by the respondent

e. Letter of 16/6/2016 to the Cabinet Secretary Ministry of Interior and Coordination of National Government, appealing against the decision of the respondent rejection of the 1st applicant on behalf of Sajjad Ahmad for a Class G permit;

f. Letter of 5/2/2016 to the Cabinet Secretary being an appeal for entry permit for Mr Sajjad Ahmad;

g. Summons dated 21/4/2016 to Mr Sajjad to appear before the Immigration Office;

h. Acknowledgment of passport for Mr Sajjad date 4/5/2016 by Immigration office;

i. Variations to the passport under section 26(3) of the Regulations;

j. Air ticket for Mr Sajjad Ahmad dated 5/5/2016 departing him to Pakistan via Qatar Airways via Doha Qatar to Lahore Airport Pakistan, Departure 10/5/2016 arrival 11/5/2016;

k. Visas for Mr Sajjad;

l. Other documents including special asses for Mr Sajjad and a statutory declaration which is undated made by Mubeen Maratab in support of an application for a dependant's visa;

Passport for the 2nd applicant herein Mr Maratab Bashir.

22. The Respondents despite being served with the pleadings and allegations herein above they neither entered an appearance nor filed any response to the allegations levelled against them.

SUBMISSIONS

23. The exparte applicants' counsel therefore filed written submissions and made oral highlights of the same, while answering the following key questions:

i) Whether or not the Respondent's decision in placing the 2nd Ex Parte Applicant on its immigration "watch-list" is illegal, ultra vires and/or unreasonable;

ii) Whether or not the Ex Parte Applicants were heard prior to the impugned decision;

iii) Who should bear the costs of this application?

i. That the impugned decision is illegal, ultra vires and/or unreasonable, the exparte applicant's counsel Mr Miyare submitted that the Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011 establishes the office of the Director of the Service, with functions and powers enunciated under the Kenya Citizenship and Immigration Act, Cap 172 of the Laws of Kenya (hereinafter called the Act).

24. That under Section 4(2) of the Act, the Director/Respondent, and all immigration officers are enjoined to perform their duties in accordance with the values and principles prescribed in the Constitution; including the rule of law, human rights and human dignity.

25. That the Act regulates immigration of citizens and foreign nationals alike; and subjects them to the aforementioned functions and powers of the Respondent, without discrimination. Thus, that any function performed by the Director must be based on the law and must equally promote the principles of the Act.

26. Further, it was submitted that Every person, alien or national, is therefore protected by the law and Constitution. reliance as placed on the case of **United States -versus- Verdugo-Urquidez, 494 U.S. 259 (1990), Supreme Court, No. 88-1353.**

27. Mr Miyare further submitted that Watch-listing is a practice not entrenched under the Kenyan laws therefore it offends the provisions of Article 25 of the Constitution of Kenya that proscribes torture and cruel, inhuman or degrading treatment or punishment, and any limitation on the right to a fair trial.

28. According to the exparte applicants, watch-listing is an indirect way of declaring a person a prohibited immigrant and have such a person deported without a hearing and/or fair trial.

29. It was submitted that a corollary of watch-listing is the inability of the 1st Ex Parte Applicant's directors to travel in and/or out of the country; in order to aid the Respondent in arresting and deporting the said directors. that Watch-listing may separate family members for months or years, ruin employment prospects, and isolate an individual from friends and associates, as was held in the writings on the **American Civil Liberties Union (ACLU): U.S. Government Watch-listing: Unfair Process and Devastating Consequences. March, 2014 (P.1)**

30. Mr Miyare submitted that only the Cabinet Secretary responsible for matters relating to Citizenship and the Management of Foreign Nationals is empowered by Section 43 of the Act to remove persons whose presence in Kenya is unlawful, or in respect of whom recommendations have been made under Section 26A of the Penal Code by a court of law, upon trial and conviction.

31. Counsel further cited Section 43 (3) of the Act which provides that an order to remove persons found unlawfully present in the country shall be carried out in such a manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.

