



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Civil Application 32 of 2009

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY:

REPUBLIC FOR ORDERS OF CERTIORARI AND MANDAMUS

REPUBLIC..... APPLICANT

-VS-

**PERMANENT SECRETARY MINISTRY OF
FOREIGN AFFAIRS.....1ST RESPONDENT**

**PERMANENT SECRETARY
MINISTRY OF IMMIGRATION.....2ND RESPONDENT**

ATTORNEY GENERAL..... 3RD RESPONDENT

EX PARTE: ABEL NYAMICHABA KENYORU

AND

**IN THE MATTER OF THE CANCELLATION OF THE DIPLOMATIC VISA ON
DIPLOMATIC PASSPORT NO.D009176 CONTRARY TO THE KENYA FOREIGN SERVICE REGULATION
2000.**

RULING

This is a Notice of Motion dated 27th February 2009 filed by M/s Nyaberi & Company advocates on behalf of the ex parte applicant **ABEL NYAMICHABA KENYORU**. The Notice of Motion application was filed under Order 53 Rule 3(1) of the Civil Procedure Rules, section 3 (2) of the Law Reform Act (*Cap. 26*), and section 3A of the Civil Procedure Act (*Cap.21*). The respondents are named as **PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS (1st respondent)**, **PERMANENT SECRETARY MINISTRY OF IMMIGRATION (2nd respondent)** and **ATTORNEY GENERAL (3rd respondent)**. The orders sought are as follows —

1. ***An order for certiorari is hereby granted in moving to this Honourable court and quashing the***

NOTE VERBALE dated 7th of January 2009 which the Ministry of foreign Affairs through the Permanent Secretary wrongfully issued to direct the British High Commission that the Applicant herein ceased to enjoy the diplomatic privileges on retirement on 31st of December 2008.

2. **An order of Mandamus is hereby granted in compelling the 1st respondent to issue another Note Verbale to the British High Commission acknowledging the existence of the applicants diplomatic status and passport for nine months from the date of this order as per the law to enable the applicant clear, handover and get his family back to Kenya.**

3. **The costs of this application be provided for.**

The application was, as the law provides under order 53 of the Civil Procedure Rules (**Cap.21**), grounded on the **STATUTORY STATEMENT** dated 19th January 2009, filed with the Chamber Summons for leave, as well as **SUPPORTING AFFIDAVIT** sworn on 19th January 2009 by the applicant, and also filed with the Chamber Summons for leave. There was also a further supporting affidavit sworn by the applicant on 4th February, 2009, a 2nd further affidavit sworn by the applicant on 6th February, 2009.

The grounds of the application are that the Note Verbale issued by the Ministry of Foreign Affairs is illegal as it breaches, the law; Secondly, that the order to cancel the applicant's diplomatic passport will inconvenience him as he will pay duty for his entire luggage when same is shipped back to Kenya; thirdly that the applicant is yet to hand over to his successor after his retirement on 31st December 2008; fourthly, that the applicant's family is in London still at the residence hired by the government. With the cancellation of his passport they will be thrown out of their residence before coming back to Kenya. Fifthly, that the directive by the Ministry of Foreign Affairs was unfair, malicious and with serious legal consequences on the applicants character and name.

The affidavit filed with the Chamber Summons, on the other hand, describes the job status of the applicant, his travel to Kenya, and that on his travel back to London from Nairobi on 7th January 2009, he was detained at Heathrow Airport and was returned to Kenya as a deportee on 9th January 2009, on the ground that his diplomatic passport had been cancelled, without prior Notice of such cancellation. It is also deposed in the said affidavit that it will be inconvenient, costly and frustrating for the applicant to use an ordinary passport. In addition, there were filed two further supporting affidavits sworn on 4th February and 6th February 2009, respectively. The applicant also, through his counsel, filed written submissions on 22nd March 2009.

It was contended in the said written submissions, inter alia, that the Notice Verbale dated 7th January 2009 was illegal and breached the laws and rules of natural justice. Reliance was placed on the Kenya Foreign Service Regulations 2000 where it was provided under section B.21 that —

“Subject to exigencies of the service, an officer shall be given adequate time which will normally be at least three months and not more than nine months to prepare himself for the transfer.”

The contents of paragraph 19 and 20 of the replying affidavit of the respondent sworn by **THUITA MWANGI** on 5th February, 2009 were challenged, on the grounds that the said two paragraphs were hearsay. Reliance was placed on Order XVIII Rules 3 (1) and 6, of the Civil Procedure Rules, wherein it was provided that a deponent of an affidavit should depone to facts which on his own knowledge could prove, and that the court may strike out any matter which is scandalous, irrelevant or oppressive. The court was urged to strike out the two offending paragraphs.

