



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)**

**JUDICIAL REVIEW 262 OF 2012**

**KHOBESH AGENCIES LIMITED & 32 OTHERS.....APPLICANT**

**AND**

**THE MINISTER OF FOREIGN AFFAIRS AND**

**INTERNATIONAL RELATIONS.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF THE**

**REPUBLIC OF KENYA.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF IMMIGRATION.....1<sup>ST</sup> INTERESTED PARTY**

**THE MINISTER OF LABOUR.....2<sup>ND</sup> INTERESTED PARTY**

**DISPORA WELFARE ASSOCIATION**

**OF KENYA (DWAK).....3<sup>RD</sup> INTERESTED PARTY**

**JUDGEMENT**

**INTRODUCTION**

1.By a Notice of Motion dated 4<sup>th</sup> July 2012 filed the same day, the *ex parte* applicants herein seek the following orders:

**1.An order of certiorari to remove into the High Court for the purpose of quashing the decision by the Minister of Foreign Affairs and International Relations, the 1<sup>st</sup> Respondent herein, contained in a Press Statement released on Friday the 22<sup>nd</sup> day of June, 2012 by the Minister for Foreign Affairs and Political and Diplomatic Secretary suspending recruitment and export of domestic workers to the Middle East;**

**2.An order of prohibition issued to the 1<sup>st</sup> respondent, the 1<sup>st</sup> interested party and the 2<sup>nd</sup> interested party or any of their employees, agents and/or servants from barring any employees recruited by the Applicants headed to the Middle East to work in the said region;**

**3.An order for costs;**

## APPLICANTS' CASE

2.The said Motion is supported by the Statutory Statement filed on 29<sup>th</sup> June 2012 and the verifying affidavit sworn by **Fidelis Onjari Masayi Abubakar**, the proprietor of **Alhadeeqah Agencies**, one of the applicants herein.

3.According to the deponent, the Applicants are registered Business Names and Companies within the Republic of Kenya, pursuant to the provisions of the **Companies Act**, Chapter 486 Laws of Kenya. According to him, the Applicants' main objectives are to contribute to the alleviation of poverty and unemployment in Kenya by securing for Kenyans local or foreign employment; to contribute to the prevention of irregular recruitment, trafficking and smuggling of persons through labour migration or any other malpractices that may occur in the course of recruitment, placement or employment of Kenyans; and to contribute to the development of national policy and law on local and foreign employment and are all accredited by Ministry of Labour, the 2<sup>nd</sup> Interested Party herein, as Employment Agents within the Republic of Kenya. As accredited agents, it is deposed, the Applicants are involved in, amongst others, the act of hiring employees for different interested persons within and out of the Country including the Middle East and that among the targeted job groups include drivers, gardeners, house maids, electricians, plumbers, mechanics, salesmen, refrigeration technicians, track drivers, fork lift drivers, salonists, accountants, cooks, waiters, managers, aeronautical engineers, teachers, plant engineers, security guards just to mention but a few. In the process of carrying out their duties, the Applicants do enter into numerous Contracts with other agencies, institutions and organizations out of the country with the sole intention of assisting Kenyans interested in securing Employment abroad but for gain and pursuant to the 2<sup>nd</sup> Interested Party's Procedures and Requirements for operating a private employment agency, the accreditation certificates are issued by the said 2<sup>nd</sup> Interested Party and the same is valid for one (1) year. However, in the year 2012, the Applicants started experiencing difficulties in having their accreditation certificates renewed by the Ministry of Labour for unknown reasons though the same have been renewed but for period not exceeding three (3) months with most of them expiring in the month of August, 2012. Despite the Applicants having on numerous occasions sought an explanation from the 2<sup>nd</sup> Interested Party on the said anomaly relating to the Accreditation Certificates no success is forthcoming.

