REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS0

Misc Civil Case 1652 of 2004

JUDICIAL REVIEW

- Right to work under the International Covenant on Economic Social and Cultural Covenant (ICESCR)
- Right to a family life under International Instruments
- Meaning of inhuman and degrading treatment under International Instruments
- Application of International Instruments
- Indivisibility and Interdependence of human rights
- Foundational values under Section 1 and 1A of the Constitution
- Margin of appreciation for Kenya to apply Immigration laws as regard work permits
- National interest and security concerns considered
- Application refused.

REPUBLIC...APPLICANT

VERSUS

MINISTER FOR HOME AFFAIRS .... 1ST RESPONDENT

THE COMMISSIONER OF POLICE .... 2ND RESPONDENT

THE PRINCIPAL IMMIGRATION OFFICER …..……...…... 3RD RESPONDENT

EX-PARTE

LEONARD SITAMZE ………………………….…..………………APPLICANT

JUDGMENT

The application before the court is dated 16th December, 2004. The applicant is a Cameroonian National married to a Kenyan Lady. As a foreigner, the Applicant can only engage in economic interests after obtaining a work permit from the Ministry of immigration. According to the statement the applicant has complied with the requirements of Rule 22 of the Immigration Act Chapter 172 Laws of Kenya but the Minister for Home Affairs and the Principal Immigration Officer have refused to positively consider the Applicant's request for Class "H" permit.

The Applicant contends that he has been running his company Sileo Company Kenya Ltd with the aid of his wife Josephine Nyambura Thuo as exhibited by the trading licence, Articles of Association and certificate of analysis produced in this case. The Applicant's Company has employed many Kenyans and it is financially healthy. The Applicant was also issued with a certificate of good conduct on 23rd June, 2003 by the Kenya police and as such the 1st Respondent has no good reason to deny the applicant the class "H" permit.

The Applicant has also been constantly intimidated harassed and subjected to inhuman treatment by the police on the pretext of failure to possess valid immigration documents.

The grounds upon which the reliefs are sought are:

1. The decision by the 1st and 3rd Respondents is discriminatory, unfair and unjust
2. The Applicant has been deprived of his right to enjoy his property quietly in contravention of section 75 of the Constitution of Kenya.
3. The Applicant shall be deprived his right to found a family if he is deported which is in contravention of Article 5 of Declaration of Human Rights of Individuals Who Are Not Nationals Of The Country In Which They Live.
4. The harassment and arrest of the Applicant by the 2nd Respondent amounts to inhuman and degrading treatment contrary to section 74 of the Constitution as well as Article 5 of the Declaration of Human Rights.
5. The decision by the 1st Respondent to refuse the applicant Class "H" Permit contravenes Article 6(2) of the International Covenant on Economic, Social and Cultural Rights.
6. The Applicant has been deprived his right to own and retain his property in contravention of Article 9 of the Declaration of Human Rights.
7. The decision of the 1st Respondent contravenes Article 1 of the Code of Conduct for Law Enforcement Officials.

The applicant has sought reliefs as follows:-

(a) An order of Mandamus to compel the 1st Respondent to issue the Applicant with a class "H" work permit to enable the applicant carry out his business lawfully.

(b) An order of Prohibition to forbid the 2nd Respondent by himself and/or his servants and agents from intimidating, harassing, arresting and or hindering Applicant's free movement on pretext of not being in possession of valid immigration documents.

The application is opposed by the Minister for Home Affairs, the Commissioner of Police and the Principal Immigration Officer who are the three Respondents. All the parties have filed their written arguments and lists of authorities.

The Respondents' response relies heavily on the Immigrations Act especially sections 5 and 8.

Section 5(1) states that there shall be classes of entry permits specified in the schedule. Section 5(2) states that where a person, other than a prohibited immigrant, has made an application in the prescribed manner for an entry permit of a particular class, and has satisfied an immigration officer that belongs to that class and that the conditions specified in the schedule in relation to that class are fulfilled, the immigration officer may, in his discretion, issue an entry permit of that class to that person.

Section 5(3) states that any person who has applied for an entry permit of any of the classes E to M (inclusive) and who is aggrieved by a decision refusing him an entry permit may, in the manner prescribed, appeal against that decision to the Minister, whose decision shall be final and shall not be questioned in any court.

Section 8(1) states that the Minister may, by order in writing, direct that any person whose presence in

Kenya was, immediately before 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.

The Respondents contend the decision of the Immigration officer is made pursuant to section 5(2) of the Immigration Act while the decision of the Minister is made pursuant to section 8 of the said Act. The Respondents further contend that the quashing of the Minister's decision contained in the letter dated 1st April, 2004 does not entitle the applicant to seek orders of Mandamus to compel the Immigration Officer to issue him with a permit as it amounts to urging the court to ursup the powers of the Executive/Immigration in issuing entry permit.

The Respondents further contend that section 5(2) of the said Act gives Immigration Officer discretion to issue an entry permit when an application is made in a prescribed manner satisfying certain conditions. According to the Respondents, prayer (1) of the Applicant's Notice of Motion is misplaced and wholly bad in law for the reasons here-in-under:-

(a) The Court cannot compel the doing of an act which is discriminatory upon the concerned public officer.

