**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 73 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF IMMIGRATION SERVICES.....RESPONDENT**

**EX-PARTE**

**DE CARO GIOVANNI &**

**LEAH OWITI DE CARO**

**JUDGEMENT**

1. The 1st Applicant De Caro Giovanni is the husband of the 2nd Applicant, Leah Owiti De Caro. They got married on 21st December, 2001. Prior to their marriage the 1st Applicant had lived in Malindi for over ten years. The 1st Applicant is an Italian citizen who prior to his deportation held a class H entry permit which allowed him to live and run businesses in Malindi. He claims that he has made extensive investments in Kenya.

2. The 1st Applicant's case is that in 2011, acting on the advice of his business partners, he applied to change his entry permit from class H to class K. He, at the same time applied for Kenyan citizenship. In order for his applications to be processed, he had to surrender his class H entry permit. He was informed that he would be advised about the outcome of his applications in due cause.

3 As the 1st Applicant was still waiting for his application to be determined he was arrested and charged by the Respondent, the Director of Immigration Services, in **Immigration Case No. 92 of 2011** for being in Kenya without a proper work permit, visa or pass. He was fined Kshs. 33,000/= and ordered to be repatriated to Italy until such a time that he had obtained proper documentation allowing him to come back to Kenya. He was indeed repatriated as ordered by the Court.

4. On 21st February, 2014, the applicants moved this Court by way of a chamber summons application seeking leave to commence judicial review proceedings. At that time, the 1st Applicant had travelled to Kenya from Italy but had been denied entry by the Respondent. The 1st Applicant had arrived in Kenya on 19th February, 2014 and was said to be suffering from an acute cardiac condition. On the date the application was filed, I directed that the 1st Applicant be taken to a medical facility for treatment under the custody of the Respondent. On 4th March, 2014 the advocates for the parties entered a consent in

which the 1st Applicant was to remain in the country pending the hearing and determination of this matter.

5. As this matter was progressing, the Cabinet Secretary responsible for immigration services issued an order declaring the 1st Applicant a prohibited immigrant. This particular decision was the subject of **High Court Judicial Review Application No. 266 of 2014.** On 19th May, 2015 I was informed by Mr. Oyomba for the applicants that my brother Odunga, J had in a judgment delivered on 11th March, 2015 quashed the declaration issued by the Cabinet Secretary on 9th May, 2014. However, as at the time of writing this judgement the 1st Applicant is presumably still out of the country.

6. The application for consideration in this judgment is the notice of motion dated 3rd March, 2014 in which the applicants seek orders as follows:

> **"1. CERTIORARI to remove into this Honourable Court and quash the decision of the Respondent to declare the 1st Ex-parte Applicant a Prohibited Immigrant and/or Inadmissible Person;**
>
> **2. PROHIBITION prohibiting the Respondent from removing the 1st Ex-parte Applicant from Kenya on account of the Respondent's decisions declaring the 1st Applicant a Prohibited Immigrant and/or Inadmissible Person;**
>
> **3. The Ex-parte Applicants be awarded the costs of these proceedings."**

7. According to the statutory statement dated 21st February, 2014 the grounds upon which the applicants seek relief are:

> **"1. The Respondent herein has made a decision declaring the 1st Applicant a Prohibited Immigrant and/or Inadmissible Person. The effect of the Respondent's decision is that the 1st Applicant will never set foot in the Republic of Kenya while the said order is still in force.**
>
> **2. The Respondent's decision was made on the basis of malicious rumours and/or extraneous consideration. The Respondent purportedly made this decision under belief that the 1st Applicant had pending criminal cases in the Republic of Italy. Despite the 1st Applicant providing the Respondent with documents showing that the 1st Applicant is a law abiding person with no pending criminal case in Italy or anywhere in the world, the Respondent has stubbornly refused to rescind its decision declaring the 1st Applicant a Prohibited Immigrant.**
>
> **3. The Respondent's decision was made in blatant breach of the Applicant's constitutional rights to family, fair administrative decision and right to protection of property as set out under the provisions of Articles 45, 47 and 40 of the Constitution of Kenya.**
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> **4. The Respondent's decision is therefore malicious, unfair and solely intended to aid the Applicant's business competitors to fraudulently grab and/or convert the Applicants' properties to themselves.**
>
> **5. The Respondent's decision is contrary to law and public policy and is an abuse of the powers vested in the Respondent by the Kenya Citizenship and Immigration Act Cap 172 Laws of Kenya. The Respondent's decision having been made administratively by junior officers in the immigration department without the approval or authorization of the Minister in charge of Immigration Affairs is illegal, null and void.**
>
> **6. The Respondent's decision therefore did not take into account the relevant considerations and provisions of the law governing immigration matters and the Applicant's constitutional**

**rights. The same is therefore a flagrant abuse of the legal process to achieve extraneous objective and ought to be quashed.**

**7. On the whole, the Respondent's decision is capricious, unfair and has the deliberate consequence of shattering the applicant's legitimate expectation to have a family unit that lives together as set out in the Constitution of Kenya.**

**8. It is in the interest of justice and fair administration of the same that the Respondent's decision be quashed."**

8. The Respondent opposed the application through the replying affidavit of the Chief Immigration Officer Alfred Omangi Abuya sworn on 3rd June, 2014. It is the Respondent's case that the 1st Applicant previously stayed in Kenya on the strength of a work permit and fell out of lawful immigration status thus the immigration case which necessitated his removal from Kenya. The Respondent asserted that the 1st Applicant was found guilty in **Immigration Case No. 92 of 2011** and was fined Kshs. 33,000/=. He was also ordered to be repatriated to Italy until such a time that he had obtained proper documentation allowing him to come to or stay in Kenya.