4.It is deposed that on Friday the 22<sup>nd</sup> day of June, 2012, the 1<sup>st</sup> Respondent issued a press release to media houses through its Political and Diplomatic Secretary suspending recruitment and export of domestic workers to Middle East and as a result of the said suspension by the 1<sup>st</sup> Respondent, the Applicants operations have been crippled causing enormous loss and damage as the 1<sup>st</sup> Interested Party has now refused to allow any recruited employee by the Applicants to travel to the Middle East no matter what kind of job they are going to pursue. Further the 1<sup>st</sup> Respondent has failed, refused and or neglected to issue the Applicants with an official copy of the Press Release herein despite numerous requests and reminders to do so.

5.It is the deponent's view that the 1<sup>st</sup> Respondent's action is arbitrary in nature, without any regard to the law and did not follow the laid down legal procedure and that as a result of the 1<sup>st</sup> Respondent's action, the Applicants have suffered enormous loss and damage and continue to suffer, since the Applicants have entered into agreements with numerous Companies and Institutions in the Middle East to recruit and supply employees in various sectors and failure to do so, as has been the case since the notice was issued on Friday 22<sup>nd</sup>, will result into breach of the said Contracts resulting into multiple suits against them for general damages. Apart from that the recruitment agencies are the only sources of income for the Applicants and due to the said suspension, the said Applicants are likely to be rendered destitute. Further, the recruitment agencies have offices to which they pay rent not to mention other office expenses including employees' monthly salary and with the suspension in place, the Applicants will not be able to have any money to pay for the said services and are likely to be evicted and the employees may proceed to the Industrial Court for redress. According to the deponent, as at the time of the said suspension, most of the Applicants had already secured several employees to work for different institutions, companies and individuals and the said employees were to travel from Saturday, 23<sup>rd</sup> June all through to date. However, this has not been possible due to the said suspension as a result of which the Applicants have incurred lots

of damage on processing visas, payment of air tickets and medical expenses on behalf of the said employees. Any event, it is contended that the Applicants are all innocent parties to the allegations put forth by the 1<sup>st</sup> Respondent and not only are the losses so far suffered by the Applicants are well into millions and the same continue to accrue but the police have now started harassing the Applicants due to the said notice.

6. It is the applicants' position that there is no reason whatsoever as to why the 1<sup>st</sup> Respondent should suspend the said recruitments as the issue as to how the employees are treated while in the Middle East is purely a Government to Government issue which can be handled between the parties without any suspension as is the case herein which has only ended up hurting the Applicants and that there is no wrong that the Applicants have committed to warrant the suffering they are going through.

7. To them, the 1<sup>st</sup> Respondent's action is clearly not anchored in any law and the same is by all means unlawful, illegal and in clear breach of the Applicants Constitutional Rights and is not only unreasonable but also oppressive to the Applicants and is thereby void and a nullity *ab initio*. Further the said action is unjust, unfair and without any authority whatsoever legal or otherwise hence the orders sought herein.

### **RESPONDENTS' CASE**

8. The Respondents opposed the applicant through a replying affidavit sworn on 30<sup>th</sup> August, 2012 by **Thuita Mwangi**, the Permanent Secretary in charge of the Ministry of Foreign Affairs.

