Republic v Cabinet Secretary, Ministry of Interior and National Government Administration & another; Sciborski & another (Exparte Applicant) (Judicial Review E035 of 2023) [2024] KEHC 8225 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEHC 8225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

JUDICIAL REVIEW E035 OF 2023

RE ABURILI, J

JANUARY 22, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL GOVERNMENT ADMINISTRATION ..... 1ST RESPONDENT

THE DIRECTOR GENERAL , KENYA CITIZENS AND FOREIGN NATIONALS MANAGEMENT SERVICE ..... 2ND RESPONDENT

AND

PROF ROMUALD JOZEE SCIBORSKI AND THOMAS GENDA NDIAYO ..... EXPARTE APPLICANT

JUDGMENT

1. This Judgment determines the exparte applicant's Notice of motion dated 11th August 2023 seeking for judicial Review Orders of Mandamus compelling the Respondents to consider and make a decision on the 1st applicant's application for citizenship and the backdating of the same if allowed, to operate from on or about 22/08/1991 and within 30 days of service of the decision of the court to notify the 1st applicant of the outcome in writing.
2. The exparte applicants also seek for an order of Mandamus compelling the Respondents to capture the 1st applicant's name as Romuald Jozef Genda Ostoya Sciborski during his registration as a citizen of Kenya.
3. The exparte applicants also prayed for costs of the Application.

4. The exparte applicants' case as elaborated in the grounds in support, affidavit and statutory statement filed herein is that the 1st exparte applicant is a Polish Citizen who came to Kenya in or about 1989 and was 'constructively adopted and came into the foster care of the second exparte applicant "through the Got Sinai Church after it emerged that the 1st exparte applicant who was aged about 18 years old was accepted into the family of the 2nd applicant as being the eldest child, which arrangement is acceptable to the family as a whole.

5. It is asserted and deposed by both the exparte applicants that the respondents' officials have conveyed to the 1st exparte applicant that even if his application for registration consideration to be registered as a citizen of Kenya is allowed, the citizenship cannot be retrospective or backdated unless an order of this Court is obtained to that effect.

6. According to the exparte applicants, the 1st applicant has a calling for public service and that therefore he will be disadvantaged if he is considered a non citizen for all intents and purposes from the date of registration in 2023 or thereabouts as opposed to backdating it to 1989, the date of his constructive adoption and foster care of and by the 2nd Exparte applicant.

7. The exparte applicants lament that the 1st applicant's registration as a Kenyan citizen from 2023 will undermine his legitimate expectation that has been created from the date of his constructive adoption on 22/08/1989 when his patriotism and love for Kenya which he has demonstrated with action and which has all along been enough to justify citizenship.

8. Further, that no good reason has been advanced for the respondents not to backdate the 1st applicant's citizenship, given the background information as enumerated in the affidavit and summarised herein hence, the respondents' decision not to register the 1st applicant as a citizen of Kenya from 22/08/1989 and instead, do so post 2023 and the legitimate expectation created, is irregular, illegal, ultravires and void ab initio.

9. It was averred and deposed that it is against the rules of natural justice to deny the 1st applicant who has demonstrated such love and zest for the country a backdated registration to enable him effectively and meaningfully participate in the development of the nation.

10. The exparte applicants claim that the respondents' decision to confer the 1st applicant citizenship after 2023 shall frustrate the applicant's legitimate expectation with respect to fair treatment irrespective of race and the right to equal protection and equal benefit of the law under Article 27 of *the Constitution* and the right to be treated in a dignified manner under Article 28 of *the Constitution*.

11. That the 1st applicant is accepted as an adopted son of the 2nd applicant and a house was constructed for him under Luo customary law and that therefore it is only fair and just that his name change is ratified from Romuald Jozef Scborski to Romuald Jozef Genda Ostoya Sciborski and the same be reflected in his new registration as a citizen of Kenya.

12. According to the exparte applicants, this case has merit, the public interest element, its intent on enforcement of constitutional values, is of proportionate magnitude and therefore meets the threshold set by the Supreme Court's decision in Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others SCK [2013] eKLR on the grant of conservatory orders.