9. According to the Respondent, under the Kenya Citizenship and Immigration Act, 2011, prohibited immigrants include persons whose presence in or entry into Kenya is unlawful under any written laws. The Respondent asserted that the 1st Applicant was ordered out of the jurisdiction of Kenya by a competent court in proceedings which were not contested and have not been appealed against to date. It is the Respondent's case that pursuant to the removal order, the 1st Applicant became a person of the prohibited/inadmissible class and it did not require the order of the Cabinet Secretary to declare him as such.

10. In addition, the Respondent averred that the 1st Applicant was a fugitive from justice in his country of origin for an offence which he committed and was convicted. A letter dated 30th April, 2012 addressed to the Respondent by the Consular Attaché of the Italian Embassy was exhibited in support of this statement.

11. The Respondent also asserted that the application before this Court is defective as the order the applicants seek to quash has not been exhibited.

12. Further, that the impugned decision the applicants seek to quash was made over six months from the date these proceedings were commenced.

13. The Respondent also urged this Court to consider that judicial review remedies are discretionary and they target the process used to make a decision and not the merits of the decision.

14. The 2nd Applicant sought to rebut the Respondent's assertions by swearing a supplementary affidavit and a further affidavit on 25th June, 2014 and 28th November, 2014 respectively. According to the 2nd Applicant an order of repatriation is not similar to an order of deportation as an order of deportation bars re-entry into the country but an order of repatriation does not bar a person from entering the country on condition that the reasons for the repatriation have been satisfactorily met. Further, that the order of repatriation made in **Immigration Case No. 92 of 2011** indicated that the 1st Applicant could come back to Kenya subject to obtaining proper documentation.

15. The 2nd Applicant averred that the 1st Applicant had been granted a visa to be in the country for three months and his stay in Kenya could not have therefore been unlawful.

16. The 2nd Applicant also averred that there was a letter that was written about one year after the one dated 30th April, 2012 showing that the 1st Applicant was not a fugitive from justice.

17. As for the Respondent's assertion that these proceedings were not commenced within six months

from the date of the impugned decision, the 2nd Applicant exhibited a copy of a Notice to Prohibited Immigrant/Inadmissible Person issued on 21st February, 2014 under Section 33 of the Kenya Citizenship and Immigration Act and averred that the said notice was the order they are challenging and these proceedings were therefore instituted within six months from the date of the decision.

18. The 2nd Applicant also exhibited a letter dated 13th March, 2014 from the Italian Embassy in Nairobi being a response, to a letter by the Respondent dated 24th February, 2014. The said letter informed the Respondent that **"the Italian citizen Giovanni DE CARO is not a fugitive, according to the relevant authorities in Italy".** The 2nd Applicant therefore accused the Respondent of hiding this pertinent information from the Court.

19. Upon perusal of the pleadings and submissions placed before the Court by the parties, I find that the first question that needs to be answered is whether there is a proper application before the Court. The Respondent gave two reasons as to why there is no proper application before this Court. The first reason is that the decision being challenged by the applicants has not been exhibited. The second argument is that an order of certiorari is not available in the circumstances of this case as the application was not filed within six months from the date of the impugned decision.

20. I will address the two grounds together as they are interrelated. In response to the Respondent's replying affidavit the 2nd Applicant exhibited Form 42 of the Kenya Citizenship and Immigration Regulations. The form which is addressed to the 1st Applicant is titled: **"NOTICE TO PROHIBITED IMMIGRANT/INADMISSIBLE PERSON (UNDER SECTION 33)".** The form which is a standard one declares the 1st Applicant a prohibited immigrant required to leave Kenya within one month. At the same time it also requires him to report at the immigration headquarters Nyayo House on 24th February, 2014 where he will be given further instructions.

21. I do not know whether the applicants honestly believe that this form contains the decision they are challenging through these proceedings. It must be noted that the notice exhibited by the 2nd Applicant was issued on the same date these proceedings were commenced in Court. Nowhere in the applicants' application for leave and the substantive notice of motion is the said notice referred to. The reason why the notice dated 21st February, 2014 has not been referred to in the pleadings is simple; it is not the decision which brought the applicants to Court. In any case it is not possible that the applicants could have instituted these proceedings on the day the notice was issued. It is most likely that the said notice was issued on the strength of this Court's order directing that the 1st Applicant be taken for treatment.

