



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
JUDICIAL REVIEW MISC. APPLICATION NO.15 OF 2012
IN THE MATTER OF THE LAW REFORM ACT
IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010
IN THE MATTER OF THE REGISTRATION OF PERSONS ACT
IN THE MATTER OF THE REFUGEES ACT CAP 13 OF 2006
IN THE MATTER OF CHAPTER 3 SECTION 47 OF THE CONSTITUTION 2010
BETWEEN
ABDIKADIR SALAT GEDI.....APPLICANT
AND
PRINCIPAL REGISTRAR OF PERSONS.....1ST RESPONDENT
COMMISSIONER FOR REFUGEE AFFAIRS.....2ND RESPONDENT
JUDGEMENT

Background

With leave of this court granted the ex parte applicant filed Notice of Motion dated 25th October 2012. He is seeking the following orders:

- i. An order of mandamus to compel the 1st Respondent to issue the ex parte applicant with a National Identity Card.
- ii. An order of mandamus to compel the 2nd Respondent to deregister the ex parte applicant as a refugee in the name of Mohamed Ahmed Ibrahim.
- iii. That the Respondent bears the costs of this case.

Ex Parte Applicant's Case

The ex parte applicant describes himself as a Kenyan Citizen by birth and that he was born on 30th

October 1992. He names his parents as Salat Gedi and Kaha Bare, both Kenyan citizens bearing National Identity Card Numbers 2104878 and 4885554 respectively. He says he attended Habaswein Primary School where he sat the Kenya Certificate of Primary Education (KCPE) in 2007 and proceeded to County High School in Garissa for his Secondary education where he sat for Kenya Certificate of Secondary Education (KCSE) in 2011.

He states that he was misled into registering as a refugee at Ifo Refugee Camp in Lagdera District which he did by using the names of Mohamed Ahmed Ibrahim in order to get food rations.

He further states that he has made a statutory declaration clarifying his status as a Kenyan Citizen; that the Chief of Damajalf Location has also written a letter confirming that the ex parte applicant is a resident of his location; that he has applied for an identity card and has received an acknowledgement for the same but could not obtain an identify card because his fingerprints showed that he was a refugee.

The ex parte applicant claims that the respondent's refusal to deregister him as a refugee and to issue him with the identity card are ultra vires their powers, erroneous in law, in bad faith, tantamount to abuse of power, irrational, biased, illegal, oppressive and are against his legitimate expectations.

The ex parte applicant has attached several documents in support of his claim, including a certificate of birth "AS1", copies parents' identity cards "AS2", copies of KCPE and KCSE certificates "AS3" and "AS4", copy of the acknowledgement of his application to be registered as a refugee "AS5", copy of the letter from the Chief "AS6", statutory declaration "AS7" and acknowledgement for his application for identity card "AS8".

The Respondents' Case

The 1st Respondent filed a Replying Affidavit in which they state that they are aware that the ex parte applicant applied for a National Identity Card vide Application for Registration Acknowledgement Serial Number 2322803987 dated 9th December 2011; that after verification of the fingerprints it was found that the ex parte applicant had registered as a refugee at Ifo Camp and had been issued with refugee identification card number 480726 in the name of Ibrahim Mohamed Ahmed on 19th August 2010; that persons are registered as refugees after a process of refugee status determination and the status can only be granted to foreign nationals who seek asylum in Kenya upon fulfilling conditions set out in the Refugees Act.

It is further deposed that the Department of National Registration Bureau has designed an administrative system and procedure for addressing the problem of citizens registering as refugees; that the process of determining the ex parte applicant's application for a National Identity Card has not been fully determined.

The Respondents are saying that they have not refused to issue the ex parte applicant with an identity card but that they are in the process of determining if the ex parte applicant is a Kenyan Citizen or not.

On 18th February 2014 when this matter was canvassed, the respondents were not in court nor were they represented. The court confirmed they had been served vide the affidavit of service dated 17th February 2014 which had a hearing notice showing hearing date as 18th February 2014. This court was satisfied that the hearing notice had been properly served.

Determination

Mandamus is defined by the **Black's law dictionary, Ninth Edition**, as follows:

"A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

The writ of mandamus lies to secure the performance of a public or statutory duty. Its origins can be found in England where it was made generally available through the King's Bench. At the time the Central Government had little administrative machinery of its own. The writ was widely used to enforce public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings etc.

In modern times mandamus is used to enforce statutory duties of public authorities. The court always retains discretion to withhold the remedy where it would not be in the interest of justice to grant it. **See Binny Ltd & Anr v. Sadasivan & Ors in the Supreme Court of India Civil Appeal No. 4839 of 2005.**

In the **Halsburys Laws of England 4th Edition Vol 1 at 111 Paragraphs 89 and 90** it is stated as follows:

“The order of mandamus is of a most 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 and 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 made 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 a 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.” See Kenya National Examination Council v. Republic Ex-parte Geoffrey Gathenji Njoroge & Others [1997] eKLR.

