REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISC APPLI 355 OF 2005

IN THE MATTER OF: AN APPLICATION BY PRADEEP HARISH HINDOCHA FOR ORDERS OF CERIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: ORDER LIII-CIVIL PROCEDURE ACT AND RULES, THE JUDICATURE ACT

IMMIGRATION ACT CAP 172 AND OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC..... ……. APPLICANT

VERSUS

PRINCIPAL IMMIGRATION OFFICER. ……. RESPONDENT

EX PARTE: PRADEEP HARISH HINDOCHA

R U L I N G

The application before the court is a Notice of Motion dated 31st March, 2005. It seeks the following orders: -

(a) An order of certiorari to quash the decision of the Respondent to withdraw the applicant's passport No. A819631 as communicated to the applicant vide Respondent's letter dated 25th February, 2005.

(b) An order of Mandamus to compel the Respondent and the Minister to

(i) re-issue to the applicant the aforesaid cancelled passport and

(ii) To approve and register him as a Kenyan Citizen.

(c) Costs of the application.

The applicant relied on his statutory statement dated 15th March 2005, his verifying affidavit sworn on 15th March 2005 and his supporting affidavit sworn on 31st March 2005 together with all the annextures thereon attached.

The facts of this case to the extent I understand them are as follows: -

The applicant, Pradeep Harish Hindocha, was born on 4th August 1967 in Kitale, in Trans-Nzoia District in Western Kenya. His father, Harishchadra Magnilal Hindocha had been born in 1944 in Eldoret where he grew up before moving to Kitale. The applicant's mother was originally born in Uganda before he married the applicant's father. Both parents were commonwealth citizens at the time of the applicant's birth in 1967.

It is deponed that on 9th August 1968, the applicant's father became a Kenyan citizen by registration. He obtained a Kenyan Passport No. R203330 – exhibit No. PHH-10-11. This is stated to be about 8 months after the applicant's birth. Later in 1986 the applicant's mother also became a Kenyan citizen by registration and obtained Kenyan Passport No. A461097.

It is deponed further that the applicant grew-up, and obtained his early education in Kenya, apparently dropping out while he was doing his form two level, to join his father's business. He later obtained a Kenyan National Identity Card Number 11221536 dated 19th October 1996 – exhibit PHH 6 – confirming the date of birth as 4th August, 1967.

It appears that on 19th April 2002 the applicant applied for a passport, paying the requisite fees of Kshs.3040 vide government receipt Number 282646 of the same date herein exhibit PHH 19. Copy of the said application was not annexed to this Notice of Motion but that such an application was made, is not being denied by the Respondent. The applicant avers that he had annexed to the said application, his National Identity Card, his birth certificate, his certificate of Good Conduct, and other relevant documents required for the processing of the passport which he had applied for.

On 20th May 2002 the Respondents through the office of the Principal Immigration Officer, Nairobi, wrote a letter to the applicant exhibit-PHH15-acknowledging the applicant's application for a passport and advising the applicant to furnish the Principal Immigration Officer with certain particulars and/or documents, details of which he would be informed if he visited the immigration offices and contacted the signatory, a Mr. S M RINTARI. It would appear from the record that on seeing the Principal Immigration Officer or his agent as advised, the applicant was advised to submit the required documents or information which were required to process the application. He was thereafter apparently advised to await the results within six months.

It is clear from the record however, that the passport was not processed soon. The Applicant accordingly wrote three reminders to the Principal Immigration Officer which are respectively dated 21st January, 2003, 14th august, 2003 and 3rd October, 2003. No reply appears to have been received from the Respondent in response to the applicant's inquiries.

The applicant, who in the meantime had been seeking advice over the issue, filed a separate application with the Principal Immigration Officer, on 30th October, 2003, seeking a Kenyan citizenship through registration. He filled and lodged the relevant application forms together with the application fees

of Kshs.50,000/- exhibit PHH I, by a National Bank Cheque Number 054488. He received a reply dated the same day, acknowledging his application with the application fee and was advised to wait for the outcome within a period of six months.

The record confirms that the applicant, meanwhile, found it necessary to travel to India to take his mother for medical treatment. He accordingly applied this time for a temporary passport to enable him travel to India. It is on record that the Principal Immigration Officer, on 31st April 2004, issued the applicant with a temporary Kenya passport No. A819631 – Exhibit PHH 26 – 27. The passport was to last for three months and was to expire on 13th April 2004. Come June 17th 2004, the Applicant applied for the renewal of the said temporary passport and it is asserted by the Applicant and not denied by the Respondents that it was so renewed for a further period of six months from 1st January, 2005.

