



**Ahmed v Director of Immigration Services & another (Constitutional Petition E253 of 2021)  
[2023] KEHC 22374 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22374 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E253 OF 2021  
AC MRIMA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**JAMAAL MOHAMED AHMED ..... PETITIONER**

**AND**

**DIRECTOR OF IMMIGRATION SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. Jamal Mohammed Ahmed, the Petitioner herein, is an American citizen of Somali origin, married to Halima Adullahi Omar. Together they have one issue of marriage.
2. On 27<sup>th</sup> September 2017, the Petitioner was charged before Makadara Chief Magistrates Court in Criminal Case No. 2069 of 2017 with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. He was found guilty and was convicted to 3 years imprisonment.
3. Upon being released from prison on 14<sup>th</sup> June 2021, the Petitioner sought for his Passport from Makadara Law Courts. He was granted the Passport and on 29<sup>th</sup> June 2021, he made an online application for Visa extension.
4. On following up the application at the Director of Immigration Services, 1<sup>st</sup> Respondent herein, in Nyayo House, the Petitioner was informed that he was a prohibited immigrant.
5. Without being allowed to make any representations, the Petitioner was asked to come back to the immigration offices on 6<sup>th</sup> July 2021 with a ticket to the United States as he was required to leave the country within 7 days.



6. Despite informing the officers at the immigration of the need to accommodate him for at least three months to put in place arrangements to take care of his incapacitated wife and young son, the Petitioner was informed that his fate was sealed.
7. The foregoing events yielded the instant Petition.
8. The Respondents jointly opposed the Petition.

**The Petition:**

9. Through the Petition dated 2<sup>nd</sup> July 2021, supported by the Affidavit of Jamaal Mohammed Ahmed deposed to on a similar date, the Petitioner sought to assert violation of his constitutional rights.
10. Filed together with the Petition was an application by way of a Notice of Motion supported by the Affidavit of Jamaal Mohammed Ahmed.
11. In the main, the Petitioner pleaded that the 1<sup>st</sup> Respondent acted arbitrarily when he ordered him to leave the country in 7 days despite the fact that he needed reasonable time and or a temporary extension of time to put matters in place for his family, including following up on his sons US citizenship application.
12. The Petitioner averred that the order to leave the country within 7 days violated his right to fair hearing for failing to accord him sufficient opportunity of being hearing before setting the timelines.
13. It was the Petitioner's case further that the order to leave the Country within 7 days violated his son's and wife's rights protected under Article 53(1)(b) and 45(1) and (2) of the Constitution respectively.
14. In the application, the Petition sought the following reliefs;
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this petition this honourable Court be please to issue an order of stay to stay the execution of the Notice of Prohibited Immigrant issued by the 1<sup>st</sup> applicant, his agent, employee and or servant on 29<sup>th</sup> June 2021 requiring the applicant to leave Kenya within 7 days from 29<sup>th</sup> June 2021.
  4. That the Cost of this application be in the cause.
15. Based on the foregoing, the Petitioner prayed for the following reliefs;
  1. A declaration by this Honourable Court that the 1<sup>st</sup> Respondent acted arbitrarily when he ordered the Petitioner to leave the country in 7 days while failing to give him any sufficient opportunity to be heard before setting the timelines within which he was to leave the Country.
  2. A declaration by this Honourable Court that the 1<sup>st</sup> Respondent's Order to the Petitioner to leave the country within 7 days of 29<sup>th</sup> June 2021 is likely to violate the rights of Mohammed Jamal Mohamed and Halima Abdullahi Omar protected under Article 53(1)(b)(c) and (e) and under Article 45(1) and (2) of the Constitution of Kenya.
  3. An order granting the Petitioner a temporary extension of 3 months before leaving the country.
  4. Costs and interest.