13. In the affidavit sworn by the 2nd Applicant in support of the Judicial Review Application, he deposes that he is the adoptive parent of the 1st exparte applicant who was born on 23rd August, 1971 and whom he met on 22/8/1989 at Got Sinai Church in Tororo Uganda when the 1st applicant was aged 18 years and took him in as his son and had been assuming parental role over him.

14. That the 2nd applicant then travelled with the 1st applicant to Ukwala where the latter was baptized in the Got Sinai Church and given the name 'OSTOYA' hence the request to have the name be registered in the registration of citizenship.

15. The 2nd applicant gave the history of how the 1st applicant moved from Poland where he lived with his grandparents, to Spain and eventually reached Tororo Uganda and to Ukwala where the 2nd applicant built for the 1st applicant a house within his land Parcel No. North Ugenya/Doho/ 418 and made him part of his family. That on 1st October 1989, the 1st applicant moved to Poland to study medicine until 30th June 1999 then he moved to France on 5th July 1999 to work until 25th October 1999, before returning to Tororo Uganda on 1st November 1999 during which time, until 15th November 1999, he lived alongside Ukwala Kenya, until 20th December 1999, when he returned to Poland to live and work at the Medical University of Wroclaw where he had studied medicine.

16. That from 10th July 2002 to 30th November 20002, the 1st applicant moved back to Tororo Uganda and subsequently to Ukwala and that he move to Spain on 5th December 2002 to work and on 20th March 2018, he returned to Ukwala even as he worked in Nairobi as a Professor in Public Health and Biotechnology.

17. That currently, the 1st applicant works as a Professor at various Kenyan Universities and has been cleared by various agencies hence he should be assisted to have the baptismal name Ostoya included in the registration as a citizen of Kenya.

18. Among the documents annexed in support of the Notice of Motion are personal identification documents, letters of employment, appointment, Investment permit, Business registration certificate, KRA Pin Certificate for the business of the 1st applicant, Foreigner certificate, photographs of a house, a Title Deed, Baptismal card, Chief's letter dated 10th December, 2022 from the Chief Ukwala Location explaining how the 1st applicant came to be in Ukwala with the family of the 2nd applicant, having been fostered by the 2nd applicant, letter of "adoption" from Got Sinai Roho Maler Church dated 23/8/1989, Affidavit sworn by the 2nd applicant and his wife Dorine Anyango Genda on 15th march 2023 to the effect that she got married to the 2nd applicant in 1987 and that in 1989, they adopted the 1st applicant and they freely gave him land and built him a house in accordance with the Luo Customary Law. Further, that their nine children as listed in the affidavit of consent have no objection to the arrangement at all.

19. More facts are deposed in the 32 page affidavit supporting the chamber Summons for leave to apply, with the 1st exparte applicant narrating the history of how he became an adopted son of the 2nd applicant who gave him a home in Ukwala, Siaya County. He deposes that when he made a formal application for registration as a citizen, he was informed by the Respondents that his citizenship could not be backdated. He believes that the spiritual blessings that he received from the 2nd applicant, his achievements in the academia and the world of scientific research as well as the warm reception made him believe that he has a duty to reciprocate and participate in the development of this nation of Kenya.

20. That his efforts and love for Kenya have been recognized in that he has been an invitee at most state functions including the inauguration of the current President into office of the President. That prior to applying for registration as a Kenyan citizen, he has been residing in Kenya continuously for a period of 12 months; that he has adequate knowledge of Kenya and the other duties and rights of citizens; that he is law abiding as shown by the certificate of good conduct, has become conversant with Luo language and basis grasp of Kiswahili language. The 1st applicant also provides his academic and professional credentials, stating that he is a man of means hence, he is not bankrupt.

21. That upon lodging his application for registration on 18/12/2022, he was awaiting the administrative decision to register him since he had already been assigned his File number. The 1st applicant confirms what the 2nd applicant deposed regarding his baptism and being assigned land in Ukwala.