(b) The Court cannot exercise its powers of Judicial review over merits of the decision by a public officer but rather the process of making the challenged decision.

(c) The Court cannot act as an appellate body over the decision made by the Immigration Officer to refuse the applicant a class "H" permit.

(d) The application is resjudicata because although the Applicant had the knowledge that he had been refused entry permit on 23rd February 2004, he did not include a prayer for certiorari to quash the notification refusing him the entry permit.

The Respondents contend that the issue as to whether the applicant should be mandatorily granted a class "H" permit or have the same renewed ought to have been canvassed in ***Misc Civil Application No. 430 of 2004.*** The Court has had the occasion to go through the pleadings and judgment of Hon. Justice J.B. Ojwang in the aforementioned case. The Applicant had sought prayers as follows:

(a) An order of certiorari to remove into the Court for the purposes of being quashed, the decision and order of the Minister for Home Affairs as contained in his letter dated 1st April, 2004.

(b) An order of Prohibition prohibiting the Respondents, by themselves or their agents, from deporting the Applicant

(c) An order of Mandamus compelling the Second Respondent to return the property of the Applicant seized on 20th March, 2004.

The case was heard on merit and Hon Justice J.B. Ojwang made the following orders:

(a) That an order of certiorari be and is hereby issued to remove into the court and quash the decision and order of the Minister for Home Affairs as contained in his letter dated 1st April, 2004.

(b) That an order of prohibition be and is hereby issued prohibiting the Respondents by themselves or their agents from deporting the Applicant on the basis of the decision and order already quashed by the order set out hereinabove.

(c) That an order of Mandamus be and is hereby issued, compelling the 2nd Respondent to return the property of the Applicant seized on the 20th of March 2004.

The Respondents contend that the decision to refuse the work permit or its renewal had been made by the 3rd Respondent as at the time of Honourable Mr Justice Ojwang's judgment and had not been quashed and the Applicant's prayer for an order of Mandamus is intended to circumvent the law and its procedural requirements and further that the mandamus now being sought is res judicata.

The Respondents have further argued that the application before Court is res judicata because although the Applicant knew that he had been refused entry permit on 23rd February, 2004, he did not include a prayer for certiorari to quash the notification refusing him the permit. The Respondents contend that the issue of whether the Applicant should be mandatorily granted a Class "H" permit or have the same renewed ought to have been canvassed in the aforementioned Case ***Misc Civil Application No. 430 of 2004.***

In consideration of the above contention by the Respondents, it is not demonstrated to the Court how this instant application is res judicata. As I have earlier stated, the Court has had the advantage of going through the proceedings in ***Misc Application No. 430 of 2004.*** The Applicants in the aforesaid case was fighting against deportation which had already been ordered by the 1st Respondent. If the Applicant was deported everything else would have been overtaken by events. The Applicant's failure to apply for Certiorari and Mandamus in ***Misc Civil Application No.430 of 2004*** cannot be a ground for alleging that the matter is res judicata for the following reasons. First, the Applicant can be lawfully in Kenya without necessarily requiring a work permit and as such one may not link his being in Kenya purely for working reasons and that is why he challenged the order to deport him. Secondly, the Applicant is seeking to enforce his right to work under the Constitution, International Covenant on Economic, Social and Cultural Rights, 1966 and the Declaration on the Human Rights of Individuals Who Are Not Nationals of The Country In Which They Live.

Therefore, going by the facts of the ***Misc Civil Application No. 430 of 2004***, the argument that the application herein is res judicata has no merit. The prayers in both previous and instant case are quite distinct and the Court has jurisdiction to proceed and determine the prayers sought by the Applicant. The Respondents have cited the Court of Appeal decision in ***MBURU KINYUA v GACHINI TUTI 1978 KLR 69-82*** where the Court quoted the Privy Council in ***YAT TUNG INVESTMENT CO. LTD. V DAO HENG BANK LTD [1975] AC 581, 590:***

"**... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence or even accident, omitted part of their Case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

As earlier noted, this instant application is not res judicata because Hon. Justice J.B. Ojwang did not consider the issues of the Applicant's right to work as well as his passport and no judgment was pronounced on the two issues. However, even if the court was to find that Certiorari and Mandamus orders ought to have been sought in the ***Misc Civil Application No. 430 of 2004,*** there are special circumstances in this case which would necessitate the reopening in this case. Since Hon Justice J.B. Ojwang quashed the deportation of the Applicant, who runs a company, which is lawfully registered in Kenya, there is no way he could have enjoyed the fruits of his earlier judgment without the orders sought herein. Further, in the **Misc Civil Application No.430 of 2004,** the Applicant was faced with imminent deportation and the day he was declared a prohibited immigrant is the day he came to court under certificate of urgency. The Court has noted that even the pleadings in ***Misc Civil Application No. 430 of 2004*** were filed by M/s Kathambi Kinoti Advocates and later the case was prosecuted by Dr Khaminwa on behalf of the Applicant. Whichever way one looks at this case, the Respondents argument on resjudicata must fail and the court finds that it has no merit.

