REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 188 of 2012

IN THE MATTER OF: THE CITIZENSHIP AND IMMIGRATION ACT NO 12 OF 2011

IN THE MATTER OF: THE IMMIGRATION ACT (CAP 172) OF THE LAWS OF KENYA (REPEALED)

IN THE MATTER OF: THE IRREGULAR AND UNPROCEDURAL ISSUANCE OF ENTRY PERMITS TO TEN (10) CHINESE NATIONALS TO STAY AND WORK IN KENYA FOR A CHINESE COMPANY BASED IN NAIROBI AND KNOWN AS THE GREAT YADUO INDUSTRY LIMITED. THE CHINESE NATIONALS ARE:

CHANG QIONG JI – DESCRIBED AS CHEMICAL ENGINEER FORMULA WITH M/S GREAT YADUO INDUSTRY LTD

RENJIAN LIU – DESCRIBED AS CHEMICAL ENGINEER FORMULA WITH M/S GREAT YADUO INDUSTRY LTD

SHAOMING DENG – DESCRIBED AS MECHANICAL ENGINEER WITH WITH M/S GREAT YADUO INDUSTRY LTD

XU WU – DESCRIBED AS MECHANICAL ENGINEER WITH M/S GREAT YADUO INDUSTRY LTD

JINGTON LIAO – DESCRIBED AS FACTORY MECHANICAL ENGINEER WITH M/S GREAT YADUO INDUSTRY LTD

QIU XIAOQIN – DESCRIBED AS FINANCIAL CONTROLLER WITH M/S GREAT YADUO INDUSTRY LTD

QINGQUAN ZHNG DESCRIBED AS FINANCIAL CONTROLLER WITH M/S GREAT YADUO INDUSTRY LTD

MINJIAN WU – DESCRIBED AS ELECTRICIAN WITH M/S GREAT YADUO INDUSTRY LTD

SHAOBO CHEN – DESCRIBED AS INTERPRETOR WITH M/S GREAT YADUO INDUSTRY LTD

JIANJUN CHEN – DESCRIBED AS BUSINESS WITH M/S GREAT YADUO INDUSTRY LTD

AND

IN THE MATTER OF: THE REFUSAL BY THE DEPARTMENT OF IMMIGRATION TO EFFECT DEPORTATION OF THE TEN (10) CHINESE NATIONALS

BETWEEN

REPUBLIC…….....……APPLICANT

AND

PRINCIPAL IMMIGRATION OFFICER…….....……..……..RESPONDENT

M/S GREAT YADUO INDUSTRY LTD…….…….….1ST INTERESTED PARTY

CHANG QIONG JI…….…….…..….2ND INTERESTED PARTY

RENJIAN LIU …….…….…….....3rd INTERESTED PARTY

DENG SHAOMING …….…….4th INTERESTED PARTY

XU WU …….……..…….5th INTERESTED PARTY

JINGTON LIAO …….....……..….6th INTERESTED PARTY

QIU XIAOQIN …….....……..……7th INTERESTED PARTY

QINGQUAN ZHNG …….....…...……..……..8TH INTERESTED PARTY

MINJIAN WU …….……...…9TH INTERESTED PARTY

SHAOBO CHEN …….10TH INTERESTED PARTY

JIANJUN CHEN …….……...11TH INTERESTED PARTY

JUDGMENT

The Applicant is Henry Magemebe Mose. The Respondent is the public officer in the Department of Immigration at the Ministry of State for Immigration and Registration of persons. His duties include the issuance of entry permits to non-citizens who want to work in Kenya.

The 1st Interested Party is a limited liability company incorporated in Kenya under the Companies Act, Chapter 486, of the Laws of Kenya. The company engages in the business of assembly and sale of footwear.

The 2nd to 11th Interested Parties are Chinese citizens. They were issued with entry permits by the Respondent, and are now residing and working for gain in Nairobi as employees of the 1st Interested Party.

The application for determination is the Notice of Motion dated 18th May 2012 which seeks the following orders:

a) An order of certiorari to move into this Honourable Court for purposes of being quashed the decision of the 1st Respondent to issue the 10 Chinese nationals, being the 2nd to 11th Interested Parties all inclusive with entry permits to come to Kenya as employees of the 1st Interested Party M/s Great Yaduo Industry Ltd

b)An order of mandamus compelling the Respondent to cause the cancellation of the entry permits and the deportation and/or removal out of the Republic of Kenya the 2nd to 11th Interested Parties working for the 1st Interested Party

c) An order of prohibition restraining the Respondent from renewing the entry permits of the 2nd to 11th Interested Parties

d)An order of prohibition restraining the Respondent from issuing any new entry permits to non-citizens to come and work from the 1st Interested Party without following the laid down regulations and procedures

e) Costs of the Application

The application is based on grounds contained on its face, in the statutory statement and in the verifying affidavit, which briefly summarised are that:

a) The Respondent irregularly and unlawfully issued entry permits to the 2nd to 11th Interested Parties who are non-citizens to come to Kenya and work as employees of the 1st Interested party;

b) The Respondent acted in excess of his powers vested upon him by the Immigration Act, Cap 172 of the Laws of Kenya (repealed);

c) The Respondent was under an obligation under the Act to comply with the provisions in the conditions specified in the schedule;

d) The continued stay of the non-citizens in Kenya is not in the interest of the Kenyan public; and

e) There are many Kenyan professionals who are available locally and can perform the tasks which the non-citizens are now performing.

