



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 265 Of 2013

DELROY LEE REIDPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION..... 2ND RESPONDENT

THE DIRECTOR OF IMMIGRATION..... 3RD RESPONDENT

JUDGMENT

Introduction

1. This petition seeks to compel the respondents to extend the petitioner's visa to remain in Kenya to enable him pursue a civil claim against his former Advocate.
2. In his petition dated 21st May 2013 and supported by an affidavit which he swore on the same date, the petitioner seeks the following orders:
 - a. *This Honourable Court do declare that the 1st and 2nd Respondent's actions and omission of failing to present the Petitioner to Court Justice violated the Petitioner's fundamental rights under Articles 40,47, 48, 49, 50 & 51 of the Constitution to right to protection of law, fair administrative action, access to justice, right to be brought before court and fair hearing.*
 - b. *This Honourable Court does declare that the Petitioner is entitled to habeas corpus under Article 25 and 51 of the constitution.*
 - c. *This Honourable Court do declare that the 1st and 2nd Respondent's actions and omission of failing to accord the Petitioner facilities to seek and renew his visa is discriminatory treatment and violates under Article 27 of the constitution.*
 - d. *This Honourable Court do declare that 1st and 2nd Respondent's actions and omissions sofa failing to accord the Petitioner dignified treatment and arresting and detaining him without due process violates under Articles 28,40,47 49, 50 and 51 of the constitution.*
 - e. *The Honourable court do order that the 3rd Respondent to allow the Petitioner to make an*

application for Visa.

- f. *The Honourable court do order that the 1st and 2nd Respondents to forthwith release the Petitioner*
- g. *The Honourable Court do order that the 1st and 2nd Respondents to be restrained and barred from detaining and/or deporting the Petitioner.*
- h. *Damages be awarded consequent the above declarations*
- i. *The Respondents be condemned to pay costs of this Petition*

The Petitioner's Case

3. The crux of the petitioner's case is that the respondents have failed or refused to extend his visa or issue a new one to enable him stay in Kenya and pursue, among others, a disciplinary cause before the Advocates Disciplinary Committee against his former advocate. He alleges that after his release from prison following a conviction for assault causing grievous harm, he has been detained in various police stations and denied an opportunity to apply for an extension of his visa. At the time of hearing his petition, several of his prayers were moot as orders had been issued for his release. On 23rd July 2013, I also made an order, on an oral application made by his Counsel, for his passport to be released to him to enable him travel to Britain to seek medical treatment and to attend his sister's funeral.
4. The petitioner avers in his affidavit sworn in support of the petition that he is a British Citizen and holder of a British passport. He entered Kenya on the basis of a single entry visa on 30th May 2009. On 10th June 2009, he was arrested, and on 12th June 2009, he was charged with assault causing grievous harm in **Kibera Chief Magistrate's Court Criminal Case No 2451 of 2009 Republic –vs- Delroy Lee Reid & Judy Lubulwa**. He was convicted and sentenced to two years' imprisonment. He states that at the time of his conviction, his visa was still valid and no order was made for his deportation or repatriation upon completion of the sentence.
5. The petitioner contends that he was entitled to an extension of his visa or issuance with a new one as he was validly in the country at the time of his conviction. He states that he made a request for such extension or re-issue, through the Prison authorities, to the Principal Immigration Officer on 8th May 2013 prior to completion of his sentence.
6. The petitioner submits that he is entitled to extension or re-issue of the visa as he intends to pursue various court matters in which he is a party against his former Advocate, one Tom Nyangoto Okemwa, in Advocates Disciplinary Committee Miscellaneous Cause No 81 of 2011 in which he alleges professional misconduct and failure to act despite payment of fees amounting to Ksh350,000.00; a criminal complaint against the said Advocate in respect of the said funds which he made at Central Police Station in Nairobi; and **High Court Miscellaneous Civil Application No 383 of 2011 Tom N. Okemwa –vs- Delroy Reid Lee**
7. The petitioner accuses the 2nd and 3rd respondents of detaining him in various police stations following his release with a view to frustrating his attempt to secure an extension of his visa and pursue his claims against the said Advocate; and that they intend to deport him despite the fact that there is no court order for his deportation. He alleges that the acts of the respondent are degrading, dehumanizing and in breach of his rights under the Constitution; and are discriminatory and violate Articles 27 and 39 of the Constitution as the respondents have failed to accord him an opportunity to apply for an extension of his visa.
8. In his oral submissions on behalf of the petitioner, Mr. Arum relied on the petition and the affidavit sworn in support whose contents I have summarised above. He submitted that the

