REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 35 of 2012

REPUBLIC .....APPLICANT

VERSUS

THE PRINCIPAL IMMIGRATION OFFICER MINISTRY OF IMMIGRATION &

REGISTRATION OF PERSONS.....RESPONDENT

EX-PARTE

DEVARAJ MALARMESAI BAGAVAN…....…….……1ST APPLICANT

SINTEL SECURITY PRINT SOLUTIONS LTD……...……..2ND APPLICANT

JUDGMENT

Pursuant to leave granted on 26th January, 2012 the ex-parte applicants (Devaraj Malarmesai Bagavan and Sintel Security Print Solutions Ltd) filed a notice of motion dated 3rd February, 2012 in which they seek orders as follows:-

1. The prerogative order of certiorari do issue to remove into this Honourable Court the decision of the Principal Immigration Officer to cancel and/or revoke the Entry Permit No. 887101 issued to the First Applicant on the 4th April 2011 and the relevant entries made in the First Applicant's passport in respect thereof.

2. The prerogative order of prohibition directed at the Principal Immigration Office to henceforth and/or hereafter prohibit the Principal Immigration Officer and/or any other immigration officer from cancelling or otherwise interfering with Entry Permit No. 887101 dated the 4th April 2011 and the entries made in respect thereof in the First Applicant's passport until the expiry thereof.

3. The First Applicant be granted an order prohibiting the Principal Immigration Officer and/or any immigration officer from deporting or otherwise removing the First Applicant from Kenya until the determination of the notice of motion.

4. Such further or other orders as this Honourable Court deems appropriate.

5. Costs of and incidental to this application.

The application is supported by grounds on its face as follows:-

1. That the actions of the Principal Immigration Officer and Director of Immigration Services are ultra vires.

2. That there has been no lawful compliance with the rules of natural justice.

3. That the action of the Principal Immigration Officer and Director of Immigration Services are arbitrary, oppressive, unreasonable and an abuse of office in all the circumstances.

4. That the action of the respondent is an abuse of the authority vested in him, if any, cannot be justified in all the circumstances of this case.

5. That the action of the Principal Immigration Officer in unilaterally cancelling the First Applicant's entry permit is illegal, null and void in all circumstances.

6. That the said J. I. Nangavo has no lawful authority to sign on behalf of the Principal Immigration Officer.

7. That the cancellation is against the rules of natural justice, fair and just treatment.

8. That the cancelling is ill motivated and an abuse of the process.

9. That the Principal Immigration Officer has acted for extraneous, ulterior and improper purposes and the said cancellation and seizure of the First Applicant's passport is mala fides.

10. That the decision of the Principal Immigration Officer to call in and review the application for an entry permit was undertaken out of malice and/or motivated by or directed to the securing of private vengeance and/or satisfaction of personal vindictiveness.

11. That this is a fit and proper case for the exercise of the court's inherent powers in the public interest.

The application is also supported by an affidavit sworn by the 1st applicant on 3rd February, 2012, the application for leave dated 25th January, 2012, an affidavit sworn by the 1st applicant in support of the said application for leave, a statutory statement, a replying affidavit by the 1st applicant filed on 19th July, 2012, a further affidavit sworn by Bipinchandra Himatalal Vora on 19th July, 2012 and all the annexures to the said affidavits.

The respondent (the Principal Immigration Officer, Ministry of Immigration and Registration of Persons) opposed the application by way of a replying sworn by James O Omondi on 19th April, 2012.

According to the papers filed in court by the applicants, the 1st applicant first came to Kenya in 1996 when he was granted a work permit to work for a company known as Paper Converters Ltd. He worked for the said company up to the year 2002. From December, 2003 to June, 2007 he worked for Ellams Products Ltd (Ellams). It is the 1st applicant's case that sometimes in April 2007 he had a disagreement with the General Manager of Ellams and he intimated to him that he no longer wished to work for the company since he had gotten a better offer from another company. He also informed him that there was no need to renew his work permit which was to expire in December, 2007. A few weeks thereafter he was requested by one Mr. Nayan Patel to surrender his passport for purposes of preparation for a trip to Nigeria. Later he was summoned to the office of the General Manager a Mr. Reddy who told him that Mr. Nayan Patel no longer wanted him to work for the company. He was then arrested and given his passport and an air ticket and taken to a cell at Jomo Kenyatta International Airport from where he was put on a plane to Mumbai, India.

