REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NUMBER. 324 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR ORDERS OF MANDAMUS

REPUBLIC

VERSUS

CABINET SECRETARY FOR MINISTRY OF

INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT..... FIRST RESPONDENT

DIRECTOR, DEPARTMENT OF IMMIGRATION

SERVICES.....SECOND RESPODENT

THE ATTORNEY GENERAL .....THIRD RESPONDENT

EX-PARTE

PATRICIA OLGA HOWSON.....APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 18th September, 2013, the *ex parte* applicant herein, **Patricia Olga Howson,** seeks the following orders:

1. **A declaration that the Applicant, Patricia Olga Howson is a Kenyan citizen.**
2. **AN ORDER OF MANDAMUS to issue directed jointly and severally to the Cabinet Secretary for Ministry of Interior and Co-ordination of National Government, the Director of Department of Immigration Services, to issue all relevant and necessary Documents for the registration of the applicant as a Kenyan Citizen within thirty (30) days from the order**

issued by this Honourable Court in the name of the Applicant in respect of her formal and official application (Immigration File Number R. No.3494) made on 13th March, 2013 under Forms 7, 9 and K of the Kenya Citizenship and Immigration Act 2011.

3. **Costs of and incidental to this application be paid by the Respondents.**
4. **Such further and other reliefs that the Honourable Court may deem just and expedient to grant.**

EX PARTE APPLICANT'S CASE

1. The same application is based on a Statement filed on 18th September 2013 and the verifying affidavit sworn by the applicant on 11th September, 2013.
2. According to the deponent, she is a British National born in Kenya at Eldoret on 22nd March, 1946 and is married **Kenneth William Howson**, a citizen of the Republic of Kenya, on 1st October 1966.
3. According to the applicant, she is entitled by Law of Kenya citizenship because her marriage was solemnized in Kenya; she has not been declared a prohibited immigrant under any law of Kenya; she has never been convicted of any offence as the Certificate of Good Conduct attests; her marriage was not entered into for the purpose of acquiring Kenyan citizenship; and the marriage is still subsists as at today.
4. According to her, it is her Constitutional right and entitlement to be registered as a citizen of Kenya upon application as the spouse of a Kenyan Citizen which application was formally submitted to the Ministry of State for Immigration on the 22nd April, 2013 and was duly acknowledged. However, despite several correspondences addressed to the second Respondent by her advocates, no response or communication has been received from the Second Respondent apart from two acknowledgement slips and the Respondents have refused and neglected to issue the Kenya Citizenship Certificate to her.
5. She further avers that despite her Advocates making numerous enquiries at the relevant counter at the Immigration Department as to the progress of the Application for citizenship, no satisfaction has been achieved and despite being in possession of her documents, the Second Respondent has acted to the detriment of her right to administrative action that is expeditious, efficient, reasonable and procedurally fair. To her, omissions and commissions of the Respondents amount to improper, arbitrary and inefficient exercise of administrative power and discretion contrary to the law and the delay in approving her said Application is inordinate and unreasonable given the fact that there is a fully functional Government and a Ministry of Interior and Coordination of National Government, with a duly appointed Cabinet Secretary which delay in registering her as a Kenya Citizen has operated and continues to operate to the detriment of my lawful rights under the Constitution.

RESPONDENTS' CASE

6. In opposing the application the respondent filed an affidavit sworn by **Alfred Abuya Omangi,** a Chief Immigration Officer at the Department of Immigration Services.
7. According to the deponent, the process of granting citizenship is a sovereign function granted and guided by the provisions of the Constitution and other relevant laws, with the discretion to grant or to reject an application for citizenship left to the executive and that on receipt of applications for citizenship, their department first forwards them to t he National Intelligence Service for the purposes of security vetting and for preparation of confidential security reports as required by law. To him, their office has no control whatsoever of this process which also does not have a specific time frame within which to be conducted and the length of time for which it takes depends on each individual case. After preparation of confidential security reports, the National Intelligence Office forwards them to the Citizenship Advisory Committee which makes recommendations to the Cabinet Secretary to either grant or reject applications for citizenship and in some instances, the Citizenship Advisory Committee even conducts interviews for some categories of applicants to determine their suitability for citizenship.
8. It is the deponent's position that the applicant is among many other applicants who are still

undergoing security vetting by the National Intelligence Service to determine their suitability and that the department does not direct or control the National Intelligence Service and therefore they are not in control of the mandatory security vetting process which is compulsory for each applicant applying for citizenship. To him, the law does not stipulate a specific time frame within which and applicant should be granted citizenship and therefore the applicant's allegation that there has been an inordinate and unreasonable delay in baseless and erroneous.