The Application is supported by the statutory statement and the verifying affidavit of Henry Magembe Mose.

The background leading to this application is the issuance of entry permits to the 2nd to 11th Interested Parties by the Respondent. The Applicant alleges that the issuance of the permit was done irregularly and unprocedurally. The Applicant alleges that the Respondent acted in excess of the powers vested upon him by the Immigration Act (Cap 172 of the Laws of Kenya) in issuing the entry permits.

The Applicant's main contention is that the decision making process of Respondent did not follow the rules and procedures that have been provided for in the law. The Applicant has submitted that the Respondent issued the permits to the Interested Parties who are purported to have some special skills, yet these skills are available in the Kenyan market. The Applicant has annexed to his pleadings proof that the local universities in Kenya are offering courses in business and Chinese. The Applicant takes the view that this is proof that there are Kenyans who are skilled in these areas.

The Interested Parties raised a preliminary objection. In this, they state that the wrong party has been sued in these proceedings contrary to sections 40 and 41 of the Kenya Citizenship and Immigration Act, and that the Applicant had no locus standi to institute this suit.

Grounds of opposition were also filed. These grounds were the same as the issues raised in the preliminary objection.

The 2nd to 11th Interested Parties case is that they were qualified to be issued with the permits, and all the rules and procedures required by law to be followed and due to the nature of work done by them i.e through training and provision of employment, their activities are beneficial to the country.

The Respondent filed a replying affidavit sworn by Eunice Lamba Chacha. In this, the Respondent contends that the Interested Parties were vetted by the Respondent's ministry and found them fit to be issued with the entry permits, and that they are making a great contribution to the Kenyan economy through the collection of revenue, job creation and the transfer of knowledge.

Locus standi is the legal capacity of a person to institute and maintain legal proceedings in court. Judicial review is concerned with public administration, and ensuring that the same is done in a proper and lawful manner. In my view, every citizen of Kenya has an interest to ensure that all public bodies act in a manner that is in compliance with the law. With respect to matters of immigration, citizens of Kenya have a duty to "***cooperate with State organs and other citizens of Kenya to ensure enforcement of the law."*** this is section 23 of the Kenya Citizenship and Immigration Act, Chapter 12 of 2011.

In judicial review proceedings, a party can bring and sustain a suit where they show that they have a sufficient interest in the suit. In ***Republic v Resident Magistrate, Milimani Commercial Court & Another exparte AIG Insurance Company Ltd [2010] eKLR (Miscellaneous Application 723 of 2007)*** the court took the view that 'sufficient interest' should be construed in a very wide manner and each interpretation would depend on the circumstances of each case. The Court adopted the sentiments of Lord Diplock*in* ***R V Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Ltd (1982) AC 617.*** Lord Diplock stated that:

"…the draftsmen…avoided using the expression 'a person aggrieved' although it lay ready to his hand. He chose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its good judgment it considers to be 'a sufficient interest' on the part of (a claimant) in the particular circumstances of the case before it. For my part, would not strain to give them any narrow meaning."

In ***John Peter Mureithi & 2 Others V Attorney General & 4 others [2006] eKLR*** the court stated that:

Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.

I adopt as good law the citations above. I am satisfied that the Applicant has this matter to ensure that the Respondent acted within the law in issuing the permits to the Interested Parties. It is therefore my decision that the Applicant has locus commence and sustain the present matter.

The Respondent and the Interested Party have also faulted the Applicant for suing the wrong party. The Applicant has responded by asking this court to hear the suit since it will serve the interests of justice. Article 159 (2) (d) of the Constitution of Kenya, 2010 states that the courts shall administer justice without undue regard to procedural technicalities. This means that courts should always decide matters on substantive justice. It is my view that the misdescription is not fatal, and that there will be no injustice if this court determines the issues raised on substance.

The main issue for determination is whether the Respondent acted in violation of the rules and regulations were contained in the schedule of the Immigration Act.

The Minister for Immigration is authorised to make rules and regulations to guide the issuance of entry

permits. The Respondent is under an obligation to comply with these regulations. However, the Applicant alleges that the Respondent acted improperly in failing to comply with Section 5 of the Immigration Act which provides that:

5. (1) There shall be the classes of entry permits specified in the Schedule.

(2) Where a person, other than a prohibited immigrant, made application in the prescribed manner for an entry permit of a particular class, and has satisfied an immigration officer that he belongs to that class and that the conditions specified in the Schedule in relation to that class are fulfilled, the immigration officer may, in his discretion, issue an entry permit of that class to that person.

There are two classes of entry permits that are in issue in the present case. The first is the class A permit issued to the 2nd to 10th Interested Party, and the class H permit issued to the 11th Interested Party.