Sometimes in October, 2010 he was approached by the management of the 2nd applicant and requested to work as a production manager. He initially rejected the offer on the basis of his unpleasant experience

with Ellams. A week later he received a call from Mr. Bipin Vora the chairman of the 2nd applicant who asked him why he had rejected the offer. The 1st applicant narrated to him his tribulations with Ellams. Mr. Bipin Vora asked him for his immigration file number so that he could check up the matter with immigration. Later, Mr. Bipin Vora informed him that having checked with immigration he had found nothing adverse in his file. He was eventually persuaded to come back to Kenya where he started working for the 2nd applicant.

In May, 2011 he received an offer, through an emissary, to go and work for Ellams with a threat that if he rejected the offer he would be ejected from Kenya again. He did not give a positive response. On 22nd December, 2011 he was informed that immigration officers had left summons for him. He complied with the summons and proceeded to the immigration office on 23rd December, 2011 where he met one Mr. Mbuthia who asked him to surrender his Indian Passport and the original entry permit. He complied with the directive and he was directed to go back to the office after a few days. He went back several times but did not receive any communication. He was later advised by his advocate that the summons was addressed to his employer. On 17th January, 2012 he was informed by the chairman of the 2nd applicant that he was required to leave the country within 7 days.

It is the applicants' case that the decision to cancel the work permit is ultra vires the immigration laws and does not comply with the rules of natural justice. They also submit that the actions by the respondent are arbitrary, oppressive, unreasonable and an abuse of power. The applicants further argue that the said action was driven by malice and motivated by influence from third parties.

The respondent did not agree with the facts as presented by the applicants. In the replying affidavit sworn by Mr. Omondi the respondent confirmed that the 1st applicant was indeed issued with a class "A" work permit to work for the 2nd applicant. It is the respondent's case that a class "A" permit is conditional upon full disclosure by an applicant of his qualification, training and expertise. There is also need to show that the expertise cannot be found in the Kenyan job market.

Mr. Omondi who is the head of the legal unit in the Ministry of Immigration and Registration of Persons further swore that after the work permit was issued to the 1st applicant a complaint was received that he had previously worked in the country and he had obtained a similar work permit either through deception and/or concealment of his previous identity. He conducted an inquiry and established that the 1st applicant had previously in a span of ten years been issued with a class "A" work permit. He also established that the work permit had been cancelled in mid-2007 when his employer accused him of bad conduct and activities bordering on criminalities contrary to conditions attached to the work permit. The 1st applicant did not challenge that decision and neither did he ask for a review but instead made a fresh application without disclosing the previous cancellation and removal from Kenya. The 1st applicant also used a new passport and actively concealed material facts with the aid of the 2nd applicant. The 1st applicant is also accused of evading Government policy by changing employers thus managing to stay in the country for over ten years.

Mr. Omondi also deposed that the officer who had dealt with the application for the work permit had passed away before investigations could be completed and there was no explanation as to why the work permit was issued. When the applicants were summoned, it was only the 2nd applicant's representative who turned up. Acting on the provisions of Section 42 of the Kenya Citizenship and Immigration Act 2011 (KC&IA) he cancelled the work permit. He averred that the 2nd applicant did not make any enquiry regarding the circumstances surrounding the removal of the 1st applicant from Kenya in 2007.

It is therefore the respondent's case that the cancellation of the permit was within the law, well-intentioned and in strict compliance with the rules of natural justice. The respondent further submits that the work permit in question was obtained fraudulently, by use of misrepresentation and/or intentional concealment or failure to disclose material facts. The respondent avers that the investigation into the circumstances surrounding the issuance of the work permit was triggered by a genuine complaint raised by a concerned Kenyan.

The respondent further argues that when the applicants were afforded an opportunity to explain themselves they failed to respond to the summons and only reacted after the cancellation of the permit.

In reply to the respondent's case, the applicants denied giving false information or concealing anything when applying for the 1st applicant's work permit. The 1st applicant deposed that he used a passport which he had obtained long before the 2nd applicant offered him work in Kenya. The applicants further averred that all the information required by the respondent was in the 1st applicant's immigration file.

Looking at the evidence placed before the court, I find that the issues for determination are:-

(1) Whether the respondent acted ultra vires the immigration laws;

(2) Whether the decision of the respondent was arbitrary, irrational, unreasonable, unfair and breached the rules of natural justice;

(3) Whether the orders sought are available to the applicants; and

(4) Who will meet the costs of the application?

I must start by clearly stating that this matter is being decided in the context of the new immigration laws which were passed in line with the Constitution promulgated on 27th August, 2010.

Counsel for the applicants submitted that the cancellation of the work permit was ultra vires because the respondent has no power to do so. He further submitted that there is no officer known as the Principal Immigration Officer and therefore the cancellation of the permit was undertaken by an unlawful entity.

