



**PJF v Director of Immigration Services & 3 others; Ajabu Technology Solutions Limited
(Interested Party) (Constitutional Petition E204 of 2021) [2023] KEHC 22370 (KLR)
(Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E204 OF 2021**

**AC MRIMA, J
SEPTEMBER 21, 2023**

BETWEEN

PJF PETITIONER

AND

THE DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

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

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

AJABU TECHNOLOGY SOLUTIONS LIMITED INTERESTED PARTY

JUDGMENT

Background:

1. On June 8, 2021, the Petitioner, PJR was approached by two men, Emmanuel Njeru and Njeiya Kamau from the Directorate of Criminal Investigations, Immigration Department, at his residence in Ruaka in Nairobi.
2. The two men informed the Petitioner that they had Orders from one James Githinji, to take him to the Office of the Director of Immigration, 1st Respondent herein, located at Nyayo House.



3. On arrival at the 1st Respondent's office, the Petitioner was told that the Immigration Department had received information that the company he worked for, Ajabu Technologies Solutions Limited, the Interested Party herein, had been wound up and, therefore, his employment terminated.
4. The Petitioner informed the 1st Respondent's officers that his employment had not been terminated, that the Interested Party was still in operation and that no winding up application had been filed in Court.
5. The Petitioner was subsequently transferred to Kilimani Police Station. At about 6.00pm, he learnt through his Advocate that The Cabinet Secretary Interior and Coordination of National Government, 2nd Respondent herein, had declared him a prohibited immigrant under section 33(6) of the [Kenya Citizenship and Immigration Act](#) 2011.
6. He further learnt that the 2nd Respondent had made an order on 28th May 2021, under section 43(1) and 43(2) of the [Kenya Citizenship and Immigration Act](#), 2011 requiring him to be placed in Police Custody pending deportation.
7. On 10th June 2019, the Petitioner was deported to United States of America.
8. The Respondents' actions aggrieved the Petitioner, hence the dispute herein.
9. The Respondents opposed the Petition.

The Petition:

10. Through the Amended Petition dated 17th June 2021, supported by the Affidavit and Further Affidavit of PJR deposed to on 9th June 2021 and 23rd June 2021 respectively, the Petitioner sought to vindicate violation of his constitutional rights.
11. It was his case that his predicament ensued when he instituted two Court cases against his wife JCT, namely; High Court Divorce Cause No. E4 of 2021 PJR v JCT and Milimani Children's Case No. E095 of 2021, PJR v JCT (hereinafter collectively referred to as 'the suits').
12. The Petitioner pleaded that upon filing the suits in January 2021, he had been the subject of harassment by law enforcement officers on various allegations, at the behest of his wife who is the sole shareholder in the Interested Party.
13. He pleaded that he is the sole provider of his two children who are currently in School. It was his case that his family been greatly prejudiced by the deportation and deprived of paternal love care and protection as a result of the 1st 2nd and 3rd Respondent's draconian actions.
14. It was his case that despite informing the 1st Respondent that he held a valid work permit and that his employment with the Interested Party had not been terminated, the 1st, 2nd and 3rd Respondents proceeded to execute the 2nd Respondent's orders by arresting and detaining him at Kilimani Police Station and subsequently forcefully and unlawfully deporting him.
15. He pleaded that before being deported, he spent the night of 8th June 2021 at Kilimani Police Station until the morning of 9th June 2021 when he was taken to Jomo Kenyatta International Airport.
16. The Petitioner decried his declaration as an illegal immigrant, his arrest, detention and subsequent deportation as unprocedural and illegal for lack of due process or reasons.
17. He posited that he had legally lived in Kenya since June 2019 and prior to his deportation he was denied contact to his Counsel and family.