It is the Applicant's case that it was during the period as he held the renewed passport No. A819631 aforesaid that the Respondent served him with the impugned Notice dated 25th February, 2005, signed by one F M Baya, the Acting Principal Immigration Officer. The notice was marked as Exhibit PHH5 and was addressed to Pradeep Harish Hindocha. The notice partly stated a follows: -

"…**Your above quoted passport issued to you at Nairobi on 13th January 2004 valid for three months is hereby withdrawn. Please note that your application for Kenya Citizenship was not approved and you have no valid passport or Travel Document of your country of nationality and you also do not have a permit or pass authorizing you to remain in Kenya. You are therefore unlawfully present in Kenya in contravention of Immigration Act Cap 172, Laws of Kenya. You are thus advised to regularize your Immigration Status within one month of the date of this letter, failure to which legal action will be taken against you…."**

This court understands the applicant's position to be that it was the decision of the Respondent's through the above quoted letter that took away or breached his rights. The applicant on 15th March 2005, properly obtained the leave required under Order LIII rule 1 to file this Notice of Motion within 21 days. This application was accordingly filed on 1st April 2005. It sought the orders of Certiorari and mandamus as stated at the beginning of this ruling.

By a replying affidavit sworn and filed on 1st February 2006 by one Mathias Koyo on behalf of the respondent, the deponent took the following position: -

1. That he had authority to swear the deponements therein.

2. That the applicant was born on 4th August, 1967 at Kitale, in Trans-Nzoia in Kenya.

3. That, on the date of the applicant's birth, neither of his parents was a Kenyan citizen since the applicant's father Harishchandra Maganlal Hindocha was a British Citizen while his mother Induken Harishchandra Maganlal Hindocha was a Ugandan citizen.

4. That, the applicant's father became registered as Kenyan citizen on 9th August 1968 and his mother on 13th June, 1986, in which case the applicant did not stand in a position to become an automatic Kenyan citizen due to his birth.

5. That the applicant was issued with a temporary Kenyan Passport No. A819631 on 31st January, 2004 to last 3 months purely on humanitarian grounds to take his mother to India for medical treatment.

6. That indeed the applicant held a Kenyan National Identity card Number 11221536 issued on 19th October, 1996 but that the same did not alone prove that the applicant was entitled to be given Kenyan citizenship.

7. That the applicant's application for registration as a Kenyan citizen was disapproved because he did not qualify to be registered as one and that therefore the temporary passport issued to the applicant deserved cancellation

8. That the principal Immigration Officer did not, in rejecting the applicant's application for citizenship and passport, break any law.

9. That to qualify to be registered as Kenyan citizen, the applicant ought to have ordinarily and lawfully, been resident in Kenya for a period of at least five years, which the applicant did not, since his stay was unlawful.

Apart from the above replying affidavit the Respondent also filed Skeletal Notes dated 24th February 2006 in which he in answer to the applicants documents, requested the court to uphold the decisions made by the Respondent on the following grounds:-

a) That the decision to withdraw the Applicant's passport should not be quashed because it was made in good faith and that all necessary procedures were followed. That the letter of 25th February, 2005 to the applicant was as good as the required notice of the Respondent's intention to withdraw the passport. That the letter gave the applicant one month to regularize his status in Kenya and that such direction was equivalent to notice to applicant to appeal if he was dissatisfied. That the original invitation to the Respondent's office to be informed of the way and what documents were required to apply for a passport, was equivalent to an opportunity to put his case which he did when he responded and complied with any directions given.

b) That the issuing of a temporary Passport was done on humanitarian grounds but nevertheless amounted an additional opportunity and occasion to put his case fully.

c) That the applicant should have filed an appeal to higher authority and that in coming to court instead made him lose his rights under section 15(a) and (d) of the Immigration Act.

On the issue of the order of Mandamus the Respondent stated: -

(a) That the renewal of a Passport is not automatic but discretionary at the instance and discretion of the Principal Immigration officer in the exercise of his statutory powers based on merit.

(b) That in any case the applicant had no locus standi to seek and/or obtain a favourable order of Mandamus.

(c) That the making of a full application by the applicant by filling and filing the relevant application for a renewal of the Passport and for the registration of the applicant as a citizen, including the payment of the required fees, amounted to and satisfied the requirement of giving the applicant the opportunity to be heard.

The court observes that after filing the Skeleton Notes the Respondent either deliberately or inadvertently lost interest, in this case. He failed to attend court to defend the above issues. He thus failed to attend any hearing. He also failed to file the written submissions ordered to be filed as well as failed to attend court to defend against the applicant's case.

On the other hand the applicant case as the court understands it, is that the decisions of the Principal Immigration Officer: -

a) To withdraw or cancel the applicants passport Number A819631 and,

b) to reject to register the applicant as a Kenyan citizen,

were null and void and contrary to the principles of natural justice. For the said reasons, the applicant's

prayers are that: -

a) The decisions above mentioned should be quashed by an order of Certiorari and; immediately thereafter, this court should issue

b) an order of Mandamus, compelling the Principal Immigration Officer to

i) Renew or reinstate the applicant's cancelled passport number A819631.

ii) cause to register the applicant as a citizen of Kenya.

The applicant relied on the following grounds in his attempt to persuade this court to issue the order of certiorari: -

(i) That the Principal Immigration Officer or his authorized agents failed to give the applicant opportunity to be heard or to state his case before canceling the passport.

(ii) That the respondent rejected the applicant's application to be registered as a Kenyan citizen without first giving the applicant an opportunity to state or present his case.