9. It is further deposed that numerous other applications for citizenship have been submitted to their office which applications are dealt with on a first come first serve basis hence it is clear that this application is premature at this point in time since the application for citizenship is still in the process of being determined.
10. According to legal advice received from legal advisers, the deponent avers that judicial review is a discretionary remedy which can be denied where there exists grounds for its refusal hence in the circumstances the proceedings herein should be dismissed for being premature.

APPLICANT'S SUBMISSIONS

11. On behalf of the applicant, it was submitted based on Article 15(1) of the Constitution that since the applicant has ben married to a Kenyan citizen since 1966 she has fulfilled the constitutional requirement to apply for citizenship by marriage, upon marriage for a period of more than seven years. It is further submitted that the applicant has fulfilled the provisions of section 11 of the ***Kenya Citizenship and Immigration Act*** No 12 of 2011. It is submitted that the Respondents being public officers have a duty to serve the members of he public and this includes performing their duties within a reasonable amount of time or without undue delay. Citing **Sir Michael Supperstone et al** in ***Judicial Review*** 4th Edn. At page 574, **In the Matter of an Application by Salt Manufacturers for Orders of Mandamus [2013] eKLR** and **Haji Yusufu Mutenda and Others vs. Haji Zakaliya Mugnyiasoka and Others [1957] EA 391**, it was submitted that an order of mandamus is issued to compel performance of a public duty or a duty imposed by a statute where there has been a failure to perform the said duty to the detriment of an aggrieved party.
12. As the first Respondent has failed to perform his duty as provided under the law, he has breached the statutory duty which he owes to the Applicant herein. It is further submitted hat the Respondents have breached the applicant's legitimate expectation to fair administrative action as provided for under Article 47 of the Constitution, to be issued with Kenyan Citizenship certificate within a fair and reasonable timeline after compliance by the applicant of the legal requirements for the issuance of Kenyan citizenship. In this case, it is submitted there has been a delay of eight months hence the Respondents' action amount to improper, arbitrary and inefficient exercise of administrative power and discretion contrary to the law and reliance was placed on **Republic vs. The Director of Public Prosecutions & 7 Others [2013] eKLR**.
13. It is therefore submitted that the Court ought to declare the applicant a Kenyan citizen, issue an order of mandamus compelling the Respondents to issue all relevant and necessary documents for the registration of the applicant as a Kenyan citizen within seven (7) days from the date of the Order being issued by the Court in the name of the applicant.

RESPONDENTS' SUBMISSIONS

14. On behalf of the respondents it was submitted while reiterating the contents of the replying affidavit that it is not in doubt that the applicant has fulfilled the requirements and presented her application to the offices of the 2nd Respondent. It is however submitted that under section 5(1)g(ii) of the ***National Intelligence Service Act*** No. 28 of 2012, it is mandatory that a confidentiality report be issued for each applicant seeking to be registered as a citizen of Kenya by the National Intelligence Service. It is therefore submitted that the applicant is yet to meet all the requirements for the grant of citizenship since a confidential report has not yet been submitted on her behalf by the National Intelligence Service and the Respondents have no control over the length of time that the mandatory security vetting process takes.
15. It is further submitted that there is no specific time frame for issuance of a certificate of citizenship hence the issue of inordinate delay does not arise since based on **Sheikh vs. Gupta &**

Others [1969] EA 140, inordinate delay depends on its own facts and circumstances.