The Respondents urge this Honourable Court to refer to its earlier decision in ***Republic vs Judicial Service Commission ex-parte Pareno 2004 KLR 1*** AT PAGE 212-213 wherein the Court held that judicial review is principally concerned with the decision making process and not merit of a decision.

The Respondents contend that prayer 2 of the Notice of Motion is also misplaced, misconceived and wholly bad in law for the following reasons:

(i) The orders are abstracts and unenforceable.

(ii) The Applicant is seeking Court orders to prohibit the Respondents from implementing the law thereby urging the court to partake in an illegality.

The Respondents urge the Court to depart from the decision of Hon Justice J B Ojwang in ***Misc Civil Application No. 430 of 2004*** to the extent that it addressed the merits of the decision which is the subject matter of the Judicial Review instead of the process through which the decision was reached. However this Court rejects the invitation firstly, it cannot review another judge's judgment on any point and secondly because the new circumstances affecting the application were never canvassed before Hon Justice Ojwang. Courts in judicial review have sometimes to deal with the same matter but under different circumstances.

The Respondents contend that section 5 of the Act gives discretionary powers to the Immigration Officer and provides room for appeal against the refusal to grant entry permit by the Minister. When a person has been refused an entry permit by an immigration officer and no appeal is filed in the prescribed manner and within the prescribed time, the person becomes a prohibited immigrant and the Minister is right under section 8 of the Immigration Act to declare such a person a prohibited immigrant for purposes of his removal from Kenya. The applicant has confirmed that he did not appeal to the Minister against the refusal to grant him or renew the entry permit which renders him a prohibited immigrant.

The Respondents have further argued that the Applicant has not filed a constitutional petition to declare the provisions of the Immigration Act unconstitutional for breach of Fundamental rights or as being inconsistent with the values and principles of the United Nations Millenium Declarations or any treaty and as such they are irrelevant to the Applicant's case.

The Applicant has relied on two lists of authorities dated 27th April and 27th July, 2007. The latter is a supplementary one. The two lists of authorities cite thirty one (31) authorities which inter alia include the Immigration Act, Local Cases, international instruments and Judicial colloqium.

The Applicant who is a foreigner contends that he has complied with all the requirements of Rule 22 of the Immigration Act Chapter 172 Laws of Kenya and should have been therefore positively considered by the 1st Respondent for the issuance of a class "H" permit. The Immigration Act at the schedule states:

"**A person who intends to engage whether alone or in partnership in a specific trade, business or profession (other than a prescribed profession) in Kenya and who:-**

(a) Has obtained or is assured of obtaining, any licence, registration of other authority or permission that may be necessary for the purpose, and

(b) Has in his own and at his full and free disposition sufficient capital and other resources for the purpose, and whose engagement in that trade, business or profession will be to the benefit of Kenya.

The Applicant has suffered great losses arising from the refusal of the 1st Respondent to issue him with the said permit because he cannot attend to his business without breaking the law.

The Judicial Review of Administrative Action by SA de Smith (2nd Edition) page 462 gives an insight

as to why the Applicants has sought the order of Mandamus against the 1st Respondent, and it reads as follows:

"**In mandamus cases it is recognized that when a statutory duty is cast upon a crown servant in his official capacity and the duty is one owed not to the crown but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it...**"

The Supreme Court practice 1979 53/1 14/4 commonly known as the White Book also outlines the principles to be followed when considering an application for the orders of mandamus. The Applicant contends that the order is discretionary but it is made where there is a legal right to the act and no other specific and equally convenient or effective remedy against officers of the state who are obliged by statute to do some ministerial act in favour of the person applying.

The Applicant contends that in deciding whether or not to issue the order of mandamus, the court should be in a position to answer the Five (5) questions outlined here-in-below:

1. Is the Applicant eligible to a class "H" permit?
2. Has the Applicant met all the requirements of Rule 22 of Cap 172 of the Laws of Kenya?
3. Does the Applicant have a criminal record?
4. Is the Applicant's company self sustaining?
5. Did the Minister use his discretionary powers as he should have?

The Applicant further argues that he applied for orders of prohibition against the 2nd Respondent because he and his family have been subject of arbitrary and abusive treatment at their home and place of business on several occasions. The Applicant's honour and reputation have been subjected to unlawful attack by the 2nd Respondent without any lawful reason which amounts to inhuman and degrading treatment.

The Applicant relies on Supreme Court practice 1979 to urge his prayer for order of prohibition.

"***An order of prohibition lies to restrain an inferior court from exceeding its jurisdiction. For this purpose any body of persons is a court if it has legal authority to determine questions affecting the right of subjects and is under a duty to Act judicially*** *[R v Electricity Commissioner (1924) I KB Atkin LJ at page 204]* ... **Excess of jurisdiction includes a case where the error of the inferior court involves doing something which is contrary to the general laws of the land or so vicious as to violate some fundamental principles of justice."**

The Applicant contends that the police have exceeded their jurisdiction or are exercising jurisdiction not vested in them because their duty to maintain law and order cannot be interpreted to mean that they can harass, mistreat and arbitrarily arrest the Applicant on suspicion that he is illegally in Kenya purely because he is a foreigner. The Applicant further submits that the court has discretion on whether or not to make the order and the order should be made in favour of the person directly affected by the proceedings of the inferior tribunal whether the defect is latent or not.