- petitioner was arrested and charged with assault causing grievous harm and jailed for two years; that he served his sentence and his term expired on 18th May 2013. When he applied for an extension of his visa, he was issued with a notice to report with an air ticket within 7 days.
9. Mr. Arum submitted that the petitioner has several matters which are pending before the High Court and a disciplinary matter against the said Advocate which he needs to pursue. He is apprehensive that once he is deported, he will be denied the right to a fair trial, which is guaranteed under Article 25(c), in those matters, as well as access to justice under Article 48.
 10. According to the petitioner, the respondents' opposition to the petition is based on section 33(1) of the Citizenship and Immigration Act. Mr. Arum contended that this section does not deny the petitioner the right to remain in Kenya. On the basis of the complaints pending against his Advocate, and owing to the distance between the United Kingdom and Kenya, he will be denied the right to a hearing as there are colossal amounts of money involved, and the court should not assist citizens to get away with the petitioner's funds.
 11. Mr. Arum submitted also that the respondent had denied the petitioner a visa yet there was no order for repatriation; that section 33 (1) of the Citizenship and Immigration Act talks of a sentence of 3 years yet the petitioner had been imprisoned for only 2 years; he does not pose a threat to national security and is not a prohibited immigrant. He therefore asked the court to allow the petition and grant the orders sought.

The Respondents' Case

12. In presenting the 1st and 3rd respondents' case, Mr. Awino relied on the replying affidavit sworn on 4th June 2013 by Mr. **Alfred Omangi Abuya**, a Senior Immigration Officer in the investigations and Prosecutions section of the Department of Immigration within the Ministry of State for Immigration and Registration of Persons, as well as the written submissions dated 18th June 2013.
13. In the said affidavit, Mr. Abuya states that his section is also involved with the removal of aliens who are unlawfully present in Kenya. He confirms that the petitioner did indeed enter Kenya on 30th May 2009 and that he was arrested by police purely for committing an offence under the Penal Code and his arrest did not involve the Ministry of Immigration; that he made a request through the prison authorities for extension of his visa which request is required to go through security vetting by security agencies; that transit, stay in and exit from Kenya is regulated by the Kenya Citizenship and Immigration Act and the Regulations thereunder; that a person is allowed into the country on fulfilling the laid down immigration conditions, chief among which is national interest and security.
14. Mr. Abuya states that it is the Immigration Ministry which is bestowed with the sovereign function of monitoring and permitting or denying entry into and out of Kenya, and a discretion is given to the Department of Immigration to carry out the immigration function within the statutory framework; that the basis on which the petitioner is seeking extension of his visa is not sufficient as it is that he wishes to pursue a court process. In the respondents' view, this right cannot be lost as he can still pursue the legal process from his country of origin.
15. In his submissions, Mr. Awino made three main points first, he contended that the petitioner had failed to adduce evidence before the court to support his allegation of violation of his rights under Articles 28, 29, 40, 47 and 50 of the Constitution. He relied in this regard on the decision of the court in **Lt. Col Peter Ngari Kagume and Others -vs- Attorney General Constitutional Application No. 128 of 2006** and submitted that the petitioner should have tendered tangible evidence to support his allegations.
16. Mr. Awino's second argument was based on the rights of citizens vis a vis those of non- citizens

under the Constitution. According to Mr. Awino, Article 39(1) provides that everyone has the right to freedom of movement. However, Article 39(3) provides that only citizens have a right to remain in Kenya. Further, section 13(1) of the Kenya Citizenship Act provides for grant of citizenship which is at the discretion of immigration officials.