22. That he did not make an application for registration earlier upon being constructively adopted in 1989 because of his engagements as a student and numerous assignments in his professional line which are nonetheless advantageous and beneficial to this country. That he has invested immense resources, mind and soul in Kenya and that if his citizenship is recognized from date of his constructive adoption then he will be cushioned from disadvantages that may accrue from failure to make an early application for citizenship.

23. That he has been instrumental in securing a grant of Ksh 5 million for Jaramogi Oginga Odinga University of Science and Technology from the European Foundation for Polish Kenyan Cooperation which he formed in 2006 and is its first President, which organization is also registered as a business chamber in 2023 and he is its Chairman.

24. Further, that as the Managing Director of Eacfffphab, he is involved in putting in place mechanisms for achievement of universal health care which the Government of Kenya cherishes and in line with the 2020 to 2023 Kenya Universal Health Coverage Policy, geared towards improving the overall status of health in the country, as per the big four agenda, *the Constitution* of Kenya, the Kenya Health Policy 2014 to 2020, Kenya Vision 2030 as well as the regional and global commitments. Further, that actualising the above aspirations was reflected in the 1st applicant securing funding for JOOUST in the sum of five million Kenya Shillings.

25. He also deposed that he was actively involved in the NGO Sector in terms of funding organizations that are engaged in activities which protect the vulnerables and in securing proper healthcare hence, his appointment as the Honorary Director for International partnership of the Competence Building Society of Early Childhood Education for Kenya as well as being the Chairman of Got Sinai Foundation.

26. According to the 1st exparte applicant, his legitimate expectation to his citizenship being deemed accruing 2 years after his being constructively adopted by the 2nd applicant meets the constitutional thresh hold espoused in the Supreme Court case of Communication Commission of Kenya & 5 others v Royal Media Services & 5 others [2014]e KLR. He cited the case of R v Attorney General & another Exparte Waswa & 2 others [2015] 1 KLR 280 on what the principal of legitimate expectation is all about and its applicability to both past and future promise or benefit.

27. The 1st applicant concedes that he is cognizant of the ordinary procedure that citizenship starts operating from the time of approval but that he relies on a legitimate expectation exerted by the current policy as inundated by Odunga J in S.NN.v Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Director General of Kenya Citizens and Foreign Nationals Management Services & the AG citing with approval other decisions as stated in paragraph 29 of the supporting affidavit.

28. That he shall be aggrieved by the approval of his citizenship to operate from the date of recommendation by the respondents hence his application as there is no good reason for refusal to backdate the citizenship date to when he was constructively adopted by the 2nd applicant, and in view of the historical background given hereinabove.

29. The Office of Attorney general filed grounds of opposition dated 28th August, 2023 opposing the application by the applicants and contending that application is misconceived, misconceived and bad

in law and devoid of any basis since the respondents were yet to make a decision with regard to the application for registration as a Kenyan citizen; That prayer c seeks to curtail the discretionary power of the Cabinet Secretary contrary to section 13 of the *Kenya Citizenship and Immigration Act* and Article 15 of *the Constitution*; that The application and prayers sought offend section 18 of the *Kenya Citizenship and Immigration Act*; that no backdating of registration as a citizen can be done as it will be contrary to the law and that the respondents have no capacity to change the names of the 1st applicant finally that there is no certificate of adoption hence the application contravenes section 14 of the *Kenya Citizenship and Immigration Act*.

30. The parties filed written submissions to canvass the application with the applicants reiterating the lengthy depositions and contentions as above summarised. I have considered the parties' respective submissions simultaneous with the determination herein below

Analysis and Determination

31. I have carefully considered the application herein and as argued out vehemently by the exparte applicants and as opposed by the respondents who contend that the Cabinet secretary has the discretion to determine who is to be considered for registration as a citizen and that he cannot be compelled to perform a public duty which is discretionary and to determine whether or not the applicant even qualifies to be and has met all the requirements in Article 15 of *the Constitution* and the *Kenya citizenship and immigration act* 2011. Further, that the respondents cannot change the name of the 1st respondent or even register him retrospectively as there is no evidence of his adoption by the 2nd respondent since there is no such a thing as constructive adoption in Kenya.