The Applicant also relies on both local and international laws which protect the fundamental rights of an individual which the Applicant alleges have been interfered with by the police through his constant harassment. Section 74(1) of the Constitution of Kenya has been cited and it provides that:

"**No person shall be subject to torture or to inhuman treatment or degrading punishment or other treatment."**

Article 17 of the international Covenant on Civil and Political Rights (1966) also relied upon by the Applicant depicts the importance of the fundamental right of the individual and is couched as follows:-

1) "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honour and reputation.

2) Everyone has the right to protection of the law against such interference or attacks."

The Applicant further relies on Article 2(3)(a) and (b) of the same Covenant which states, "**Each State Party to the present Covenant undertakes:"**

(a) "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided by the legal system of the state, and to develop the possibilities of judicial remedy."

The Applicant urges that this Honourable Court is the only authority that can aid him to realize his rights. He has been deprived of his passport and other travel documents which is in contravention of section 75(1) of the Constitution of Kenya which provides:-

"**No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied..."**

The Applicant argues that the Respondents have not only kept in their possession vital travel documents but that the 1st Respondent's refusal to issue him with a class "H" permit has interfered with his property in that he is unable to use, enjoy or dispose it as he wills. The Applicant submits that the need to protect the right of an individual's right of ownership of property is underscored by the reason that even international bodies have come up with laws to govern these rights. He has cited the International Covenant on Economic, Social and cultural Rights of 1966 Article 1 which states:-

1. **) "All people have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**
2. **) All people, may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence."**

The Minister for Home Affairs is mandated under the Immigration Act Chapter 172 to issue work permits to foreigners who have complied with all the requirements thereof and the Applicant is one of such foreigners. In discharging his mandate as per the Act, it must be appreciated that the 1st Respondent is the best judge of merit pertaining to issuance of work permits. Parliament clearly vests the aforesaid mandate to the 1st Respondent and it would be wrong in the view of this court to intervene with the merits of the decision by the 1st Respondent. This Court can only intervene in the following situations:

1. Where there is abuse of discretion.

2. Where the decision maker exercises discretion for an improper purpose.

3. Where the decision maker is in breach of the duty to act fairly.

4. Where the decision maker has failed to exercise statutory discretion reasonably.

5. Where the decision maker acts in a manner to frustrate the purpose of the Act donating the power.

6. Where the decision maker fetters the discretion given.

7. Where the decision maker fails to exercise discretion.

8. Where the decision is irrational and unreasonable.

Turning on to the orders of prohibition, as the Court has already noted, some decisions are best made by the persons or bodies mandated to do so. The duty to maintain law and order or to prevent commission of crime is vested in the Kenya Police under section 14 of the Police Act Chapter 84 which states:

"**The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged**."

In discharging the mandate given to the Kenya Police Force, by section 14 of the Police Act, similarly, the best judge of merit pertaining maintenance of law and order as well as prevention and detection of crime is the 2nd Respondent and not the courts. It would be wrong for the court to interfere with the merit of the decision by the Police. Again this Court can only intervene in the following situations:

1. Where there is abuse of discretion by the police in discharging the same.

2. Where the police exercise their discretion for an improper purpose.

3. Where the police are in breach of the duty to act fairly.

4. Where the police Act in a manner to frustrate the intentions of the Act donating the power.

5. Where the police act in an irrational and unreasonable manner while discharging their duties.

As the Court has noted, the case herein deals with an Applicant who is a foreigner and before addressing the abovementioned issues, the Court must first settle the following:

(i) Is the Applicant as a foreigner entitled to the benefits and protection which accrue to the Kenyan citizens under the Constitution of Kenya as regards the provisions cited?

(ii) If the Applicant cannot rely on the Constitution of Kenya to enforce his rights, can he count on international law to achieve the same end?

The Applicant alleges contravention of Sections 74 and 75 of the Constitution. The case presents a new challenge to the Court as the Applicant is a foreigner. Section 74(1) of the Constitution prohibits torture or inhuman treatment or degrading punishment or other treatment. Although the Applicant as a foreigner may not have the same standing as the Kenyan Citizens in respect of some of the rights in the Constitution, Section 74(1) is available to protect the Applicant because it applies to all persons and it echoes human rights which are recognized by all modern and democratic societies and Kenya is one of such States. Further, the provisions of Section 74(1) of the Constitution of Kenya are echoed in Article 7 of the International Covenant on Civil and Political Rights, 1966 which states.

"**No one shall be subjected to torture or to cruel , inhuman or degrading treatment or punishment..."**

The Kenyan provision applies to all persons and not only to citizens.

As demonstrated both by Section 74(1) of the Constitution of Kenya and Article 7 of the International Covenant on Civil and Political Rights, 1966, the Applicant has a right as a foreigner not to be subjected to torture, inhuman or degrading treatment or punishment both under the Constitution and also under the Covenant on Civil and Political Rights. The right cuts across the board, and it is inherent in mankind. However the Applicant must demonstrate that section 74(1) has been infringed in relation to him.