17. Finally, the position of the respondents is that the petitioner is a prohibited and inadmissible person under the provisions of the Citizenship and Immigration Act. Mr. Awino contended that the petitioner was charged with the offence of assault causing grievous harm contrary to section 251 of the Penal Code, which carries a penalty of 5 years. He referred the court to section 33(1)(a) of the Citizenship and Immigration Act which defines a prohibited immigrant. According to Mr. Awino, the offence that the petitioner was charged with committing carries a penalty of 5 years, and consequently, the petitioner is deemed to be a prohibited immigrant who does not merit to be in Kenya. He urged the court to dismiss the petition with costs to the respondents.

The 2nd Respondent's Case

18. Mr. Njogu, Counsel for the 2nd respondent, relied on the grounds of opposition dated 3rd June 2013 and associated himself with the submissions made by Mr. Awino for the 1st and 3rd respondents. He submitted that when the petitioner was charged in Criminal Case No 2451 of 2009, the 2nd respondent's constitutional mandate was spent; that none of the prayers sought in the petition are directed at the 2nd respondent as he is not responsible for matters of deportation; that as the petitioner has not regularized his stay, he cannot seek such orders.

19. Mr. Njoso submitted further that no violation of rights has been pleaded against the 2nd respondent; that the petition does not meet the constitutional threshold as no violation are pleaded with precision, and he asked that the petition be dismissed with costs to the 2nd respondent.

Determination

20. The petition before me, though not so worded, is essentially a request to the court to review the decision of the 3rd respondent not to extend the petitioner's visa or issue him with a new one. In effect, the petition calls for a consideration of the process through which the decision of the 3rd respondent was arrived at. As is the law with regard to judicial review of administrative action, the court is called upon to examine the process and determine whether there was, in the said process, a violation of the petitioner's rights. It is not the duty of the court to inquire into the merits of the decision made by the 3rd respondent, for that would be for the court to substitute its discretion for that of the respondent, unless the decision was manifestly unreasonable.

21. In the case of **Susan Mungai –vs- The Council of Legal Education & Others High Court Petition No. 152 of 2011**, I observed as follows:

'If I may paraphrase the finding of the Court in Republic –v-The Council of Legal Education ex parte James Njuguna and 14 Others (supra), a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223.

22. In the present case, the petitioner challenges the decision of the 3rd respondent to declare him a prohibited and inadmissible person, and to deny him an extension of his visa or issue a new visa.

The evidence that he has placed before the court includes the charge sheet and part of the proceedings before the trial court, a letter from the Officer in Charge, Kamiti Maximum Security Prison, and an affidavit sworn by his Advocate in the criminal case, Tony Nyangito Okemwa.

23. The first letter, from the Chief Magistrate's Court, is addressed to the Principal Deputy Registrar of the High Court and is in the following terms:

CHIEF MAGISTRATE'S COURT

KIBERA

P. O. BOX 21039 -00505

NAIROBI

7TH OCTOBER 2011

The Principal Deputy Registrar,

High Court of Kenya

P. O. Box 30041,

NAIROBI

TO WHOM IT MAY CONCERN IN

RE: IN THE MAGISTRATE'S COURT AT KIBERA

KIBERA CRIMINAL CASE NO 2451 OF 2009

REPUBLIC – VERSUS – DELROY LEE REID

This is to certify that the person named here above is an accused person in a part heard Kibera Criminal Case. No CR. 2451/2009. Assault C/Section 251 C.P.C. I also do confirm that his passport is held in court custody as security

Any assistance accorded to him is appreciated in anticipation.

J. K. WAINAINA

EXECUTIVE OFFICER

KIBERA LAW COURTS – NAIROBI

24. It is not clear what the intention of the petitioner in producing the said letter is, especially given that it is not addressed to any of the respondents and is written prior to his conviction. I can only surmise that it was intended to show that the petitioner's passport was in the court's custody.