32. The main issue for determination is whether the Judicial Review Orders of Mandamus as sought are available to the exparte applicants. It is noteworthy that the ex parte Applicants have sought orders of mandamus against the Respondents, to compel the latter to back date the 1st applicant's application for reregistration as a citizen of Kenya to 1989 when he was allegedly constructively adopted by the 2nd applicant.

33. According to the 1st applicant as supported by the 2nd applicant, he lodged the application in 2022. He is however not complaining that the application has been rejected but that if they grant it, then it should operate retroactive the date he was constructively adopted as that is what will meet his legitimate expectation. He alleges that he was informed by the respondents that the backdating can only be done if the court issues an order to that effect. It is further asserted that although the applicants are aware of the ordinary procedure for citizenship approval which operates prospectively from date of approval, but that they heavily rely on the doctrine of legitimate expectation to be considered retrospectively.

34. The exparte applicants also seek judicial review orders of Mandamus compelling the Respondents to capture the 1st applicant's name as Romuald Jozef Genda Ostoya Sciborski during his registration as a citizen of Kenya.

35. This brings me to the question, what is the purpose of an order of mandamus? The purpose of an order of mandamus is to compel the performance of a public duty or any act which the law commands to be done but has not been done by the respondents. Mandamus therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted.

36. The conditions that must be met for mandamus to issue are that it must be shown that the public officer has failed to perform his or her duty. It follows therefore, that the Court will not grant mandamus where there is an alternative remedy available to the applicant; and that mandamus may be refused if the enforcement of the order will pose implementation challenges that require the Court's

supervision. See the case of Evanson Jidiraph Kamau & Another v The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.

37. In Republic v The *Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012* it was held that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. Further, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has "a public element" which may take any form.

38. The Court of Appeal in a much older case of Republic v Kenya National Examinations Council ex parte Gathenji & Others, [1997] e KLR explained the applicable principles for an order of mandamus to issue as follows:

> " The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:
>
> "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
>
> At paragraph 90 headed "the mandate" it is stated:
>
> "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."
>
> What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...."

39. In Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, it was held that an order of mandamus compels a public officer to act in accordance with the law.

40. Thus, the key principles that apply for an order of mandamus to issue are firstly, that the Court will only issue a mandamus order if the Court concludes that mandamus is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

41. Additionally, the Court will only compel the satisfaction of a public duty if that public duty has become due, and therefore if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass.

42. It follows that where there is a dispute as to whether a public duty has crystallized, the Court will not by an order of mandamus compel the Respondents to exercise or perform that duty until the dispute is resolved. Finally, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of discretion by a public officer in a particular manner.

43. I have reproduced all the above authorities to illustrate that the present case is from the onset, not one where an order of mandamus can issue for two reasons. Firstly, it is necessary to point out that the 1st mandamus order sought will require this Court to undertake a merit review beyond the remit of this Court as a judicial review Court for various reasons. Firstly, it will require this Court to make a value and qualitative judgment as to whether the 1st exparte applicant qualifies to be registered as a Kenyan citizen on account that he was 'constructively adopted' by the 2nd Exparte applicant in 1989.

44. The 1st exparte applicant avers that he has lodged his application for consideration by the respondents, for registration as a Kenyan Citizen and that what he wanted the respondents to do is to positively consider that application and in addition, backdate the registration from 1989, the date when he was constructively adopted by the 2nd exparte applicant. In addition, it is deposed that the respondents informed the 1st exparte applicant that for them to register him retrospectively, he must obtain an order from Court.

45. The respondents through the Office of Attorney General and Department of Justice have denied that the 1st exparte applicant was promised such retrospective registration only if the court issues an order to that effect. What I gather from the exparte applicants is that this court can be called upon to issue any orders and that the respondents can comply or accept any orders from this court, as long as the court so orders, which argument I find, quite ridiculous. This is because, this is a superior Court of record which is deemed to know the law and it would be unfortunate if parties were to rush before this court and seek and obtain any orders which are legally not available to the parties but which the parties have legitimate expectation to obtain, for enforcement or implementation by Government bodies or authorities.

