



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO.38 OF 2012

KHATIJA RAMTULA NUR MOHAMED1ST
PETITIONER

ZAHID ABBAS MOHAMMED AKRAM2ND PETITIONER

VERSUS

THE MINISTER FOR CITIZENSHIP AND IMMIGRATION1ST
RESPONDENT

THE DIRECTOR FOR IMMIGRATION2ND
RESPONDENT

ASSISTANT DIRECTOR OF IMMIGRATION COAST..... 3RD
RESPONDENT

J U D G M E N T

SOME BACKGROUND AND THE PETITION

1. The Kenya Citizenship and Immigration Act, 2011 (No.12 of 2011) (hereinafter “the Act”)is not an old statute having commenced on 30th August 2011. This Petition invites the Court to consider the Constitutionality of some of the Provisions of that Act. That there would be questions about the Constitutionality of the Act so soon after its enactment should not be surprising as Immigration Regulations, the world over, attract a fair share controversy.
2. The Petitioners **KHATIJA RAMTULA NUR MOHAMED (KHATIJA)** and **ZAHID ABBAD MOHAMMED AKRAM(ZAHID)** who are husband and wife. They seek the following declarations and orders-
 - a. **A Declaration that the citizenship and Immigration Act No.12 of 2011(of the Laws of Kenya) is unconstitutional to the extend (sic) that it discriminates upon the Petitioners herein from getting automatic residency status by virtue of their marriage contrary to Article 27 of the Constitution.**
 - b. **A Declaration that the rights of a citizen like the 1st Petitioner herein envisaged by Section 22 of the Kenya Citizenship and Immigration Act which provides that:-**

“22(i) Every citizen is entitled to the rights, privileges and benefits and is subject to the limitations provided for or permitted by the Constitution or any other written law

including:-

- a. *The right to enter, exit, remain in and reside anywhere in Kenya.*
- b. *Entitled to any document of registration or identification issued by the state to citizens.”*

Includes:-

- a. *The right of foreign spouses married to Kenyan citizens to enter, exit, remain in and reside anywhere in Kenya in accordance with Article 39(3) of the Constitution.*
- b. *That a denial of the said rights of ingress, egress and abode at will in Kenya is protected by Article 27 and 45 among others of the constitution of Kenya.*
- c. **A Declaration that Section 22(g) of Kenya Citizenship and Immigration Act which for the entitlement to any document of registration or identification issued by the state to citizens including (i) Certificate of registration – a passport (ii) A National Identification card extends automatically to a foreign spouse domiciled in Kenya within 3 years from the date of marriage.**
- d. **A Declaration that a denial of the 2nd Petitioner by the Respondents of a permanent resident Permit based on the limitation period of 3 years of the Act is contrary to Article 45(2) (3) and amounts to an unfair administrative action contrary to Article 47(1) (2) of the Constitution and hence discriminatory contrary to Article 27 of the Constitution.**
- e. **An Order for injunction restraining the Respondents from doing such actions purportedly that may negate the Petitioners Constitutional rights as husband and wife resulting in the unconstitutional separation and severance of their marital status through means of Deportation, Arrest or Prosecution for purportedly being illegally present in the Republic of Kenya.**
- f. **A Mandatory injunction compelling the state through the Respondents to regularize the 2nd Petitioners presence in Kenya by issuance of such permits, passes or visas or such Authority or any such document so as to secure the Petitioners’ choice of domicile as spouses in the Republic of Kenya.**

THE EVIDENCE

3. The story told by **KHATIJA** and **ZAHID** is that they celebrated a marriage under Islamic Law on 25th September 2011 which took place at Mombasa. **KHATIJA** is a Kenyan citizen by birth while **HAHID** is a Pakistan National.
4. **ZAHID** first came to Kenya in 2009 as an investor. He states that, together with **Arshad Iqbal Wahla** and **Ghulam Mustafa**, they founded a company known as Mombasa Khushi Motors Company Ltd. **Zahid** was on 22nd October 2009 issued with an Alien Certificate No.388817. The Certificate was to expire on 24th September 2011.
5. **Zahid** had been issued with a class H Entry Permit for a period of two years with effect from 24th September 2009. That Permit had been issued pursuant to the Immigration Act (Chapter 172) (now repealed) It was by virtue of this Permit that he was issued with the Alien Certificate.
6. **Zahid** says that business differences emerged between his co-shareholders and himself. So by a letter dated 23rd February 2012, the Company wrote to the 2nd Respondent informing him that **Zahid** had ceased being a Director of the Company with effect from 9th February 2013. The letter was also a request by the Company that the Director of Immigration Services cancels **Zahid**’s “visa”. The Company may have meant the Entry Permit. The Respondents have refused to grant further permission to **Zahid** to remain in Kenya.