The classes of permits were contained in the Schedule to the Immigration Act. Class A permits are issued to applicants who are offered specific employment by a specific employer if they are qualified to undertake that employment and whose engagement in that employment will be of benefit to the country. Class H permits are issue persons who engage in specific trades, businesses or professions if he has obtained, or is assured of obtaining any authority necessary for carrying out the business, or if in his own right, he has sufficient capital to engage in that business or trade.

It is now well settled that in exercise of judicial review jurisdiction, the court shall in most circumstances not consider the merits of the case before it, and will not sit as a court of appeal on the decision of the inferior body, or in this case, from the decision of a public officer. The court is concerned with the process of reaching the decision, or the procedure used by the inferior body or public officer in reaching that decision. See the recent decision of the Court of Appeal in ***Kenya Pipeline Company Limited And Hyosung Ebara Company Limited And Others*** **[2012]eKLR (Civil Appeal No 145 of 2011)** where the court stated as follows:

"moreover, where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is to say it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction)or that its decision is wrong on matters of fact or that it misdirects itself in some matter."

The instances in which the court will exercise its judicial review jurisdiction were well summed up in the English case of ***Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935.*** These are interalia illegality, procedural impropriety and irrationality.

Illegality means where the decision maker acts in a manner that is in contravention of the law. Irrationality can best be described by the case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223*** from which the termWednesbury unreasonableness was coined. This heading of unreasonableness includes a situation where the decision maker acts in disregard of relevant considerations, where he considers irrelevant material and where his decision is so unreasonable, that no other person in a similar situation would reach that decision.

Procedural impropriety refers to a situation where the procedure laid down in the law is not correctly followed. It also includes a failure of an administrative body to observe the rules of natural justice.

In the instant case, the Applicant alleges that the Respondent is guilty of procedural impropriety. The Schedule provides the form of the application for an entry permit into Kenya. The form requires the applicant to fill in a number of details. It also requires the prospective employer to give details on the steps it (the prospective employer) has taken in trying to recruit a Kenyan to fill the vacancy. When the form is filled, it is submitted to the Principal Immigration Officer who then assesses it and makes a

decision either to issue or not to issue the entry permits. In this case, although the Applicant has alleged otherwise, it appears that the proper procedure was followed, and that the permits in issue were issued because the Respondent was satisfied with the information given by the Interested Parties. There is no material or evidence to make me depart from the decision of the Respondent.

The Applicant has alleged that the permits ought not to have been issued because there are Kenyans who are suitably qualified to carry out the duties that the 2nd to 11th Interested Parties are engaged in. The Applicant relies on the explanatory notes that are contained in the schedule. The first of these notes reads as follows:

It is the Government policy that the economy of Kenya should be manned by trained and competent citizens. Entry Permits are issued to non-citizens with skills not available at present on the Kenya Labour Market, only on the understanding that effective training programmes are undertaken to produce trained citizens within a specified period.

In my opinion, this note does not bar the Respondent from issuing non-citizens with entry permits only on the basis that the skills they possess are available in the Kenyan market. My understanding of this note is that non – citizens who are issued entry permits who are possessed with special skills must put in place training programmes so that citizens of Kenya can be trained.

Although the Applicant has stated that the Respondent issued the entry permits on misrepresentations, he has not outlined what these misrepresentations are. The court cannot simply assume that he is right. It is therefore my finding that this allegation is without merit.

Moreover, the Respondent had received an anonymous complaint, setting out various complaints against the 1st Interested Party. After receiving this complaint on the operations of the company, a team from the Respondent's office visited the company on 8th February 2012, conducted investigations and compiled a report. The Respondent found that the basic requirements were met with regard to the issuance of the permits, and that no law or procedure was violated.

On the qualifications of the 2nd to 11th Interested Parties, the Immigration Officer found that the academic and professional certificates of the Interested Parties had been accompanied by a notarial certification, and that the same had been forwarded to the Chinese Embassy for authentication. In other words, the Immigration Officer conducted his due diligence. He found that the entry permits were issued to the Applicants upon receipt of the necessary information from them. He also found that that the operations of the company were beneficial to the country because it had provided employment for 65 Kenyan citizens and was making a positive contribution to the economy. The Immigration Officer also took note of the fact that the major investors of the company were based in China, and advised that the department would have to review the situation at a later date so as to minimise the number of expatriates in Kenya.

It is clear that the Respondent issued the permits after following the procedure that is outlined in the law. When complaints were made about the company, the Respondent acted upon these complaints, conducted investigations and found that the issues raised were superfluous. Had the Respondent found the allegations against the company to be true, the Respondent would have taken the appropriate measures that are outlined in the law.

Having considered all the arguments presented before this court, it is my finding that the Applicant has failed to prove the grounds for the award of judicial review orders. The application dated 7th May 2012 therefore fails in its entirety and it is hereby dismissed with costs to the Respondent and the Interested Parties.

DATED, SIGNED and DELIVERED this 19TH day of NOVEMBER 2012

M. WARSAME

JUDGE