For seeking an order of Mandamus to compel the respondent to re-issue the cancelled passport and to register the applicant as a Kenyan citizen, the applicant based his application on the grounds: -

(i) That the applicant was eligible to have his passport renewed on expiry under the Immigration Act, Cap 172.

(ii) That the Principal Immigration Officer was under legal duty to cause the applicant to be registered as a Kenyan Citizen under sections 92 and 93 of the Constitution and the Citizenship Act, Cap 170.

This court identified the issues in this case to be as follows:-

1) Was the Applicant entitled to an opportunity to be heard before the Respondent cancelled his passport No. A819631?

2) Did the Respondent give the applicant such opportunity to be heard?

3) If the answer to (2) above is in the negative, did failure to give such opportunity occasion injustice and thus invalidate the Respondent's decision communicated in the letter dated 25th February, 2005?

4) Is the applicant entitled to the order of certiorari to quash the decision to cancel the temporary Passport.

5) Is the applicant entitled in the circumstances, to an order of Mandamus to compel the Respondent to restore the cancelled passport to the applicant?

6) Was the applicant entitled to be given opportunity to be heard in support of his application for registration as a Kenyan Citizen?

7) If the answer is in the positive, did the Respondent give the applicant the said opportunity?

8) If the answer is negative, did the Respondent's failure invalidate the decision to reject such registration, as communicated in the letter of 25th February 2005 aforesaid?

9) Is the applicant entitled to be registered as a Kenyan citizen upon the facts before the court?

10) If the answer to (9) above is positive, is the applicant in the circumstances, entitled to an order of Mandamus to compel the Respondent to authorize the applicant's registration as a Kenyan citizen?

Before considering the issues above to resolve them, the court wishes to examine the facts on record to decide those it accepts.

The applicant averred that he was born at Kitale in Western Kenya where he also grew up and where he went to school. It is not in dispute that at the time of his birth, both his parents were not Kenyan citizens. The father was apparently a British citizen of Indian origin. His mother held Ugandan citizenship. It is accepted therefore, that they were both citizens of the British Commonwealth, a body that brought and held together, Great Britain and all its former colonies even after they had became independent nations.

It is accepted also that on August 9th 1968, less than a year after the applicant was born on 4th August 1967, the applicant's father became a Kenyan citizen by registration. Similarly, his mother followed suit on 13th August, 1986.

Apparently, the applicant lived with his parents throughout his early life. He dropped out of school a year or two after joining a secondary school and joined his parents' business. The business apparently became his jointly with his mother when his father died.

Being a person whose two parents were Kenyan's, he applied for the Kenyan National Identity Card and obtained one, No. 11221536, dated 19th October 1996. Then on 13th January 2004 he obtained a Kenyan Passport No. A819631 which was to last for three months to April the same year. The record shows that the application for the passport had apparently been lodged on 19th January 2002, but processing took up to January 2004.

There is further evidence on record that the applicant sought renewal of the issued temporary passport by his letter of 17th June 2004, and he avers that it was renewed for a further six months thereafter. Although the date of renewal is not clarified, the Respondent did not dispute such renewal.

The record further indicates that while the Applicant waited for the passport to be processed after his application in May 2002, he, on 30th October 2003 applied to be registered as a Kenyan citizen by lodging the relevant application forms and paying to the immigration office Kshs.50,000/- which was the requisite application fee.

There is evidence on the record that the applicant used the temporary Passport to travel to India when he took his mother, a Kenyan citizen, for medical treatment. It was apparently as he enjoyed the use of the passport while waiting for his registration as a Kenyan citizen that he was bombarded with the sad news contained in the Respondent's letter of 25th February 2005. The letter not only cancelled his temporary passport but also informed him that his application for registration as a Kenyan citizen had been rejected. The letter further stated that he was illegally in Kenya as he had now no documents authorizing him to stay and that he had 30 days to regularize his presence in Kenya. That is when he decided to come to court by filing a process on 15th March 2005. He sought leave to file the Notice of Motion now before the Court.

It will be necessary to explore the Immigration status of the applicant at this point in time – In 1967 August when he was born, his two parents were British and Ugandan, thus British Commonwealth citizens. At the time of applying and obtaining the Passport under dispute, as well as applying for citizenship by registration, the applicant was a person whose parents were Kenyan citizens. He was accordingly on the face of things, eligible to be registered as a Kenyan citizen by virtue of his parents being Commonwealth citizens as well as having his both parents being Kenyan citizens under section 92 of the Constitution.

There is however a second position to the matter above. The applicant who was born and bred in Kenya

and whose both parents were Kenyan, had been identified and registered by the Republic of Kenya as an ordinary Kenyan citizen on 19th October 1996 and had been given a national identity card No. 11221536. There is evidence, which was not challenged by the Respondent, that in deciding to grant the applicant with the Passport No. A819631, Respondent was among other considerations, influenced by the fact that the applicant was an ordinarily registered Kenyan for being a person ordinarily carrying a Kenyan identity card. Generally, a birth certificate and a National identity card are required by an applicant for the consideration to be issued with passports.