9. According to him, on the 22<sup>nd</sup> June 2012 Ministry of Foreign Affairs through the Political and Diplomatic Secretary issued a notice conveying certain actions including the temporary suspension of recruitment and export of domestic workers (housekeepers/maids) to Middle East Countries with immediate effect. The said, according to him, action by the Ministry was precipitated by recent happenings of reported mistreatment of domestic workers in the Middle East Countries that was of major concern to both the Kenyan Government and the public at large. According to him, the Government of Kenya has a responsibility to protect the welfare of its citizens resident both within and without its borders and the responsibility of the Government is even greater to the vulnerable members of its populace such as domestic workers being recruited to work out of the Country. It is deposed that whereas in the recent past many Kenyans have sought employment all over the world including but not limited to countries in the Middle East, the Kenyan Government has been receiving innumerable complaints concerning the mistreatment of Kenyan domestic workers in the Middle East, some of which border on modern day slavery and gross violation of human rights and that the same has been the subject of discussions in parliament thus underlying the public's interest in the matter. According to the information received by him from Kenya's Ambassador in Saudi Arabia 846 cases of distressed Kenyan domestic workers were reported to the Embassy in the year 2011 alone and that these Complaints of mistreatment are either reported by the relatives to the Ministry or by the workers themselves at our Embassy in Saudi Arabia while some of the Applicants herein have written to the Ministry seeking the ministry's intervention in cases where the very domestic workers whose employment they facilitated in the Middle East were in distress. It is contended by the deponent that some of the Kenyan domestic servants in Saudi Arabia have been brutally murdered, others driven to commit suicide by hanging and jumping from multi-storied buildings. Therefore, the problem at hand was so grave that it attracted the attention of the Cabinet which after deliberations resolved to refer the matter to the National Security Advisory Committee which Committee pursuant to the decision of the Cabinet resolved to set up a High level committee of Permanent Secretaries on Labour Migration to deal with the matter and find a lasting solution to protect the Kenya Migrant workers. In order to assist the Inter-Ministerial Committee to appreciate the gravity of the matter, the Ministry sent senior officials led by the Ambassador in charge of Middle East Directorate and the Director in Charge of Consular Affairs on a fact finding mission to Saudi Arabia in June, 2012 who established that almost 90% of domestic workers employed by ordinary Saudis and other foreign nationals recruited to work in the Republic of Saudi Arabia complained of mistreatment including starvation, sexual harassment, overworking, physical and verbal abuse and lack of sleep while some domestic workers complained of non-payment and under payment of salaries, unilateral change of the terms of their contracts, charge of agents fees and commissions, being locked up in employers homes

incommunicado, not being allowed to associate, inhibition of their freedom of movement, assault and rape yet the employers pay a sum of \$3,000 which is shared between the foreign Agent and the Kenyan Agent to facilitate travel of the domestic worker to the Middle East and the Employer would on arrival of the worker retain the workers passports to prevent the worker from escaping before recouping the amount used to get the domestic worker from Kenya. The Kenyan Agents, however, do not disclose to the domestic workers that money has been paid by the employer to bring the domestic worker to Middle East and there have been instances where the Kenya Embassy in Saudi Arabia and the Consulate in Beirut has been informed by the employers that the domestic worker would not be released until the money that the employer had paid to procure the worker is refunded. Further, the team established that there were agencies called 'maktab' which served as mediation centres for employers and workers when they disagree and in the event that a conflict is not resolved, a worker is sold to another willing employer to recover money paid when the worker was recruited, the 'maktabs' are like auctions where workers are sold, exchanged or traded until employers recover their money.

10. According to the deponent's information, many domestic workers run away from their employers to the Kenyan Embassy in Riyadh who have to facilitate their return home by taking them to deportation centres to secure the exit permit while based on information received from the Kenyan Ambassador in Saudi Arabia, according to Saudi law a domestic worker in a deportation centre is still dependent on a former employer to provide an air ticket, exit permit and their passport and where an employer refuses on account of a claim the same is referred to court which entails a lengthy process that is foreign to the worker and the Kenyan embassy's facilities are limited *vis a vis* the very high number of domestic workers who seek refuge in the Embassy on a daily basis.