16. With respect to the prayer for a declaration, it is submitted that declarations do not fall under the purview of judicial review and in support of this submission the Respondents relied on **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] eKLR**.
17. On the prayer that the Respondents be ordered to issue the relevant and necessary documents it is submitted that apart from the prematurity of the application the Respondents have not refused to perform their statutory duty which is a requirement before mandamus can issue and the case of **Wamwere vs. Attorney General [2004] 1 KLR 166** was cited in support. Apart from that it is submitted that the prayer is ambiguous since the applicant has not specified which documents she needs. To the Respondents mandamus is a discretionary remedy which does not compel an administrative body to arrive at a decision preferred by the ex parte applicant as sought in this case. It is therefore submitted that the application ought to be dismissed with costs.

DETERMINATIONS

18. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.
19. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

> **"The order of *mandamus* is of a most extensive 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 or 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 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 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… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done".**

20. Article 47 of the same Constitution which provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

21.The foregoing provision deals with "every person" other than every citizen. Accordingly the applicant though not a citizen of Kenya is entitled to the protection of his rights enshrined in Article 47 of the Constitution. This position was confirmed by Nyamu, J (as he then was) in Republic vs. Minister For Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 in which he expressed himself as follows:

> **"Although the applicant as a foreigner may not have the same standing as the Kenyan Citizens in respect of some of the rights in the Constitution, section 74(1) is available to protect the applicant because it applies to all persons and it echoes human rights which are recognised by all modern and democratic societies and Kenya is one of such states. Further, the provisions of section 74(1) of the Constitution of Kenya are echoed in article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Kenyan provision applies to all persons and not only to citizens. Therefore the applicant has a right as a foreigner not to be subjected to torture, inhuman or degrading treatment or punishment both under the Constitution and also under the said ICCPR. The right cut across board, and it is inherent in mankind. However, the applicant must demonstrate that section 74(1) has been infringed in relation to him and onus of doing so is purely on him. Although his right under the said section is guaranteed, evidence must be availed to the Court to determine if there is any infringement."**

22.To drive the point home I wish to refer to **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375** in which it was held:

> **"The right to protection of law under section 70 of the Constitution has been accorded to every person. The Constitution gives equal protection in relation to enjoyment of fundamental rights and freedoms and it is only where a right or freedom has permissible limitations when the court is called upon to consider competing values and interests such as necessity of limitation, reasonableness, whether reasonably justifiable in a democratic society, proportionality (whether the means justify the end)…..Except where there are limitations clearly set out in the Constitution or any written law made pursuant to the Constitution a court of law cannot impose a limitation to the enjoyment of the right at all. Even when there is a specific limitation to the enjoyment of a right or freedom such a limitation is designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. Thus, the limitations are aimed at ensuring that the rights and freedoms are equally enjoyed and the enjoyment achieves common good and also exercised responsibly so as to achieve the equilibrium and an orderly society……..The fundamental rights and freedoms have over the years acquired an international dimension which can nolonger be ignored by the municipal courts and courts should therefore recognise that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should also be guided by the underlying purpose of the right and freedom……..One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of limitation. Since what is at stake is the limitation of fundamental rights, that must mean the legislative objective of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society……..The rights of each person are limited by the rights of other, by the security of all, and by the just demands of the general welfare in a democratic society."**

23.It follows and I so hold that the applicant herein is entitled to the rights enshrined in Article 47 of the Constitution.

24.From the documents exhibited by the applicant it is clear that the application for citizenship was

made on 13th March 2013. The present application was filed on the 13th September 2013, six months later. *Prima facie* a delay of six months in processing an application for citizenship, in my view amounts to inordinate delay. It must always be remembered that the delay in processing such an application deprives the applicant from the enjoyment of certain rights conferred upon citizens hence there ought not to be an undue delay in processing such applications. To state that since there is no time frame for considering the application no amount of delay can be termed as inordinate in my view is irrational.

25. Article 15(1) of the Constitution provides as follows:

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.