32. The applicants' counsel maintained that via the decision challenged herein, the Respondents have unlawfully/unreasonably prohibited the 2nd Ex parte Applicant's travel out of the country with the intention to have him arrested and consequently deported for no offence at all. That the reason given for

the Respondent's decision that the 2nd Ex Parte Applicant **“is operating two separate files under his name at the department of immigration services neither** constitutes an offence nor is that kind of reason known to law.

33. The applicants' counsel submitted that a person can only be declared a prohibited immigrant on the grounds found in Section 31(1) of the Act and that those grounds cannot be enlarged at the whims of the Respondent. further, that the class of persons who can be declared prohibited immigrants is closed, as emphasized by Section 33 (1) (v) where the Act gives the Cabinet Secretary the power to declare a person a prohibited immigrant for any other reason subject to approval by Parliament. That it is therefore not open to the Cabinet Secretary to go out of the dictates of Section 33(1) and that doing so was ultra vires the clear provisions of the Act. Reliance was placed on **Republic -versus- Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad [2015] eKLR at page 8 thereof.**

34. It was submitted that the 2nd Ex Parte Applicant who has a valid work permit does not qualify as a prohibited immigrant or inadmissible person warranting the subject decision/actions of the Respondent.

35. By its said decision, it was submitted that the Respondent has indirectly declared the 2nd Ex Parte Applicant a prohibited Immigrant contrary to law, and in violation of the 2nd Ex Parte Applicant's right to fair trial, which power the respondent does not possess.

36. On the question of whether the **impugned decision is unreasonable: it was submitted that** Section 7 (2) (k) of the Fair Administrative Actions Act, No.4 provides that an administrative action can be reviewed if the impugned decision is unreasonable.

37. Mr Miyare submitted that an unreasonable decision is a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Reliance was placed on the case of **Associated Provincial Picture Houses Ltd. -versus- Wednesbury Corporation [1948] 1 K.B. 223.**

38. It was submitted that it was unreasonable for the respondent to allege that the 2nd exparte applicant was **“Operating two separate files under his name at the Department of Immigration Sservices”** because the 2nd Ex Parte Applicant has no control of immigration files in the sole custody of the Respondent; and that the 2nd Ex Parte Applicant does not/cannot determine the sequencing or filing of the relevant files.

39. That by the impugned decision, the Respondent is attempting to visit their apparent incompetence and maladministration upon the 2nd Ex Parte Applicant. Further, that in any event, the decision is disproportionate as the reasonable action to be taken by the Respondent to cure such anomaly would be a consolidation of the alleged “multiple files” which have not even been shown to the Ex Parte Applicants.

40. It was also submitted that moreover, the Respondent directed the 2nd Ex Parte Applicant to make a written explanation on the foregoing allegations on multiple files, which the 2nd Ex Parte Applicant did; and that there has been no response from the Respondent to date as shown by the **Applicants' letter dated 5.7.2016 at pages 3, 4 and 5 of annexures to the Verifying Affidavit sworn by Maratab Bashir on 29.8.2016.**

41. It was submitted that neither the Kenya Citizens and Foreign Nationals Management Service Act nor the Kenya Citizenship and Immigration Act establish **“operation/maintenance of multiple files”** as an offence; and that the reason given for the subject decision not being known to law, is unreasonable, malicious, made in bad faith, and is clearly intended for extraneous ends not contemplated under the Act, in abuse of statutory power and discretion.

ii) On the question of whether the exparte applicants were heard prior to the impugned decision it was submitted that as earlier stated, a finding/declaration of an individual as a prohibited immigrant as indirectly attempted by the Respondent herein through watch-listing,

involves a trial by a court of law of an alleged offence, as stipulated in **Sections 33 and 43 of Kenya Citizenship and Immigration Act, No. 12 of 2011**; and **Section 26A of the Penal Code, Cap 63 Laws of Kenya**.

42. That under Article, 25 of the Constitution of Kenya, the right to a fair trial is absolute. Therefore, that by placing the 2nd Ex Parte Applicant on the immigration watch-list and restricting/stopping his travel out of the country with the aim of removing him from Kenya, the Respondent purported to circumvent the 2nd Ex Parte Applicant's right to fair trial, in violation thereof.