It would not be far-fetched therefore to presume that in issuing the passport to the applicant in January 2004, the Respondent was effectively, prima facie issuing a passport to a Kenyan national. Indeed, the process of issuing national identity cards is a due process requiring establishment of proper and meritorious facts. It is carried out not by the Respondent's Ministry of the same government but a different department in the President's office. It is not unreasonable or illogical to presume therefore that the registration of the Applicant as an ordinary Kenyan national who deserved to be so registered and be given the Identity Card was done on merit and stands valid. Indeed if it has to be reversed, a full and proper legal judicial or semi-judicial process would be required. So by the time the applicant applied for and obtained the Passport, the same would appear to have been granted to him (however temporary its class was) on merit.

With the foregoing state of facts, which the court hereby accepts the court now turns to the issues earlier tabulated to find answers to them.

The first issue was whether the applicant was entitled to a notice and opportunity to be heard before the Respondent cancelled his Passport No. A819631.

To answer the issue, this court would first state what a Passport is and what is entailed in it that would adversely affect the applicant in the event of its cancellation? In the case of **Republic v. Brallsford (1905)** 2 KB 730 at p. 745 a passport was described: -

"**It is a document issued in the name of the sovereign on the responsibility of a Minister of the crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries and it depends for its validity upon the fact that the Foreign Office in an official document vouches on the respectability of the person named…."**

In Kenya a Passport's validity stems from the Constitution. The document upholds and protects the right of movement out of the country and into the country as part of the basic right and freedom of movement enshrined in the constitution, in section 81(1) which states: -

"**No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely, throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya"**

It means accordingly that a person who holds a Passport in Kenya carries with him the constitutional right of travel in and out of the country as of right and sometimes of necessity. As put in the Canadian case of **ABRURAHMAN KHADR v ATTORNEY GENERAL FOR CANADA**, 2006 F. C, 727, para. 34: -

"**In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy."**

In short therefore, a passport confers not only the right to travel in and out of ones country but also confers a means to social and economic improvement besides being a means to personal security to the holder. It is in my opinion, a valuable property which in addition protects an individual's good name, reputation, honour, integrity and personal security from other individuals and government officials of other countries.

To the ends just mentioned above, the court observes that in his application for a passport dated 21st January, 2003, the applicant had stated that he wanted it for, inter alia, traveling outside to expand his business. Later he sought renewal of the same to enable him travel to India for medical treatment of his mother. Both grounds partly stress the importance of a passport to its holder.

It is on record that the applicant's passport was cancelled on 25th February 2005. There is no evidence on the said record that the Respondent gave any prior notice of his intention to revoke the passport. Nor is there evidence that the Respondent invited the applicant to show cause why the document should not be revoked for good reasons in the hands of the Respondent, if he had any. The Respondent argued that the letter canceling the passport was itself a good and sufficient notice. However, the applicant argued that he deserved prior notice and a chance to explain his case and give reasons why the Passport should not be cancelled.

I have considered the issue carefully. I observe that section 81(1) which enshrines the freedom of movement, also under section 81(3) allows for the imposition of restrictions on the movement or residence within Kenya or the right to leave Kenya, that are reasonably required in the interest of defence, public safety, public order, public morality, public health or public protection. This provision, in my understanding, authorizes parliament, where necessary, to pass a regulatory statute which would regulate the extent and manner the above right would be freely enjoyed while taking care of the mentioned public interests without allowing such statute to be inconsistent with the Constitution. In my view, the Immigration Act, Cap 172, was probably intended to be such Act. However, a careful perusal of the Act shows that it is silent in respect to relevant provisions and regulations particularly, to the issuance, management, limitation and cancellation of a Passport. The conclusion I would find reasonable to come to in the above circumstances is that the officers exercising the regulatory powers relating to the enjoyment of the said right, have to do so most probably, in accordance with the broad purpose of the constitutional provisions as well as the principles of natural justice. Indeed it is my further view that even where there is an authorized statutory regulation to constitutional rights the regulation has to be constructed in such a way as not to be inconsistent with the Constitution.

The High Court in Nairobi Petitions 199 and 200 of 2007 (consolidated) strongly emphasized the strict principle of the above mentioned constitutional provisions by putting it as follows in the case of **DEEPAK CHAMANLAL KAMANI v PRINCIPAL IMMIGRATION OFFICER AND TWO OTHERS**, at page 50: -

"**In Kenya the right of travel is an expressed constitutional right, and its existence does not have to depend on a prerogative, inference or any implied authority. For it to be lawfully regulated this must be based only on the limitations expressly specified in the limiting provisions which are in turn designed to achieve a legitimate purpose defined in the relevant provisions."**

I am in full agreement with the expressions above. It is my considered view therefore that any statutory legislation set up or to be set up under section 81 of the Constitution would be one to assure maximum enjoyment of the right of the freedom of movement while authorizing certain limitations and restrictions for the wider public interest stated in the provisions. It logically follows then that any public body or bodies set up to regulate the relevant procedures involving the regulation of any constitutional right, will be limited to the purpose for which they were created, particularly in the exercise of their powers and functions. This implies that the exercise of such functions will require a due process in order to make the functioning lawful, fair and just. After all, the exercise of powers in the regulation of the enjoyment of a basic right is from the start an interference of such right and requires to be watched lest there be a stealthy

overstepping. Hence the view that deprivation or restriction of the enjoyment of the basic rights should preferably be exercised or regulated under clear or certain rules or regulations. That is to say, deprivation should never be left to the whims of policy makers, the executive or even the judiciary.