The Petitioners case

7. **Zahid** told Court that he is a victim of an elaborate scheme to deport him from Kenya. That there is a conspiracy between his co-shareholders and officials of the Respondents to carry out this scheme. **Zahid** contends that the intended deportation is unlawful because:-

- i. He has a family in Kenya and is married to a Kenyan citizen.
 - ii. His marriage to Khatija denotes that he cannot be discriminated against.
 - iii. That the marital union is protected by Articles 27 and 45 of The Constitution 2010.
8. For Khatija it was argued that the intended deportation from Kenya contravened Articles 27(3) and 27(4) of The Constitution which provide:-

“(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, region, conscience, belief, culture, dress, language or birth.”

9. It was also argued that the intended deportation affronted the Petitioners Right to Human Dignity and their Right to have that dignity respected and protected as assured by Article 28 of The Constitution.
10. There were then arguments made around Article 45 of The Constitution, and in particular clauses (1), (2), and 3 thereof. These provide,

“45.(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

11. The contention of the Petitioners was that **“by placing a fetter of 3 year period before gaining residence status for a foreign spouse married to a Kenyan citizen the Law out rightly sanctions discrimination.”** It was argued that that would be unconstitutional as the Constitution does not create any distinction between marriages.
12. It was submitted that the intended deportation of the 2nd Respondent would infringe on the Petitioners Right to Consortium. That Consortium is a legal consequences of a marriage as provided for in Article 45(3) of The Constitution. The State was lambasted for attempting to negate on the legal consequences of a marriage.
13. To reinforce its case the Petitioners cited the convention on **“The Elimination of All Forms of Discrimination against Women.”** It was said that Kenya as a State party **“affirmed the principle of inadmissibility of Discrimination and proclaimed that all Human Beings are borne free and equal in Dignity and Rights.”** Articles 9, 15(4) and 16 of that Convention were emphasized. These provide:-

“Article 9. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, tender her stateless or force upon her the nationality of the husband.”

“Article 15(4) States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”

“Article 16 – 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.

- a. **The same right to enter into marriage.**
- b. **The same right freely to choose a spouse and to enter into marriage only with their free and full consent.**
- c. **The same rights and responsibilities during marriage and at its dissolution;**
- d. **The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;**
- e. **The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;**
- f. **The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;**
- g. **The same personal rights as husband and wife, including the right to choose a family name, profession and an occupation;**
- h. **The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.**

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The Response

- 14) The Respondents filed a written submissions on 30th October 2012 and addressed the issues in 3 themes.
15. It was the Respondents view that the rationale for the law requiring a three year marriage before a foreign spouse can be eligible to Permanent Residence Status is to prevent abuse by people who could use marriage to obtain Permanent Residency in Kenya. Secondly, and that issues of National Security should be considered.
16. It was submitted by the Respondents that the Petitioners could not benefit from the Doctrine of Legitimate Expectation because it would fly in the face of clear Statutory Provisions if it was argued that the Petitioners marriage would automatically entitle the 2nd Petitioner to Permanent Residency. It was the view of the Respondents that the 1st Petitioner (Khatija) knew or ought to have known that her marriage to Zahid would not guarantee him automatic Residence Status. That consequently there could not have been any discrimination against her.
17. The Court was cautioned against usurping the powers granted to the Respondents to receive process, grant or reject applications for visas or permits. The Respondents pointed out that Zahid had not applied for renewal of the work permit upon expiry and that the Petitioners could not use these proceedings to have Zahid remain in Kenya.

The Courts determination

- 18) As I turn to determine the question raised by this Petition, it is imperative to first consider the current Immigration Status of Zahid. This is because emerging from both the evidence and the arguments, a doubt was cast as to whether Zahid's presence in Kenya was lawful. That, as will be presently apparent, affects the outcome of these proceedings.
19. When Zahid first came to Kenya in 2009 he applied and obtained an entry permit issued pursuant to the provisions of Section 5 of the Immigration Act (Cap 172) (now repealed). The permit was of a class “H” Entry Permit. The classes of entry permits were specified in the schedule to the Act. A class “H” permit is issued to a person who intends to engage, whether alone or in partnership, in a specific trade, business or profession in Kenya and who,

- a. **“has obtained or is assured of obtaining, any licence, registration or other authority or permission that may be necessary for the purpose; and**
- b. **Has in his own right and at his full and free disposition sufficient capital and other resources for the purpose,**

And whose engagement in that trade, business or profession will be to benefit of Kenya.”

