REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPLI 316 OF 2008

IN THE MATTER OF AN APPLICATION BY MOHAMUD MUHUMUD SIRAT FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE MINISTER FOR IMMIGRATION AND REGISTRATION OF PERSONS AND THE HONOURABLE ATTORNEY GENERAL

AND

IN THE MATTER OF THE IMMIGRATION ACT, CAP. 172 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP.26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES

B E T W E E N

REPUBLIC …….... APPLICANT

HON. OTIENO KAJWANG' THE MINISTER FOR IMMIGRATION AND

REGISTRATION OF PERSONS…….. 1ST RESPONDENT

THE ATTORNEY-GENERAL…….…..…… 2ND RESPONDENT

EX-PARTE: MOHAMUD MUHUMED SIRAT

J U D G M E N T

This is a Notice of Motion dated 25th May, 2008 filed by Kilonzo & Company advocates on behalf of the ex-parte applicant **MAHAMUD MUHUMED SIRAT.** The respondents are named as **THE MINISTER FOR IMMIGRATION AND REGISTRATION OF PERSONS** *(1st respondent), and the* ***ATTORNEY-GENERAL*** (*2nd respondent*).

The application was brought under section 8 and 9 of the Law Reform Act ***(Cap. 26)*** and Order LIII Rule 1 and 2 of the Civil Procedure Rules. The orders sought are that-

1. An order of *CERTIORARI* ***be issued to the 1st and 2nd Respondents to remove and bring to the High Court to be quashed the deportation Order dated 23rd May, 2008 issued under section 3 of the Immigration Act Cap. 172 of the Laws of Kenya classifying the applicant as a prohibited immigrant and ordering his deportation from Kenya.***

2. An order of *CERTIORARI* ***be issued to the 1st and 2nd Respondents to remove and bring to the High Court to be quashed the deportation Order dated 23rd May, 2008 under section 8 of the Immigration Act Cap. 172 of the Laws of Kenya, directing that the Applicant be deported allegedly for being a threat to national security.***

3. An order of *PROHIBITION* ***be issued to the 1st and 2nd Respondents prohibiting them, their agents, servants and officers or otherwise from removing the Applicant from Kenya as directed by the 1st Respondent in the deportation Order dated 23rd May, 2008, pending the hearing and determination of this Judicial Review.***

The application was supported by a **SUPPORTING AFFIDAVIT** sworn by the applicant on 27th May, 2008, which was filed with the Chamber Summons for leave. As required by law there was filed with the Chamber Summons for leave a **STATEMENT** dated 27th May, 2008 as well as **VERIFYING AFFIDAVIT** sworn by the ex-parte applicant on 27th May, 2008.

The grounds of the application are, inter alia, that the applicant is a Kenyan citizen by birth and holder of Kenyan identity card number 221329812 and that he possesses a Kenyan voter's card, drivers licence and Kenyan passport. That the applicant was validly issued with a Kenyan identity card on attaining 18 years of age under section 93(2) of the Constitution. That on 25th May, 2008 agents, officers or servants acting under the 1st Respondent's instructions under a deportation order dated 23rd May, 2008 invaded the Applicant's home and forcefully obtained entry without identifying themselves and arrested the applicant on the allegation in the order that the Applicant is a prohibited immigrant under section 3(1) of the Immigration Act, and also an allegation that the applicant is a threat to national security under section 8 of the Immigration Act, but the 1st respondent failed to issue the Applicant or his advocates with the order. That the Order by the 1st Respondent was illegal as it contravened the Immigration Act which provided that only persons who were not Kenyan citizens could be declared prohibited immigrants. That the order of the 1st Respondent deprived the applicant of his Kenyan citizenship without affording him a warning. That the deportation order was issued maliciously and for improper purpose in order to stop the scrutiny and/or recount of votes cast in Wajir South Constituency in Election Petition No. 15 of 2008 filed by the Applicant against a sitting member of Parliament. That the applicant has been taken and kept in unlawful custody without due process.

