



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Civ Appli 285 of 2005**

**IN THE MATTER: APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW  
PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS BY AYUB  
MOHAMED AND  
IN THE MATTER OF: THE IMMIGRATION ACT CHAPTER 172 LAWS OF KENYA**

**AYUB MOHAMED.....  
APPLICANT**

**VERSUS**

**1. THE PRINCIPAL IMMIGRATION OFFICER**

**2. THE MINISTER FOR IMMIGRATION AND**

**REGISTRATION OF PERSONS.....  
.....RESPONDENT**

**RULING**

Ayub Mohamed, the Ex-Parte Applicant (the Applicant), a Pakistan National, by his Notice of Motion dated the 12th May 2005 brought under Order 53 Rule 3 of the Civil Procedure Rules seeks the judicial review orders of certiorari to quash the decision of the Principal Immigration Officer made on 26th April 2005 deporting him from Kenya and mandamus to compel the same officer to allow him back into Kenya. The application is based on the grounds that the decision was malicious but also capricious, unilateral and was made in blatant and naked disregard of the provisions of the Immigration Act Cap. 172 of the Laws of Kenya.

The application is supported by the verifying affidavit of the Applicant's employee, one Feroze Ahmed and the accompanying statement both of which were filed at leave stage as well as the Applicant's two further affidavits. The application is strenuously opposed by the Respondents who have caused a replying affidavit to be sworn by on Nicodemus Muinde an Immigration Officer I attached to the Malaba Border Control.

Before hearing the application Mr. Khatib, counsel for the Applicant orally sought from me an order under the provisions of Order 18 Rule 2(1) requiring the said Nicodemus Muinde to appear before court for cross-examination on his said affidavit. I refused the application and said I would give my reasons in this ruling which I now proceed to give.

Mr. Khatib's application was based on the ground that the events leading to the deportation of the Applicant occurred in Nairobi and Mombasa. The deponent of the replying affidavit was at the material time based at Malaba Border. According to counsel he was not in a position to positively swear to the

facts relating to the Applicant's deportation.

Mr. Muinde the deponent of the replying affidavit is an employee of the Immigration Department. He is the one who allowed the Applicant to come into the country on 26th May 2005. In my view he was the right person to say why he allowed the Applicant into the country after he had been deported. The other matters contained in his affidavit are facts obtained from the Applicant's file in Immigration Department. I therefore found no good reason to warrant his cross-examination hence the refusal of the Application.

I have since noted from the court file that counsel had on 13th July 2005 made the same application which Lady Justice Khaminwa refused to grant and yet he did not tell me that such conduct is to be deprecated and I trust counsel will not repeat it.

Turning to the Applicant's Notice of Motion, it was Mr. Khatib's argument that while the Applicant was a holder of a valid entry permit, he was on 26th April 2005 bundled out of the country without being given a hearing or the reasons for his deportation. He further argued that the Applicant who had invested to the tune of KSh. 15,000,000/- should have been given time to wind up his business if he had to leave the country. Counsel further contended that section 8(1) of the Immigration Act which provides the grounds upon which the Minister can deport an immigrant does not apply to the Applicant as there was no report filed against him and he had not been charged with any offence. In the circumstances he urged me to allow the Application.

In response Mr. Maroro, learned state counsel submitted that the Principal Immigration Officer never made the decision sought to be quashed and that the same has not been exhibited. He further argued that the Minister did not act in disregard of the law. To the contrary, he said, the Minister acted within the law. Pursuant to intelligence information received and acting under section 3(1)(f) of the Immigration she declared the Applicant a prohibited immigrant after which she ordered his deportation.

