



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E1123 OF 2020**

**IN THE MATTER OF**

**AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**BETWEEN**

**HIMATLAL LAKHAMSHI RAJSHI SHAH.....APPLICANT**

**VERSUS**

**CABINET SECRETARY FOR THE MINISTRY**

**OF INTERIOR AND CO-ORDINATION OF**

**NATIONAL MANAGEMENT SERVICES.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR GENERAL, KENYA CITIZENS & FOREIGN**

**NATIONALS MANAGEMENT SERVICES.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The *ex parte* Applicant herein, Himatlal Lakhamsi Rajshi Shah, states that he is a British National, born in Nairobi, Kenya on 14<sup>th</sup> January 1941, and has been residing in Kenya for 79 years through the renewal of relevant permits. Further, that he studied in Kenya from primary school to university, and worked as a business man until his retirement. He was married to a Kenyan citizen, Lata Himatlal Shah on 13<sup>th</sup> May 1967, for 53 years and had been blessed with 2 issues who were both adults and citizens of Kenya.

2. The *ex parte* Applicant has therefore filed a Notice of Motion dated 27<sup>th</sup> October 2020, wherein he seeks an order of mandamus to be issued directed jointly and severally to the Cabinet Secretary, Ministry of Interior and Coordination of National Management Service, the Director General, Kenyan Citizens & Foreign Nationals Management Services and the Attorney General commanding them to issue to the Applicant a Certificate of Kenyan Citizenship, and all relevant and necessary documents for the registration of the Applicant as a Kenyan forthwith in respect of the Applicant's Application (Immigration file number R. 155982) applied on 6<sup>th</sup> February 2013. Further, that the cost of this application be provided for.

3. He has sued the Cabinet Secretary, Ministry of Interior and Coordination of National Management Service, an office established under Article 152 (1) (d) of the Constitution, as the 1<sup>st</sup> Respondent. The Director General, Kenyan Citizens & Foreign Nationals Management Services, an office established under the Kenya Citizens and Foreign Nationals Management Services Act, is sued as the 2<sup>nd</sup> Respondent, while the 3<sup>rd</sup> Respondent is the Attorney General, an office established under Article 156 of the Constitution of Kenya, and is the legal adviser to national government.

4. The grounds upon which the Notice of Motion is based are in the statutory statement and verifying affidavit dated and sworn 27<sup>th</sup> October 2020. The *ex parte* Applicant averred that on 6<sup>th</sup> February 2012, he made an application to be registered as a Kenyan citizen by virtue of being a spouse to a Kenyan citizen. Further, that he fulfilled all the requirements set out in section 11 of the Kenyan Citizenship and

Immigration Act, No.12 of 2011. However, that he has not received any communication, and his lawyers also sent letters dated 30<sup>th</sup> July 2020 and 9<sup>th</sup> September 2020 but the same have not been responded to.

5. According to the *ex parte* Applicant, the undue delay in processing the Applicant's citizenship application is unfair, unreasonable and unconstitutional, since Article 259 (8) of the Constitution provides that if the time period for performing an act is not specified, then it should be done without unreasonable delay. In addition, that the failure to furnish a reason for the delay in processing the application despite the inquiries by the *ex parte* Applicant showed that the administrative action was without good reason as per section 6 (4) of the Fair Administrative Action Act.

6. The Respondents did not file any responses despite being served with the *ex parte* Applicant's pleadings.

### **The Determination**

7. C. Mputhia Advocates, the counsel for the *ex parte* Applicant, filed submissions dated 2<sup>nd</sup> February 2021, and drew the Court's attention to the case of **Republic vs Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 Others Ex parte Patricia Olga Howson (2013) e KLR**, in which it was held that Article 47 of the Constitution can be relied on by non-citizens who are entitled to the right to administrative action. The counsel Applicant also made reference to section 11 of the Kenyan Citizenship and Immigration Act no. 12 of 2011 where the requirements were set. He submitted that at the time of making the application on 6<sup>th</sup> February 2014, the *ex parte* Applicant had fulfilled all the requirements and further to that, he had fulfilled the requirements of Section 13 of the Kenya Citizenship and Immigration Act

8. The *ex parte* Applicant's counsel further submitted that it had been 9 years since the application for citizenship was made, and no response in terms of acceptance, rejection or even reason for delay had been received. This was an unduly long time and thus unfair, unreasonable and constituted breach of administrative action. Reliance was placed on the holding in **Republic vs Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 Others Ex parte Patricia Olga Howson (supra)** that 8 months' delay constituted breach of Article 47 of the Constitution.

9. Lastly, the *ex parte* Applicant cited the case of **Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge (2017) eKLR**, on the circumstances when an order of mandamus can be granted, and submitted that the Respondents had failed to fulfil their mandate under statute, and thus an order of mandamus was the most efficacious remedy.