20.As stated by Zahid, he intended to engage in business and he co-founded Mombasa Khushi Motors Company Limited with one Arshad Iqbal Wahla and Ghulam Mustafa. The permit which was issued to him was specifically for purposes of engaging in that business. The purpose of the Permit was,

“As Business with M/s Mombasa Khushi Motors Co. Ltd.”

21.The Permit was for a period of two (2) years from the date of issue, which was 24th September 2009. And as required by Order 3 of The Aliens Restriction Order, Zahid had to be registered as an Alien. Zahid was issued with Alien Certificate serial No.388817. That certificate was to expire on 24th September 2011. This was be the same date when his Entry Permit was due to expire.

22.The Immigration Act was repealed on 30th August 2011 vide Section 65 of The Act. Nevertheless, Section 61 of The Act saved the validity of Permits issued under the Repealed Statute. Section 61 reads,

“Any residents certificate, certificate of exemption, entry permit or pass granted or issued under the repealed Acts shall have effect accordingly to the terms as if it had been issued under this Act, and the provisions of this Act shall apply accordingly.”

Because of these provisions, Zahid’s Permit would continue to be valid and effective after the date of commencement of The Act as though it had been issued under its Provisions. As noted earlier, the date of commencement was 30th August 2011.

23.The Entry Permit that was issued to Zahid was to expire on 24 September 2011. That is why his Alien Certificate had an expiry date of 24 September 2011. This would be in consonance with the Provisions Order 6(3) of The Aliens Restriction Order under which Zahid’s Alien Certificate was issued. Order 6(3) reads,

“(3) Where a certificate of registration is issued or renewed and the holder thereof is the subject of an entry permit or pass which will expire within two years of that issue or renewal, the certificate shall expire on the same date as the entry permit or pass expires.” (my emphasis)

24.On the face of it Zahid’s presence in Kenya may have been unlawful on 25th September 2011 when he contracted the marriage with Khatija. There is, however, this statement by Mr. James Nyatigoh, the Senior Assistant Director of Citizenship and Immigration in his Affidavit in response to the Petition.

“THAT the second Petitioner herein duly took up the employment at the said Khushi Motors Co Ltd until the expiry of his permit in November 2011 whereupon he resigned from his employment.” (emphasis added)

He then proceeds to state,

“THAT two months to the expiry of his permit, the second Petitioner contracted an Islamic marriage with the first Petitioner herein.”

This would be an admission by the Respondents that Zahid's presence was lawful when he contracted the marriage. This seems to contradict the Permit of 24th September 2009 and Alien Certificate No.8388817, and although this Court was unable to find any documentary evidence that supported Mr Nyatigho's proposition, it shall for purposes of this matter leave it at that and proceed on the assumption that Zahid was lawfully in Kenya when he married Khatija.

25. That said this Court must consider the legal implication of the following statement made by Zahid in paragraph 5 of his Affidavit in support of the Petition:

“5.(a) THAT the Immigration Officers have declined to extend my Visa. So my resident status in the country is not regular. My Visa has now expired. Fresh efforts by my Company have been initiated to have me arrested and charged in Court. This is for being illegally present in the Country”.

This is an express concession that at the time of presenting this Petition, Zahid's presence in Kenya was unlawful. That must turn out to be a serious self-indictment. Zahid had blamed his woes on what he said were machinations of his former business partners. Zahid contended that owing to collusion between them and the Immigration Department, the Immigration Department had declined to extend his Visa (or did he mean Permit?). It needs to be noted however that Zahid neither said nor demonstrated that he has challenged the refusal of the Immigration Department to extend his Visa. The Act in Section 57(1) provides an avenue for redress to any person aggrieved by a decision of a Public Officer made under the Act. Section 57(1) reads;

“57.(1) Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.”

Zahid has not told this Court that he has sought review of the Immigration Officers decision not to extend his Visa (Permit?). And this Petition is certainly not a challenge of that decision. This Petition is on another frontier. It is about the prospects of his acquisition of Permanent Residence and not of an Entry Permit. In so far as Zahid is unlawfully in Kenya, this Court must ask itself whether it should entertain the plea by the Petitioners for orders that would endorse and protect Zahid's illegitimate presence.