46. in the Advanced Gaming Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited (Interested Party) [2019] eKLR case, Mativo J (as he then was) elaborately on the applicability of the doctrine of legitimate expectation and I have no reason to differ with the findings and holding of the learned Judge that legitimate expectation must not only exist but must be legitimate meaning, it must be lawful.

47. In this case, the exparte applicants concede that the procedure for application and granting of citizenship is such that the citizenship would accrue from the date of such approval and not before. That being the case, it would be irrational for the applicants to expect this court to perform miracles and order otherwise than what the law provides. In the cited Advanced Gaming Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited (Interested Party) [2019],(supra) case, the learned Judge stated that:

> " In Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another[23] in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[24] who said that:-
>
> "Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could

threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).

48. The 1st exparte applicant upon lodging the application for registration as a Kenyan citizen did not wait to get feedback from the respondents. he decided to approach this court so that it can grant him orders that will meet his legitimate expectation of being registered retrospectively. He has not shown this court any single statutory provision that allows the respondents to register applicants as citizens of this country in a retrospective manner and therefore the provision that has been violated for this court to order for performance in accordance with the statute or whether it is the respondent's public duty to register 1st applicant who is a foreign national as a citizen retrospectively.

49. In the Advanced Gaming Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited (Interested Party) (supra) case, the Court further stated as follows:

> " 116. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.
>
> 117. The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[37] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.
>
> 118. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[38] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[39] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-
>
> "Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."[40]
>
> 119. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[41] The fear in protecting legitimate expectations substantively is that administrators

may be forced to act ultra vires. That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act contra legem. It is clear that such representations will not be upheld by the court.[42] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

120. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in National Director of Public Prosecutions v Philips.[43] These include:- (i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

121. Discussing legitimate expectation, H. W. R. Wade & C. F. Forsyth[44] states thus:-

"It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."

"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added)

122. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. At the risk of repeating myself, I state that the doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification. Earlier in this judgment, I reproduced the relevant provisions

> of section 5 of the act, which prescribes the legal requirements for the grant of the license. These being express requirements of the law, the doctrine of legitimate expectation cannot apply in the circumstances of this case. This is because the Petitioner has not demonstrated that it met all the requirements for the renewal or grant of the license. A case in point is absence of evidence that it paid withholding tax. In addition, the fact that it held similar licenses cannot confer legitimate expectation that once its license expires, it would be renewed automatically. This is because the renewal is subject to the conditions being met. It follows that the allegation of violation of the right to legitimate expectation fails."

50. It is worth noting that Proof of contribution made to the progress or advancement in any area of national development within Kenya or capability to do so is one of the requirements or qualifications of an applicant for registration as a Kenyan Citizen and that qualification therefore does not confer on any applicant as is the case herein, any legitimate expectation to be registered retrospectively.

51. In addition, under section 18 of the Citizenship and Immigration Act, on the effect of registration as a citizen provides that:

> 18. A person who qualifies to be registered as a citizen of Kenya under this Act, shall upon taking the oath or affirmation or allegiance, in the prescribed manner, be issued with a certificate of registration as a citizen of Kenya.

52. The above provision as read with Regulation 10 of the Kenya Citizenship and Immigration Regulations, 2012 no doubt presupposes that upon taking oath, the citizenship is conferred from that date and not before such oath is taken and therefore the idea of legitimate expectation of a retroactive citizenship does not arise and would be contrary to the law.

53. Furthermore, despite the applicants claiming that the respondents told them verbally that a retrospective citizenship can only be effected upon this court issuing an order, section 57 of the *Kenya Citizenship and Immigration Act* is clear that any person aggrieved by a decision of a public officer under the Act, which decision can be refusal to consider the application for citizenship or for retrospective registration, may apply to the High Court for review of the decision and secondly, an appeal against the decision of the Cabinet Secretary or of the Service under this Act may be made to the High Court.

54. For avoidance of doubt, under Rule 10 of the *Kenya Citizenship and Immigration Act*, an application for Kenyan citizenship can only be made to the Cabinet Secretary and not to any other person and therefore a refusal to consider such application can only be challenged by way of an appeal and not otherwise, to the High Court, as stipulated in section 57 of the Act.