The verifying affidavit gives the facts surrounding the acts complained of. It is deposed that the applicant contested the December, 2007 Parliamentary Elections in Wajir South Constituency and one **ALI HASSAN ABDIRAHMAN** was declared winner. That the applicant filed Election Petition No. 15 of 2008 challenging the election of Ali Hassan Abdirahman. It is further deposed that on 15th May, 2008 Hon. Justice Kimaru ordered scrutiny of the ballot papers, original forms 16A and other statutory forms, which scrutiny was to take place on 26th May, 2008. It is further deposed that on 25th May, 2008 a day before the scrutiny, the applicant was arrested by plain clothes police officers who demanded that he gives them an alleged Australian Passport, which he did not own. Then the police searched his house and

took his national identity card, voting card, driving licence and Kenyan passport. They also took his verification ***(screening)*** card issued by the Kenya Government in 1989, Kshs.700,000/= and all his election records. It was deposed that they showed him an order declaring him a prohibited immigrant and a security risk, but refused to give him or his advocate a copy of the same. It was deposed that the allegations of his being an Australian citizen were concocted to delay or prevent the scrutiny of ballots and election forms in the election petition. It is deposed that the actions of the 1st Respondent were manifestly unreasonable, illegal, in breach of rules of natural justice and ***mala fides***. It was also deposed that if the actions of the 1st respondent were not stopped by the court, the applicant would be rendered stateless contrary to international conventions.

The applicant also filed a further affidavit sworn by himself on 15/7/2008 and filed on the same date. It was deposed in the said affidavit, inter alia, that the replying affidavit sworn by Mr. James Nyatigoh was defective as he was not a party to the proceedings and the deponent did not disclose that he had authority of the 1st Respondent to swear the affidavit. It is further deposed that the applicant was not subject to any known investigations nor was he arraigned in court under the Registration of Persons Act or the Immigration Act. It is further deponed that the applicant applied for a Kenyan passport on 4th November, 1993 which he obtained but it got lost, and he was issued with another passport No.A1105526 on 20th December, 2006. It was deposed that the applicant was not guilty of misrepresentation and that his father Mohammed Sirat Ahmed was a Kenya Citizen and a civil servant in the Ministry of Education and that his mother Elba Bulle Onshow is also a Kenya Citizen. It was deposed that the deponent did not fraudulently obtain a national identity card, a Kenya passport and voters card or unlawfully contest in the Wajir South constituency in the general elections. It was deposed that it was not true that the deponent had an Australian passport or that he was an Australian citizen. It was deposed that the deponent travelled to Australia as a student and used his valid Kenyan passport for that travel.

The applicant's counsel also filed written submissions on 15th July, 2008. It was contended in the said submissions that this court has jurisdiction to hear and determine this matter under section 8 and 9 of the Law Reform Act **(*Cap. 26 of the Laws of Kenya)***. It was contended that the 1st respondent's actions were illegal. It was contended that sections 3 and 8 of the Immigration Act ***(Cap. 172),*** relied upon by the 1st respondent through the replying affidavit of James Nyagitoh, are not applicable to the applicant as he is a Kenyan Citizen holding a National Identity card under the Registration of Persons Act. It was contended that under the Registration of Persons Act, and the Immigration Act, the Minister ***(or state)*** could only charge the ex-parte applicant if the Minister was satisfied of wrong doing, not deporting the applicant and declaring him to be a prohibited immigrant. The failure to charge the applicant indicated malice, abuse of office and irrationality. Reliance was placed, inter alia, on the case of ***DE SOUZA –VS- TANGA COUNTY COUNCIL [1961] E.A. 377*** where it was held-

"***The Appeals Committee may, or may not, have arrived at the correct conclusions. That is not a matter which this court is concerned with. What concerns this court is that their procedure was not in accordance with that which the staff Regulations required and in my opinion, the principles of natural justice were not observed by the appeals committee……."***