### **The Submissions:**

16. In his written submissions dated 4<sup>th</sup> February 2022, the Petitioner submitted that the failure to accord him an opportunity to make representations especially on the plight of his incapacitated wife and infant son was a derogation of his fair hearing rights.
17. It was his submission that the right to hearing is a fundamental inalienable universal right. Reference to that end was made to the decision in *Republic v Kenya School of Law & 2 others ex Parte Juliet Waniiru Niorose & others* [2014 eKLR.
18. To demonstrate arbitrariness, the Petitioner further relied on the decision in the case of *Justice Amraphael Mbosholi Msasha v Chief Justice of the Republic of Kenya & 7 others* [2006] eKLR where it was observed that a decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision.
19. With respect to the averments about his son and wife, the Petitioner submitted that the Respondent did not controvert or deny its case and as such the Court should find that the interest of the minor should be taken and placed above the interest of all the other parties, including that of the 1<sup>st</sup> Respondent's.
20. The Petitioner sought to fortify his case by drawing support from the decision in *C.M.S v. I.A.K* HC Misc. Application No. 526 of 2008 where it was observed;

In determining a matter such as this the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child."
21. In submitting on violation of his wife's rights under Article 45(1) and (2) of the *Constitution*, the Petitioner stated that at the time of filing the petition, his wife had suffered a serious fracture to her left leg rendering her incapacitated.
22. He submitted that his wife could not go to work to fend for herself or take care of their son singlehandedly and as such needed his help otherwise, they would be rendered a destitute.
23. In the end, the Petitioner prayed for temporary extension of 3 months before leaving the country and costs and interest of the Petition.

### **The Respondents' case:**

24. The Director General Immigration Services and The Hon. Attorney General opposed the application and the Petition through the Replying Affidavit of Jimmy Nyikuli, the Principal Immigration Officer in the Investigations and Prosecutions Section, deposed to on 31<sup>st</sup> August, 2021.
25. He deposed that when the Petitioner applied for visa extension, he was requested to present his original passport in order to verify that he is qualified for the extension.
26. To that end, he deposed that the Petition presented an American Passport No. 488xxxx86 which upon examination indicated that his previous visa expired on 28<sup>th</sup> November 2017, almost three years ago.
27. It was further his case that under Section 33(1) of *Kenya Citizenship and Immigration Act*, (hereinafter referred to as 'the Citizenship Act') the Petitioner's conviction for the criminal offence and visa expiry rendered him a prohibited immigrant had no legal status to remain in the Country.



28. He deposed further that Section 34 of the Citizenship Act allow the removal of immigrant who do not have valid pass or permit, a fact the Petitioner did not satisfy.
29. Based on the foregoing, the Respondent deposed that the Directorate acted within the law and the fact that the Petitioner is married to a Kenyan Citizen did not give him any legal status to remain in the Country.

#### **The Submissions:**

30. In its written submissions dated 2<sup>nd</sup> March 2022, the Respondents identified the only issue for determination as; whether the Petitioner's constitutional rights were violated.
31. It was submitted going by the provision of section 33 and 34 of the Act, that there was no harm occasioned to the Petitioner as a result of the alleged constitutional violation since he was illegally in the country.
32. The Respondents relied on the decision in *Diana Waceke Wainaina v Directorate of Immigration Services; Serge Louodom (Interested Party)* (2022) eKLR where it was observed;

I find as clearly submitted a foreign national has no independent or inherent right to remain in Kenya. The right to reside, work and or engage in any economic activity in Kenya is restricted and can only be exercise by non-citizens in compliance with the statutes regulating the same.

I find to the contrary that it is the Interested Party who has violated the Kenyan immigration laws and based on those illegalities as clearly captured above, it follows that the respondents' actions were warranted and there was no violation of his rights.

33. In conclusion the Respondents submitted that the Petitioner failed to disclose which constitutional rights were violated and the harm suffered. It also was its case that the Petitioner had failed to justify the temporary extension of 3 months before leaving the Country.
34. It was urged that the Petition is dismissed with costs.

#### **Analysis:**

35. From the reading of the pleadings and parties' submissions, there is no doubt that the Respondents are not only constitutionally-obligated, but also enabled by law to discharge their respective duties which involve regulation of stay of foreigners in the country.
36. What stands out in this case is the question of whether in discharging the said duties, the Respondents kept within the *Constitution* and the law. This Court will, therefore, interrogate the processes as undertaken by the Respondents with a view to ascertain if the *Constitution* and the law were upheld.
37. The main contention herein is whether the first Respondent acted in contravention of Article 47 of the *Constitution* in ordering the Petitioner to leave the country within 7 days without according him a hearing and whether such decision affected the rights of his son under Article 53(1)(b) and (c) and the rights of his wife under Article 45(1) and (2) of the *Constitution*.
38. With the facts already set out, a discussion on Article 47 of the *Constitution* now follows.
39. Article 47(1), (2) and (3) of the *Constitution* states that: -
  1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
  - b. promote efficient administration.
40. The legislation that was contemplated under Article 47(3) is the *Fair Administrative Actions Act*. Section 4 thereof provides that: -
  4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
    - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
    - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
    - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
      - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
      - (b) an opportunity to be heard and to make representations in that regard;
      - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
      - (d) a statement of reasons pursuant to section 6;
      - (e) notice of the right to legal representation, where applicable;
      - (f) notice of the right to cross-examine or where applicable; or
      - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
    - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
      - (a) attend proceedings, in person or in the company of an expert of his choice;
      - (b) be heard;
      - (c) cross-examine persons who give adverse evidence against him; and
      - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
    - (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.



- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.
41. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’, an ‘administrator’ and a ‘decision’ as follows: -
- ‘administrative action’ includes –
- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
  - ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
- ‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.
- “decision” means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;
42. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission v. Mbalu Mutava & Another (2015) eKLR addressed itself to Article 47 of the Constitution as follows: -
- Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
43. In South Africa, the Constitutional Court in President of the Republic of South Africa and Others v. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -
- Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...



44. Article 47 of the Constitution, therefore, goes beyond being a mere codification of the common law principles on administrative action. Its main purpose is to ‘... regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice...’. The entrenchment of Article 47 in the Constitution was a deliberate move by Kenyans in demanding inter alia fairness, transparency and accountability in public administration. Public officers must, therefore, embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and execute administrative decisions complies with Article 47 of the Constitution and the Fair Administrative Actions Act.
45. This Court will now apply the foregoing to the facts in this case. As said, the issue is whether the Petitioner was accorded an expeditious, efficient, lawful, reasonable and procedurally fair process before the impugned decision was made.
46. There is no doubt that the Petitioner is a foreigner. Article 47 of the Constitution however applies to every person as opposed to only citizens. The Petitioner served a sentence of three years in prison and on release he applied for the extension of his visa which had definitely expired for his incarceration. That is when he was given 7 days to leave the country.
47. The Petitioner had wanted to be heard before the decision was made. The reason for the request was that his wife, who is a Kenyan, had fractured a leg and the Petitioner had a young child. He had hoped to explain the need to be accorded an extension of around 3 months before he left the country. It was that opportunity to render his part of the story that was allegedly not accorded.
48. Responding to the allegation, the Respondents held to the fact that the Petitioner was a foreigner, his visa had expired and no such application had been made for three years.
49. The Respondents did not allude to how the decision to give the Petitioner 7 days within which to leave the country was arrived at. Whereas the Respondents had the discretion to decline the Petitioner’s request, that ought to have been arrived at within the confines of the Constitution and the law.
50. The Petitioner ought to have been accorded an opportunity to present his case as to why he did not renew the visa as required in law and to also shed some light on the effect of his immediate departure from Kenya on his Kenyan family.
51. The impugned decision was, therefore, procedurally unfair and it was contra Article 47 of the Constitution and Section 4 of the Fair Administration Actions Act.
52. As to whether the impugned decision infringed Articles 53(1)(b) and (e) and 45(1) and (2) of the Constitution, the Petitioner did not demonstrate how his return to his country of citizenship would hinder him from providing for his family in Kenya. The contention is, therefore, rejected and is for dismissal.
53. Having said as much, this Court can now come to the end of this matter.

**Disposition:**

54. In the end, the following orders hereby issue: -
  - a. A declaration be and hereby issue that the decision by the Director of Immigration Services to order the Petitioner, who is a foreigner, to leave the country within 7 days without according him an opportunity to be heard on his application for visa extension was contrary to Article



47 of the Constitution and Section 4 of the Fair Administrative Actions Act. The said decision is, therefore, constitutionally infirm, null and void *ab initio*.

- b. An order of Judicial Review in the nature of Certiorari hereby issue bringing the said decision by the Director of Immigration Services to order the Petitioner, who is a foreigner, to leave the country within 7 days without according him an opportunity to be heard on his application for visa extension before this Court for quashing. The said decision is hereby quashed.
- c. For avoidance of doubt, the Director of Immigration Services is at liberty to consider the Petitioner's application in accordance with the Constitution and the law.
- d. As the Petition has partially succeeded, each party shall bear its own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of:

N/A for the Petitioner.

N/A for the Respondent.

Regina/Chemutai – Court Assistants.