43. The applicants' counsel emphasized that the right to a hearing is well protected in the Constitution and is the cornerstone of the rule of law, as was observed in the cases of **Suchan Investment Limited-versus-Ministry of National Heritage & Culture & 3 others [2016] eKLR**; **Onyango Oloo -versus- Attorney General [1986-1989] EA 456**; and as stipulated in **Section 12 of the Fair Administrative Action Act, No. 4 of 2015**.

44. It was submitted on behalf of the exparte applicants that in consequence of the impugned decision, the Respondent has refused to approve the 2nd Ex Parte Applicant's application for a dependant's pass on behalf of his wife who is wholly dependent on him, and with whom he lives in the country; and that the 2nd Ex Parte Applicant is unable to return his wife to Pakistan, just as he brought her into the country, owing to his purported travel ban.

45. It was submitted that before making the impugned decision with devastating and shattering consequences upon the livelihood of the Ex Parte Applicants and their employees/dependants, the Respondent was enjoined by the principles of natural justice to hear the Ex parte Applicants; and, that the Ex Parte Applicants had legitimate expectation that due process of the law would be followed by the Respondent.

46. The Ex parte Applicants maintain that they were not heard at all before the Respondent's decision challenged herein was taken; hence the decision is amenable to being quashed [as of right].

iii) on what remedies are appropriate in the circumstances, the exparte applicants' counsel submitted that his clients were entitled to:

a) Certiorari: that the impugned decision was informally made by the Respondent in bad faith to *“catch the 2nd Ex Parte Applicant unawares”* and have him locked permanently from coming back to the country once he made a decision to travel out of the country. That this was maliciously done at the behest of the Ex Parte Applicants' business competitors to stall the operations of the 1st Ex Parte Applicant and push them out of business.

47. Further, that under Order 53, rule 7 of the Civil Procedure Rules, an Applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, it was submitted that in a deserving case as the case herein, the Court may call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law; and that while doing so, the court only needs to satisfy itself that such a decision was made. Reliance was placed on the **Republic -versus- Minister of State for Immigration and Registration of Persons Ex-Parte C.O [2013] eKLR (at para. 18-20)**.

48. According to Mr Miyare, the existence of the impugned decision is not contested at all; it is in fact impliedly admitted. further, that as a result of the decision to “watch-list” the 2nd Ex Parte Applicant and his co-director (to be in charge of operations) who has been denied entry into the country vide a similar decision of the Respondent placing the said director on the immigration “watch-list”, all directors of the 1st Ex Parte Applicant have been unfairly and unlawfully restrained from travelling in and out of the country without being heard.

49. In consequence of the foregoing decision, the Respondent is alleged to have refused to approve the 2nd Ex Parte Applicant's application for a dependant's pass on behalf of his wife who is wholly dependent on him, and with whom he lives in the country; and, he is unable to return his wife just as he brought her into the country, owing to his purported travel ban!

50. It was submitted that the 2nd Ex parte Applicant's right to freedom and security of person, and the right to freedom of movement has and will continue to be violated by the threatened actions abovementioned, unless this Honourable Court intervenes as sought herein.

b) Mandamus:

51. The Applicants have also sought an order of mandamus to compel the Respondent to remove the 2nd Ex Parte applicant from its immigration "watch-list. As submitted earlier, the Respondent's decision is alleged to be unlawful, disproportionate and unreasonable. That the 1st Ex Parte Applicant's business majorly concerns importing of cars for sale. That the same involves frequent travel by the 1st Ex Parte Applicant's directors including the 2nd Ex Parte Applicant, who are unable to travel freely and oversee the 1st Ex Parte Applicant's business. That the impugned decision has unfairly hindered the 1st Ex Parte Applicant's operations and interests.

52. The Ex Parte Applicants believe that the real objective behind the impugned decision/conducts is to harass, frustrate and force the 1st Ex Parte Applicant to close its business and exit the Kenyan market in favour of its competitors. It is claimed that the decision impugned herein is thus unlawful, based on irrelevant considerations, manifestly oppressive; and, violates the Ex Parte Applicants rights to fair administrative action.