55. The Regulation provides as follows:

> " Application for citizenship by registration.
>
> 10.
>
> (1) A person who wishes to be registered as a citizen of Kenya under sections 10, 11, 12, 13, 14, 15, 16, 17 or 18 of the Act shall apply to the Cabinet Secretary, in Form 8, 9, 10, 11, 12, 13, 14 or 15 set out in the First Schedule, whichever is applicable to be registered as a citizen of Kenya.

(2) Every application made to the Cabinet Secretary under the sections referred to in paragraph (1) shall be—

(a) accompanied by the prescribed non-refundable application fee, where applicable;

(b) supported by such documentary or other evidence of the facts stated therein, in such other manner as the Cabinet Secretary may require; and

(c) verified by a declaration made before a magistrate, commissioner for oaths or notary public.

(3) A person who qualifies for registration as a citizen of Kenya shall take an oath or affirmation of allegiance set out in the Second Schedule before the person is issued with a certificate of registration as a citizen of Kenya.

(4) A person who qualifies for registration as a citizen of Kenya shall upon taking an oath or affirmation of allegiance be issued with a certificate of registration as a citizen of Kenya in Form 16 set out in the First Schedule."

56. I reiterate that as to whether the ex parte Applicants' application will be favourably considered by the Cabinet Secretary in the first instance and registration granted or whether such registration can be done retrospectively, which application is yet to be considered by the Cabinet Secretary, can only be challenged by way of an appeal to the High Court and not through Judicial Review. It follows that these proceedings are incompetently filed and are amenable for striking out in limine, although I have made a deliberate decision to consider the merits of the application. Even assuming that judicial review lies, the application is premature as no decision has been made declining the application as lodged by the 1st exparte applicant hence this court cannot issue mandamus to compel the performance of a statutory duty when there is no evidence of failure to perform such duty.

57. I will briefly state the standards of merit review as set out in section 7 (2) of the Fair Administrative Act which are as follows:

(2) 2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power

58. The Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, [2016] e KLR noted that even though Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator.

59. Therefore, in granting an order of mandamus in the manner sought, this Court will also be usurping the roles of other public bodies that regulate citizenship, which is forbidden in judicial review.

60. The ex parte Applicant in this respect cited various decisions including Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) [2020] eKLR and Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) [2020] eKLR where the Court held that it is the Commission for Higher Education that is tasked with ensuring that there exists uniform standards in the learning, accreditation, licencing and qualifications in the provision of university education in Kenya.

61. However, the ex parte Applicants have not pointed out to this Court the statutory provisions or laws that impose the duty on the part of the Respondents to accept his intent to submit his application for retrospective application of citizenship and the conditions and procedures that apply in this respect, for this Court to be able to make a determination that such a duty does exist, and that such duty was breached by the Respondents in the circumstances of this case.

62. Furthermore, the applicants claim that the decision not to register him as a citizen retrospectively is irregular, illegal, ultravires and void ab initio, for which the appropriate remedy is an order of certiorari to bring into this court and to quash the impugned decision, but not mandamus. Mandamus can never be a substitute for certiorari as the two remedies exist independently and a quashing order cannot be a compelling order at the same time and vice versa.

63. On the second prayer of mandamus that this court compels the respondents to register the 1st exparte applicant as a citizen of this country and include the names Genda and OSTOYA, this is a totally misplaced prayer which I will not belabor citing decision after decision. Names, additions and subtractions are governed by a totally different legal regime. One would be expected to draw and sign a Deed Poll and apply for registration after gazettement, under the *Registration of Documents Act*, a Change of Name. The Respondents herein are not responsible for change of names.

The Disposition

64. In the end, I find and hold that the ex parte Applicants' Notice of Motion dated is not merited for the foregoing reasons, and the said Notice of Motion is dismissed with no order as to costs.

65. This file is closed.

Dated, Signed and Delivered at Kisumu this 22nd day of January, 2024

R.E. ABURILI

JUDGE