10. I have considered the pleadings and arguments made by the *ex parte* Applicant. This Court's jurisdiction in relation to immigration matters was confirmed in **Republic vs Cabinet Secretary: Ministry of Interior and Co-ordination of National Government, Director of Immigration & Attorney General Ex Parte Richard Boack, [2018] eKLR** wherein *the case of Leonard Sitamze vs The Minister For Home Affairs & 2 Others*, Nairobi High Court Misc. Civil Application No. 430 of 2004 was cited, in which Justice J. B. Ojwang (as he then was) held as follows:

**“Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilized society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”**

11. **The *ex parte* Applicant has urged that the** he had fulfilled the requirements of Section 13 of the Kenya Citizenship and Immigration Act, and that the Respondents are thereby under a duty to grant him citizenship, and the delay by the Respondents is In light of the fact that the Respondents did not dispute the *ex parte* Applicant's averments and version of events, this Court will proceed to consider the main issue, which is whether the *ex parte* Applicant merit the relief sought.

12. Section 11 of the Kenya Citizenship and Immigration Act 2011 provides for the for citizenship by marriage as follows:

**A person who has been married to a citizen of Kenya for a period of at least seven years and has acquired residence status shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if—**

**(a) the marriage was solemnized under a system of law recognized in Kenya, whether solemnized in Kenya or outside Kenya**

**(b) the applicant has not been declared a prohibited immigrant under this Act or any other law;**

**(c) the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;**

**(d) the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and**

**(e) the marriage was subsisting at the time of the application.**

13. In addition, section 13 provides for application for registration of citizenship on account of residence as follows:

**(1) A person who has attained the age of majority and capacity who has been lawfully resident in Kenya for a continuous period of at least seven years may on application be registered as a citizen if that person—**

**(a) has been ordinarily resident in Kenya for a period of seven years, immediately preceding the date of application;**

**(b) has been a resident under the authority of a valid permit or has been exempted by the Cabinet Secretary, in accordance with section 34(3) (h) and who is not enjoying the privileges and immunities under the Privileges and Immunities Act (Cap. 179);**

**(c) has resided in Kenya throughout the period of twelve months immediately preceding the date of the application;**

**(d) has an adequate knowledge of Kenya and of the duties and rights of citizens as contained in this Act;**

**(e) is able to understand and speak Kiswahili or a local dialect;**

**(f) understands the nature of the application under subsection (1);**

**(g) has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;**

**(h) satisfies the Cabinet Secretary that he or she intends to reside in Kenya after registration; (i) has been determined, through an objective criteria, and the justification made, in writing, that he or she has made or is capable of making a substantive contribution to the progress or advancement in any area of national development within Kenya; and**

**(j) is not an adjudged bankrupt.**

14. The *ex parte* Applicant has brought evidence to show that he has met the conditions in section 11 and 13, and that he has made the necessary application, which for nine years has not been responded to by the Respondents. In this respect, he brought evidence of his Oversea School Certificate Examination that he sat for in 1958 and his Higher School Certificate Examination that he sat in 1960 both at the Duke of Gloucester School in Nairobi, and of his degree certificate awarded by the University of London, University College at Nairobi on 16<sup>th</sup> July 1965. He brought evidence of a copy of a certificate of marriage showing that on 13<sup>th</sup> May 1967 he celebrated a marriage with Lata Raichand Shah under the Marriage Ordinance. He brought evidence of two applications made for citizenship, the first on 4<sup>th</sup> February 2013 and the second on 24<sup>th</sup> April 2020. The Respondents have not disputed the *ex parte* Applicant's averments, nor demonstrated any reasons why he should not be granted Kenyan citizenship.

15. It is thus my finding from the foregoing reasons and observations, that in the present case, the Respondents are under a duty to act on the *ex parte* Applicant's application, and having fulfilled the conditions set out in sections 11 and 13 of the Kenya Citizenship and Immigration Act 2011, to grant him Kenyan citizenship. They have also acted unlawfully, unfairly and unreasonably in their refusal and delay in responding to the *ex parte* Applicant's application. Article 47 of the Constitution provides as follows in this regard:

**“(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.”**

It is indicated in Article 47, the situations where a duty to act fairly will apply is where the decision maker is taking a decision that will have a direct and specific impact on an individual.

16. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows in this regard:

**“(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.”

17. In addition, the Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others**, (1997) e KLR explained the applicable principles for an order of mandamus to issue as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an **ORDER OF MANDAMUS**? Once again we turn to **HALSBURY’S LAW OF ENGLAND**, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

18. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

19. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

20. It is notable that all these requirements for the grant of an order of mandamus have been met in the present application as illustrated in the foregoing. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 27<sup>th</sup> October 2020 is merited, and I accordingly grant the following orders

**I. An order of mandamus be and is hereby issued directed jointly and severally to the Cabinet Secretary, Ministry of Interior and Coordination of National Management Service, the Director General, Kenyan Citizens & Foreign Nationals Management Services and the Attorney General commanding them to issue to the *ex parte* Applicant a Certificate of Kenyan Citizenship, and all relevant and necessary documents for the registration of the *ex parte* Applicant as a Kenyan forthwith, in respect of the Applicant’s Application (Immigration file number R. 155982) applied on 6<sup>th</sup> February 2013.**

**II. The Respondents shall meet the *ex parte* Applicant’s costs of the Notice of Motion dated 27<sup>th</sup> October 2020.**

21. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**

**A. NDUNG'U**

**JUDGE**