53. That the 2nd Ex parte Applicant is completely unable to freely travel outside the country as he routinely did to source for business, network and arrange for merchandise/goods for the Company's business due to the decision herein. On the other hand, Mr. Sajjad Ahmad, the 2nd Ex parte Applicant's co-director (to be in charge of operations) cannot also travel freely into the country due a similar decision against him by the Respondent.

54. That the Ex Parte Applicants are highly prejudiced by the Respondent's actions/decision, and have suffered financial loss and loss of business as a result. Further, that the Ex Parte Applicants are faced with imminent loss of business and threats of closure or total collapse due to failing operations; which will lead to loss of employment/livelihoods by the 1st Ex Parte Applicant's employees/dependants, unless the orders herein are urgently granted as sought- as shown by the exparte **Applicants' letter dated 5.7.2016 at pages 3, 4 and 5 of annexures to the Verifying Affidavit sworn by Maratab Bashir on 29.8.2016.**

55. The applicants maintained that the decision to watch-list the 2nd Ex Parte Applicant is arbitrary, unreasonable, malicious and unlawful, hence unjustified; and that the 2nd Ex Parte Applicant's freedom of movement is unfairly and unlawfully curtailed and that therefore the prayer for mandamus is thus justified.

c) Prohibition:

56. It was submitted that he Respondent is hell-bent in having the 2nd Ex Parte Applicant deported. That the 2nd Ex Parte Applicant is at the undue mercy of the Respondent and its officers unless the Honourable court intervenes as prayed.

57. Further, that the Ex Parte Applicants are reasonably apprehensive that unless this application is allowed and a prohibition issued as sought herein, the Respondent will cause the 2nd Applicant's arbitrary arrest, harassment, detention and/or deportation to their detriment/prejudice, and to the detriment of the Ex Parte Applicants' business and prejudice to their employees'/dependants' livelihoods hence the

necessity to prohibit the respondent's contemplated actions.

d) Declaration and Compensation:

58. It was submitted that due to the Respondent's flagrant breaches of the law, the decision herein and consequent actions of the Respondent are thus unlawful, unfair and a breach of the Ex Parte Applicants' right to fair hearing, fair administrative action, freedom and security of the person of the 2nd Ex Parte Applicant; and, the 2nd Ex Parte Applicant's right to freedom of movement and secure protection of the law.

59. The exparte applicants relied on the provisions of Sections 11 (1) (a) and (j) of the Fair Administrative Actions Act, which stipulate that the court may declare the rights of the parties and award costs or other pecuniary compensation in appropriate cases, as herein. Reliance was placed on the case of **Suchan Investment Limited -versus- Ministry of National Heritage & Culture & 3 others** supra at pages 15 and 16 thereof.

60. As the motion herein is not controverted by the Respondent who was duly served and has notice of the same, it was submitted that this application be allowed as prayed, with costs to be borne by the Respondent

DETERMINATION

61. I have carefully considered the exparte applicant's Notice of Motion, the accompanying statutory statement, verifying affidavit and exhibits thereto. I have given equal consideration to the exparte applicant's counsel's written and oral submissions as well as the statutory and case law cited.

62. In my humble view, the main issue for determination in this matter is whether the judicial review orders sought are available to the exparte applicants.

63. The role of a court exercising powers of judicial review is limited to the process involved in arriving at a decision, and does not require the court to enter into an inquiry on the merits of a decision and reliance was placed on **Civil Appeal No. 180 of 2013- Isaack Osman Sheikh vs. IEBC & Others** where the Court expressed itself thus:

“A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.”

64. Section 34 of the Kenya Citizen and Immigration Act provides that:

“Every person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya, unless she or he has a valid permit or pass.”