Mr. Maroro further submitted that the Applicant's reentry into the country was on false information given by the Applicant. He changed his name and passport and did not inform the Immigration Officer at the Malaba Border Control that he had been deported from Kenya. Having considered these submissions and having also read the application together with the accompanying statement as well as the supporting and replying affidavits I have reached the conclusion that this application is for dismissing for various reasons. One, in his chamber summons dated 9th May 2005 the Applicant sought for orders:

**"1. that leave be granted to the Applicant to file an application for Judicial Review Orders of Certiorari to bring into the High Court and quash the Respondents' decision to deport the Applicant from Kenya on 26th April 2005.**

**2. that leave be granted to the Applicant to apply for Judicial review Order of Mandamus to compel the Respondents to allow the Applicant back into the country."**

That application was granted as "sought". In his Notice of Motion dated 12th May 2005, however, the Applicant seeks for orders:-

**"(i) that pursuant to the leave granted on 11th May 2005, an order of certiorari do hereby issue to bring into this court and quash the decision of the Principal Immigration Officer made on 26th April 2005, to deport the Applicant from Kenya.**

**(ii) that an Order of Mandamus do issue compelling the Principal Immigration Officer to allow the Applicant back into Kenya."**

This Notice of Motion is clearly not consonant with the leave granted on 11th May 2005. It was therefore filed without leave.

The second reason which the application has to be dismissed is that contrary to Order 53 Rule 7 (1) the Applicant did not file with the Registrar a copy of the Principal Immigration Officer's order sought to be

quashed or account for his failure to do so to the satisfaction of the court. That provision forbids an applicant, in an application for an order of certiorari, questioning:

**“...the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court.”**

What instead is exhibited and by the replying affidavit is the Minister's order of 26th April 2005 deporting the Applicant. That is not the same as the Principal Immigration Officer's order.

The third reason is the *bona fide* and conduct of the Applicant. It should always be born in mind that the grant of judicial review orders is at the court's discretion. In exercise of that discretion the court is entitled, nay under duty, to examine the conduct of the applicant leading to the making of the application and even after. If the Applicant's conduct is found to be dishonest or unlawful or if he is guilty of material non-disclosure or has tried to overreach his application will be dismissed.

In this case after being deported back to his country he changed his name from MUHAMED AYUB MOHAMMED SHAFFI to MUHAMMAD AYUB SHAIKH. He also changed his date of birth from 5th October 1963 to 1st January 1963. Thereafter he obtained a new passport No. AJ5199831 in his new names MUHAMMAD AYUB SHAIKH showing his date of birth as 1st January 1963. He says in his further affidavit that he changed his passport because the previous one was about to expire and the “particulars had changed because my actual date of birth is one in the new passport.” I do not believe any of those allegations. A date of birth for instance is not something one can forget especially when applying for a passport.

Having been deported to his country Pakistan it is not clear why he could not fly directly to Jomo Kenyatta International Airport but chose to come into the country by road from Uganda. While in Kenya before being deported he had registered his business name thrice and on all those occasions he gave different names and different physical addresses. In the first one registered under Number 328852 on 5th January 2001 he gave his name as **MUHAMMAD AYUB MOHAMMAD SHAFI** and stated that he was carrying on business at **plot No. 447 Section XXXX Kitui Road, Mombasa P. O. Box 88699 Mombasa**. One registered under Number 330557 on 5th February 2001 he gave his name as **MOHAMMED AYUB MOHAMMED SHAFFI** and stated that he was operating from **plot No. 392 Section 36 Old Kilindini Road, Mombasa P. O. Box 85124 Mombasa** and the third registered on **28th October 2002 under Number 362934** he gave his name as **MOHAMED AYOUB**. While completing the Application Form for a visa at Malaba on **26th May 2005** he gave his name simply as Shaikh Muhammad and his date of birth as 1963. In the paragraph asking if he had been to Kenya previously he put a dash.

If one does not keenly observe the names as stated herein above one will not notice the difference in the way they are spelt from time to time. Even both the physical and postal addresses changed from time to time. I have no doubt in my mind that this was a deliberate attempt by the Applicant to obfuscate his identity. Such a person is not deserving of the exercise of the court's discretion in his favour.

For these reasons I dismiss the applicant's Notice of Motion dated the 12th May 2005 with costs to the Respondents.

DATED and delivered this 30th day of September 2005.

**D. K. MARAGA**

**JUDGE**