To grant a mandamus is a matter for the discretion of the court and from the above citation, it is clear to me that a party seeking mandamus must demonstrate existence of a legal right to the performance of a legal duty; that the legal duty must be of a public nature; that the party against whom a mandamus is sought must have failed, despite the demand, to perform the legal duty to the detriment of the party who has a legal right to expect the performance. In **S.I Syndicate v. Union of India AIR 1975 SC 460** the Supreme Court of India stated as follows:

“As a general rule the orders would not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that the demand was met with refusal.”

Mandamus will not issue where to do or not to do an act is left to the discretion of the authority. The duty must be imperative and should not be discretionary.

Mandamus will issue in cases where there is a legal right and there is no specific legal remedy for enforcing it. Mandamus may issue in cases where there is an alternative legal remedy but that mode of redress is less convenient, beneficial and effective.

In the matter before me, the ex parte applicant applied to be registered and be issued with a Kenya National Identity Card. He applied to be registered as a refugee using the names Ibrahim Mohamed Ahmed. He claims to be citizen of Kenya and stated that he was born Abdikadir Salat and his father is Salat Gedi and mother is Kaha Bare. To support that he attached copy of birth certificate No. 142659. He also attached copies of Kenyan Identity Cards Nos. 2104878 and 4885554 in the names of Salat Gedi Gullet and Kaha Bare Ogle as father and mother respectively. He also attached copies of KCPE certificate

in the name of Abdikadir Salat Gedi from Habaswein Primary School and Kenya Secondary Schools Leaving Certificate in the same name from County High School Garissa; copy of handwritten letter from the chief dated 20th July 2012 and copy of an application for refugee acknowledgement dated 15th June 2010. All these documents are aimed as proving that the ex parte applicant is a Kenyan citizen.

He claims that he was misled into registering as a refugee in order to get food rations available to refugees and this is the reason why he used a different name than his real name.

The Respondents have stated that upon receiving the application for registration and issuance of the Kenya National Identity Card and acknowledging the same the Respondents began the process of verification and found that the ex parte applicant had registered as a refugee at Ifo Refugee Camp. Based on the knowledge that persons registered as refugees are so registered after the process of refugee status determination is complete and the status of refugee is only granted to foreign nationals who seek asylum in Kenya and have fulfilled the conditions set out in the Refugees Act, the Respondents are in the process of determining the process involved in the application for registration and issuance with identity cards.

I wish to determine a singular issue, whether the ex parte applicant deserves the orders he is seeking?

All Kenyan citizens are entitled to the following by dint of **Article 12 (1) of the Constitution (the Constitution)**:

- a. **The rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and**
- b. **A Kenyan passport and any documents of registration or identification issued by the State to citizens.**

Under Article 12 (2) of the Constitution, 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.

To my understanding, 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”. The preamble to the Registration of Persons Act, Cap 107 (the Act) is:

“An Act of Parliament to make provision for the registration of persons for the issue of identity cards, and for purposes connected therewith.”

Section 2 of the above Act provides as follows:

“This Act shall apply to all persons who are citizens of Kenya and who have attained the age of eighteen years or over or where no proof of age exists, are of the apparent age of eighteen years or over.”

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. This is a statutory duty firmly anchored in the Constitution and the Act, which is an Act of Parliament.

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 himself as a Kenyan citizen, applied for issuance of an identity card and attached documents to show that he is a Kenyan citizen. When his finger prints were taken, the result was exhibit marked “JMK1” titled “Refugee Report”. The ex parte applicant according to this report is a refugee named Mohamed Ahmed Ibrahim born on 1st January 1985 in Dagabur Ethiopia. He is an Ethiopian as per the report and a UN-Mandate Refugee.

While there is a statutory duty in existence, it is applicable to Kenyan citizens. This court is not the right

forum to determine whether the ex parte applicant is a Kenyan citizen. The duty of this court is to determine if mandamus should issue commanding the Respondents to register the ex parte applicant and issue him with an identity card and to deregister him as a refugee.

It is now settled that a mandamus will not issue as a matter of course. As stated in **Kenya National Examination Council case, above**, where the Court of Appeal cited the Halsbury's Law of England with approval:

“.....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.”

In my view, the discretion to register and issue applicants with identity cards is left with the relevant authorities. They receive applications, screen applicants and ascertain that the set criteria for issuing identity cards are met. This court cannot tell them how to exercise that discretion.

Finally, I wish to state that going by the documents attached by the Respondent, it is not true that they have refused to register and issue identity card to the ex parte applicant. The process of determining his application for suitability is on-going and is not completed.

The ex parte applicant has not satisfied this court that he deserves the orders he is seeking. In my view he took the shortcut and it is a costly one. This court therefore declines to issue the orders for mandamus as sought. This court cannot compel or command the Respondent to issue the ex parte applicant with the identity card or to deregister him as a refugee because the ex parte applicant has failed to demonstrate that he deserves those orders. As a result the Chamber Summons dated 25th October 2012 is hereby dismissed. Let each party bear its own costs. I so order.

Dated, signed and delivered on 31st March 2014.

S.N.MUTUKU

JUDGE