65. In the instant case, it is not denied that the 2nd applicant is a holder of a valid Class G Work/Resident Permit authorising him to enter, remain and work in Kenya, issued to him on 3rd December, 2015 there is also no denial that the 2nd applicant is the director of the 1st applicant and therefore on 5th July, 2016, while on a visit to the Department of Immigration Services at Nyayo House, Nairobi to follow up on an application by the 1st Ex Parte Applicant for a permit on behalf of its director one Sajjad Ahmad, the Ex Parte Applicants were verbally informed by the Respondent that the 2nd Ex Parte Applicant had been placed on the immigration watch-list for **“operating two separate files under his name at the department of immigration services.**

66. Kenya is a signatory to the ICCPR and by application of Article 2(5) and (6) of the Constitution, the

above international covenant forms part of the laws of Kenya under the Constitution.

67. Article 13 of the ICCPR provides:

“An alien lawfully in the territories of a state party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

68. In the case of **Knauf Vs Shaugnessy 338 US** the US Supreme Court held:

“The admission of aliens to this Country is not a right but a privilege which is granted only upon terms as the United States prescribes.”

69. Further in the case of **Jong Yue Ting 149 US** , the US Supreme Court held that:

“The right to exclude or to expel aliens or any class of aliens,absolutely or upon certainconditions, in war or in peace is an inherent andinalienable right of every sovereign nation.”

70.the test and elements of procedural fairness was laid down and elucidated in **R vs. Commission for Higher Education ex-parte Peter Shitanda [2013] eKLR** as follows:

a. *“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”*

Lenaola J(as he then was) in **High Court Petition No. 586 of 2012** between **Bashir Mohamed Jame Abdi and Minister for Immigration & Others** held that:

“By denying the subject Abdi Bashir entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or orders and without according him a hearing to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subjects fundamental rights and freedoms to equal treatment and equal action/justice to deprivation of the society and recognition of his family under articles 27(1), 45(1) and 47 of the Constitution.”

72. In **Daniel Nyongesa and Others vs. Egerton University College** the Court further stated that:

“...it is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.”

73. In **Samuel Mukira Mohochi Vs. Attorney General of Uganda EAC J Ref No. 5 of 2011** the East African Court of Justice was at a loss as to why a suspect was returned from one partner state to another

while he was allegedly suspected of terrorism related activities without him being interrogated or questioned on those alleged activities.

74. In Republic –Vs- Otieno Kajwang Exparte Mohmud Siras (2009) eKL Dulu Judge stated that:

“A suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him”.

75. In The case of Samura Engineering Ltd. & Others –Vs- Kenya Revenue Authority High Court Petition No. 54 of 2014 Majanja J stated:

“Kenya and its people must now embrace the culture of justification which requires that every officials act must find its locus in the law and under pinning the Constitution”.

76. See also the case of Salim Awadh Salim & 10 Others Vs Commissioner of Police on violation of petitioner's right to due process.

77. In Nairobi High Court Misc. Civil Application No. 430 of 2004, LEONARD SITAMZE v THE MINISTER FOR HOME AFFAIRS & 2 OTHERS Justice J. B. Ojwang (as he then was) stated, what is in my view, the correct legal position as follows:

“Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilised society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”

78. This position was recently restated by G. V. Odunga, J in REPUBLIC v MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS EX-PARTE C.O. [2013] eKLR where the learned Judge opined at paragraph 33 of his judgment that:

“ To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

79. It goes without saying, therefore, that where a public officer has been granted statutory powers, the

exercise of such powers is subject to the supervisory jurisdiction of the Court. It is the duty of the Court to ensure that the exercise of such powers is legal, rational and compliant with the principles of natural justice.

80. The question that follows is whether the respondents treated the Applicants fairly in this matter. There is also the issue of the legality of the respondents' orders. The Applicant asserts that the reason given for his being placed on the immigration watch list is not one of the grounds found in **Section 33 (1) of the Act**.