It was contended that the action by the 1st respondent was actuated by ulterior motives. This was because it was apparent that the deportation order was made in order to stop the scrutiny or recount of votes in Wajir South Constituency in Election Petition No. 15 of 2008. Reliance was placed on the case of **PADFIELD –VS- MINISTER OF AGRICULTURE, [1968] I ALL E.R. 694** wherein at page 719 Lord Upjohn stated-

"***This fear of Parliamentary trouble …… is alone sufficient to vitiate the Minister's decision which can never validly turn on purely political considerations. He must be prepared to face the music if Parliament by statute has cast on him an obligation in the proper exercise of a discretion conferred on him to order a reference to the Committee of investigation.***

It was further contended that the principles of natural justice were breached, as the 1st respondent did not give the applicant a chance to contest the allegations against him that he was no longer a Kenyan. It

was contended that the provisions of the Constitution of Kenya were violated, especially section 77(1) (a) of the Constitution on fair hearing.

It was contended that the ex-parte applicant was a Kenyan citizen by birth and section 89 of the Constitution was specifically highlighted. The said section provides-

89. "***Every person born in Kenya after 11th December, 1963 shall become a Kenya citizen if at the date of his birth one of his parents is a citizen of Kenya; except that a person shall not become a citizen of Kenya by virtue of this section if at the date of his birth.***

(a) his father possesses immunity from suit and legal process as is accorded to the envoy of a foreign state accredited to Kenya; or

(b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country."

It is lastly, contended that the alleged Australian citizenship of the applicant had not been proved.

The respondents, in response to the application, on 26/6/08 filed a replying affidavit sworn on 25/6/08 by James Nyatigoh described as the Principal Immigration Officer in charge of Investigations and Registration of Persons Prosecution Section. It is deposed, inter alia, that the applicant applied for a Kenyan passport on 29th November, 2006 for purposes of attending **HAJJ**, and provided a birth certificate issued at Wajir on 2/10/06; a Kenya identification card issued at Wajir on 2/10/06; a letter from the Supreme Council of Kenya Muslims; a KCPE certificate from Habaswein Primary School; a result slip and leaving certificate from Sabuley Secondary School Wajir and a Kenya Somali Registration Certificate. It was deposed that on the basis of the above documents a passport No.A1105526 was issued to the applicant on 20th December, 2006 and was valid for one year because the applicant did not undergo strict security ***(checks)***. It is deposed that in the course of work, the deponent came across information that the applicant was an Australian citizen and was a holder of a passport of that country No. L 9977140 issued in Sydney on 28/9/2001. It was deposed that the applicant obtained the Kenyan documents (***in 2006)*** by misrepresentation. It was also deposed that the applicant did not use the passport to travel for **HAJJ**, but used that as an excuse to obtain a passport expeditiously. It was deposed that the Australian High Commission by their letter dated 23/5/08 confirmed that the applicant was an Australian citizen. It was further deponed that the applicant, on fraudulently obtaining the Kenyan documents, contested the 2007 December General Elections for MP in Wajir South. It was deposed that the ex-parte applicant filed an election petition. It was also deposed that it was on the basis of the aforesaid that it was recommended that the passport of the applicant be withdrawn, and that it was within the powers of the 1st respondent under section 3 and 8 of the Immigration Act to declare the ex-parte applicant a prohibited immigrant. It was deposed that the detention of the ex-parte applicant was lawful in terms of section 3 and 8 of the Immigration Act ***(Cap. 172).*** It was deposed that at the time of obtaining the Kenyan passport, the ex parte applicant was a PHD student at University of Technology Sydney and that the applicant had failed to explain which passport, he had used at the time he had not secured a Kenyan Passport.

The respondents also filed a further affidavit sworn by the same deponent on 7/10.08. It was deposed that the fact that the 1st respondent did not swear the replying affidavit in person did not make the same invalid. It was reiterated that the actions taken by the 1st respondent were lawful and that the same was based on investigations and findings that the ex-parte applicant was an Australian citizen.