18. The Petitioner pleaded that his constitutional entitlement to fair administrative action under Article 47 as appreciated alongside section 2, 3(1) and 4(2) of the [Fair Administrative Action Act](#) was trampled upon by the Respondents' conduct.
19. He further pleaded that the 2nd Respondent's conduct was in contravention of Section 43(3) of the [Kenya Citizenship and Immigration Act](#), 2011 which makes it mandatory that the decision must comply with the [Constitution](#) and all related laws.
20. The Petitioner asserted that the 2nd Respondent subjected him to inhumane treatment for failing to accord him adequate notice of the nature of the reasons for its administrative action, an opportunity to be heard and make representations, notice of a right to a review or make an internal appeal against administrative action, statement of reasons, right to legal representation and information relied upon in the administrative decision.
21. It was his case that his right to equal application of the law under Article 27 of the [Constitution](#) had been breached and had yielded violation of his right to family under Article 45(1) and Article 29 which guarantees every person freedom and security of the person not to be deprived arbitrarily.
22. The Petitioner pleaded further that his legitimate expectation to hold the work permit for a period of two years during the period of his employment had been breached as a result of the 2nd Respondent's unlawful, irregular and unreasonable declaration.
23. It was his case that the 1st, 2nd and 3rd Respondents' conduct violated the national values and principles of good governance, social justice, human dignity, equity, human rights, integrity, transparency and accountability under Article 10 of the [Constitution](#).
24. On the foregoing factual and legal backdrop, the Petitioner prayed for the following reliefs;
 - i. A declaration that the Petitioner's Constitutional rights under Articles 27 and 47 of the [Constitution](#) have been violated.
 - ii. A declaration that the 2nd Respondent's decision declaring the Petitioner as a prohibited immigrant is unreasonable, irrational, unprocedural fair, contrary to the [Constitution](#) of Kenya and applicable laws and is therefore illegal.
 - iii. A declaration that declarations dated 28th May 2021 issued against the Petitioner are illegal void and therefore quashed.
 - iv. A declaration that the deportation of the Petitioner on 9th June 2021 was unprocedural and contrary to the [Constitution](#) of Kenya and applicable law and was therefore illegal and void.
 - v. A declaration that the Petitioner's Class D work permit is valid.
 - vi. In the alternative, there be an order for judicial review by way of mandamus directing the 1st Respondent to forthwith issue the Petitioner with Class D work permit.
 - vii. An order for Judicial Review by way of an order for *certiorari* to remove to this Court and quash the decision of the 2nd Respondent, the Cabinet Secretary for Interior and Co-ordination of National Government, contained in the declarations dated 28th May 2021.
 - viii. A permanent injunction restraining the Respondents, whether by their agents' servants or anyone acting under them from arresting and or deporting the Petitioner unlawfully and or without proven just cause and or without following due process.



- ix. An order of judicial review by way of prohibition to prohibit the Respondents whether by themselves, their agents, servants or anyone acting under them from preventing the Petitioner from returning to and remaining in the Republic of Kenya.
- x. An order that the 1st Respondent pays the Petitioner such compensation as the Court may deem fit for violations of his right and fundamental freedoms under the Constitution.

The Submissions:

25. In its written submissions dated 12th October 2021, the Petitioner identified issues for determination as: whether due process was followed in his deportation; the significance of Article 47 of the Constitution; whether he held a valid work permit as to create a legitimate expectation; and whether his constitutional rights were violated.
26. On the first issue, the Petitioner submitted that despite being a law-abiding citizen, he had been deported contrary to section 4, 4(2) and 33 of the Kenya Citizen and Immigration Act.
27. It was submitted that the purported deportation declaration made on 28th May 2021, was never served upon him. it was his case that it was unlawful and to that end relied on the decision in Republic v Minister of State for Immigration of Persons ex-parte C.O where it was observed;
- “To hold the minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the executive or at the whims of the legislature, the independence of judiciary is the first victim.”
28. The Petitioner further asserted that he had not violated any laws and it was illegal for the Respondents to deport him without service of the deportation notice. Support of the position was drawn from the decision in Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 Others (2020) eKLR where it was observed;
- “...it is not for them to urge that they should be accorded the autonomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of the above I find that due process was not followed in the Petitioner’s deportation.”
29. On the second issue regarding violation of the right to fair administrative action, the Petitioner submitted that the Respondents’ actions constituted administrative action which ought to have conformed to the dictates of Article 47 of the Constitution as well as the Fair Administrative Action Act.
30. The Petitioner referred the Court to the decision in in Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 Others (*supra*) where the Court, in similar circumstances, frowned upon the Respondent’s conduct in the following terms;
- “I find the manner in which the Petitioner has been treated is unbearingly shameful of a democracy, callous to the extreme and insensitive to human dignity and to an individual whose children are born of a Kenyan Mother, and are citizens by birth.”
31. On the issue regarding propriety of the work permit, it was submitted that the same was validly issued to the Petitioner under Class D for a period of 2 years upon payment of requisite fees of Kshs. 400,000/-.