The onus of demonstrating that Section 74(1) of the Constitution has been infringed is purely on the Applicant. Although the Applicant's right under Section 74(1) of the Constitution is guaranteed, evidence must be availed to the Court to determine if there is any infringement. In order to determine whether the Applicant's rights under S 74(1) of the constitution have been infringed, the Court must define the meaning of torture, inhuman treatment or degrading punishment.

According to Black Law Dictionary 8th Edition, torture means **infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure.**" The said dictionary has also quoted another definition by James Heath in his text, Torture and English Law 3 (1982):

"**By torture I mean infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest.**"

In the Case of ***IRELAND v UNITED KINGDOM (1978) 2 EHRR 25*** (Eur. Ct of Human Rights), the court referred to torture as deliberate inhuman treatment causing very serious and cruel suffering.

Further, the said dictionary defines inhuman treatment as physical or mental cruelty so severe that it endangers life or health. Inhuman treatment was for the first time in International Humanitarian Law defined by the Trial Chamber in the ***CELEBICI CAMP CASE NO IT-95-14/2-PT(1999) p44*** as ...

"**an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.**"

I have considered the facts of this case and in particular the averments of the Applicant. There is absolutely no evidence of torture or inhuman treatment by the Kenya Police. As earlier noted, all rights have their limitations. The alleged infringement of Section 74(1) of the Constitution must be tangible and not imagined or deduced from the existing circumstances. The Applicant's evidence falls far below what torture or inhuman treatment envisage either in the Constitution of Kenya or under the International Convention on Civil and Political Rights, 1966 (ICCPR).

The Applicant has also relied on section 75 of the Constitution. He alleges that his passport has been compulsorily taken away from him in contravention of Section 75 of the Constitution. The application is misconceived as regards the status of a passport which is described as property. A passport is not a property for purposes and intent of Section 75 of the Constitution. This Court has already made a decision on the issue of a passport. In ***DEEPAK CHAMANLAL KAMANI v PRINCIPAL IMMIGRATION OFFICER & 2 OTHERS PETITION No. 199 of 2007***, where the Court held that a passport is part of the right to liberty and the right of movement under Sections 72(1) and 81(1) of the Constitution. I therefore without going further, find that the passport is not property and that the Applicant has not demonstrated in the least sense how his property has been compulsorily taken away from him. The Applicant has also offended the rules contained in Legal Notice No. 6 of 2006 and which are Rules were in turn made pursuant to s 84(6) of the Constitution. The Applicant has come before the court under a Judicial Review application instead of a Constitutional Application and the Court cannot conclusively deal with the passport which as earlier observed is a part of right to liberty and right of movement. The upshot is that the application before Court is incompetent.

I have addressed the application of International instruments and in particular the International Covenant in Economic, Social and cultural Rights, 1966 (ICESCR) vis a vis the right to work. Kenya has ratified the Covenant and the Court cannot just wish away an Applicant who insists on his rights guaranteed in the instrument. Article 6 of the Covenant states:

1) "**The States parties to the present Covenant recognize the right to work, which includes the right of everyone of the opportunity to gain his living by work which he freely chooses or accepts,**

and will take appropriate steps to safeguard this right.

2) The steps to be taken by a State party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

Under the International Covenant on Economic, Social and Cultural Rights 1966, the right to work is one of the fundamental rights. It is necessary not only for the material well being of the Applicant but also for the harmonious development of his personality. This area of human rights has grown at a faster speed and our Constitution is somehow behind. However, since Kenya is a State that is a party to the aforesaid Covenant, the Court must rise to the occasion in addressing, recognizing and giving remedies under the Covenant. To give effect to the human rights provided for under the International Covenant on Economic, Social and Cultural Rights, 1966, the Court should interpret the Constitution generously to reflect a dynamic and progressive society. The Court should bear in mind that the rights under the Covenant are intended to be guaranteed by each party state and effectively redressed whenever infringed.
The Constitution of Kenya at Section 1A states that the Republic of Kenya shall be a multiparty democratic State. Section 1 also provides that Kenya in a sovereign State. Sovereignty is internally vested in the people of Kenya. Multiparty democracies are modern and progressive states which are evolving everyday towards making the world a universal entity in terms of social, economic and political issues. With the above provisions in mind, the Court is inclined to hold the view that social, economic and cultural rights, are part and parcel of a multiparty democracy and particularly because Kenya has ratified the instrument. There is no doubt that under a broad interpretation, the Applicant is entitled to the right to work under the Constitution of Kenya and can seek redress if the same is infringed. However, the Applicant as a foreigner is also subject to ***the Declaration on The Human Rights of Individuals Who Are Not Nationals of The Country in Which They Live,*** 1985. The Applicant is also relying on the instrument to enforce his rights. Article 5(1)(d) states:

"**Aliens shall enjoy in accordance with domestic law in particular the right to choose a spouse, to marry and to found a family."**

I have no doubt that the Applicant is entitled to found a family under the aforementioned instrument but as earlier noted all rights are subject to limitations. Even considering Article 5(1)(d) quoted above, a non national such as the Applicant can only enjoy his rights in accordance with the domestic law. A closer look at the preceding Article 4 captures the spirit and the scope of enjoyment of rights by foreigners. Article 4 states:

"**Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State."**

In the context of the case before the Court, the applicant cannot demonstrate and has not demonstrated any discrimination in the application of the Municipal Immigration laws of Kenya to him. The Kenyan immigration law is not in conflict with any of the Covenants relied on or the provisions of the Constitution.