The respondents also filed written submissions through Opundo J. Omondi a Principal State Counsel. They relied on the above mentioned replying affidavits. It is in addition contended that the main issue is whether the applicant is a Kenyan or Australian citizen. It was contended that though the applicant might have been born in Kenya, he voluntarily acquired Australian Citizenship. Reference was made to section 97(3) of the Constitution, which provides-

"***A citizen of Kenya, shall subject to section 7 cease to be such a citizen if having attained the age of***

twenty one years he acquires the citizenship of some other country other than Kenya by voluntary act *(other than marriage)."*

It was contended that the Kenyan law prohibited dual citizenship. Therefore the applicant would have to apply again for Kenyan citizenship under section 92 of the Constitution and, in that event, section 3(2) of the Citizenship Act would apply. The applicant would have to renounce in writing his other citizenship in the prescribed form, which he had not done. It is contended that section 3(1) (f) of the Immigration Act defines a prohibited immigrant. It is contended that under section 8 of the Immigration Act, the Minister ***(1st respondent)*** can order in writing that any person whose presence was immediately before the making of the order unlawful under section 26A of the Penal Code, shall be removed out of Kenya. Therefore, the Minister acted within his mandate. It was contended that the court cannot be called upon in a judicial review application, to examine and declare that the applicant is a Kenyan citizen. Reliance was placed on the case of ***KENYA NATIONAL EXAMINATIONS COUNCIL -VS- REPUBLIC – Nairobi C.A. No. 266 of 1996.***

The interested party ***(who is undisclosed but is clearly ALI HASSAN ABDIRAHMAN)*** through M/s Issa & Company advocates filed written submissions on 18th October, 2008. It was contended that the application is not competent in that the contraventions alleged appear to be Constitutional under section 97(3) of the Constitution, but no Constitutional reference was filed. Reliance was placed on the case of ***SANJAY SHAH ARUNJAIN –VS- REPUBLIC*** Criminal Application No. 5671 of 2002 ***(unreported).*** It was also contended that there was material non-disclosure by the applicant, in that the applicant failed to disclose his dates of arrivals and departures ***(in Kenya)*** from 2004 and 2005 using an Australian passport. It was also contended that judicial review remedies were not available in this matter. Reliance was placed inter alia on the case of **COUNCIL OF CIVIL SERVICE UNIONS –VS- MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL E.R. 935.**

I have to state at the onset that this judicial review court is ill equipped to determine the nationality or citizenship of the ex-parte applicant. There is a contest on the same from the facts disclosed. If that issue has to be determined by a court, it has to be determined by a court where evidence is given with a chance to parties to cross examine on the same. That cannot be for this judicial review court. On this I fully agree with what was stated by counsel for the respondents that this court cannot, in judicial review proceedings, determine the nationality of the ex-parte applicant. Having said so, the issues that are for my determination are firstly whether this application is competent. Secondly, whether the 1st respondent acted within his powers or legal mandate. The last issue is whether I can grant the prayers requested.

1. WHETHER THE APPLICATION IS COMPETENT

The first issue is whether this matter should have been brought under a Constitutional reference. The interested party's counsel contends so. I do not think so. The 1st respondent was not performing any constitutional functions, but exercising some powers conferred upon him by statute specifically the Immigration Act. It was quite proper, in my view, for the applicant to come to court under the judicial review procedure because he alleges failure to observe principles of natural justice, unreasonableness and ultra vires.

2. WHETHER THE 1ST RESPONDENT ACTED WITHIN STATUTORY POWERS

It is generally agreed that the 1st respondent was acting under the provisions of section 3 and 8 of the Immigration Act (***Cap. 172).*** I have perused the two sections. There is no provision under those two sections that donates powers to the Minister to cancel a passport.