32. It was submitted that he was entitled and had legitimate expectation that he would be permitted to work in Kenya during the period of his employment. He relied on the decision in Communications Commission of Kenya & 5 Others v Royal Media Services & 5 others (2014) eKLR where it was held;
- “Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that it is expected to fulfil the expectation.”
33. Based on the foregoing, the Petitioner submitted that his constitutional rights had been violated and was entitled to reliefs sought.

The Respondents’ Case:

34. The Respondents jointly opposed the Amended Petition through the Attorney General’s Ground of Opposition dated 26th October 2021 and the Replying Affidavit of Christine Kinyua, the Senior Immigration Officer in the Directorate of Immigration Services (Enforcement and Compliance Section) within the Ministry of Interior and Co-ordination of the National Government, deposed to on 6th May, 2022.
35. In the Ground of Opposition, it was the Respondents’ case that the Petition is premised on conjecture and unsubstantiated facts by failing to demonstrate and specifically outline any incidences of discrimination.
36. It was its case that the Petitioner had not demonstrated how the Respondents acted without or beyond the authority granted to them under the law.
37. It was their case that under section 33 and 43 of the Kenya Citizenship and Immigration Act an individual may be declared a prohibited immigrant and declared prohibited immigrant and to cause such person to be detained in police custody and to be returned to his place of origin.
38. It was further its case that under section 41 of the Kenya Citizenship and Immigration Act, the Respondents may invalidate a work permit.
39. In the Replying Affidavit, Mrs. Kinyua deposed that the Petitioner was issued with a Class D work permit on 27th October 2020 for a period of 2 years.
40. He deposed that as per the terms and conditions of the work permit, the Petitioner was to come to the country as the Interested Party’s CEO to plan, formulate and develop strategies, grow revenue base, organize and control operations and budgets, advise on capital Appraisal and advise on capital Sourcing.
41. It was her deposition further that sometime in April 2021, the Directorate received a letter from the interested party herein requesting for cancellation of the Petitioner’s work permit for failing to engage in employment as per his contract and work permit but instead venturing to agriculture, leading to the winding up of the Interested Party.
42. She deposed that subsequently, the Petitioner failed to honour summons to the 1st Respondent to be informed of his employer’s intention to terminate his employment and subsequently invalidate his work permit.



43. She deposed that consequently, the Petitioner's work permit was invalidated according to the provisions of section 41(1)(b) of the [Kenya Citizenship and Immigration Act](#) of Kenya and for thereon was unlawfully present in Kenya.
44. She deposed that as a result the Petitioner became a prohibited immigrant under section 33(1)(f) of the [Kenya Citizenship and Immigration Act](#) of Kenya hence deportation orders were issued.
45. It was her case, therefore, that the Petitioner was legally removed from the country in accordance to the law.

The Submissions:

46. In its written submissions dated 8th May 2021, the Respondents identified the issues for determination as; Whether the petitioner has a right to enter and remain in Kenya and Whether his rights were violated.
47. On the first issue, the Respondent submitted that the Petitioner was issued a work permit under the Seventh Schedule of the Kenya Citizenship and Immigration Regulations, 2012 which allows skilled workers with job offer from an employer/company to be issued with class D work permit.
48. It was its case that upon receiving information of the Interested Party's move to wind up the company and Petitioner's termination of employment, it automatically meant the Petitioner was in the country illegally since he was not a citizen within the provision of Article 39(3) of the [Constitution](#).
49. As regards the Petitioner's marriage to Ms. JCT the Respondents submitted that having claimed that he was married to a Kenyan citizen, the Petitioner was entitled, upon application, to dependant's pass and subsequently to citizenship, which would have afforded him the protection of Article 39(3) of the [Constitution](#).
50. It was its case that the failure of the Petitioner to make the application, denied him the opportunity to remain in Kenya after his Class D permit was invalidated on account of the termination of his employment at the Interested Party.
51. On the foregoing, the Respondents submitted that the Petitioner's rights to non-discrimination and to fair administrative action as guaranteed for under Article 27 and 47 of the [Constitution](#) were not violated.
52. It was submitted that the remedies sought by the Petitioner tenable as they arise from an illegality.
53. To bolster their position, the decision in [Diani Waceke Wainina v The Director of Immigration Services & another](#) (2022) eKLR was relied upon 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 exercised by non-citizens in compliance with the statutes regulating the same."
54. In the end, the Respondents submitted by failing to honour the summons by statutorily mandated body enforcing immigration laws in Kenya, the Petitioner did not come to court with clean hands.
55. It was submitted that should the Court grant the orders and reliefs sought, it would interfere with the constitutional mandate and responsibility of the Respondents.
56. It was prayed that the Petition be dismissed.



Analysis:

57. 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 investigations into the manner in which persons enter, remain and leave the country.
58. What stands out in this case is the question as to 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.
59. As the Petition revolves around the issue of due process, Articles 27(1) and 47 of the Constitution are outrightly triggered. Article 27(1) deals with whether a law in place was complied with whereas Article 47 is on whether a party was accorded a fair administrative process.
60. In this case, on one hand Article 27(1) of the Constitution will interrogate if the procedure laid down in the law on the deportation of the Petitioner were complied with. On the other hand, Article 47 will deal with whether the processes of deportation were in line with the fair administrative procedures' requirements of lawfulness, reasonability and procedural fairness.
61. On Article 27(1), the Constitution provides as follows: -
- Every person is equal before the law and has the right to equal protection and equal benefit of the law.
62. In the instant case, since the Petitioner was in Kenya on the basis of a work permit prior to his deportation to the United States of America, then the applicable law was the Kenya Citizenship and Immigration Act, No. 12 of 2011 (hereinafter referred to as 'the Citizenship Act').
63. Section 40 of the Citizenship Act provides for the procedure for issuance of permit to non-citizens. Since the Petitioner was lawfully issued with a work permit, there is really no need of interrogating that procedure. Instead, it is Section 41 of the Citizenship Act that is of paramount importance.
64. The said Section 41 is on invalidation of a work or residence permit. The provision states as follows: -
41. Invalidation of a work or residence permit:
- (1) Where a permit has been issued to a person, and that person—
- (a) fails, without the written approval of the Director, to engage within ninety days of the date of issue of the permit or of that person's entry into Kenya, whichever is the earlier, in the employment, occupation, trade, business or profession in respect of which the permit was issued or take up residence;
- (b) ceases to engage in the said employment, occupation, trade, business or profession;
- (c) engages in any employment, occupation, trade business or profession, whether or not for remuneration or profit, other than the employment, occupation, trade, business or



profession in respect of which the permit was issued;

- (d) has violated any of the terms of his or her stay under the permit;
- (e) has violated any of the provisions of this Act or Regulations made under it;
- (f) has been declared a prohibited immigrant or inadmissible person;
- (g) has become an undesirable immigrant;
- (h) acquired the permit by fraud, false representation or concealment of any material fact;
- (i) has during any war in which Kenya was engaged unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in such a manner as to assist an enemy in that war; and
- (j) the person has after acquiring the permit been convicted of an offence and sentenced to imprisonment for a term of three years or longer, the permit shall cease to be valid and the presence of that person in Kenya shall be unlawful, unless otherwise authorized under this Act.

- (2) Notwithstanding any other provision of this Act, and subject to the provisions of any other written law, a person to whom a work permit of class M is issued may engage in any occupation, trade, business or profession, and sections 34, 35, and 36 shall not apply to a child of that person. (emphasis added).

- 65. In line with the above provision, the Respondents' deposed that in April 2021, the Directorate received a letter from the Interested Party herein requesting for cancellation of the Petitioner's work permit for failing to engage in employment as per his contract and work permit but instead venturing to agriculture, leading to the winding up of the Interested Party.
- 66. It was further deposed that the Directorate then summoned the Petitioner for a meeting to discuss the matter, but the Petitioner failed to honour the summons. The Respondents then engaged the provisions of Section 43 of the [Citizenship Act](#) and declared the Petitioner to be unlawfully in Kenya and subsequently deported him.
- 67. The Petitioner, however, contended that he was never summoned as alleged and that he was unilaterally arrested, detained, denied access to his Counsel and family and eventually deported.
- 68. As the puzzle seems to rest on whether the Petitioner was accorded a due process, it is incumbent that this Court interrogates Article 47 of the [Constitution](#).



69. 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.

70. The legislation that was contemplated under Article 47(3) is the Fair Administrative Action 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.

71. Section 2 of the Fair Administrative Action 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;

72. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. 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.

73. In South Africa, the Constitutional Court in President of the Republic of South Africa and Others vs. 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...

74. 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.
75. 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 Action Act.
76. This Court will now apply the foregoing to the facts in this case. On a careful consideration of the Respondents’ position in the matter, it comes to the fore that the Respondents only averred, but failed short of availing the requisite evidence to support the averments.
77. The Respondents ought to have availed evidence demonstrating how they summoned the Petitioner upon receiving the letter from the Interested Party. Having failed to do so, then the Petitioner’s position that he was never summoned by the Respondents and that he was bundled out of the country without being accorded any opportunity to be heard remains tenable.
78. Further, even if the Petitioner’s presence in Kenya was confirmed to be unlawful for whatever reason, still the provisions of Section 43 of the Citizenship Act which gives powers to the Cabinet Secretary to remove persons unlawfully present in Kenya ought to have been complied with.
79. Section 43 elaborately provides as follows: -

Power to remove persons unlawfully present in Kenya:

- (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 (Cap. 63), 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.

80. Whereas Section 43 of the Citizenship Act gives the power to the Cabinet Secretary to make an order for the removal of such persons from Kenya, sub-section 3 calls upon the Cabinet Secretary to discharge such duties subject to the Constitution and the related laws. In that case, it goes without say that, at the very bare minimum, the Cabinet Secretary ought to interrogate the manner in which the subject was declared unlawful in Kenya before making the order removing the person from the country. In this case, there is no evidence that the Cabinet Secretary was satisfied that the Petitioner was rightfully declared unlawfully in Kenya before issuing the removal order.

81. From the above discussion, it is apparent that the manner in which the Petitioner was handled in this matter is an affirmation that the Respondents did not heed to the calling in Article 27(1) of the Constitution as well as Sections 41 and 43 of the Citizenship Act. Likewise, Article 47 of the Constitution



and the Fair Administrative Action Act which called for want of compliance with due processes were not complied with.

82. As this Court has repeatedly stated, the Respondents are under a constitutional and statutory obligation to not only act transparently, but are also accountable. They cannot deal as it pleases and in opaque ways. Had the Respondents handled the matter as per the dictates of Article 10 of the Constitution, the Petitioner would have been properly so dealt with and could not be heard to cry foul.
83. It is, therefore, the finding of this Court that Article 27(1) of the Constitution as read with Sections 41 and 43 of the Citizenship Act and Article 47 of the Constitution in conjunction with Section 4 of the Fair Administrative Action Act were variously infringed by the Respondents. Article 27(1) of the Constitution was infringed to the extent that the Respondents did not accord the Petitioner the benefit of the procedures in Sections 41 and 43 of the Citizenship Act. Article 47 of the Constitution as well as Section 4 of the Fair Administrative Action Act were flouted by the Respondents' failure to accord the Petitioner fair administrative procedures.

Conclusion:

84. The foregoing discussion has revealed that the Petitioner was removed from Kenya contrary to the Constitution and the law. However, it is the position that the Petitioner's stay in Kenya was on the basis of a work permit courtesy of the Interested Party.
85. As the position taken by the Interested Party on the Petitioner and as communicated to the Respondents has not been legally challenged, the Respondents remained under a duty to call upon the Petitioner to either exit from the country or, if possible, to regularize his stay.
86. Therefore, since the Petitioner was already deported, this Court cannot make orders allowing him back to the country on the basis of the work permit which was cancelled on the instructions of the Interested Party. If the Petitioner wishes to return to Kenya for whatever reasons, then he is at liberty to make the appropriate applications.
87. On the issue of compensation, it is this Court's position that declaratory orders suffice in the circumstances of this case.
88. Having said so, the Petition is now for determination.

Disposition:

89. Deriving from the foregoing, the following final orders do hereby issue: -
- a. The Petition hereby partially succeeds.
 - b. A Declaration hereby issue that the removal of the Petitioner from Kenya was in violation of Article 27(1) of the Constitution and Sections 41 and 43 of the Kenya Citizenship and Immigration Act for infringing on the Petitioner's right to equal protection and benefit of the law and it was further contrary to Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act for want of fair administrative procedures.
 - c. An Order of *certiorari* hereby issue bringing the decision to declare the Petitioner as being unlawfully present in the Kenya before this Court for quashing. The said decision is hereby declared unconstitutional, null and void ab initio and of no legal effect. The decision is hereby quashed.



- d. For clarity, the Petitioner is at liberty to make appropriate application(s) for re-entry into the country.
- e. Any prayer which has not been specifically allowed stands dismissed.
- f. There shall be no order as to costs as the Petition has partially succeeded.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment Virtually Delivered In The Presence Of:

N/A for the Petitioner.

N/A for the Respondents.

N/A for the Interested Party.

Regina/Chemutai – Court Assistants