26. The Right to access Court for enforcement of a Fundamental Right is itself a Right under Article 22 of the Constitution and it should not be stifled, blocked or fettered except where the Petition affronts a fundamental principle of Law [See the discussion on this aspect of the law in the High Court decision of Misc Civil Application No 1052 of 2004, **BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD (BOOTH IRRIGATION (No.1))**]

27. And it is a fundamental principle of Law that a Court should not allow itself to be made the instrument of enforcing obligations or rights that have arisen out of an illegal transaction or an illegality if the person seeking the aid or intervention of the Court is himself guilty of or implicated in the illegality (**Scott -vs- Brown [1952] 2 QB 724**). The presence of Zahid in Kenya is without the sanction of the Law and this is expressly admitted by him. If this Court were to grant him the prayers he seeks then that illegal status would be changed into a Legal Status. The Court can only reach that decision by overlooking the illegality of his position. This Court is reluctant to do so as it will be abridging a fundamental principle of Law and of public policy. Since the Petitions of Zahid and Khatija have a umbilical connection, the failure of Zahid's plea necessarily means the end of the road for Khatija's Petition and therefore of the entire Petition.

28. Even having reached that decision I would remiss if I failed to make my views known on some of the pertinent issues that this Petition raised.

29. The status of Permanent Residence is a new category of status in our Immigration regime introduced by the 2011 statute. In providing for the status of Permanent Residence in the Act, the Legislature was saluting to Article 18 of the Constitution 2010 which required it to enact legislation providing for that status. And the Act provided for Permanent Residence in Section 37 as follows;

“37. The following persons, their children and spouses shall be eligible upon

application in the prescribed manner for grant of permanent residence status in Kenya-

- a. **Persons who were citizens by birth but have since renounced or otherwise lost their citizenship status and are precluded by the laws of the countries of their acquired domicile from holding dual citizenship;**
- b. **Persons who have held work permits for at least seven years and have been continuously resident in Kenya for the three years immediately preceding the making of the application;**
- c. **Children of citizens who are born outside Kenya and have acquired citizenship of the domicile; and**
- d. **The spouses of Kenyan citizen married for at least three years.**” (I emphasize this)

30. Of concern in this Petition is Section 37(b) which is acquisition of the status by marriage. Parliament in its wisdom prescribed that a spouse of a Kenyan Citizen shall be eligible for application if that spouse has been married for at least three years. The status is not acquired automatically upon marriage. In requiring the lapse of a specific period, Parliament may have been borrowing from the provisions of Article 15(1) on Citizenship acquired by marriage. Article 15(1) makes this provision,

“15.(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.”

31. A question that arises is how we should deal with a spouse of a Kenyan Citizen whose marriage has not attained the minimum period and is therefore not eligible for application as a Permanent Residence. The Act itself is silent on this and so is the Kenya Citizenship and Immigration Regulations 2012 which were published on 15.6.2012.
32. Regulation 19 provides for procedure for application for Permanent Residence. Regulation 19(3) seems to suggest that a person seeking Permanent Residence can apply while in present in Kenya. I demonstrate this by reproducing the provisions of that Regulation.

“(3) A permanent residence certificate issued in respect of a person who is not present in Kenya, at the time of application, shall cease to be valid if such person fails to enter Kenya within one year from the date of issue.” (my emphasis)

34) That said neither the Act nor the Regulations provide for an Interim Residency. Section 41 of the Act which is on work or Residence Permits, does not specify the category of Permits that can be issued. Instead the classes of Permits are provided in the 6th schedule to the Regulations and there is only one class of a Residence Permit, which is class “K”. A class “K” Permit holder is a person,

“A person who-

- a. **Is not less than thirty-five years of age; and**
- b. **Has in his own right and at his full and free disposition an assured annual income of not less than the prescribed amount that is derived from sources other than any such employment, occupation, trade, business or profession as is referred to in the description of any of the classes specified in this Schedule, and being an income that either-**
 - i. **Is derived from sources outside, and will be remitted to Kenya; or**
 - ii. **Is derived from pension or annuity payable from, sources in Kenya; and**
- c. **Undertakes not to accept employment, paid or unpaid, or engage in any income generating activity of any kind without a permit of the relevant class; and**
- d. **Whose presence in Kenya will be of benefit to Kenya”**

Quite clearly, this is not an appropriate category for a spouse of a Kenyan Citizen who seeks Interim Residency pending the maturity of the three year period.