11. Therefore in September 2011, the Ministry convened an Inter-Ministerial Committee to draft a labour agreement that would provide a legal framework for the protection of Kenyan domestic workers at whose conclusion, a draft labour agreement was drawn by the office of the Attorney General and forwarded to the Kenyan Embassy in Riyadh who in turn forwarded to the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia who failed to respond despite constant reminders on the same by the Kenyan Embassy. As the problems persisted and there was no agreement between the two States that could be relied on to protect our nationals engaged as domestic workers the Kenya Government requested the Saudi Arabia Embassy to suspend the issuance of visas to domestic workers from Kenya pending the signing of a labour agreement a request which the Saudi Arabia Embassy failed to heed while the problems afflicting domestic workers continued to escalate. Since the Saudi Arabia Government has not subscribed to International labour conventions this exposes Kenyan domestic workers in Saudi Arabia to abuse. As the Saudi Arabian Government failed to respond to our request to have a legal framework in place by way of a bilateral labour contract, the Government was left with no other choice but to temporarily halt further migration until a regulatory framework was in put place to protect the workers. In his view the Government has only temporarily suspended recruitment of domestic workers (housekeepers/maids) who are the most vulnerable but not entire recruitment of Kenyans to work abroad as stated by the applicants and therefore it is not true that the businesses of the Applicants have been crippled after the issuance of the said notice of temporary suspension as the Government has been issuing travel clearance letters for other workers. However, the decision was reasonable and for the benefit of a vulnerable group of Kenyans who deserve Government protection and in the public interest. The fact that some of the workers were held against their will and were being mistreated amount to trafficking in persons. Kenya being a state party to the United Nations convention against Transnational Organised crimes is under a duty to fulfil its international obligations and other Countries especially from South East Asia have suspended recruitment of migrant workers to Middle East countries hence the increase for demand in domestic workers from Kenya. Despite a concession by the applicants that there exists a problem with the domestic workers going to the Middle East, the deponent states that they appear determined to allow their economic interest/gain to override the rights of the workers to equal protection by the Government and hence the need for accreditation of the recruitment agencies by the Ministry of Labour and allow the agencies to continue recruiting all other cadre of workers other than domestic workers (housekeepers/maids) pending the vetting of all recruitment agencies afresh and signing of labour framework agreement with various countries in the Middle East to protect the welfare of Kenyan citizens. To him, there exist unscrupulous agents who have been recruiting domestic workers and taking them to the Middle East Countries and the Government action was meant to deal with this problem which

problem is not peculiar to Kenya alone since other countries have dealt with the problem by blacklisting such agents.

12. It is therefore the deponent's opinion that both administrative and judicial authority should be exercised for the benefit of the public and to that end the actions of the Respondents herein should be interpreted in that light. Some of the applicants, he deposes, are just business names and therefore not legal persons capable of instituting the present application and that the Ministry has received complaints from some of the agencies listed as applicants stating that they have not given their authority to be enjoined in these proceedings.

### **APPLICANTS' REJOINDER**

13. In their rejoinder to the replying affidavit, the applicants on 28<sup>th</sup> September 2012, filed a supplementary affidavit sworn by the said **Fidelis Onjari Masayi Abubakar** on 28<sup>th</sup> September 2012.

14. In the said supplementary affidavit, it is deposed that without identifying the Applicants which fall under the **"Unscrupulous and unregistered agents who promise non-existent and supposedly lucrative jobs to desperate and unsuspecting Kenyans"**, the Respondent's action will only affect innocent parties, the Applicants herein. While acknowledging that there is indeed a problem facing Kenyan employees in Saudi Arabia and Lebanon, it is the applicants' position that the approach being taken by the Respondents in solving the matter is the one that is illegal, improper and discriminatory in nature which this Honourable Court should not condone hence there is need for Kenya's Foreign affairs to engage its counterparts in the said counties since a blanket action in Middle East affects so many other countries including but not limited to Qatar, Kuwait, Dubai. The deponent, however states that there is no evidence provided of payment of the sum of US\$3,000/= as alleged or at all and that what is normally provided to the agents are monies to be used for the air ticket, processing of passport and other disbursements hence this Honourable Court should take the deponent's allegations with a pinch of salt as the same deponent did cause to be published at page 5 of the Sunday Nation of the 19<sup>th</sup> August, 2012 allegations to the effect that the agents are always paid Kshs.1,000,000/=. With respect to the word **'maktab'**, the deponent states that from his own knowledge, the word simply means the agency office on the other side and not an auction place as alleged. According to him, from the agreements between the agents in Kenya and the agents in Saudi Arabia, it was normally the cost of the agents in Kenya should the concerned domestic worker desire to come back to Kenya through sending a replacement and now that the Government has suspended the recruitment exercise, it has not been possible to have a replacement hence the backlog as shown in paragraph 23 of the Affidavit.

