



**Umesh v Director of Immigration Services & 2 others (Petition
E015 of 2021) [2023] KEHC 17463 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION E015 OF 2021
FA OCHIENG, J
MAY 9, 2023**

BETWEEN

NICHAT UMESH PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

**THE CABINET SECRETARY INTERIOR COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner, Nichat Umesh filed the petition herein seeking 12 reliefs to wit: a declaration that the action of the 1st respondent purporting to cancel his valid Special Pass, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class of and a prohibited immigrant and removal from Kenya were;
 - a. In violation of Articles 12, 14(1) & (2) and 16 of *the Constitution* and a violation of his rights under Article 39(3) was unlawful, unconstitutional, invalid and void.
 - b. In violation of Articles 47, 48 and 51(10) of *the Constitution* because they were done without due regard to the requirements of fair administrative action, access to justice and denied the petitioner a fair hearing before a court or another independent and impartial tribunal or body.
 - c. In violation of the rule of law and in direct contravention of provisions of *the constitution* that guide the respondents and was therefore an abuse of office.



- d. A declaration that detaining the petitioner without justification, without informing him of the reasons, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death and physical harm, denying him food and basic sanitation services was a violation of the petitioner's rights under Article 29 of *the Constitution*.
 - e. A declaration that the actions of the respondents infringes on the petitioner's rights to dignity (Article 28); property (Article 40); family (Article 45); rights of a detained person, arrested and persons held in custody (Article 51) and all other rights that flow with the right to citizenship.
 - f. An order of certiorari removing into this court and quashing any declaration under The *Kenya Citizenship and Immigration Act*, 2011 by the 1st and 2nd respondent indicating that the petitioner is illegally in Kenya and that his presence in Kenya was contrary to national interest.
 - g. An order of certiorari removing into this court and quashing any declaration under The *Kenya Citizenship and Immigration Act*, 2011 by the 1st and 2nd respondent directing the removal of the petitioner from Kenya.
 - h. An order of mandamus compelling the respondents to return to the petitioner his Kenyan passport and any other identification documents taken from him, within 14 days.
 - i. An order for exemplary and punitive damages against the 1st and 2nd respondents jointly and severally, in their individual and official capacities on account of their gross violation of the petitioner's fundamental freedoms and rights.
 - j. 1st and 2nd respondents to bear the costs of the petition.
 - k. An alternative order requiring the respondents to facilitate the re-entry of the petitioner to Kenya at a date and time of his appointing including by issuing him with necessary travel documents.
2. The petition was hinged on the grounds that: the petitioner had been in Kenya legally, abiding by the terms of the special pass issued to him by the Kenyan Immigration Department; at the time of his alleged unlawful arrest and attempted deportation, the special pass he held had not expired and was valid; he has made massive investment within Kenya, he is the Director of a community hospital known as Max Cure Hospitals Limited situated at Mega city mall in Kisumu which hugely benefits the residents of Kisumu County; the institution had obtained all the requisite statutory licences and he was not in any way involved in any illegal activities while in Kenya or any other country; and it is in the interest of justice that the orders sought be granted.
 3. The petition was verified by the petitioner's affidavit in which he reiterated the grounds on the face of the petition.
 4. The affidavit in response to the petition was sworn by Timothy Njoroge, the Principal Immigration Officer at the State Department of Immigration Kisumu. He deponed to the facts that: the petitioner was an Indian national; the petitioner travelled to India on 15th October, 2021 on his own accord; the petitioner was neither arrested nor was his passport confiscated by Kenyan authorities; at the time of his departure, the petitioner had presented documentation of his resignation from Max Cure Hospital;



there was no deportation order emanating from the cabinet secretary to support claims for attempted deportation; the petition is defective as the signature on the affidavit does not belong to the petitioner as it is not in tandem with the signature in his passport and other documents furnished to the department of immigration; the petition is marred with lots of falsities and does not meet the threshold for granting the orders sought as the petitioner has not demonstrated how his constitutional rights were violated; and the petition is an abuse of the court process, lacks merit and should be dismissed with costs, the petitioner should also be condemned to pay punitive costs for wastage of judicial time.