FINDINGS

1. Our Constitution is silent on the right to work as is the case with the other economic, social and cultural rights.
2. This Court has no doubt that the right to work is the first of the specific rights recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Thus under Article 6(1) the Covenant provides for the right to work which includes ***the right of everyone to the opportunity to gain his*** living by work and the Article further provides that the full realization of the right shall include technical and vocational guidance and training programmes.
3. Article 23 of the Universal Declaration of Human Rights (UDHR) guarantees everyone "***the right***

to work, to free employment, to just and favourable conditions of work and to protection against unemployment."

4. Article 1(2) of ILO Convention No.122 states that each member shall ensure that there is work for all who are available for and seeking work.
5. Article 15 of the African Charter on Human and Peoples Rights provides:

"**Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work."**

6. It is clear to the Court that the language of the Covenant on Economic, Social and Cultural Rights is inclusive and that the rights of the Covenant are granted to everyone and the rights in the covenant are not restricted to the nationals of the State Parties.
7. In the ***R v RM*** suing through ***KAVINDO HCC 1351 OF 2002*** a two judge bench of the High Court made a finding that International Human Rights Instruments and other Treaties apply even without specific domestication where there are ambiguities or gaps in the domestic law and where the instruments are not inconsistent with the Constitution. The High Court dealt at length with the relevance and application of the Bangalore Principles as well. It is not intended to restate the law again in this decision. It is however useful to reproduce Articles 7 and 8 of the Bangalore Principles.

<u>P7</u> "**It is within the proper nature of the judicial process and were established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."**

<u>P8</u> "**However, where national law is clear and inconsistent with the international obligation of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country."**

I have no intention of restating the position here except to repeat the same findings. I find that there is nothing in the Constitution that prevents the Court from upholding the right to work especially where the individual has created the right as in the case before me, where the applicant's Company has generated employment for himself and others. Constitutions speak to the people, their vision, their values, their obligations and aspirations.

8. Again in the case of ***ROGERS MWEMA v ATTORNEY GENERAL (TITANIUM CASE II]*** I did make an observation concerning the extent of State obligations in human rights under International instruments and the Bill of rights, where I set aside a draft bill of costs in the issue of shs 200 million in a human rights case.

In this case, I think it is apt to restate the State obligation as regards economic, social and cultural Rights. The treatment which States owe to non-nationals (and nationals) under (ICESCR) have been conceptualized as covering three levels of state obligations:

- the duty to respect

- the duty to protect

- the duty to fulfill

The obligation to respect requires the State to abstain from interfering with the freedom of the individual. The obligation to protect requires the State to prevent other individuals from interfering with the rights of the individual. The obligation to fulfill requires the State to take necessary measures to ensure satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual

alone. The latter obligation is central to economic, social and cultural rights and is the basis of the State's duty to progressively realize the rights of the ICESCR.

9. I therefore uphold the Applicant's Counsel contention and citations of the International Human Rights Instruments with special emphasis on the right to work. Work might not exist for everyone but shall progressively become a State obligation to provide directly or by creating an enabling environment. No doubt, the State party cannot frustrate a non-national or a national who has created work for himself and others as in this case, because she would be in breach of (ICESCR) and as expounded herein also in breach of the Constitution. In situations such as set out in the facts where the applicant has created employment the State obligation is both to respect and protect the right to work.
10. Having made the observation in 9 above I wish to add that work permits are not an automatic entitlements and have to be issued in accordance with the domestic law and each State does have a margin of appreciation to take into account local needs and circumstances before granting them. Each application has to be considered on its merits and in accordance with the provisions of the Immigration Act. A temporary residence permit or work permit or any other permit specified in the Immigration Act to an alien or non national spouse could be refused on reasonable grounds and in the national interest.
11. Although the current Constitution does not expressly mention the right to family life I find that following its recognition in international treaties and its protection under the treaties in a variety of ways, I find that it is constitutionally protected in Kenya taking into account the central position the family occupies in the hierarchy of values in the Kenyan society as a whole and because of deep cultural roots the family unit has occupied since time immemorial in the Kenyan Societies.

Marriage and family are of vital importance to nearly all the societies on earth and Kenya society is one of them. Human dignity is of fundamental importance to any society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights. It follows therefore the right to enter into and sustain permanent intimate relationships is part of the human dignity. Entering into and sustaining a marriage relationship is of defining significance for many people including the applicant. In turn the central aspect of marriage is cohabitation and the right and duty to live together. Any limitation on this right must therefore be based on some law and it must be reasonable, proportionate and aimed at addressing a pressing social need. Permits must therefore be issued to applicants who qualify as per the requirements of the domestic law as defined therein except where there are pressing social needs to the contrary or where grant, extension, or renewal of the permits constitutes a real threat to the public.