The KC&IA repealed the Kenya Citizenship Act, the Immigration Act and the Aliens Restriction Act Caps 170, 172 and 173 respectively. Section 61 is a saving clause and it provides that any resident's certificate, certificate of exemption, entry permit or pass granted or issued under the repealed Acts shall have effect as if it has been issued under the KC&IA and its provisions shall apply accordingly. By dint of that provision, the 1st applicant's work permit which was applied for and issued under the repealed Immigration Act Cap 172 is governed by KC&IA.

Section 40 of KC&IA provides for the issuance of permits. The application for the issuance of a work permit is made to the Director of Kenya Citizens and Foreign Nationals Management Service who is appointed under the Kenya Citizens and Foreign Nationals Management Service Act 2011 (KC&FNMSA). The Director shall issue or revoke a permit on recommendation of the Permits Determination Committee (PDC) which is established under Section 7(1) of the KC&FNMSA. When it comes to the issuance or revocation of a work permit the Director cannot act without involving the PDC. The applicants' counsel is therefore right when he submits that an immigration officer cannot issue or revoke a work permit. I will come back to this issue later.

The applicants' counsel also submitted that the cancellation of the work permit was done by an entity not recognized by the law. I have looked at the letter dated 10th January, 2012 conveying the news of the cancellation of the permit and find that the same was signed by an immigration officer called J. I. Nangavo on behalf of the Principal Immigration Officer. Counsel for the applicants argued that the said office no longer exists. I do not appear to have followed this argument. In my view the Board of Service established under Section 5 of KC&FNMSA can appoint directors and other members of staff as may be necessary for carrying out its functions. Section 5 of KC&IA provides for the appointment of immigration officers. Section 25 of KC&FNMSA provides for transition of staff to the new Board of Service. The new immigration laws do not therefore expressly extinguish certain offices within the immigration department.

I now come back to the issue as to whether the cancellation of the work permit was ultra vires the immigration laws. I have already stated that the Director cannot cancel a work permit without involving the PDC. However, immigration services are currently transiting from the old laws to the new laws and

there is no evidence that the PDC had been inaugurated at the time the work permit was cancelled. As per Section 25 of the KC&FNMSA the officers who were appointed under the repealed Immigration Act Cap 172 were still empowered to carry out the responsibilities they were performing before the new laws were passed. Due to the fact that the permit was cancelled during the transition period, I do not agree with the applicants that the immigration officer did not have power to cancel the work permit. Agreeing with the applicants would mean that there should have been an immediate standstill in the issuance and revocation of all work permits the moment the new laws came into force. I therefore reject the argument that the respondent did not have the legal capacity to cancel a work permit at the material time.

Having said so, I must state that all officers working in the immigration department must comply with the new laws. Section 41(1) of KC&IA clearly specifies the reasons for cancellation of a work permit. It states that:-

"41. (1) Where a permit has been issued to a person, and that person-

(a) fails, without the written approval of the Director, to engage within ninety days of the date of issue of the permit or of that person's entry into Kenya, whichever is the earlier, in the employment, occupation, trade, business or profession in respect of which the permit was issued or take up residence;

(b) ceases to engage in the said employment, occupation, trade, business or profession; or

(c) engages in any employment, occupation, trade business or profession, whether or not for remuneration or profit, other than the employment, occupation, trade, business or profession referred to in paragraph(a),

the permit shall cease to be valid and the presence of that person in Kenya shall be unlawful, unless otherwise authorized under this Act.

(2) ……"

Assuming that the work permit was valid, then there was no reason to cancel the same. There is no evidence that the applicants had breached the provisions of the above quoted section.

It is, however, the respondent's case that the permit was void and of no effect from the beginning since it was obtained fraudulently or through misrepresentation. The respondent argues that the cancellation of the permit was therefore effected under Section 42 of the KC&IA which provides that:-

"Any entry permit, pass, certificate or other authority, whether issued under this Act or under the repealed Acts, which has been obtained by or was issued in consequence of fraud or misrepresentation, or the concealment or nondisclosure, whether intentional or inadvertent, of any material fact or circumstance, shall be and be deemed always to have been void and of no effect and shall be surrendered to the service for cancellation."

The respondent submitted that the applicants did not disclose material facts when applying for the work permit. The applicants have denied this allegation. Through paragraph 17 of his replying affidavit, Mr. Omondi exhibited in court the form that was used by the 2nd applicant to apply for a work permit for the 1st applicant. I have carefully gone through the said form and find that the applicants diligently filled the form and revealed everything that was asked for in the form. In fact in paragraph 10 of the form it is revealed that the 1st applicant had worked for Ellams for 3½ years. The application is made in respect of Immigration Department File No. 755449. Attached to Omondi's affidavit are copies of work permits number A31284, A314890 and 834470 issued in the years 2000 and 2003. All these work permits were issued in the names of the 1st applicant using File No. 755449. The information that the respondent needed was therefore contained in the file and the applicants cannot be accused of concealing anything.