5. When this matter came up for hearing on 1st December, 2021 counsel for the petitioner requested for 15 days to file his submissions as counsel for the respondents had already filed their submissions on 29th November, 2021.
6. On 24th March, 2022 when the matter was mentioned for further directions, there was no appearance by either party. On a further mention on 20th April, 2022 there was no appearance for the petitioner and neither had he filed his written submissions. The matter was further mentioned on 13th July, 2022 and as the petitioner was yet to file his submissions, the matter was set down for judgment.
7. The respondents submitted that the petitioner had not presented any document and in particular, a deportation order, to prove that he was deported. They maintained that the petitioner travelled to India on 15th October, 2021 on his own accord after meeting all the requirements that facilitate travel.
8. They maintained that the petitioner was an Indian national as per his passport and as enumerated in Section 32 of the Kenya Citizens and Immigrations Act.
9. Relying on the case of Mohammed Ibrahim Naz v Cabinet Secretary responsible for matters relating to Citizenship and Management of Foreign Nationals & Another [2013] eKLR, the respondents stated that the petitioner was a foreigner who wanted to enjoy the privileges of citizens. The petitioner ought to have followed the correct procedure to be granted re-entry into the country having left on his own accord.
10. On whether the petitioner was entitled to judicial review orders, the respondents submitted in the negative. They maintained that the petitioner was never deported and neither was his special pass cancelled nor was he denied entry into the country. To buttress this submission, the respondents relied on the case of Republic v Director, Department of Immigration Services & 2 Others ex parte Michael Olanrewaju Adeboye [2017] eKLR.
11. I have carefully considered the petition, the affidavits, submissions and the law. The issues for determination are; whether the petitioner was deported from Kenya, whether there is an infringement on petitioner's constitutional rights and freedoms and whether he is entitled to the reliefs sought.
12. The Bill of Rights applies to all persons including foreign nationals and any decision that is bound to affect their rights must be arrived at in conformity with the constitutionally guaranteed rights to a fair process.
13. Section 2 of the [*Kenya Citizenship and Immigration Act*](#) defines deportation as:
The action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act and the verb 'to deport' has a corresponding meaning;
14. Section 43 of the Act provides as follows:
 - (1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in



respect of whom a recommendation has been made to him or her 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.

- (2) A person against whom an order has been made under this section shall-
 - (a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or
 - (b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.
- (3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to *the Constitution* and related laws.
- (4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.
- (5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.
- (6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.
- (7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.

15. Section 49 (8) of the Act provides that:

An immigration officer may, by summons in writing, require any person other than a citizen of Kenya to attend at his office and to furnish to that officer such information, documents and other particulars as are necessary for the purposes of determining whether that person should be permitted to remain in Kenya.

16. While Section 49 (6) provides that:

Notwithstanding any provisions of this Act, all persons against who a deportation order has been issued shall be removed from Kenya within a period of ninety days from the day such final removal order is made or after appeal and further detention shall be extended by a court of law for not more than thirty days;



- 17. It follows therefore, that the foregoing sections do not entail arbitrary deportation nor does it justify a situation whereby a foreign national is summoned, held at the immigration offices or cells and then escorted to the next available flight without being afforded a reasonable opportunity to defend himself or to show cause why he ought not to be deported or seek court intervention.
- 18. In the present case, the petitioner’s case is that he was unlawfully deported from Kenya. That position is however contested by the respondents whose position is that the petitioner voluntarily chose to leave the country upon his resignation. No evidence was adduced to show that the petitioner was summoned by the immigration officer or that he was held at the immigration cells or made to board a flight by the immigration officers.
- 19. The evidence produced shows that the petitioner bought a plane ticket and underwent a COVID-19 test in preparation for his travel. No evidence has been led before this court to show that deportation proceedings were commenced against the petitioner. There is also no evidence to show that the petitioner was detained or that his constitutional rights were violated. It would seem the petitioner did leave the country on his own accord. In the cases of Anarita Karimi Njeru [1976-80]1 KLR 1272 and Trusted Society of Human Rights Alliance v Attorney General & Others, High Court Petition No. 229 of 2012, it was held that the petitioner has an obligation to show the provisions of the Constitution that have been violated and the manner of violation with regard to him.
- 20. As regards the question as to whether or not the petitioner was deported, I am unable to reconcile the two versions of the parties herein. I cannot therefore, quash the decision that had allegedly led to the petitioner leaving the country, as the decision which is sought to be quashed has not been exhibited as required under Order 53 rule 7(1) of the Civil Procedure Rules. If anything, it appears that the petitioner left the country voluntarily.
- 21. It follows therefore, that without quashing the alleged decision in question the other prayers which were sought cannot be issued.
- 22. It is however, contended that the petitioner was never deported from the country. If that position is true, then the petitioner must when he intends to come back to the country be treated in the same manner as any other person applying for re-entry. The respondents are not warranted to treat his application as made by a person who had been deported. In considering his application, the respondents must comply with the provisions of Article 47 of the Constitution and if there was any offence committed by the applicant, he must be subjected to the due process of the law.
- 23. From the foregoing, the petition fails; and the same is dismissed.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2023.

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FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