12. In the case of the applicants the State has, using a classified document, demonstrated that the presence of the applicant and any such issue or renewal of a permit pauses a threat to national security or interest and the State is entitled to a margin appreciation in denying any such issue or extension on grounds of national security on the ground that its grant, renewal or extension would pose a real threat to the public and the Court is so satisfied. The State is entitled to take into account security concerns when administering the Immigration laws. I am satisfied that such a threat does exist. In terms of entitlement to work permits, I adopt the reasoning in the South African case of ***DAWOOD AND ANOTHER v MINISTER OF HOME AFFAIRS*** and as regards respect for family life, I adopt the reasoning of the Strasbourg Court case in the case of ***ABDULAZIZ, CABALES AND BALKANDALI v UNITED KINGDOM*** to the effect that contracting parties/State enjoy a wide margin of appreciation in determining the steps to be taken in ensuring compliance with the Convention or Treaties with regard to the needs, and resources of the community and of the individual and above all I dare add, considerations of national security or threats paused to the State by the residence of a non national such as the applicant, cannot be ignored by the Court.

DUTY OF COURT

While it is clear to the court that economic, social and cultural rights including the right to work are not specifically mentioned in the Constitution, it is equally clear that under s 75 of the Constitution some

rights and interests are recognized and have been enforced by the High Court as the Constitutional Court over the years. It is also not lost to the Court that in the recent past the High Court has given an expanded meaning to the meaning of life under s 71 of the Constitution. In addition, this Court recognizes the principle of indivisibility of human rights and their interpendency. As it is not disputed that Kenya is a signatory to the International Covenant on Economic, Social and Cultural Rights and therefore in so far as the Covenant Rights are not inconsistent with the Constitution the Court has a duty to recognise them and apply them where appropriate, as Kenya as a member State has specific obligations under the Covenant which obligations, in turn, demand both judicial interpretation, and in some cases judicial remedies. It follows therefore the Covenant's Rights cannot be said to be outside the Court's role or mandate and in my view they are justiciable. The principle of indivisibility of human rights and interpendency alluded to above means that since the Fundamental Rights and freedoms under Chapter 5 of the Constitution on Civil and Political Rights share that Indivisibility and interdependence the rights are inseparable.

The other good reason for the Court not to abdicate its role is that, the Covenant (I CES CR) of 1966 does in a singular way express the reasons why democracies and progressive governments exist. Governmental power is largely aimed at achieving social justice. Justice Hedge expressed the same point in the Indian case of ***NOTHERN INDIAN CATERERS CASE ASC 205*** as follows:

"The mandate of the Constitution is to build a welfare society in which justice, social, economic and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied, if the minimum needs of the lowest of the citizens are not met."

Thus, despite the fact that many states especially the developing states face many economic and social problems, the rights expressed in the Covenant have been and remain a legal tool, aimed at achieving a steady improvement in the living conditions of the people in each state regardless of the means and resources available. A state's ability to direct its policy to achieving even the barest minimum in satisfying the covenant rights is necessary. Governmental powers and governance must of necessity and in practical terms be directed to fulfilling the rights set out both in the Political and Civil Rights (ICCPR) and the Economic, Social and Cultural (ICESCR) rights Covenants in order to in turn achieve Governmental development goals. It follows therefore although the civil and political rights have been largely and specifically provided for in the Constitution in (Chapter 5), the ICESCR rights do in my view constitute foundational values in any democracy and would be covered as attributes of a democratic society as contemplated in s 1 and s 1A of the Constitution. A democratic society has been defined to include a society which respects human rights. The ICESCR rights constitute in my view foundational values under s 1 and s 1A of the Constitution quite apart from constituting international State obligations for Kenya. In Kenya a good example of the States recognition of these rights is the recently introduced compulsory primary education - this is indeed one of the (ICESCR) Covenants Rights. The Government itself took an executive decision to introduce the project. What is now left is legislation to provide for sanctions for default in the primary education project. Granted that in practice most (ICESCR) rights demand both administrative action and remedies, this does not oust the Court's role.

The reality on the ground is that, the Covenant's rights entail both a legal duty of immediate enforcement to achieve the basic minimum (subject to resource availability) and an allowance for progressive realization of the rights which cannot be immediately enforced due to resource constraints for example in developing countries.

In order to underscore the scope of (ICESCR) Covenant it is important to reproduce herein the relevant Article which does embrace the requirements as outlined above.

Article 2 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) reads as follows:-

(1) "Each State Party to the present Covenant undertakes to take steps individually and through international assistance and co-operation especially economic and technical to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means including particularly the adoption of

legislative measures.

(2) The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status

(3) Developing countries with due regard to human rights and their national economy may determine to what extent, they would guarantee the economic rights recognised in the present Covenant to non-nationals."