22. The truth of the matter is that nowhere in their pleadings have the applicants specifically referred to an order issued by the Respondent. The decision being challenged has not been exhibited. Order 53 Rule 7 of the Civil Procedure Rules, 2010 requires that the impugned decision be exhibited and where this has not been done, reasons should be given for non-compliance.

23. Order 53 Rule 7(1) of the Civil Procedure Rules, 2010 provides that:

> **"7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not 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."**

The above cited rule requires the impugned decision to be exhibited and where it is not exhibited such failure should be accounted for to the satisfaction of the Court.

24. From their pleadings the applicants give the impression that they have never set their eyes on the decision they challenge. The Respondent concedes that there was no decision made by the Respondent as what the Respondent did was simply to comply with a court order. The Respondent did not therefore

make a decision which can be challenged through judicial review proceedings.

25. In **Nairobi Civil Appeal No 160 of 2008 Republic v Professor Mwangi S. Kimenyi & another Ex-parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)** the Court of Appeal stressed the importance of identifying the decision to be quashed in judicial review proceedings. The Court stated that:

> **"The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed….."**

26. In the case before this Court the applicants have completely failed to identify the decision they claim was made by the Respondent. That is not to say that the 1st Applicant was not removed from Kenya by the Respondent. On that ground alone the applicants' case should fail.

27. The Respondent's other ground for opposing the application is that the same was not made within six months from the date of the impugned decision. Assuming that the Respondent did indeed make a decision then that decision must have been made on an unknown date in 2011. These proceedings were commenced on 21st February, 2014 over two years after the decision was made.

28. Order 53 Rule 2 of the Civil Procedure Rules, 2010 states:

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.**

29. In **Ako v Special District Commissioner Kisumu & another [1989] KLR 163,** the Court of Appeal commented on Section 9(3) of the Law Reform Act, Cap 26 and concluded that:

> **"It is plain that under sub-section (3) of Section 9 of Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of section 9 of the Law Reform Act."**

Order 53 Rule 2 of the Civil Procedure Rules, 2010 is a replica of the Section 9(3) of the Law Reform Act.

30. Again in **Kiura Kigundu v David Muriithi Kigundu & 5 others [2013] eKLR** the Court of Appeal stated that:

**"Order LIII rule 2 (now Order 53 rule 2) of the Civil Procedure Rules, which is couched in mandatory terms provides ,**

***"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding...'***

**The decision of the appeals tribunal which the appellant sought to be quashed was made on 24th November, 1999 and was adopted as a judgment of the court on 2nd June, 2009. The application for leave to institute judicial review proceedings for an order of certiorari was filed by the appellant on 10th February, 2010. Based on the foregoing, we concur with the learned Judge's finding that the appellant's application for leave to institute judicial review proceedings for an order of certiorari was filed beyond the prescribed period of six months after the decision of the appeals tribunal and its subsequent adoption as a judgment of the court. Therefore, the said application was bad in law and could not have been granted. Having found as we have, we see no reason to interfere with the learned Judge's discretion of declining to grant the leave sought."**

31. It is clear from the decisions of the Court of Appeal that the time for seeking leave to apply for an order of certiorari cannot be enlarged and any application made outside the six months window is bad in law. An application for leave must therefore be made within six months from the date of the impugned decision. The purpose of this rule is to ensure that any person who desires to challenge an administrative action or decision does so promptly. Public organisations are not supposed to be unnecessarily held back by challenges to their decisions. An order of certiorari will therefore not be available to the applicants in the circumstances of this case.

32. There is a third reason why the applicants should not succeed in these proceedings. As already stated, the decision the applicants challenge belongs to the courts. The Respondent pointed out that the decision was not appealed against. This assertion was never challenged by the applicants. It was not alleged by the applicants that the decision to repatriate the 1st Applicant was not made by a competent court of law. The Court which made the decision that is being challenged through these proceedings has not been made a party to the matter and it would be contrary to Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 to quash the decision of the Court as there is no evidence that the Court which issued the repatriation order was served with the application.

33. The 1st Applicant was ordered to be repatriated to his home country, Italy and he can only come back to Kenya upon applying to the relevant authorities to enter Kenya. By virtue of his conviction for being unlawfully present in Kenya, Section 33(1) (f) of the Kenya Immigration and Citizenship Act makes his presence or entry into Kenya unlawful "under any written law". His brazen attempt to enter Kenya on 19th February, 2014 only shows his unmitigated contempt for the laws of this country. He is out of Kenya on a lawful order and he will remain outside Kenya unless and until he follows the right procedure for entering this country. In bringing these proceedings, the applicants were attempting to overturn the 1st Applicant's conviction through the backdoor. This cannot be allowed as it amounts to an abuse of the court process.

34. Having concluded that the applicants' case was a non-starter in all aspects, the question as to whether or not the 1st Applicant was a fugitive from justice in his home country of Italy becomes irrelevant.

35. The end result is that the applicants' case is dismissed. As the 1st Applicant is out of the jurisdiction of this Court, there will be no order on costs.

Dated, signed & delivered at Nairobi this 19th day of August, 2015.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**