25. The second letter relied on by the petitioner is dated 8th May 2013 and is addressed to the 3rd respondent. It states as follows:

Officer in-Charge

Kamiti Medium Security Prison

P. O. Box 65501-00607

Nairobi, Kenya

The Principal Immigration Officer,

P. O. Box 30191,

Nairobi.

RE: VISA OF A BRITISH NATIONAL DELROY LEE REID

The person named above was convicted on the 18th Jan 2012 at the chief magistrate court at Nairobi vide CM'S NBI CRC .NO. 2451/2009 for the offence of causing grievous harm c/sec 243 p.c. and was sentenced to serve 2 years imprisonment which expires on 18th May. There was no order for repatriation herein.

Kindly assist him to process his visa to enable him travel upon discharge from prison.

Olivia L.A Obell (SSP)

OFFICER IN CHARGE

KAMITI MEDIUM SECURITY PRISON

26. There is nothing in the said letter that indicates that the grounds the petitioner relies on in this petition that his right to justice will be violated if he is deported and is unable to pursue his claim against his former Advocate, were ever placed before the 3rd respondent. That being the case, the petitioner is now presenting evidence that was never before the Immigration Department, and asking the court to judge the 3rd respondent's decision on the basis of this new evidence.

27. The mandate and discretion to deal with matters of immigration are vested in the 3rd respondent, to be exercised in accordance with the law as set out in the Constitution and the Citizenship and Immigration Act, 2011. What the 3rd respondent had before it was a request, without more, by a person serving a prison sentence for assault causing grievous harm contrary to section 251 of the Penal Code. Was its decision not to extend his visa so unreasonable in the circumstances? In my view, it was not.

28. Section 33(1) of the Act provides as follows:

33.(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;

29. The petitioner has alleged violation of his rights under Article 27, 28, 48 and 50 of the Constitution on the basis that he was convicted and sentenced to imprisonment for a term of two years. In declaring the petitioner a prohibited and inadmissible person, the 3rd respondent exercised powers conferred under the provisions of section 33 of the Citizenship and Immigration Act. Nothing has been placed before me that indicates that the exercise of the mandate given by statute was so unreasonable as to merit interference by the court. The rights guaranteed under

Article 39 are clear-the right of entry and to remain in Kenya by a non-citizen are subject to the provisions of the law. For the 3rd respondent to deal with the petitioner on the basis of that law cannot, in my view, amount to discrimination and therefore a violation of Article 27.

30.The petitioner alleges that his right to access to justice will be compromised if he is unable to pursue his complaint against his former Advocate, in Advocates Disciplinary Committee Miscellaneous Cause No 81 of 2011. He alleges that his complaint is with respect to a sum of Kshs Ksh350,000.00 paid to the Advocate for which he claims no professional services were rendered. However, aside from the fact that it was not a matter that was placed before the 3rd respondent at the time the decision to deny the petitioner an extension of his visa was made, I am not persuaded that it is sufficient reason to interfere with the decision, or that it amounts to a denial of his right under Article 48. The petitioner has already filed his complaint with the Advocates Disciplinary Committee. Rule 18 of the **Advocates (Disciplinary Committee) Rules** empowers the Committee to make decisions in matters before it on the basis of affidavit evidence.

31.With regard to the 2nd respondent, as correctly argued by Mr. Njogu, the DPP's role is limited to the prosecution of the petitioner. He has no role in determining whether or not the petitioner's visa is extended, or whether he is issued with another. The petitioner clearly has no claim against the 2nd respondent.

32.Given the above matters, I can find no reason to interfere with the exercise of discretion by the 3rd respondent. The petitioner has not been able to demonstrate that any of his rights under the provisions of the Constitution that he relied on have been violated or threatened with violation. This petition therefore fails, and it is hereby dismissed with costs to the respondents.

Dated, Delivered and Signed at Nairobi this 30th day of August 2013

MUMBI NGUGI

JUDGE

Mr. Arum instructed by the firm of Otieno Arum & Co. Advocate for the Petitioner.

Mr. Awino, Litigation Counsel, instructed by the State Law Office for the 1st and 3rd Respondents.

Mr. Njogu, Prosecution Counsel, instructed by the Director of Public Prosecutions.