It is therefore evident that the Covenant Rights apply to both nationals and non-nationals pursuant to this Article. Thus under provision (3) above Kenya would be perfectly entitled to regulate the issue of work permits by law and she has a margin of appreciation, that has to take into account the needs of her nationals and also take into account the national interest including security concerns. A non national such as the applicant cannot properly argue that the right is absolute because it is subject to the margin of appreciation accorded to each State and also subject to the national interest including security concerns. The need to comply with the requirements of the Immigration laws and regulations is embraced by the Article.

Finally on justiciability of the Covenants Rights it is pertinent to observe that whereas in many cases administrative remedies are contemplated as the effective remedies, where a (ICESCR) Covenant right cannot be made fully effective without some role of the judiciary, judicial remedies would still be necessary and the courts must be involved.

Turning to the facts of the case before me I find that it would not be right for Kenya to discriminate against a non national where he has created legitimate employment for himself and his family but where there are national security concerns - the Respondent would be entitled to decline issue a work permit or to renew or extend the same. Such a rejection would in my view not constitute a violation of the Covenant's right to work or any constitutional foundational value and in particular the right to work and the right to family life. The applicant has a choice to emigrate to his country of origin and to move there with his family.

In the case of ***ABDULAZIZ COBALES AND BALKANDALI v UNITED KINGDOM*** the European Court of Human Rights had to decide whether the United Kingdom immigration laws violated the right to respect for family life guaranteed by Articles of the European Convention taken either alone or in conjunction with the non-discrimination provision contained in Article 14 of the European Convention on Human Rights. The case involved three women who wanted to establish residence in the United Kingdom with their respective husbands. The women were of Malawian, Philipine and Egyptian origins and their husbands were from Portugal, the Philipines and Turkey respectively, and all wanted to settle in the United Kingdom. It was held inter alia:

"**The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a contracting State to respect the choice by married couples of the country of the matrimonial residence and to accept the non-national spouses for settlement in that country. The European Convention is in pari material with the (ICSCR) Covenant. In the present case the applicant has not shown that there were obstacles to establishing family life in their own or their husbands home countries or that there were special reasons why that could not be expected of them."**

I am persuaded by the decision of the BALKANDALI, above, and I find no contravention of any of the Chapter 5, fundamental rights and freedoms or s 1 and s 1A of the Constitution or the relevant International Covenant on Economic, Social and Cultural Right (ICESCR). In addition I find no violation of the Immigration Act or regulations in the circumstances.

I am sufficiently convinced that there are great similarities here with the holding in BALKANDALI

case and this one before me, in that it has not been shown that it is impossible for the family to move to the husband's country of origin. In addition hovering over the applicant's head are matters of national security as set out in the classified document, shown to the Court and which raise security concerns and I find that Respondents are entitled to enforce the immigration law as regards the Applicant.

As regards the detention of the applicant's passports he is entitled to it as the passport has been held to be part of the right to liberty under s 72 and therefore a Constitutional right unless it is otherwise lawfully held e.g. for deportation purpose. However, as regards freedom of movement in Kenya this right is specifically accorded to Kenya citizens under s 81 of the Constitution and there is no constitutional reference on this. However as the applicant sought to move the Court by way of a judicial review application, I cannot give any order or declaration under s 72 and 81 of the Constitution as he should have moved the Court under s 84(6) and LN 6/2001.

Since the right to a passport is part of liberty reference to s 75 of the Constitution is a misdirection and this is rejected. Concerning s 74 on alleged inhuman and degrading treatment on the facts, no contravention has been shown or proven as per the definition of the right as outlined above and this too is rejected.

On the issue of the right to family life, the Court finds no breach on the part of thee Respondent since on the facts there is no such proof of breach of the covenant and any event, the demand of national interest must prevail.

Finally on the issue of national security and the Court's handling of such matters I wish to rely on the decision in the case of ***ZAMORA [1916] 2 AC 77 AT PG 107*** where Lord Parker observed:

"**Those who are responsible for the National security must be the sole judges of what the National security requires. It would be obviously undesirable that such matters should be the subject of evidence in a court of law or otherwise discussed in public. The Judicial committee were there asserting what I have already sought to say namely that some matters of which National Security is one are not amendable to the judicial process."**

In the case of ***COUNCIL OF CIVIL SERVICE v MINISTER FOR CIVIL SERVICE 1985 AC 374*** Lord Scarman held that the Minister's opinion on security, ought to be accepted unless no reasonable minister could in the circumstances reach such a conclusion.

Again in the case of ***R v SECRETARY OF STATE FOR HOME DEPARTMENT ex-parte RUDDOCK/1987 I WLR 1482,*** at page ***1490*** the court observed:

"**It was said that, credible evidence was required in support of a plea of national security before judicial investigation of a factual issue is precluded Taylor J accepted that in an extreme case where "congent" "very strong and specific" evidence of potential damage to National Security flowing from the trial of the issues a court might have to decline to try factual issues."**

In this matter the Respondent has sufficiently, demonstrated to the Court vide the classified document seen by the court, that it is entitled to take into account national concerns as regards the grant of the permit and also as regards the applicant's immigration status. Consequently even on this ground alone, the application would stand dismissed.

For the above reasons I would dismiss the application but give no order as to costs in the circumstances.

DATED and delivered at Nairobi this 18th day of April 2008.

J.G. NYAMU

JUDGE