The respondent claimed that the use of a different passport by the 1st applicant was meant to conceal the fact that the 1st applicant had earlier on been issued with a work permit. The 1st applicant clearly explained the circumstances under which he got a new passport. In any case, the fact that the same immigration file was used to apply for the work permit could only have meant that the application was for the same person and the use of a different passport was not an attempt to conceal anything. There is nothing else to show that the passport was acquired for the purpose of misleading the respondent. In my view, the work permit was acquired honestly and it cannot be said to have been null and void from the beginning as envisaged by Section 42 of KC&IA. The claim by the respondent that the permit was cancelled because it was obtained fraudulently therefore fails.

The respondent submitted that its action was arrived at after investigations were commenced as a result of a genuine complaint of a concerned Kenyan. The letter which is alleged to have conveyed the complaint is undated and unsigned. It was received by the respondent on 30th June, 2011. It was however not acted upon until 22nd December, 2011. No reason has been given for the delay in acting on the allegation. With such a letter who will not believe the applicants when they claim the action against the 1st applicant was driven by personal vendetta?

The applicants denied knowledge of the letters allegedly written to the respondent and the 1st applicant by Ellams in June 2007. The letters do not disclose the action taken by the respondent following the complaint of Ellams. In any case if these letters were in the file of the 1st applicant then it means whoever approved the work permit must have considered them and found that they were not adverse to the issuance of another work permit. It is surprising that the respondent did not produce anything from its records to support the alleged cancellation of the 1st applicant's permit and his ejection from the country. Evidence of such important information should be found in the 1st applicant's immigration file which is in the custody of the respondent.

At the end of the day it is clear that the applicants obtained the permit genuinely and complied with its conditions. There was therefore no good reason for cancelling the same. The cancellation was done outside the clear provisions of Section 41(1) of KC&IA and was therefore contrary to the law.

Were the applicants treated fairly by the respondent? In the summons dated 22nd December, 2011 the Human Resource Manager of the 2nd applicant was summoned to appear on 23rd December, 2011 at 3.00 p.m. either before Mr. Wambilianga or Mr. Mbuthia. The subject of the summons is the 1st applicant. The Human Resource Manager was requested to take along the passport, original work permit, alien registration certificate, special pass and any other documents. I presume that the said documents are in respect of the 1st applicant. From the exhibits attached it seems the chairman of the 2nd applicant went to the immigration office and was asked to go back on 10th January, 2012 and again on 11th January, 2012. Through a letter dated 10th January, 2012 the 1st applicant's entry permit was cancelled.

The applicants argued that they were not given a hearing. The respondent replied that the applicants did not take advantage of the opportunity given to them to present their side of the story. The respondent's case is that the 1st applicant went underground instead of coming forward to present his case. It must be noted that the summons was addressed to the 2nd applicant and its chairman went to the immigration office as attested to by the visitor access permits which have been exhibited. The 1st applicant also deposed that he went to the immigration office. The evidence of the applicants clearly contradicts the respondent's claim that they never took advantage of the opportunity given to them to present their side of the story.

From the face of it, there is no evidence that the defence put forward by the applicants was taken into consideration before the decision was made. No reasons were given for the decision reached by the respondent. It must be noted that the applicants had already been issued with the work permit and the respondent was obliged to give reasons as to why the work permit was being cancelled. The letter dated 10th January, 2012 only conveyed the message that the permit had been cancelled. No reasons are given

for this drastic action. One of the principles of good governance demands that reasons must accompany decisions. In a case where a right that was already being enjoyed was being withdrawn, it was imperative that reasons for the action ought to have been given.

As already demonstrated, the respondent contravened the clear provisions of KC&IA and also failed to comply with the rules of natural justice. The action of the respondent was highhanded and the applicants are correct when they say it was irrational, unreasonable and amounted to abuse of power. For those reasons, the decision of the respondent must be quashed in terms of the 1st prayer of the notice of motion. The 2nd prayer is also allowed but with amendment so that the respondent is prohibited from cancelling work permit No. 887101 dated 4th April, 2011 and the entries made in respect thereof in the 1st applicant's passport until the expiry thereof or in accordance with the law. The order asked for in the 3rd prayer is no longer viable at this stage. There is no order as to costs.

Dated and signed at Nairobi this 31st day of October , 2012

W. K. KORIR, JUDGE