81. Article 47 of the Constitution of Kenya guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that the procedure for fair administrative action is elaborated in section 4(3) and (4) of the **Fair Administrative Action Act** No. 4 of 2015 as follows:

(3) “Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior **and adequate notice of the nature and reasons for the proposed administrative action;**
- b. an **opportunity to be heard and to make representations in that regard;**
- c. notice **of a right to a review or internal appeal against an administrative decision, where applicable;**
- d. a **statement of reasons pursuant to section 6 of the Act;**
- e. notice **of the right to legal representation, where applicable;**
- f. notice **of the right to cross-examine or where applicable; or**
- g. information, **materials and evidence to be relied upon in making the decision or taking the administrative action.”**

82. In the instant case, there is absolutely no evidence to show that the applicants were heard or given an opportunity to be heard before the decision to watch list the 2nd applicant by the immigration department. Accordingly, without much ado, the provisions of Article 47 of the Constitution on the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action; and Article 50(1) of the Constitution on the right to a fair hearing was violated. In addition, the Fair Administrative Action Act No4 of 2015 was violated by the respondent.

83. In addition, **Section 33(1) and (2) of the Kenya Citizens and Immigration Act Cap 172 Laws of Kenya** is clear that:

“33. Prohibited Immigrants and inadmissible persons

(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—

(a) not having received a pardon—

(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;

(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;

- (iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;*
- (b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;*
- (c) a person who procures or attempts to engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;*
- (d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;*
- (e) a person who, there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;*
- (f) a person whose presence in or entry into Kenya is unlawful under any written law;*
- (g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;*
- (h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;*
- (i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;*
- (j) a person involved in or is reasonably suspected to be engaged in money laundering;*
- (k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;*
- (l) a person engaged in or suspected to be engaged in illicit arms trade;*
- (m) a person engaged in or suspected to be engaged in illegal human body organs trade;*
- (n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber crimes and related crimes;*
- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;*
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;*
- (q) a person whose conduct offends public morality;*
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;*
- (s) a person who is seeking to enter Kenya illegally;*
- (t) a person who is a fugitive from justice;*

(u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006); and

(v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed).

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—

(a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;

(b) the family and dependants of a prohibited immigrant;

(c) incapable of supporting himself and his dependants (if any) in Kenya;

(d) is adjudged bankrupt;

(e) anyone who has been judicially declared incompetent;

(f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or

(g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.

(3).....”

84. The above elaborate **Section** creates two categories of persons who are not wanted in Kenya. **Sub-section (1)** refers to **prohibited immigrants** whereas **Sub-section (2)** deals with **inadmissible persons**, that is to say persons who are not supposed to enter Kenya in the first place.

85. The provision relevant to the case before me is **Sub-section (1)**. G. V. Odunga, J had the occasion to address the powers of the Respondent under that **Sub-section** in **Ex-parte C.O.** (supra), at paragraph 22 of his judgment where he opined that:

“It has been contended that the impugned decision was made pursuant to section 33(1) of the Act. It is important to note that section 33(1) employs the phrase “a prohibited immigrant is” rather than “a prohibited immigrant includes.” It is my view therefore that where the legislature uses the word “is” there is no room for extension of the circumstances enumerated thereunder. No material has been placed before the court upon which the court can find that the criteria stipulated in section 33(1) aforesaid applied to the present circumstances. Instead the respondent has hidden under the principle of national security. Where an authority decides to keep certain crucial information from the Court which information may enable the Court to form a view favourable to the authority, the said authority must take the risk that the Court may find that the decision was not warranted.”[Emphasis added].

86. I am further in agreement with the learned Judge that a person can only be declared a prohibited immigrant on the grounds found in **Section 33(1)**. Those grounds cannot be enlarged at the whim of the Cabinet Secretary in charge of immigration affairs, and that the class of persons who can be declared prohibited immigrants is closed. This closure is emphasized by **Section 33 (1) (v)** where Parliament gives the Cabinet Secretary the power to declare a person a prohibited immigrant for any other reason subject to approval by Parliament. It is not therefore open to the Respondent to go out of **Section 33(1)** and declare a person prohibited immigrant. Doing so will be *ultra vires* the clear provisions of the Act and therefore

call for the court's intervention.

87. It is imperative that the decisions of those empowered by law to do certain things must be within the law granting such powers. The Respondent can only declare any person a prohibited immigrant if the person falls under the classes created by **Section 33(1)**. The words **“operating two separate files under his name at the Department of Immigration”** do not appear in **Section 33(1) (a)-(v)**.