15. While admitting that the Saudi Arabian Government has not subscribed to International labour conventions, the applicants pose the question why the Respondents' action only affected domestic workers and not other categories of staff, an action which in their view, is discriminatory in nature. To them, the respondents' action clearly demonstrate the illegal, discriminatory and unacceptable manner of implementation adopted by the Respondents which is clearly contrary to the law and has resulted into infringement on the right of movement against many Kenyans. To them, it is improper for the Respondents to curtail the right of movement provided in the Constitution and that what the Respondents should have done was to issue travel advisory so that Kenyans are left to choose whether to travel or not but not to discriminate on who to travel and who not to travel.

16. It is therefore deposed that the decision by the Respondents is contrary to the Constitution and is thereby a ***nullity ab initio*** and it does not matter that similar measures have been taken by other countries especially from South East Asia. The applicants, however, deny that the Applicants are only interested in their own economic gain but that they are rather concerned of the illegal action by the Respondents which this Honourable court need to nullify.

17. The applicants' position is that while both administrative and judicial authority should be exercised for the benefit of the public, the same must be exercised in conformity with the law and not contrary to it and moreso the Constitution of the land. Further, the Respondent has equally failed to disclose to this Honourable Court that there are indeed very many situations of Kenyans working in the Middle East as

domestic workers earning a very good salary without any complaints. This should not be taken lightly considering the rate of unemployment and inflation in Kenya. On the issue of withdrawal from the action by some of the applicants, it is contended that this was occasioned by the Respondent's act of use of threats and police to intimidate the Applicants hence their change of heart but the same does not in any way affect Application herein.

### **EX PARTE APPLICANTS' SUBMISSIONS**

18. It is submitted on behalf of the applicants that the subject Press Statement was unreasonable, oppressive, contrary to law and hence void and a nullity ab initio. Secondly, the same is unconstitutional and in contravention of Chapter 4 thereof dealing with the Bill of Rights. While reiterating the contents of the supporting affidavits, it is submitted that pursuant to the provisions of Article 19 of the Constitution of Kenya, 2010 and more so at Article 19(2), one of the purposes of recognising and protecting human rights is to promote social justice and the realisation of the potential of all human beings while Article 19(3)(c) thereof provides that the rights and fundamental freedom in the Bill of Rights are subject only to the limitations contemplated in the Constitution hence no individual can purport to limit any provision in the Bill of Rights and any law that attempts to do so will no doubt be unconstitutional. It is submitted that Article 20(1) provides that the Bill of Rights applies to all and binds all state organs and all persons while Article 20(2) gives every person the right to enjoy the rights and fundamental freedoms in the Bill of Rights to the extent consistent with the nature of the right or fundamental freedom. Though expressed to be temporary, it is submitted that the same remains in force without any indication of its being lifted any time soon yet the same to the extent that it bars a category/group of Kenyans from travelling out of the country to the Middle East offends the provisions of Article 39(1) and (2) of the Constitution with respect to the right to freedom of movement and the right to leave Kenya. It is submitted that under Article 24(1) of the Constitution, it is clear that in so far as limitation of rights and fundamental freedoms is concerned, the same cannot be done except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors listed in the said Article. In the instant case, it is submitted that the action complained of limits the provisions of Article 39(1) and (2) and are not anchored in any law.

19. By directing the said action to domestic workers such as housekeepers/maids, it is submitted that the directive is discriminatory on the ground of sex and therefore contrary to the provisions of Article 27 of the Constitution.

20. Since the author of the statement is a public officer and Article 23(3)(f) of the Constitution provides one of the means of seeking relief as an Order of Judicial review, under Article 22(2)(b) and (c) the Court proceedings may be instituted by a person acting as a member of, or in the interest of a group or class of persons or a person acting in public interest, the application is properly before the court and the applicants have the locus to institute these proceedings.

21. It is the applicants' position that whereas the Government of Kenya's intervention was inevitable, such intervention must be within law and that the rights and fundamental freedoms of Kenyans as set out in the Bill of Rights cannot be curtailed, save by the law as set out in Article 24 of the Constitution. It is therefore the applicants' view that the application ought to be allowed.