35. It is my understanding of one of the arguments by the Petitioner that placing a fetter of 3 years before gaining Residency status abridges the couples right to family in that the Act does not provide how the spouse is to be treated in the period before the lapse of 3 years. The non-Kenyan Spouse may be required to stay out of the Country in the preceding period and this could force the couple to live separately.

36. The Constitution of Kenya 2010 recognizes the family as the natural and fundamental unit of society and makes provision to protect and safe-guard this important institution. Article 45(1) of the Constitution reads;

“The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy recognition and protection of the State.”

37. This Court agrees with Mr. Opolu for the Petitioner that consortium is an integral part of family life. Consortium is defined as follows in Blacks Law Dictionary 9th Edition;

“The benefits that one person, esp, a spouse, is entitled to receive from another, including companionship, co-operation, affection, aid, financial support, and (between spouses) sexual relations.”

The Constitutional Court of South Africa in case CCT.35/99 RAHMID DAWOOD & OTHERS VRS THE MINISTER OF HOME AFFAIRS & 2 OTHERS said this of consortium;

“33 In terms of common law, marriage creates a physical, moral and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations re for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage. An obligation of support flows from marriage under African customary law as well. In terms of Muslim personal law, the husband bears an enforceable duty of support of the wife during the subsistence of the marriage.”

38. And this Court also agrees with the following holding in that decision.

“It is not only Legislation that prohibits the right to form a marriage relationship that will Constitute an infringement of the right to dignity. But any Legislation had significantly impairs the ability of spouses to honour their obligation to one another would also limit that right. A Central aspect of Marriage is cohabitation, the right (and duty) to live together and legislation that significantly impairs the ability of spouses to honour that obligation would also Constitute a Limitation of the right to dignity.”

It is the view of this Court that in the Kenya situation where the Right to Family is a fundamental right, legislation that hinders consortium limits the Right to Family. But whether this limitation is unconstitutional must be read in the context of Article 24(1) of the Constitution.

39. Article 24(1) of the Constitution provides:

“24.(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then 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, including-

- a. **The nature of the right or fundamental freedom;**
- b. **The importance of the purpose of the limitation;**
- c. **The nature and extent of the limitation**

- d. **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**
- e. **The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”**

The Court subscribes to the view that a Nation must be left to determine its own policies on immigration. Immigration by its very nature has implications on the job market in country. It also means a further load or strain to a country's limited resources. It may have an impact on the culture of its people. These are a few of the implications that come to mind.(But that is not to say that Immigration only comes with negative effect!). For this reason, the condition to admit into Permanent Residence a person who has been married to a citizen for a minimum of 3 years, seems to this Court, a reasonable and justifiable limitation to the Right to Family and Right to Dignity. That limitation is not unconstitutional.

40) That said, it needs to be remembered that it is the duty of every State organ including the Legislature to promote and fulfill the Rights and Fundamental Freedoms in the Bill of Right (Section 21 of The Constitution 2010). It is suggested that for the Act to be seen to be promoting the Bill of Rights, it should make clear provision which can enable a non- Kenyan spouse waiting for the lapse of the mandatory three year period to access Interim Residence. Such legislation would resonate with the need to promote consortium. Needless to say the right to such Interim Residence (and even to Permanent Residence) cannot be automatically acquired. An application should be considered on merit by the Immigration officials. Legislation can provide the criteria. But even in the absence of that criteria the Provisions of Section 33 on prohibited Immigration and inadmissible persons would be a useful guide in considering whether an application is merited.

41) My observations in the latter part of this decision notwithstanding, the Application is for dismissal for the reasons I stated earlier. It is hereby dismissed. No order on costs.

40.It is however suggested that for that statute to be seen to be promoting the Bill of Rights it should make clear and clear provision which can enable a none Kenyan spouse waiting for the lapse of the three year period to obtain Interim Residence. Such legislation would resonate with the need to promote consortium. Needless to say the right to such Interim Residence or Permanent Residence would not be automatically granted and will have to be considered on their merit by the Immigration officials. The provisions of Section 33 on prohibited immigrants and inadmissible persons would be an invaluable guide in considering whether an application is merited.

F. TUIYOTT

J U D G E

DATED AND DELIVERED THIS 2ND DAY OF SEPTEMBER 2013

IN THE PRESENCE OF:

J U D G E