Having come to that conclusion, I proceed to state that due process requires an inbuilt procedure in which a prior reasonable notice would issue to the person who would be adversely affected by the decision intended to be taken by a public body exercising public power and functions.

In relation to the case before me, the Principal Immigration Officer was therefore intending to take away from the Applicants: -

"**the right to travel (which) is part of liberty which a citizen cannot be deprived without due process of law….."**

as was stated in **Kent** v **Dulles**, 357 US 16 (1958). Indeed many cases from across the wide world can be cited in support of the view that the issuence of a passport towards the fulfillment of maximum enjoyment of the right or freedom of movement is one which cannot be over stressed. Regulation or interference with a passport is therefore, a subject of great importance. In the Canadian case of **ABDURAHMAN KHADR v ATTORNEY GENERAL FOR CANADA 2006 FC, 727 PARA 734** the court stated: -

"**In my view the improper refusal of a passport should as the English courts have held, be judicially reviewable"**

And at page 67: -

"**In my view the greater the importance of the right or interest, the higher the standard of fairness will be imposed. The importance of a passport means that the principle of fairness in which legitimate expectation is one must closely and vigorously be adhered to."**

Having considered the facts of this case, I have come to the conclusion that the applicant was entitled to minimum notice prior to the cancellation of the passport. Such notice, the respondent failed to serve him. I am also of the view and do find that the Respondent should have given the applicant an opportunity to speak in support of saving the passport from being cancelled. The Respondent's conduct led to injustice in that it caused the applicant's means to full enjoyment of his right to freedom of movement to disappear, to his detriment.

I find the decision of the Respondent liable to be declared null and void on two separate grounds: -

- First, on the ground that it was against the rules of natural justice already discussed above for lack of due process.

- Second, on the ground that the decision and/or action to cancel the Passport lacked legal authority or power as the cancellation was not carried under any known statute or statutory regulations.

This arises from the fact that the Immigration Act, Cap 172 which would be the source of statutory authority to regulate the issuance, control and withdrawal or cancellation of a Passport, provides no such authority for such cancellation. As stated in the case of **DEEPAK CHAMANLAL KAMANI** earlier quoted at page 51: -

" **The revocation of the Petitioner's Passport must be unconstitutional, null and void because there**

was no enabling or authorized law which was invoked in the revocation of the passport… the decision to revoke is void for violating the provisions of the Constitution. The decision should have been based on the law."

I understand the above quotation which I agree with, to mean that the Principal Immigration Officer had no power, in the absence of specific enabling legal provisions in the Immigration or any other relevant Act, to cancel an existing passport, especially where, as in this case, cancellation was done without giving any reasons for doing so by the Respondent.

In my further view, the exercise of the executive power by the Respondent in this case as typified above, shows how much such power can be abused by those entrusted with it. The purpose for which such persons, tribunals or authorities are, set up is to decide controversies between the state and its subjects or between a subject and another subject. Such exercise of power, almost without exception, involves exercise of discretion with the view or purpose of arriving at a fair and just resolution. That is why it is necessary that there should be in place clear and certain rules governing the exercise of such executive power. Stressing this position and the fact that the exercise requires due process, the court in **R . GILLAN & ANOTHER v COMMISSIONER OF POLICE OF THE METROPOLITAN & ANOTHER,** (2006) UKHL, 2 stated: -

"**The exercise of powers by public officials as it affects members of the public must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred."**

In this case before me, it can be concluded without much hesitation, that the Respondent, in addition to acting under no clear or certain regulations, exercised his official powers arrogantly and arbitrarily. I cannot possibly put it better than it was done in the Nigerian case of **OLISA AQBAKOBA v. THE DIRECTOR OF STATE SECURITY SERVICE & ANOTHER,** (1998) HRLRA, 252 at page 281, relating to the interpretation of a Constitutional provision similar to ours: -

"… **It would be an affront to all known human rights norms were the right to freedom of exit specifically guaranteed by our Constitution, to be drained of all effect by arrogating to the government a discretionary and almost arbitrary power to withhold, withdraw or revoke a passport."**

In conclusion of this issue, which also is a resolution of issue (4) in the list of issues earlier herein tabulated, it is my view and finding that upon the two reasons discussed above, the applicant is entitled to an order of Certiorari to quash the Respondent's decision to cancel his Passport. I take this decision while being aware that courts are very loath of interfering with decisions of officials or public bodies and tribunals whose legal or constitutional duty it is to exercise executive, administrative or disciplinary powers. However, I am also at the same time conscious of the fact that it is the duty and jurisdiction of the court to curb excesses of officials and such bodies who act to the detriment of individual citizens in the enjoyment of their basic rights as re-stated in the case of **NYONGESA & 4 OTHERS v EGERTON UNIVERSITY COLLEGE** (1990) KLR, 692 at page 697. An order of certiorari deserves to, immediately issue recalling to this court the decision of the Respondent as contained in the letter of 25 February 2005, for quashing.