Section 3 deals with prohibited immigrants. It defined a prohibited immigrant as a person who is not a Kenya citizen. Then there are other attributes that go to the definition, inter alia, such as a person who is incapable of supporting himself and his dependants in Kenya; one who is mentally defective or a person suffering from mental disorder; one who is a criminal or a murderer and whom the Minister considers is an undesirable immigrant; and one whom from information or other sources, the Minister considers to be

an undesirable immigrant; and one whom the Minister can consider his/her presence in Kenya to be contrary to national interest.

Therefore, in my view, to be a prohibited immigrant one has to go by the definition under section 3 of the Act. It has to be clear, first of all that the affected person is not a Kenya citizen. In the present case, the citizenship of the applicant appears to be a contested issue. I have not been shown any law that gives the Minister ***(1st respondent)*** powers to determine who is and who is not a citizen, where there is a contest. Therefore, in my view, the issue of citizenship of the ex-parte applicant having not been finally and conclusively determined, the 1st respondent had no powers to issue a deportation order of the ex-parte applicant under section 3 of the Act.

Section 8 (1) of the Act on the other hand provides-

"8(1) The Minister may, by an order in writing, direct that any person whose presence in Kenya was immediately before the making of that order, unlawful under this Act, or in respect of whom a recommendation has been made to him under section 26A of the Penal Code, shall be removed from, and remain out of Kenya either indefinitely or for such period as may be specified in the order."

On the limb of unlawfulness, I agree with counsel for the ex-parte applicant that the applicant should have been given an opportunity by the Minister to present his side of the story. The Constitution section 77(1) envisages that somebody will be given an opportunity to be heard before he is condemned. In addition, the failure to do so by the Minister was a clear breach of the general Principles of natural justice. In my view the applicant should not have been deported or declared a prohibited immigrant without being given a chance to be heard.

The second limb of the section refers to recommendations under section 26A of the Penal Code. The respondents seem to rely on so called recommendations from investigations to justify the orders made by the 1st respondent. I am afraid they are wrong. Such recommendations were by law required to come from a criminal court where the person has been tried. There were no recommendations from the court,therefore the orders could not legally be made from other recommendations. The statutory legal procedure had to be followed, but was not followed – See ***DE SOUZA –VS- TANGA COUNTY COUNCIL [1961] EACA 377***. The deportation and prohibited immigrant orders are therefore of no legal value.

In addition to the above, the party against whose actions suit was filed is the first respondent. Even if there is an affidavit filed by a civil servant, the 1st respondent himself, who is still the Minister in charge of Immigration, should have sworn an affidavit in response to the application. The rule of hearsay applies to evidence as well as documents. An affidavit is evidence, and its weight goes according to its source. The affidavit sworn by a person who did not take the actions complained of have little, if any weight at all.

I find and hold that the action by the first respondent was not backed by the law, was unlawful, unreasonable and contravened the principles of natural justice. They were null and void, as they did not comply with legal requirement.

4. DO I GRANT THE ORDERS SOUGHT?

The order for prohibition was for the period pending the hearing of the Notice of Motion. It is spent. However, from my above findings I will have to grant the two certiorari orders sought.

For the above reasons, I allow the application and grant prayer 1 and 2. I order as follows-

1. An order of** CERTIORARI **is hereby issued directed at the 1st and 2nd respondents to remove and bring to this court to be quashed the deportation order dated 23rd May, 2008 given under section 3 of the Immigration Act, Cap. 172 of the Laws of Kenya classifying the applicant as a prohibited

immigrant and ordering the deportation of the Applicant from Kenya and same is hereby quashed forthwith.

2. An order of *CERTIORARI* ***is hereby issued directed to the 1st and 2nd Respondents to remove and bring to this court to be quashed the deportation order dated 23rd May, 2008 under section 8 of the Immigration Act, Cap. 172 of the Laws of Kenya as shown to the applicant, but never served upon the Applicant, directing that the applicant be deported, and the same is hereby quashed forthwith.***

The respondents and the interested party will pay the applicants costs of the proceedings with the interested party paying 1/3 of the costs.

Dated and delivered at Nairobi this 9th day of October, 2009.

GEORGE DULU

JUDGE.