88. Therefore, the Respondent could not declare the 2nd Applicant as placed on the immigration watch list or declare him prohibited immigrant on the ground of **“operating two separate files under his name at the Department of Immigration.”**

89. Consequently, I find that the respondent had no power to order the watch listing of the 2nd exparte applicant and not even removal from Kenya under **Section 43 (1) of Kenya Citizenship and Immigration Act, 2011**. The Respondent’s decision which was verbally communicated to the applicants was not based on the powers granted to him by **Section 33(1)**. He could only do that which the statute allowed him to do.

90. Assuming that the reason given by the Respondent for the watch listing of the Applicant is indeed a valid reason, was the Respondent’s exercise of power reasonable, or did he act within the rules of natural justice? I find not. As already stated, the applicants were never given any hearing and or an explanation or reasons for the decision to watch list the 2nd applicant with the immigration. In addition, it is the respondent who is the sole custodian of all the immigration files and who opens such files and handles them, and not the applicants therefore there is no way the applicants could be aware of the existence of two files concerning the same person.

91. There are contradictory decisions as to the extent a Court can interrogate the executive’s exercise of power in matters of national interest or national security. In the case before me, no evidence has been adduced as to what national interest the Applicant had threatened or is likely to threaten. I therefore agree with J. B. Ojwang, J (as he then was) in **Sitamze I** (supra) that a judge is among the very few people who are entitled to know the reasons behind the deportation of a foreign national. Odunga, J extended the above observation further to assert in **Ex-parte C.O.** (supra) that the State must exhibit the evidence in support of the decision to deport a foreign national.

92. In this case, although there is no deportation, but this court is persuaded beyond doubt and **“ reads in” in the watch listing label and tag** that the conduct of the respondent speaks volumes. Although watch listing is not in our statute books, the conduct of the respondent is likely to trigger a deportation order without due process being followed.

93. A foreign national has rights and is entitled to equal protection of the law. He is a human being and is not to be denied any of the inherent human rights or those rights that our constitution guarantees, even if limited to some extent. He is entitled to know the specific reasons for his deportation or for refusal to renew his resident permit or to be watchlisted. That is why Parliament through **Section 33(1)** of the Act listed all the reasons that can form the basis for the deportation of an immigrant.

94. In the case before me, the reason for the watch listing of the Applicant has been hidden in a blanket statement called **“operating two separate files under his name at the Department of Immigration.”** With due respect to the respondent, the act of operating multiple files for one individual is undertaken by the respondent. The exparte applicants have not been shown to have opened any files or to be in charge of any immigration desk. The Immigration Department, in my humble view, have acted unreasonably, for no reasonable person could make such an illogical allegation except to expose their ineptitude to the whole world.

95. As was rightly observed G.V. Odunga, J in **Ex-parte C.O.** (supra):

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no

good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based on irrelevant matter.”

96. That should be the case in an environment where public servants exercise their powers within the law. The State must indeed be supported in its fight against external threats. This support can only be forthcoming where it places all its cards on the table. In the present case the Applicants have submitted that the respondents acted in bad faith. This allegation is indeed supported by the evidence they have placed before the Court.

97. Should the judicial review orders issue? I believe that I have clearly demonstrated in this judgement that the Respondent’s decision was illegal, irrational and contrary to the principles of natural justice.

98. The Applicants who have extensively invested in this country and created employment for the local folks were entitled to a hearing. The 2nd exparte applicant had a valid permit and as observed by **Lord Denning MR** in **SCHMIDT v SECRETARY OF STATE FOR HOME AFFAIRS [1969] 1 ALL ER 904,CA:**

‘If his permit is revoked before the time limit expires he ought then to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time.’

99. And in the **Speaker of the National Assembly vs Njenga Karume (2000) I KLR 425** the Court stated;

“In our view there is considerable merit that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.

100. I reiterate that holding and add that in the Kenya Citizens and Immigration Act, the fact of making an application for renewal of a resident permit presupposes that the application would be considered on its merits and a decision made one way or the other. If the decision is grossly unfair or perverse and if the decision is not equitable, or if there is no decision, then the same can be challenged either by way of judicial review or by way of a Petition. (See - **Narok County Council vs Trans Mara County Council (2000) EA. 1**).