The next issue is whether in the circumstances following the said quashing, an order of Mandamus to compel the Respondent to restore the Applicants Passport No. A819631, should issue?

To start with the Respondent had issued the said passport to the Applicant in the first place. There is no evidence on the record to persuade this court that the issuence of the document was not done on merit. That means that the applicant must have deserved the right to be issued with the passport. The Respondent chose not to appear before the court to establish any facts that could reverse the scenario. Accordingly the Applicant remains entitled to having a passport which can only be re-issued or be restored by the Respondent, especially after any impediments placed before him have been removed by this court's order to quash the decision to cancel the passport.

In addition, it cannot be denied that the applicant has a genuine and substantial personal interest in the passport being restored. He shows that he needs the passport to travel out of and back to this country for various genuine purposes. It may be for trade or other economic purposes, or for medical treatment for himself or his relatives. Indeed, it may even be for pleasure. Whichever may be the reason for travel, there is no evidence that it would not be for a genuine purpose sought to be faithfully accomplished by the Applicant.

In my view and finding, the Respondent should be fully aware of his legal duty to re-issue the cancelled passport to the Applicant after the cancellation of the same has been ordered quashed. There is no other legal remedy which can be ordered to achieve the Applicant's need to have his passport restored. Under the above circumstances, this court finds that an order of Mandamus to compel the Respondent to restore the applicant's passport aforementioned is needful and necessary.

Turning now to the issue listed as (6), the question is whether the Applicant should have been given opportunity to be heard or to make a representation in support of his application to be registered as a Kenyan citizen. As earlier shown, he had originally been given a National Identity Card No. 11221536 dated 19th October 1996 and thereafter he was treated just like any other Kenyan National. He has lived in Kenya all his life and all his life activities show that he has always taken himself as a Kenyan national. This status does not appear to have been reversed or proved to be untenable by any person including the Respondent. That is how, in the court's understanding, he was in the first instance, granted a passport when he applied for one using the national Identity Card aforementioned.

Apart from what is stated above the record confirms that the applicant at the minimum, was a person whose parents were Kenya citizens at the time of his application to be registered as a Kenyan citizen. Having then lived in Kenya for longer than five years, indeed all his life and with his proven good character and good conduct as confirmed by the certificate of good conduct presented to the Respondent, he in my view and finding, deserved a fair er and better treatment by the Respondent.

The Respondent did not present facts showing the reason or justification for the rejection of the applicant's application. This was necessary to justify the argument that the case was properly and adequately considered before rejection, especially since, on the face of it, the case appeared to avail all the basic qualifications in favour of registration under Section 92 of the Constitution and Section 3 of the Kenya Citizenship Act, Cap 170 of the Laws of Kenya. The exercise of the Respondent's discretion required among others, due process which in my view, would demand that the Applicant should be given opportunity to present reasons why his otherwise qualifying case, should not be rejected.

As earlier stated of such bodies, tribunals or officials who are appointed to exercise regulation of public functions, they have no heritage of the legal rights which they enjoy for their own sake at every turn. All their dealings constitute the fulfillment of the duties they do to those they serve. They are under obligation to act in good faith purposely to vindicate the better performance of the duties for whose performance and fulfillment they were created and exist. For similar reasons such bodies or officials are regarded as having no rights of their own and have therefore no axe to grind beyond their public responsibility. It would follow therefore that the people's rights that the bodies decide and often regulate should be protected from arbitrary interference, not only by the nature of such bodies as described above but also by the manner they perform their functions.

Perusal of section 92 of the Constitution, (Most probably under which the Applicant was eligible to and applied to be registered as a Kenyan citizen) will confirm that an Act of Parliament was expected to

be passed under it. Such an Act would be expected to lay down the qualifications of the applicant, the procedure to be followed by the eligible applicants to apply and the due process to be adopted by the public body or official to grant the citizenship registration. The view I hold is that the Act intended to fulfill the purpose of Section 92 of the Constitution is the Kenya Citizenship Act, Cap 170 of the Laws of Kenya. The Act under its sections, indeed, repeats the qualification or criteria for the persons who may qualify to apply for registration under various categories. Section 10 prescribes that the granting authority shall be the Minister or any officer to whom the power or authority may be delegated, in this case the Principal Immigration Officer. The section prescribes the forms and the payment of requisite fees as made and prescribed under Section 14, for the carrying into effect the purposes of the citizenship provisions of the Constitution.

The most eye-catching parts of section 14 of the Act (at least for the purpose of this case before me) are subsections (b), (d) and (e) which state: -

"**14(1) The Minister may make regulations to make provision generally for carrying into effect the purposes of the citizenship provisions of the Constitution and this Act and in particular: -**

(b) for the registration of anything required or authorized under the said citizenship provisions or this Act to be registered

(d) for the giving of any notice required or authorized to be given to any person under this Act.