26. It is not disputed that the applicant has fulfilled the requirement under the aforesaid Article. It follows that the applicant is therefore eligible to apply to be registered as a citizen of Kenya. However under Article 18 of the Constitution, Parliament is empowered to enact legislation providing for procedures by which a person may become a citizen. One such legislation is no doubt the ***Kenya Citizenship and Immigration Act*** No 12 of 2011. Under section 11 thereof it is provided as follows:

A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if—

(a) ***the marriage was solemnized under a system of law recognized in Kenya, whether solemnized in Kenya or outside Kenya;***

(b) ***the applicant has not been declared a prohibited immigrant under this Act or any other law;***

(c) ***the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;***

(d) ***the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and***

(e) ***the marriage was subsisting at the time of the application***

27. It is clear that once a person shows that she/he has been married to a citizen of Kenya for a period of at least seven years, he/she is entitled, on application, in the prescribed manner to be registered as a citizen. The law does not state that such a person shall on application be registered as a citizen since under the said section there are circumstances under which such a person may not be registered as a citizen. Therefore the registration of a person as a citizen by virtue of being married to a Kenyan citizen is not absolute but is subject to the conditions stipulated under section 11 of the said Act. In the instant case it is not contended that there exist any bar under the said section which prohibit the applicant from being registered as a Kenyan citizen. To the contrary the Respondent concedes that the applicant has met the requirements under the said Act.

28. However the Respondent contends that there is a further requirement under the ***National Intelligence Service Act*** No. 28 of 2012. Section 5(1)(g)(ii) of the said Act under which the service is responsible for security intelligence and counter intelligence to enhance national security in accordance with the Constitution and shall undertake to provide a confidential security report for persons seeking to be registered as a citizen of Kenya.

29. Under section 5(1) it is true the security intelligence is empowered to provide a confidential security report for persons seeking to be registered as citizens of Kenya. It is however a power coupled with a duty; a duty which must be performed when valid grounds justifying the exercise of the power are put forward. The question is whether the Respondents can bypass the requirement for the confidential security report in issuing a certificate of citizenship to a person. Section 5(2) of the said Act provides:

The provisions of subsection (1) shall not be construed as—

(a) ***depriving any person or authority any power, duty or function conferred upon that person or authority under the Constitution or any other written law; or***

(b) ***limiting the performance of an intelligence related function by a State organ, department or agency.***

30. It is therefore clear that the mere fact that the Intelligence Service is in the process of undertaking to provide a confidential security report for an applicant for Kenyan citizenship, does not bar the Respondents from carrying out their statutory or Constitutional obligations especially where the said report is not forthcoming.
31. For the security intelligence to sit on such a report for an unnecessarily and unjustified long period of time would fall foul of Article 47 of the Constitution and would in my view amount to an abuse of power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**,while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC:**

"A power which is abused should be treated as a power which has not been lawfully exercised….. Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

32. The Respondents have contended that the applicant is among many other applicants who are still undergoing security vetting by the National Intelligence Service to determine their suitability. They have however not stated for how long this security vetting has been going on. What is known however is that the applicant has been waiting for her application for eight months while the National Security Intelligence continue to babysit the same. That state of affairs cannot be tolerated as it clearly goes contrary to Article 47 of the Constitution. Whereas there is specific timeline within which the application for citizenship ought to be considered Article 259(8) of the Constitution provides that if a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. Eight months delay in considering an application for citizenship without informing the applicant at what stage such application has reached is clearly unreasonable. I wish to reiterate the sentiments made by **Warsame, J** in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** that the security arms of this country have not tried to understand and appreciate the provision of the new Bill of Rights and that the yester years impunity are still thriving in our executive arm of the government.
33. Since no reason has been advanced by the Respondents why the applicant's application cannot be allowed it is my view that the Notice of Motion dated 18th September, 2013 is merited.
34. Accordingly, an order of mandamus is hereby issued directed jointly and severally to the Cabinet Secretary for Ministry of Interior and Co-ordination of National Government, the Director of Department of Immigration Services, to issue all relevant and necessary Documents for the registration of the applicant as a Kenyan Citizen within thirty (30) days from the order issued by this Honourable Court, excluding the vacation days, in the name of the Applicant in respect of her formal and official application (Immigration File Number R. No.3494) made on 13th March, 2013 under Forms 7, 9 and K of the ***Kenya Citizenship and Immigration Act 2011*.**
35. I however agree with the Respondents that the only remedies available in judicial review proceedings under sections 8 and 9 of the ***Law Reform Act*** are certiorari, prohibition and mandamus and hence declaratory orders cannot be issued in purely judicial review proceedings.
36. The applicant will have the costs of this application.

Dated at Nairobi this 20th day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ongicho for the applicant