### **RESPONDENTS' SUBMISSIONS**

22. On behalf of the Respondent, it is submitted that the High Court's jurisdiction in judicial review is circumscribed by the provisions of the **Law Reform Act** which confers to the court the jurisdiction to issue any of the three judicial review orders and the grounds for issuing the same include *ultra vires*, observation of rules of natural justice, review of discretion on grounds of reasonableness/rationality or otherwise. It is submitted that it is therefore incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach of any of the above criteria in order to succeed.

23. It is further submitted that under Order 53 rule 4(1) of the **Civil Procedure Rules**, the law is very clear that a party is bound by its pleadings and that a party cannot at the hearing purport to rely on the

grounds not contained in its statement. It is submitted that the applicant's submissions are a departure from the grounds in the statement of facts since the submissions are in respect of a Constitutional petition.

24. While admitting that the Government issued the impugned order, it is submitted that based on the facts disclosed in the replying affidavit, with every right there is a commensurate responsibility on the government, and where the rights are couched in absolute terms as those under Article 25 of the Constitution the responsibility on the Respondent is even greater. Rights to freedom of torture, cruel, inhuman and degrading treatment, freedom from slavery or servitude justify the swift action by the respondents and that if the respondents had not acted in the manner they did they would be in breach of the said provisions of the Constitution since nothing justifies violation of the rights under Article 25 not even the guise of commercial or economic advancement or freedom of movement and the responsibility of the respondent is amplified where the specific group of people is a vulnerable group in society.

25. The respondents further submit that judicial review application is a public law claim in which public interest is an overriding factor hence the actions of the Respondents were undertaken in the public interest and the relief sought should not be issued.

### **DETERMINATIONS**

26. The purpose of judicial review was explained in **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996** where it was held:

**“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”**

27. In this case, the first issue which I intend to deal with is the competency of the instant application. Order 53 rule 4(1) of the Civil Procedure Rules provides:

***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

28. Therefore a party is not entitled to rely on any ground or seek any relief apart from the one indicated in the statement. The rationale for this is that in granting leave to apply for judicial review, the Court looks at the material before it and where a party having obtained leave based on a particular set of facts ought not to change his case midstream by abandoning the grounds upon which leave was granted and in effect change the nature of his case by relying on totally different state of affairs. Again where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive Motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted.

29. In the present case, the applicants did expressly set out in the Statutory Statement herein the grounds upon which they intended to apply for judicial review. In that statement the applicants' complaint was that the action taken by the Respondents had subjected them to enormous loss of income yet they were innocent parties who had committed no wrong and that the Respondent's action was not anchored in any law and that the same was unlawful, illegal and in breach of the applicants' Constitutional rights. In the submissions, however, the applicants seem to have based their cause of action on the ground that the Respondents' action had the effect of denying those who wished to leave the country to seek "greener pastures" the opportunity of doing so. It is not difficult to understand the applicants' change of tact after they were confronted with the allegation that they were more concerned with their own economic and

financial fortunes rather than the welfare of those seeking livelihood outside the country. It is therefore clear that the plank of the applicants' submissions were not expressly disclosed in the Statutory Statement and those grounds cannot be relied upon by the applicants' in the Motion the subject of this decision.

30. The Applicants have, however, contended that since under Article 23(3) of the Constitution, the Court is empowered to grant orders of judicial review where an application is brought for the enforcement of the Bill of Rights. I agree with the decision in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex parte Nzioka [2006] 1 EA 321** that:

**“Judicial review is about fair treatment and for it to remain relevant now and in the future it must reach out to enhance democracy and public morality – it has a glorious role and future and in this role it has a partner in the Constitution and as partners the two must keep almost the same pace.”**