(e) for the cancellation of the registration of… persons deprived of citizenship under the Act…"

It will be noticed that Parliament, acting under the constitutional provision, empowered the Minister to fully regulate the method of granting eligible persons of various classes of citizenship. The Minister's powers and functions in my view, however, were to make such provisions or regulations for the carring into effect the purposes of the citizenship provisions of the Constitution and the Kenya Citizenship Act. I understand Section 14 of the Act to be saying that the Minister should promulgate regulations which would lawfully, fairly and justly govern the registration and cancellation of citizenships. They would in my view prescribe clear and reasonable forms of application. They would prescribe reasonable fees. They would make fair and just rules to manage and control the methods which would ensure that applicant's application would only be rejected on reasonable or lawful grounds and that the applicant would be given a fair opportunity to represent his case. In summary, the regulations would ensure a due process where the rules of natural justice are observed.

I have made a search of the rules that the Minister may have promulgated under the said section 14 above cited. Unless my conclusion is inadvertent, the Minister appears to have promulgated only the regulations headed **"The Kenya Citizenship (Forms and Fees) Regulations,"** and no other. The brief regulations provide the nature of forms for the various applications and the fees for applications. No regulations for the nature of notices required to be served or the method, rules and procedure for registration of citizenship were ever legislated in order to make the process lawful, fair and just. The only interpretation I can give for lack of such regulations is that the process was left to the good and common sense of those issuing and cancelling such citizenship registration. Thus, although Parliament under the Act expected, and indeed required the Minister to promulgate the regulations, the Minister, if I am not wrong on facts, failed to do so.

It might on the other hand, be argued that failure to make such regulation did not really matter since the

granting and cancellation of citizenship registration, after all, lay at the discretion of the Minister or his authorized official by virtue of section 9 of the same Act. The section states: -

"**The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on any such application shall not be subject to appeal or review in any court."**

In my opinion, however, law must be precise and specific to ensure certainty in order that people can plan and regulate their affairs in the confidence of obedience to it. That is why the Constitution, being a basic and brief law document, allows and authorizes the promulgation of more detailed and specific legislation by Parliament.

It is my finding accordingly, that the provisions of section 9 giving the Minister what appears to be unlimited power and authority did not excuse him from making the required legislation. On the other hand lack of such subsidiary legislation to define the limits within which to grant and cancel citizenship legislation, while it may be tolerated in circumstances in which it operates in favour of a citizen, cannot be easily overlooked in circumstances where it works against the enjoyment of basic rights and freedoms. In my further opinion, where lack of authorized legislation operates against those it would have protected, then this court would not hesitate to find that deliberate or negligent failure by the Minister or the executive to promulgate an authorized necessary legislation, cannot and should not be allowed to be the basis for denying a citizen his basic rights and freedoms.

In this case the Minister entrusted with the duty to make subsidiary legislation that would define the methodology of granting registration of Kenyan citizenship failed to do so. He or his authorized officers then proceeded to deny the Applicant registration under what may be termed "**Kangaroo"** procedure under which the applicant was denied a chance to represent his case. No reasons for denying him the registration were given, nor was he notified of the date of the rejection of his case. The evidence on the record shows that this was a deserving case, which the Respondent did not even attempt to defend. Should the construction of section 9 of the Kenya Citizenship Act be allowed then to give the respondent any consolation? The answer, in my opinion should be in the negative, for the following reasons: -

First, because prima facie, the effect of section 9 is, in my view, taken away by the provisions of section 15 of the same Act in so far as the latter clearly subjects any provision in the Act which is inconsistent to the citizenship-granting provisions of the Constitution, to nullification. I have already made a finding that failure to raise a subsidiary legislation which would define the methodology of granting citizenship by registration, allowed and enabled the Minister to adopt a "**Kangaroo"** method which operates inconsistently to the Constitution. Further more the method adopted by the Minister to refuse registration, having not been defined or authorized by the Act or any possible subsidiary legislation thereunder, is in the logic of the **DEEPAK CHAMNLAL KAMANI** case earlier cited, unauthorized and therefore automatically unlawful and unconstitutional because it does not satisfy the principle of legality.

Secondly, section 9 of the Act, in so far as it tends to or appears to be limiting the Constitutional provisions for granting citizenship registration, must be held unconstitutional to the extent it is inconsistent. The position of the Constitutional provisions, as I understand them, is that a person, who holds the minimum constitutional requirements or qualifications therein prescribed, is entitled to registration as a Kenyan citizen unless he is affected by exceptions to the provision. The Minister should not therefore be allowed to comfortably claim that he has unrestricted powers or authority under the said Section 9 of the Kenya Citizenship Act, to restrict or limit the constitutional provisions for registration of citizenship. This once more calls for support from the case of **R. GILLAN & ANOTHER V COMMISSIONER OF POLICE OF THE METROPOLITAN & ANOTHER** (2006) UKHL 12, concerning the exercise of power by public bodies or officials: -

"**The exercise of power by public officials as it affects members of the public must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by**

public officials acting on any personal whim, caprice, malice, predilection or purposes other than that for which the power was conferred."

The conclusion I come to is that, a statutory provision such as the one contained in section 9 of the Kenya Citizenship Act, cannot be allowed to expressly or impliedly contradict a provision of the Constitution.