101. Furthermore, this court finds that if the applicants were such a threat to the security of this nation, then the court wonders why the respondent did not appear in these proceedings to furnish the court with relevant information that would assist in arriving at a different decision from the one I am about to make. Courts of law are under a duty to do justice and to protect the sovereignty of the nation of Kenya and its inhabitants. If there was evidence of the applicants being involved in any of the acts set out in section 33(1) of (2) of the relevant Act, this court would be happy to direct that the respondent, nonetheless, follows the legal procedures for deporting such persons. High handedness is abhorred by the law.

102. Our laws are certain. Therefore, the court would not allow any body or authority to create its own regime of “watch listing” persons which terminology is nonexistent in our laws and thereby causing the persons to be anxious about nothing, while waiting for anything to happen to them. That in my view is subjecting persons to torture and degrading punishment. The 2nd applicant is entitled to the freedom of movement and security of the person. He cannot exercise those rights which are universal and inherent if the respondent labels him “watch listed” without giving reasons for such watch listing” and or without taking appropriate steps to have the 2nd applicant know his fate.

103. That conduct of the respondent is unacceptable in law. It is illegal and amounts to abuse of process. It must be prohibited. The respondent must also be compelled to remove from the 2nd applicant’s file the label or tag of being “watch listed,” as there is no such a thing as being watch listed. If there is reason to

investigate the 2nd applicant's' conduct or dealings, he should be subjected to due process as by law established. Nothing short of that.

104. As the decision by respondent to watch list the 2nd applicant was illegal, it is open to being brought into this court for purposes of being quashed. The Fair Administrative Action Act No 4 of 2015 creates an additional judicial review remedy in the form of a declaration, where there is violation of rights. In this case, I find that the ex parte applicants' constitutional rights to fair hearing, fair administrative action, freedom and security of the person of the 2nd ex parte applicant Maratab Bashir; and the 2nd ex parte applicant's right to freedom of movement and secure protection of the law have been violated by the respondents' actions and or inactions. A declaration is therefore available to the ex parte applicants.

105. In the end, I find the ex parte applicant's notice of motion dated 14th September, 2016 merited. I make the following judicial review orders:

a. ***Certiorari*** to issue to bring into this court to be quashed and I hereby bring into this court and quash the respondent's decision made on 5th July, 2016 and communicated to the ex parte applicants verbally, placing the 2nd ex parte applicant Maratab Bashir on the immigration watch list;

b. ***Mandamus*** is hereby issued compelling the respondent to remove the 2nd ex parte applicant Maratab Bashir from the immigration watch list;

c. ***Prohibition is hereby issued*** prohibiting the respondent acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the respondent, from arbitrarily arresting, detaining, harassing and or deporting the 2nd ex parte applicant Maratab Bashir or in any manner whatsoever curtailing/impeding the 2nd ex parte applicant's liberty/freedom of movement with regard to the matters herein;

d. ***A Declaration- I hereby declare*** that the action of the respondent in placing the 2nd ex parte applicant Maratab Bashir under the immigration watch list is unlawful, unfair and a breach of the ex parte applicant's rights to fair hearing, fair administrative action, freedom and security of the person of the 2nd ex parte applicant Maratab Bashir; and the 2nd ex parte applicant's right to freedom of movement and secure protection of the law;

e. I order that the respondent do consider all the 1st and 2nd ex parte applicant's applications for the resident/work permit and for the 2nd applicant Maratab Bashir's dependant's pass, on their merits once lodged and that due process be followed in arriving at any decision affecting the ex parte applicants.

106. On the prayer for compensation, no sufficient material has been placed before the court to enable this court to quantify the damages awardable. Accordingly, that prayer for compensation is declined and dismissed.

107. I further order that the ex parte applicants bear their own costs of these judicial review proceedings.

Dated, signed and pronounced in open court at Nairobi this 16th day of December, 2016

HON. R.E. ABURILI

JUDGE

In the presence of:

Mr Miyare for the Ex parte Applicants

N/A for the Respondent (served)

CA: Lorna