31. However, whereas, the Court is bound in determining an application for judicial review to ensure that the Constitutional provisions are adhered to, this does not entitle the Court to change the nature of the judicial review application into a Constitutional petition. To do that would defeat the express provisions of Order Sections 8 and 9 of the ***Law Reform Act***, Cap 26 Laws of Kenya. It must always be remembered that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. Any other remedy such as a declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determine the case on the merits before making such a declaration. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Accordingly, it would be improper to turn judicial review proceedings into civil proceedings or even a Constitutional petition where by virtue of Article 23(3) of the Constitution, the Court has jurisdiction to award inter alia a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review. Under the said Article the operative phrase is “a court may grant appropriate relief, including” as opposed to section 8 of the Law Reform Act which employs the phrase “The High Court shall not”. I therefore find that it was incorrect for the applicants to equate the Court's judicial review jurisdiction with the Court's jurisdiction under Article 23(3) of the Constitution. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

32. As already indicated above, the High Court being inherently the Constitutional Court, in the exercise of its judicial review jurisdiction must take into account the Constitutional provisions without necessarily distorting the nature of the judicial review proceedings. Where, therefore, in the course of the proceedings, it comes out clearly that a right or fundamental freedom is threatened or has been contravened the Court would be abrogating its Constitutional mandate if it decided to shut its eyes from glaring disregard of the provisions of the Constitution. Here, it is conceded by all the parties to these proceedings that the Government has the obligation to take the necessary steps to protect the rights and interests of its citizens both inside and outside the country. This, in my view, is the principles of executive authority provided under Article 129 of the Constitution to the effect that Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. The well-being of the people of Kenya is not just limited to their well being when within the Country but also their well being when outside the country as long as they are within the law. Therefore where, due to hostile attitude, directed towards the people of Kenya, their well being cannot be assured, the Government is perfectly entitled to take necessary steps towards ensuring that the people of Kenya are not unnecessarily exposed to such hostilities. Such steps, however, where their effect is to limit a right or fundamental freedom in the Bill of Rights, must comply with the provisions of Article 24 of the Constitution in that the limitation must be by law and only to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose



of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. When the framers of the Constitution committed the people of Kenya to building a democratic society, they did not mean democracy according to the standard of Kenya with all that it entails but they meant democracy as universally known. See **Obbo and Another vs. Attorney General [2004] 1 EA 265 (SCU)**.

33. That the executive is under a duty to ensure the welfare of its citizens is to be found in Article 21(1) which provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. For the Government to knowingly permit its citizens to leave the country either voluntarily or forcefully to face cruel, inhuman and degrading treatment abroad would be an abdication on the part of the Government of its obligation under Article 21(1) of the Constitution. In **Kaunda and Others vs. President of the Republic of South Africa [2004] ZACC 5** the Constitutional Court of South Africa held:

**“The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which Government is required to exercise its powers. To this extent the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.”**

34. In **Minister of Home Affairs and Others vs. Emmanuel Tsebe and Others [2012] ZACC 16**, the same Court was of the view, which view I certainly share, that if the State hands over a person to another state in which his rights as a person enshrined in our Constitution are certain to be violated, we shall have failed to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman and degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone.

35. Accordingly I find that there was nothing wrong about the steps the Government of Kenya took in protecting its citizens from the risk of cruel, inhuman and degrading treatment in the Republic of Saudi Arabia until such a time as the Republic of Saudi Arabia shall have put into place mechanisms which ensure that the citizens of this Country do not face such treatment in that country.

36. The Court, however recognizes that the step taken by the Government is a limitation on freedom of movement and residence in particular the right of every person to leave Kenya which right cannot be fully realized if a person can only leave Kenya for a particular destination and not others.

## **ORDER**

37. Accordingly whereas I decline to grant the orders sought in the Notice of Motion dated 4<sup>th</sup> July 2012, in order for the Constitutional requirement that the limitation must take into account the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose is attained, I direct the Respondents to urgently take measures to engage the Government of the Republic of Saudi Arabia with a view to ensuring that the latter puts into place appropriate mechanisms for the protection of Kenyans who are working for gain in that country. The Respondents to report to this Court what steps they have taken in that direction within sixty days.

38. There will be no order as to costs

**Dated at Nairobi this day 29<sup>th</sup> day of April 2013**

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of

Mr Wasonga for the applicants,

Miss Kenyani for the Respondents and

Miss Wanjiru for the Interested Parties: