REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 169 OF 2017

PMC.....PETITIONER

VERSUS

1. CABINET SECRETARY, MINISRTY OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT

2. DIRECTOR, IMMIGRATION SERVICES

3. HON. ATTORNEY GENERAL

4. CHP.....RESPONDENTS

AND

CHIEF MAGISTRATE COURT, MILIMANI LAW COURTS.....INTERESTED PARTY

JUDGMENT

Introduction:

1. The Petition in this matter is yet again another product of irreconcilable differences within the institution of marriage.

2. *CHP*, the 4th Respondent herein (hereinafter referred to as '***C***' or '***the 4th Respondent'***) and *PMC*, the Petitioner herein (hereinafter referred to as '***P'*** or '***the Petitioner'***) were legally married in India and their marriage solemnized on 23rd May, 2015.

3. C is a Kenyan citizen. P is an Indian national. On their marriage occasion, C and P travelled to Kenya on 2nd June, 2015. P applied for and was granted a Visitor's Pass as a Tourist. The couple had allegedly agreed that C will apply for a Dependency Pass for P before the expiry of validity of the Visitor's pass. The newly married lived together in their matrimonial home in Nairobi County.

4. Shortly afterwards, the couple experienced strained relations. C, allegedly so, abandoned the matrimonial home. As a result, P instituted *inter alia* maintenance proceedings in *Milimani Chief Magistrates Commercial Court Petition No. 708 of 2016.* The proceedings are still pending.

5. In a bid to forestall the possibility of being repatriated back to India, the Petitioner instituted the current proceedings against the refusal by the Director of Immigration to extent her Visitor's Pass.

6. The Petition is opposed.

The Petition:

7. The Petition is undated, but was filed on 26th April, 2017. It is supported by three Affidavits of the Petitioner. They are a Supporting Affidavit, a Further Affidavit and a Further Supplementary Affidavit. The Petitioner also filed a Statement, written submissions, Further written submissions and a List of Authorities.

8. It is the Petitioner's case that her Visitor's Pass was initially valid for three months, that is from 1st June, 2015 to 1st August, 2015. At expiry, the Visa was extended to 31st October, 2015 and then extended again to 17th March, 2016, then to 13th September, 2016. It was later again extended to 13th December, 2016 and yet again to 10th April, 2017.

9. The Petitioner states that on 31st October, 2015 the Respondent and herself went back to India for a short stay. Unfortunately, the Petitioner laments that, the Respondent secretly cancelled the Petitioner's return ticket to Kenya. The Respondent returned to Kenya alone sometimes in January, 2016 leaving the Petitioner in India.

10. It is further stated by the Petitioner that she made her own arrangements and returned to Kenya on 17th March, 2016. The Petitioner and the Respondent nevertheless stayed together in Nairobi until the separation sometimes in April, 2016. The Petitioner also avers that the Respondent filed divorce proceedings against her in India. Those proceedings are also still current.

11. To the Petitioner's utter shock and surprise, the Respondent renegaded on his undertaking to apply for a Dependency Pass and instead, it is averred, mounted a scheme to have the Petitioner repatriated back to India. The Petitioner avers further that she had intended to apply for a Work Permit using the Dependency Pass so that she could find employment, but for the Respondent.

12. Despite the acrimony with the Respondent, the Petitioner still applied for an extension of the Visitor's Pass. The application was made through the Petitioner's Advocates on record *vide* their letter dated 10th April, 2017. The application was addressed to the 2nd Respondent herein.

13. The Petitioner deponed that the 2nd Respondent summarily and contrary to the Constitution and the law rejected her application through its evenly dated letter.

14. Sensing that she was eligible for repatriation, the Petitioner instituted the current proceedings and obtained interim conservatory orders. In the Petition, the Petitioner *inter alia* challenges the decision of the 2nd Respondent to refuse to grant her application and to extend her visa.

15. In her submissions, the Petitioner contends that being domiciled in Kenya, she is entitled to protection under the Constitution, the law and international instruments which Kenya is a state party.

16. The Petitioner asserts that the actions by the Respondents variously infringes her rights under Articles 20, 21, 27, 28, 29, 31, 43, 45, 47 and 50(1) of the Constitution. It is further submitted that the impugned actions contravene the *Kenya Citizenship and Immigration Act, No. 12 of 2011* (hereinafter referred to as '***the Citizenship Act***') as well as the provisions of *Convention on the Nationality of Married Women* and *The Treaty on the Elimination of all forms of Discriminations against Women*.

17. The Petitioner relied on the decisions in *JWI & Another v. Standard Group Limited & Another (2015) eKLR, Reg. v. Secretary of State for Home Department exparte Doody (1994) 1 AC 531, Charnley v. Charnley (MLJ (1960) 29)* among others in urging this Court to allow the Petition.

18. In the main, the Petition prays for the following orders: -

A. That this application be certified as urgent, service be dispensed with and the same be heard ex-parte in the first instance.

B. That a Conservatory order do issue prohibiting and/or saying any proceedings against the petitioner/Applicant including any repatriation/deportation to be repatriated/deported by the Respondents pending hearing and determination of this Application inter-parties.

C. That a Conservatory Order to issue prohibiting and/or staying any proceedings against the petitioner/Applicant including any repatriation/deportation to the repatriated/deported by the Respondents pending hearing and determination of the petition.

D. That a Conservatory Order do issue prohibiting the Respondents from any acts removing the Applicant/Petitioner from within the jurisdiction of this court pending the hearing and determination of Chief Magistrate's Court, Milimani Commercial Courts petition No. 708 of 2016.

E. That an Order be issued directed to the Respondents to provide a Dependency Visa and in the alternative appropriate residence Visa to the Applicant pending and hearing and determination of this petition.

F. That this court be pleased to ant any other or further relief which the Honourable court deems fit and just to grant.

G. Costs be provided for.

The Responses:

19. The Petition is opposed.

20. The 1st, 2nd and 3rd Respondents and the Interested Party filed a joint Replying Affidavit sworn by one *Alfred Omangi* a Principal Immigration Officer. They also filed written submissions.

21. It is deponed that the Petitioner came to Kenya on 13th September, 2016 using a Visitor's Pass. On 10th April, 2017 the Petitioner applied for extension of the validity of the Pass which Pass had previously been extended.

22. On the basis of Regulation 31 of the *Kenya Citizenship and Immigration Act, 2012 Regulations* (hereinafter referred to as ***'the Regulations'***), the 2nd Respondent declined to extend the validity of the Pass as the Petitioner had already stayed in Kenya for a period of 6 months. The 2nd Respondent formally communicated to the Petitioner's Counsel.

23. On the issuance of a Dependency Pass, the 1st, 2nd and 3rd Respondents and the Interested Party posit that such a Pass is only issued upon a joint application by the Petitioner and the 4th Respondent to the 2nd Respondent, which application is yet to be made.

24. Buttressing the foregoing through their submissions, the 1st, 2nd and 3rd Respondents and the Interested Party contend that the law does not accord the 2nd Respondent the power to renew a Visitor's Pass after the expiry of 6 months from issuance.

25. It is further submitted that Regulation 31 of the *Regulations* is clear on the life of a Visitor's Pass. Citing *Okiya Omtatah Okoiti & 3 Others v. Attorney General & 5 others (2014) eKLR*, they submitted that the Petitioner had not given any reason why the Court should interfere with the administrative decision of the 2nd Respondent in declining to extend the Pass.

26. It is also submitted that the Court cannot usurp the functions of the 2nd Respondent and order it to issue the Pass since there is a defined procedure on application for any Pass. Emphasis was laid on *Bashir Mohamed Jama Abdi v. Minister for Immigration and Registration of Persons &2 Others (2014) eKLR* and *Khatija Ramtula Nur Mohamed & Another v. Minister for Citizenship and Immigration& 2 Others (2013) eKLR*.

27. The 1st, 2nd and 3rd Respondents and the Interested Party further submit that under Section 57 of the Citizenship Act the Petitioner was to lodge a review of the decision to decline to renew the Pass by the 2nd Respondent and not to file a constitutional Petition. The decisions in *Harrikissoon v. Attorney General of Trinidad and Tobago (PC) (1980) 265-272, Alphonce Mwangemi Munga & 10 Others v. African Safari Club (2008) eKLR, Speaker of the National Assembly v. Karume Civil Application No. NAI 92of 1992* and *Benjoh Amalgamated & Ano. V. Kenya Commercial Bank Limited (2007) eKLR* were cited in support of the submission.

28. To that end, the Court is called upon to strike out the Petition with costs as incompetent.

29. In opposition to the Petition, the 4th Respondent filed a Replying Affidavit and a Supplementary Affidavit. He also filed written submissions, Further written submissions, List of Authorities and a Supplementary List of Authorities.

30. The 4th Respondent deponed that he was indeed married to the Petitioner, but for only 6 months, that is from May, 2015 to November, 2015.

31. Resulting from constant misunderstandings and eventual breakdown of the marriage, the 4th Respondent took back the Petitioner to India. That was in November, 2015. The 4th Respondent then returned to Kenya alone and that he has been staying alone since then.

32. It is further deponed that the Petitioner then returned to Kenya own her own. That was in March, 2016. She applied for her own Visitor's Pass with the support of one *MKP*, whom the Petitioner claimed that he was her brother and that she was visiting him. The Petitioner also confirmed that she will be staying with the said P.

33. The 4th Respondent further deponed that the Petitioner has since then been living in Kenya to his total exclusion. The 4th Respondent also alleges that the Petitioner has been occasionally leaving the country and returns on the basis of her Visitor's Pass.

34. According to the 4th Respondent, the parties herein are by now embroiled in several Court litigations including divorce proceedings pending in India. Some suits are pending in Nairobi Courts.

35. Given the circumstances under which the parties herein are, at the moment, the 4th Respondent contends that he cannot possibly apply for a Dependency Pass for the Petitioner since they have not been staying together since November, 2015 and the 4th Respondent only has scanty knowledge of the Petitioner's whereabouts and dealings.

36. In his submissions, the 4th Respondent contends that the duty to issue any Pass is on the 2nd Respondent and not himself. On why he is yet to apply for a Dependency Pass for the Petitioner, the 4th Respondent contends that the parties have been separated since June 2016 and have been living separate and independent lives and embroiled in various proceedings including divorce proceedings. As such, compelling the 4th Respondent to apply for a Pass for the Petitioner will be an infringement of his right to privacy which is protected under Article 31 of the Constitution, the right to association guaranteed under Article 36 of the Constitution as well as the right to equality and freedom from discrimination under Article 27 of the Constitution.

37. The 4th Respondent vehemently submits that the Petitioner is not his dependent. He asserts that when the Petitioner and the 4th Respondent returned to India sometimes in October, 2015, the 4th Respondent left the Petitioner in India as he came back to Kenya in January, 2016. The Respondent mad her own plans and travelled to Kenya a result of which the 4th Respondent is unaware of her whereabouts in the country. Further, the Petitioner is a qualified Professor and can easily get employed without the intervention of the 4th Respondent.

38. Submitting that marriage by itself does not warrant complete dependency of one spouse over the other, the 4th Respondent relied on *WMM V. BML (2012) eKLR* and *NRB v. JO (2014) eKLR*.

39. The 4th Respondent further submitted that since the Petitioner has admitted being in Kenya illegally, then the Court should not countenance such illegality.

40. The 4th Respondent also submitted that since the Petitioner failed to apply for the review of the decision of the 2nd Respondent, then the constitutional Petition is an abuse of the process of the Court. He relied on *Benard Murage v. Fineserve Africa Limited & 3 Others (2015) eKLR, David Ramogi & 4 Others v. The Cabinet Secretary, Ministry of Energy and Petroleum & 7 Others (2017) eKLR* and *Rodgers Mwema Nzioka v. Attorney General & 9 Others (2007) eKLR*.

41. The 4th Respondent prayed that the Petition be dismissed with costs.

Issues for Determination:

42. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following issues are for determination: -

(i) Whether the complaints raised by the Petitioner are premature and debarred by the doctrine of exhaustion;

(ii) Whether the Petitioner's rights under the Constitution and the law were violated by the decision to decline to renew the validity of the Petitioner's Visitor's Pass;

(iii) What remedies, if any, ought to issue?

Analysis and Determination:

(i) Whether the complaints raised by the Petitioner are premature and debarred by the doctrine of exhaustion:

43. The doctrine of exhaustion was recently dealt with in detail by a 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR.*** The Court stated as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

44. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> *59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*
>
> *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)*
>
> *60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.*
>
> *61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*
>
> *62. In the instant case, the Petitioners allege violation of their fundamental rights.* ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

45. Returning to the case at hand, the argument that the matters raised in the Petition are premature is premised on **Section 57(1)** of the Citizenship Act. The provision states as follows: -

> *Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.*

46. It is contended that the Petitioner failed to seek review of the decision and instead filed a fresh constitutional Petition, which Petition is not a review application, hence infringing the said provision.

47. This Court is at a loss in respect to the argument by the Respondents and the Interested Party. Section 57(1) of the Citizenship Act behoves any one aggrieved by a decision of a public officer to apply for review to the High Court. The Citizenship Act is silent on the procedure of applying for the review.

48. In her Petition, the Petitioner in paragraphs 15 to 20 inclusive vehemently challenges the decision by the 2nd Respondent. The Petitioner goes ahead to list particulars of the violations and the provisions of the Constitution and the law which are contravened by the impugned decision.

49. The Petitioner has, among other orders, sought orders of prohibition and *mandamus*. The said orders are part of the orders of judicial review. Under *Article 23(3)* of the Constitution, a Court may grant reliefs including an order of judicial review.

50. The Respondents and the Interested Party have not demonstrated how different the review provided for under Section 57(1) of the Citizenship Act is different from the review provided for in the Constitution. Further, the Citizenship Act demands that the review application be filed in the High Court and that is what the Petitioner did.

51. In case the Respondents and the Interested Party are purturbed by the way the Petitioner filed the review application before the High Court, and may be they are of the view that the review application ought to have been filed through a different procedural posture, then, to me, such an argument centres on a procedural issue which does not go to the root of the matter. The argument is curable by dint of Article 159(2)(d) of the Constitution.

52. Speaking on the essence of Article 159(2)(d) of the Constitution, the Supreme Court in Civil **Application No. 7 of 2014** ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR*** held as follows: -

> ***[55] Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties.***

53. Having said so, I therefore, do not see how the objection can possibly stand. This is a matter in which the doctrine of exhaustion does not

apply or at all. The Petitioner is within the confines of Section 57(1) of the Citizenship Act.

54. The issue is, hence, answered in the negative.

(ii) Whether the Petitioner's rights under the Constitution and the law were violated by the decision to decline to renew the validity of the Petitioner's Visitor's Pass:

55. I have already captured the parties' cases, their submissions and decisions referred to on this issue.

56. In consideration of the issue, I will look at the manner in which the decision by the 2nd Respondent ***('the impugned decision'***) was made.

57. The facts are settled. The Petitioner made an application to the 2nd Respondent for the extension of the validity of her Visitor's Pass on 10th April, 2017. On the same day, the 2nd Respondent wrote to the Petitioner's Counsel and informed them of the impugned decision.

58. Section 35(2) of the Citizenship Act provides that '*a person who wishes to obtain a visa shall apply to the Director in the prescribed form*.' Section 36(2) of the Citizenship Act states that '*permits shall be issued in the manner provided in section 40 of this Act*.'

59. Section 40 of the Citizenship Act details the issuance of permits as follows: -

> *(1) In this section—*
>
> > "*Committee" means the permits determination committee appointed by the Cabinet Secretary.*
>
> *(2) An application for a permit shall be made to the Director in the prescribed manner.*
>
> *(3) The Director shall issue a permit of the required class to a person who is not a prohibited immigrant or inadmissible person, who has—*
>
> > *(a) made an application in the prescribed manner before entry into Kenya; and*
> >
> > *(b) satisfied the Committee that he has met the requirements relating to the particular class of permit.*
>
> *(4) The Director shall issue or revoke a permit on recommendations of the Committee.*
>
> *(5) The Committee shall have power to request for additional information and where necessary, summon the applicants, require production of production supporting documents.*
>
> *(6) The Director shall, within fourteen days of receipt of recommendations of the Committee, cause to be issued a permit to an applicant who so applies and qualifies.*
>
> *(7) Where the Director is of the opinion that the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason, the Director may upon giving reasons, in writing, to both the applicant and the Committee—*
>
> > *(a) refer the matter back to the Committee for further consideration; or*
> >
> > *(b) decline to issue the permit to the applicant.*
>
> *(8) Where the application has been referred back to the Committee, the Committee shall, within fourteen days, make its findings to the Director and such findings shall be limited to the reasons given for the referral.*

60. From the reading of the above provision, several procedural requirements come to the fore. The main one is the role of the *Permits Determination Committee* or the *Committee*. Under Section 40(4) the Director can only issue or revoke a permit ***on recommendations of the Committee***.

61. The Committee is created under Section 7(1) of the *Kenya Citizens and Foreign Nationals Management Service Act,* No. 31 of 2011 (hereinafter referred to as '***the Management Service Act')***. The section provides as follows: -

> *The Board shall establish a Citizenship Advisory Committee, a Permits Determination Committee and such other committees as it shall deem necessary for the efficient and expedient disposal of the business of the Board*.

62. The **Board** referred to above is the one established in Section 5(1) of the Management Service Act. The Board is the governing body of the Service. The **Service** is established under Section 3(1) of the Management Service Act as follows: -

> *There is established the Kenya Citizens and Foreign Nationals Management Service which shall be a body corporate with perpetual succession and a common seal.*

63. The functions of the Service are provided for under Section 4 of the Management Service Act as: -

(1) The Service shall , under the general supervision of the Cabinet Secretary, be responsible for the implementation of policies, laws and any other matter relating to citizenship and immigration, births and deaths, marriages, identification and registration of persons, issuance of identification and travel documents, foreign nationals management and the creation and maintenance of a comprehensive national population register.

(2) Notwithstanding the generality of sub-section (1), the service shall-

(a) in relation to the national population register and for the purpose of collecting and compiling information concerning the distribution and composition of the population in Kenya, the scope and direction of migration, labour resource utilization, and other connected purposes have the following functions-

(i) receiving, storing and updating information from primary registration agencies;

(ii) generating of appropriate unique identifier for individuals and groups in accordance with this Act;

(iii) subject to the Constitution and in consultation with other relevant institutions, regulating the sharing of information by the various registration agencies and other users;

(iv) implement the relevant policies and guidelines and provide the cabinet secretary with the necessary information to guide the formulation of new policies, review of existing policies and guidelines;

(iv) in consultation with the Cabinet Secretary, coordinate and mobilize resources for the implementation of the relevant policies;

(v) undertake the task of data collection and dissemination in a manner that ensures consistency and accuracy in accordance with set national standards and guidelines; and

(vi) facilitate access to information and data to national population registration information in accordance with this Act, any other relevant law or policy and the Constitution;

(b) administer the Acts of Parliament set out in the First Schedule and any other written law;

(c) advise the Government on the matters provided for in this section;

(d) collaborate with other state agencies for effective discharge of its mandate; and

(e) perform such other functions as may be directed by the Cabinet Secretary

64. The functions of the Board are enumerated in Section 6 of the Management Service Act in the following manner: -

(1) The Board shall be responsible, through Cabinet Secretary, to the people of Kenya for –

(a) formulation and review of the policies of the Service in accordance with constitutional values and principles including the principle on public participation;

(b) monitoring of the performance of the Service;

(c) appointment training, discipline and removal of members of staff of the Service; Kenya Citizens and Foreign Nationals Management Service

(d) establishing departments within the Service and allocate responsibilities to such departments; and

(e) reviewing and recommending for review laws and regulations for the better management of the Act.

(2) The Board shall ensure that all its appointments conform to the values and principles of the Constitution including the principles of affirmative action for gender equality, regional balance and inclusion of the marginalized populations at all levels of employment in accordance with Articles 27, 54, 55, 56, 232 and other relevant provisions of the Constitution of Kenya.

65. The Permits Determination Committee is, therefore, a Committee of the Board, which Board, is the governing arm of the Service. The mode of operation of the Committee is provided for under Section 7(2) to (6) inclusive and as follows: -

(2) A committee of the Board shall have authority to deliberate on and make resolutions or recommendations over such matter as shall be referred to it by the Board.

(3) A committee of the Board shall be chaired by a member appointed by the Board and in the absence of the member, the members of committee present shall appoint one member from among themselves to chair the meeting.

(4) The quorum for each meeting of a committee shall be two thirds of its membership inclusive of its chair.

(5) No resolution of a committee of the Board shall become a decision of the Board until it has been tabled before the Board and adopted by the Board.

66. As stated in Section 7(2) above, the Committee has authority to deliberate on and make resolutions or recommendations over such matter as shall be referred to it by the Board. It is, hence, the recommendation of the Committee, once adopted by the Board, which guides the Director on whether or not to issue or revoke a permit. That is clearly provided for in Section 40(4) of the Citizenship Act.

67. The decision of the Director on an application for a permit has the effect of, in one way or the other, affecting the rights and fundamental freedoms of the applicant. **In the event the decision is likely to adversely affect the applicant**, then Article 47(2) of the Constitution enjoins the Director to give written reasons. Such a decision will no doubt be an administrative decision which must pass the test in Article 47(1) of the Constitution, to wit;

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

68. The right to fair administrative action is further amplified in the *Fair Administrative Actions Act,* No. No. 4 of 2015. Section 4 thereof provides that: -

(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.

69. Section 2 of the Fair Administrative Actions Act defines an '*administrative action'* and an '*administrator*' 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'.

70. The Courts have also, on an equal measure and in many occasions, dealt with the right to a fair administrative action. In ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** Court of Appeal addressed itself on Article 47 of the Constitution. The Court held that: -

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.

71. The South African 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 while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

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…

72. The right was further discussed in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR***. The Court had the following to say:

25. *In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*

These are: -

a. ***Illegality*** *- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*

b. ***Fairness -*** *Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

c. ***Irrationality and proportionality*** *- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

73. The question which now begs an answer is whether the impugned decision, as an administrative action, complied with the dictates of the Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act.

74. There is no doubt the impugned decision adversely affected the Petitioner. Rightly so, the decision is in writing and it is in line with Article 47(2) of the Constitution as read with Section 4(2) of the Fair Administrative Actions Act.

75. On procedural fairness, the Director received the Petitioner's application for extension of her Pass on 10th April, 2017. The Director rejected the application *vide* the letter dated the same day which carried the impugned decision.

76. There is no proof or allegation that the Director, in arriving at the impugned decision, adhered to Section 40(4) of the Citizenship Act which provision commands the Director to only issue or revoke a permit ***on recommendations of the Committee***. There is further no evidence or allegation that the Petitioner's application was ever dealt with by the Permits Determination Committee.

77. The Respondents and the Interested Party seem to hang on the position that a Visitor's Pass cannot be extended for more than an

aggregate of 6 months. That is, indeed, expressly provided for in Regulation 31 of the Regulations. Whereas the position is correct, suffice to say that the position only takes care of the lawfulness of the decision under Article 47(1) of the Construction. The decision is also called upon to be procedurally fair, reasonable, efficient and expeditious.

78. The 2nd Respondent, therefore, did not adhere to the procedure in law in arriving at the impugned decision. While it is so tempting to just look at the lawfulness of the impugned decision, there is a lot of credit in the manner in which such a decision is arrived at. In this case, for instance, I will demonstrate how, adherence to the procedural requirements in the law may aid in the review of laws and policies.

79. Section 4(2) of the Management Service Act obligates the Service to, *inter alia*, implement the relevant policies and guidelines and provide the Cabinet Secretary with the necessary information to guide the formulation of new policies and the review of existing policies and guidelines. The Service is also called upon to advise the Government on the matters relating to citizenship.

80. The Board, which is the governing organ of the Service, is called upon under Section 8 of the Management Service Act to review and recommend for review laws and regulations for the better management of the Management Service Act. Further, any of the Committees of the Board is called upon under Section 7 to deliberate on and make resolutions or recommendations over the matters it has jurisdiction over. Needless to say, some of the recommendations may lead to the review of the relevant policies and laws.

81. Another possibility is that upon considering the application, and in view of the circumstances of this case, the Committee may even recommend that the Petitioner be granted a Special Pass. Therefore, the recommendations are endless.

82. There are many ways in which the Committee may discharge its mandate. One of such ways is provided for in Section 40(5) of the Citizenship Act as follows: -

> ***The Committee shall have power to request for additional information and where necessary, summon the applicants, require production of production supporting documents.***

83. In according an Applicant the opportunity to be heard or to even appear before the Committee, even in instances where one may consider the law to be settled, it creates a further and better opportunity to the Applicant to present the case. It also gives the Committee an opportunity to interrogate the matter further. Out of such engagements, the Committee may see the need to make recommendations for law and policy review or to advise the Applicant accordingly.

84. Emerging from the above, there is no doubt the impugned decision was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioner. As said, the impugned decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness. As demonstrated, the 2nd Respondent failed to adhere to the procedure in law in arriving at the impugned decision.

85. At a minimum, to meet the constitutional and statutory threshold, the 2nd Respondent had to: -

(i) Forward the Petitioner's application to the Permits Determination Committee for consideration.

(ii) The Committee was to notify the Petitioner of its legal position;

(iii) The Committee would accord the Petitioner an opportunity and the manner in which to respond to the legal position. May be the Petitioner would have distinguished the Committee's position;

(iv) If need be, the Committee would have informed the Petitioner of her right to attend the proceedings, in person or in the company of an expert of her choice, in the event the proceedings were to be physically or virtually held;

(v) Inform the Petitioner of her right to be heard and to make representations;

(vi) Inform the Petitioner of the right to cross-examine the witnesses, if any will be called;

(vii) Inform the Petitioner of her right to legal representation;

(viii) Inform the Petitioner of her right to where necessary to request for an adjournment of the proceedings;

(ix) Inform the Petitioner of the right to a review or internal appeal against an administrative decision;

(x) Notify the Petitioner of its decision and the reasons thereof.

(xi) The Director would then make a decision on the basis of the recommendations of the Committee.

86. As I come to the end of this issue, I must make it clear that this issue only centres on the procedure undertaken by the 2nd Respondent in arriving at the impugned decision. For clarity, the discussion does not venture into the merits or otherwise of the 2nd Respondent's decision to decline to extend the validity of the Petitioner's Visitor's Pass. That is at the heart of judicial review proceedings which I will briefly look at below.

87. Judicial review has over time been a subject of litigation. The Court of Appeal in Civil Appeal No 185 of 2001 ***Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd*** stated the parameters of judicial review as follows: -

> ***Judicial Review is concerned with the decision-making process not with the merits of the decision itself;*** *the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions.* (emphasis added).

88. The above position was restated in ***Republic –vs- Kenya Revenue Authority exparte Yaya Towers Ltd (2008) eKLR*** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision-making process itself.

89. *The Halsbury's Laws of England 4th Edition Vol. (1)(1) at paragraph 60* bolsters the position and cautions that the purpose of judicial review proceedings is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

90. Having said so, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of ***Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300***, the Court citing with approval the cases of *Council of Civil Unions v. Minister for the Civil Service (1985) AC 2* and *An application by Bukoba Gymkhana Club (1963) EA 478* held as follows: -

> ***In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety****……Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission….Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards….. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.* (emphasis added).

91. The Respondent's impugned decision, therefore, infringed Articles 47 and 50(1) of the Constitution as well as the Kenya Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act and the Fair Administrative Actions Act on account of procedural impropriety. The impugned decision is, hence, in contravention of the Constitution.

92. Given the circumstances of this matter, I am not convinced that the Petitioner's rights and fundamental freedoms under Articles 27, 28, 29, 31, 43 and 45 of the Constitution were in any way infringed.

93. In the end, the issue is partly answered in the affirmative and to the extent that the impugned decision infringes Articles 47 and 50(1) of the Constitution as well as Kenya Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act and the Fair Administrative Actions Act.

(iii) <u>What remedies, if any, ought to issue?</u>

94. The Petition has succeeded on the basis of the infringement of the right to a fair trial and right to fair administrative procedures. However, the real dispute between the parties is yet to be determined.

95. One of the remedies sought by the Petitioner is an order of *mandamus* to compel the 1st and 2nd Respondents to issue the Petitioner with a Dependency Pass. My quick response thereto is that this Court is not vested with that jurisdiction. That is an obligation legally donated to the 2nd Respondent and the other necessary entities. As cautioned, this Court should resist the temptation of replacing the impugned decision with its view.

96. The Court of Appeal in Kisumu ***Civil Appeal Nos. 89 and 90 of 2011 West Kenya Sugar Company Limited vs. Kenya Sugar Board & Butali Sugar Mills Limited (2014) eKLR*** dealt with a like scenario. In that case the High Court had issued an order of *mandamus* directing the then Kenya Sugar Board to issue a manufacturing license to Butali Sugar Mills Limited on being satisfied that Butali Sugar Mills Limited had met all the requisite requirements for issuance of a manufacturing license but the Kenya Sugar Board, then the regulator in the sugar sector, was unreasonably not discharging its duty. The Court of Appeal in allowing an appeal by West Kenya Sugar Company Limited against the order of the High Court held that the High Court did not have the jurisdiction to order the Kenya Sugar Board to issue a manufacturing license. Instead, the Court of Appeal directed the Kenya Sugar Board to expeditiously hear and determine the application by Butali Sugar Mills Limited for the manufacturing license in accordance to law and with notice to all necessary parties.

97. The prayer is, hence, unavailable to the Petitioner.

98. Another prayer sought by the Petitioner is that of compensation to the tune of Kshs. 1,000,000/=. On this prayer, I will, refer to the guidance by the Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR.***

99. The Court of Appeal made a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. In the end, the Learned Judges expressed themselves as follows: -

> *Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "**appropriate and just** "according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.*

100. In this case the Petitioner's rights are certainly vindicated *vide* an appropriate declaration and other orders. Further, although the 2nd Respondent violated the rights aforesaid, the matter is still pending further deliberations wherein the Petitioner will be accordingly accorded a fair hearing.

101. In consideration of the circumstances of this matter, I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate remedies. The prayer for damages is, hence, declined.

Disposition:

102. Flowing from these findings and conclusions, the disposition of the Petition is as follows:

> **(a) A declaration, be and is hereby issued, that the 2nd Respondent's failure to consider the Petitioner's application dated 10th Aril, 2017 for extension of the validity of her Visitor's Pass in accordance with the procedure provided for in the law is contrary to the Constitution, the Kenya Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act and the Fair Administrative Actions Act. The said decision is, hence, unconstitutional, unlawful, procedurally unfair and null and void.**
>
> **(b) An Order of *Certiorari,* be and is hereby issued, calling, removing, delivering up to this Honourable Court and quashing or revoking the 2nd Respondent's decision made on 10th April, 2017 refusing to extend the validity of the Petitioner's Visitor's Pass.**
>
> **(c) The 2nd Respondent shall forthwith consider the Petitioner's application dated 10th April, 2017 for extension of the validity of the Petitioner's Visitor's Pass in accordance with the Constitution and the law.**
>
> **(d) Pending the outcome of order (c) above, the conservatory order issued on 27th April, 2017 shall remain in force.**
>
> **(e) Any prayer which has not been expressly allowed is deemed to have been disallowed.**
>
> **(f) Costs to the Petitioner which costs shall be borne by the 2nd Respondent.**

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. T. K. Rutto, Counsel for the Petitioner.

Mr. Moimbo, Learned Senior State Counsel instructed by the Honourable **Attorney General** for the 1st, 2nd and 3rd Respondents.

Mr. Njeru Mucheru, Counsel for the 4th Respondent.

Elizabeth Wambui – Court Assistant