Thirdly, it is now trite law that this court has power to review the exercise of prerogative or executive powers where it were justifiable. Indeed even where there is no specific Act, statute or subsidiary legislation regulating a particular exercise of power by a public body or official, any necessary exercise of such power must be based on a residual law, such as the common law received by this country by virtue of section 3 of the Judicature Act. What this entails at the minimum is that prerogative or executive power must be exercised in accordance with the law. Such law will be the Constitution or the statute or the subsidiary legislation or in the absence of all the above, the common law.

The court's jurisdiction is therefore to review executive decisions to make sure that the public bodies or public officials have carried out their public responsibility in the manner defined for them under the law constituting them. This is for the purpose of protecting the people from arbitrary interference by the said bodies or officials.

The result is that despite the blunt wording of section 9 of the Kenya Citizenship Act giving the Minister or his authorized agent (here the Respondent) purportedly overwhelming powers intended not to be questioned, this court using its overriding civil jurisdiction, has power to supervise the exercise of his power to ensure proper exercise. That means that the Minister's decision can be revised if it is unlawful or improper despite the express words to the contrary found in Section 9 aforementioned. The result is that the court finds that the Respondent failed to adhere to due process by failing to give the Applicant opportunity to represent his case. In so doing the Respondent whether deliberately or inadvertently eliminated or excluded a fundamental cog in the constitutional and legal chain intended to be included in the exercise of the power by the Minister under the provisions under discussion. That was to the detriment of the applicant who deserves a remedy. This answers issues number (5) and (6) of the tabulated issues.

Having arrived at the conclusions above, I hereby do find that the decision of the Respondent refusing the Applicant Kenyan citizenship registration, stands liable to be declared invalid, null and void for the reasons discussed above. It follows that the said decision as contained in the letter of the Respondent dated 25th February 2005 will need to be recalled to this court to be quashed forthwith.

As earlier stated, the applicant is registered as a Kenyan national and holds a National Identity Card Number 11221536 issued by the State on 10th October, 1996. The status has never been legally challenged. That is clearly why the respondent most probably issued the Applicant with the Passport No. A819631. Despite the cancellation of the said passport, the applicant's National Identity Card considered with grounds already discussed, in my view, still entitles him to a Kenyan citizenship.

However, even if my above view were wrong, the Applicant's status would revert to that of being a person whose both parents are Kenyan citizens as at the time of his application for registration. He was born and has lived in Kenya all his life. He has a certificate of good conduct, speaks Swahili besides English and carries on a business activity which is for the benefit of Kenya's economic development. He lawfully resides in Kenya after being so registered as a Kenya National and being given a Kenyan identity card. He has no other country's citizenship, as he has never attempted to get any under the genuine belief that he was a Kenyan national. These qualifications, in my view, not only satisfied the requirements of section 92 of the Constitution but also Section 3 and 17 of the Kenya Citizenship Act, Cap 170. In the absence of any representation by the respondent that the Applicant failed to satisfy any other test required to be satisfied for the purpose of registration, I find that the Respondent had no valid ground to refuse the Applicant registration.

In the circumstances, it is my view and finding that the Applicant is entitled to an order of Mandamus. I

hereby order that it forthwith issues, directed to the Respondent, to compel the Respondent to carry out his public duty of registering the Applicant as a Kenyan citizen.

Before bringing this ruling to an end, I would wish to make the following comments: -

That the perusal and consideration of section 9 of the Kenyan Citizenship Act and decisions such as that in **RE-APPLICATION BY MWAU**, (1985) LRC CONST. 444 as reconsidered and distinguished in the case of **DEEPAK CHAMANLAL KAMANI** earlier cited suggest that it may not be too early for the Honourable Attorney General to have a fresh look at the Immigration Act, Cap 172 and the Kenya Citizenship Act, Cap 170, both of the Laws of Kenya. The purpose may be perhaps to reconsider the present structure of the said Acts with a view to decide whether or not they are generally suitable and effective in carrying out the purposes of the citizenship and immigration provisions of the Constitution under which the Acts were promulgated.

The final orders which the court finds relevant to make are as follows: -

Orders

a. The decision of the Respondent to cancel the Applicant's passport No. A819631 is hereby ruled and declared unlawful, null and void.

2. The Respondent's said decision as contained in his letter dated 25th February 2005 is hereby recalled to this court to be quashed forthwith.

3. An order of Mandamus is hereby ordered to issue, directed at the Respondent, compelling him to forthwith re-issue to the Applicant or reinstate to him, the Applicants Passport No. A819631.

4. The decision of the Respondent to reject or refuse registration of the Applicant as a Kenyan citizen is hereby declared unlawful, null and void.

5. The Respondent's said decision as stated in (4) above, and as contained in the Respondent's letter dated the 25th of February, 2005, is hereby recalled to this court to be quashed forthwith.

6. An order of Mandamus is hereby ordered to issue, directed at the Respondent, compelling him to forthwith register the Applicant as a Kenyan Citizen.

7. Costs are to the Applicant.

Dated and delivered at Nairobi this 12th day of March 2008.

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D A ONYANCHA

JUDGE