It was contended that the applicant should have been given reasonable time before cancellation of his diplomatic passport. Reliance was placed on the case of **SUAREZ –VS- SUAREZ (1918) ALLER 647** where Warrington LJ, stated-

“The first question is whether at the date of the order on 23rd October 1917, the defendant was entitled to claim the privilege against legal process of the office, by letter under the hand on one of the assistant secretaries, informed the plaintiff’s solicitors that it is majesty’s charge d’affaires at La Paz had ascertained and reported by that telegraph that the Bolivian government had terminated his appointment as Bolivian Minister to the British court, and that his name had accordingly been removed from the diplomatic list. In my opinion, that letter is for the purpose of the present matter sufficient evidence of the fact that at the date of that letter the defendant had ceased to hold the office of Minister. The privilege may however, continue for a reasonable time after the Minister ceased to hold office in order that he may wind up the affairs of the legation and transfer him to his successor.”

It was contended that the alleged notice of cancellation of diplomatic passport by a letter dated 7th January 2009, which the applicant only came to be aware of at Heathrow Airport, could not be said to be sufficient notice. It was further contended that even if there was no specific provision in the Code of Regulation and Foreign Service Regulations for the period of 9 months requested by the applicant, the court should be guided by usage.

On the issue of whether the cancellation of the applicant’s diplomatic visa to the UK before hand over and travel back to Kenya was punitive, reliance was placed on the provisions of section 16A of the Pensions Act (**Cap.186**) Laws of Kenya which provides —

“A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until the payment in full of the gratuity payable to him consequent upon the exercise by him of this option to receive such gratuity under the provisions of this Act.”

It was contended that the applicant had never been paid his salary for the month of December 2008 as well as his gratuity. In addition, the cancellation of this diplomatic passport without giving the applicant a grace period was itself punitive.

On the issue of malice, it was contended that there were contradictions in paragraph 13, 14 and 15 of the 1st respondent’s replying affidavit, which confirmed malice. In paragraph 13 it was deponed that the applicant failed to report to the authorized officer for deployment and instead remained in London for more than one year, where in paragraph 15 there was confirmation that the applicant was retained for one year beyond retirement. It was also contended that it was deponed in the said affidavit at paragraph 22 that the 1st respondent held a meeting with the applicant on 21st January 2009, and assured the applicant that the Ministry would facilitate the applicant’s acquisition of an ordinary passport for use to the UK to help him transport back his personal effects duty free, which was basically an

admission that the applicant still enjoyed the privileges of a diplomat. It was contended that officers who had been retired, redeployed, and assigned other responsibilities as listed in paragraph 21 of the replying affidavit, did not have their visas cancelled. Therefore the discrimination applied on the applicant was malicious. It was lastly, contended that there was no evidence that the conduct of the applicant was wanting.

In response to the application, the respondent filed a replying affidavit and further replying affidavit. The replying affidavit was sworn by **THUITA MWANGI** the Permanent Secretary to the Ministry of Foreign Affairs on 5th February 2009. It was deponed in the said affidavit, inter alia, that the applicant was posted to the Kenya High Commission in London on 29th April 2005 to perform the duties of Principal Counselor on a tour of duty for forty eight (48) months or until retirement age, whichever came first. It was deponed that the applicant would reach retirement age on 31st December 2007. It was also deponed that by letter dated 25th May 2007, the applicant was reminded of his retirement date and informed to report back not later than 1st December 2007. It was deponed further that, even though the applicant on 20th December 2007 was allowed by the Public Service Commission to remain in the Civil Service for an additional year, that did not reverse or vary the decision to recall him and post a replacement. It was deponed that the applicant failed to report to the authorized officer and instead remained in London for more than one year. It was further deponed that, by letter dated 12th November, 2008, the applicant was informed of the consequences of his failure to contact the shipping agent to ship his personal effects to Kenya. It was also deponed that on 7th January 2009, the applicant was handed the Note Verbale by the Chief of Protocol personally at the Ministry Headquarters in Nairobi at 3 p.m. It was further deponed that on 21st January 2009, the deponent assured the applicant that the Ministry would facilitate expeditious acquisition of an ordinary passport and help him transport his personal effects duty free as provided for in the Foreign Service Regulations, and that, in any case, there was no provision in the Code of Regulations and Foreign Service Regulations or any convention which stipulates a grace period of nine months as alleged by the applicant.

In the further affidavit sworn by the same deponent on 1st April 2007, it was deponed, inter alia, that the applicant was not seeking the extension and use of his diplomatic visa genuinely to enable him ship back his belongings and return his family, but to perpetuate his stay in London. It was also deponed that the applicant had retired, but continued to occupy the Deputy Head of Mission's Residence in London and his family and children were being educated at the tax payer's expense while his replacement was still languishing in a hotel also at the tax payers expense. It was also deponed that the applicant's own conduct was wanting and, therefore, he did not merit the exercise of this court's discretion in his favour. The said further replying affidavit otherwise emphasized what was deponed in the replying affidavit.

On the hearing date Mr. Nyaberi for the applicant addressed me, and Mr Njogu for the respondents also addressed me.

The orders sought herein are judicial review orders for certiorari and mandamus. The situations where the judicial

review jurisdiction of this court is called into play are wide. They range from actions that are done irrationally, unreasonably, without good faith, illegally, without jurisdiction, contrary to the principles of natural justice, inter alia. The burden is on an applicant to demonstrate the violations and justify the reliefs sought, as judicial review remedies are discretionary and are granted where they are the most efficacious remedy, even where there are other alternative remedies available.

The applicant has gone to great length to show that the cancellation of his diplomatic visa or passport was contrary to law and regulations and practice, and unreasonable. Reliance was placed on the case of **SUAREZ –VS- SUAREZ** (*supra*) emphasizing what was stated in that case by Warrington LJ. In my view, that case can be distinguished from the present case. That was a case where the appointment of a minister of Bolivia was terminated while the minister was on duty in Britain. It was also a case of continuance of privilege against legal process. In that case there was justification for continuance of the privileges against legal process for a reasonable time after the minister ceased to hold office in order to wind up the affairs because the Minister was still in a foreign country. The applicant, on the other hand, has been on retirement and there is correspondence, including a letter ref. **MFA. P/PS – PE/1** dated 18th November 2008, from the Ministry of Foreign Affairs showing that the applicant and two others has been given the opportunity to ship their personal effects through M/s Urgent Cargo Handling Ltd. before the cancellation of the diplomatic visa, but had failed to do so. Secondly, the applicant's diplomatic visa was not cancelled when he was on duty in London, and there is no issue of privilege against legal process being raised here. In my view, the above case is not applicable to our present situation. In any case, it is only a persuasive authority in Kenya.

The applicant has also relied on a tradition or practice of diplomatic officers being left to enjoy 9 months of diplomatic status after transfer or retirement. The applicant has been retired. No Regulation has been given nor actual example been provided of staff who have retired and given such privilege. The clause B.12 of the Kenya Foreign Service Regulation cited refers to officers who have been transferred while still in service. They are allowed 3 to 9 months to prepare for transfer. The applicant is a retired officer, therefore the clause does not apply to him. In my view, that ground cannot be sustainable.

The applicant also claims that the cancellation of his diplomatic visa and the way he was treated was punitive. Reliance was also placed on section 16 A of the pensions Act (**Cap. 186**) which provides that an officer who retires but is not paid his entitlement to pension or gratuity is entitled to be retained in the service. I do not think that the issue of punitive treatment is a ground for judicial review remedies. It could possibly however, be a constitutional matter. On the provisions of the Pensions Act relied upon, they do not state that they will be retained in the same status or benefits. In any case, the applicant is not asking for reinstatement or retention in service after retirement. Therefore, in my view, the provisions of the Pensions Act are not relevant to our present case.

I have agonized over this matter, but I do not see anything that can persuade me that the decision to cancel the

diplomatic visa or passport of the applicant was done in bad faith, unlawfully, or unreasonably. In my view, the diplomatic status is a privilege, which may be withdrawn, where there are justifiable reasons. In our present case, I am of the view that there were justifiable reasons to cancel the diplomatic visa of the applicant. He appears to be a person who wants to continue using a status which he does not have, nor is he entitled to. I will not grant certiorari orders.

On the prayer for mandamus, I will cite what was stated by the Court of Appeal in the case of KENYA NATIONAL EXAMINATIONS COUNCIL –VS- REPLUBLIC – EX Parte Geoffrey Gathenji Njoroge- Civil Appeal No. 266 of 1996, that-

“ An order of mandamus will 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.”

I do not see what public duty the respondents or any of them were required to perform, which they can be compelled to perform by an order of mandamus. The applicant has not exhibited any law, regulations or public practice that was not performed. The applicant has also not demonstrated the legal right which was breached to this detriment. As I have stated earlier, in my view, the diplomatic status is a privilege, and for him it was a privilege granted for the performance of certain functions in the Ministry of Foreign Affairs, from which he has now retired. I will also not grant mandamus orders.

For the above reasons, I dismiss the application, and decline to grant the orders sought. I award costs to the respondents against the applicant.

Dated and delivered at Nairobi this 13th day of May 2009.

GEORGE DULU
JUDGE.

In the presence of-

Mr. Omwanza for applicant

Mr. Obiri for the respondent

Kevin Court Clerk