REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATIO NO. 229 OF 2018

REPUBLIC...APPLICANT

VERSUS

CABINET SECRETARY FOR INTERIOR & CO-ORDINATION OF

NATIONAL GOVERNMENT...1ST RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES...........2ND RESPONDENT

AND

PETER ADIELE MMEGWA..........................1ST *EX PARTE* APPLICANT

NIGKEN AUTO LIMITED...........................2ND *EX- PARTE* APPLICANT

JUDGMENT

The Parties

1. The first *ex parte* applicant is a citizen of the Federal Republic of Nigeria. He is the holder of Nigerian Passport Number A04347816 issued on the 3rd January 2013. He states that he is a businessman, a director and a shareholder of the second *ex parte* applicant.

2. The second *ex parte* applicant is a limited liability company duly incorporated under the Companies Act.[1]

3. The first Respondent is the Cabinet Secretary, Ministry of Interior and Coordination of National Government appointed under Article 152(2) of the Constitution.

4. The second Respondent is the Director of Immigration Services appointed under the provisions of the Kenya Citizenship and Immigration Act.[2]

Factual background

5. The first *ex parte* applicant describes himself as a law abiding person with no criminal record. He states that he has resided in Kenya with his family since 2004 and that his two children who entirely depend on him for upkeep, education and financial support study at the Catholic University, Karen and at Daystar University, Nairobi respectively.

6. Additionally, the first *ex parte* applicant states that his entry permit was last renewed for a period of two years vide a letter dated the 19th September 2016, and, that on 25th December 2017, he travelled through the Jomo Kenyatta International Airport to Lagos, Nigeria, but as he exited, an immigration officer examined his passport and without offering reasons cancelled the endorsement on his entry permit at page 15 of his passport. He states that he was not notified of the intention to cancel the entry permit nor was he offered an opportunity to show cause why the entry permit should not be cancelled. He states that the impugned decision was arbitrary, oppressive whimsical, unlawful, uncalled for and that it was undertaken in breach and disregard of the principles of natural justice and without authority.

7. As a consequence of the said decision, the first applicant states that he has not been able to return to Kenya because he is unable to obtain a visa because his passport has been flagged. He states state that the effect of the impugned conduct is to unlawfully render him a prohibited immigrant without complying with section 33 of the Kenya Citizenship and Immigration Act[3]and in breach of Articles 10 (b) (c), 47 and 50 of the Constitution.

Reliefs sought

8. The applicants pray for the following orders:-

a. An order of certiorari quashing the decision and cancellation/deletion of the first ex parte applicant's entry permit ref KEP/G/0609691.

b. An order of Mandamus directing the Respondents to forthwith reinstate the first ex parte applicant's entry permit ref KEP/G/0609691 and to facilitate his unhindered re-entry into Kenya.

c. That the costs of this application be provided for.

Respondents' grounds of opposition

9. The Respondents filed grounds of opposition dated 25th November 2019 stating :-

a. That *the application is frivolous, vexatious and an abuse of court process and it does not meet the threshold of issuing the order of certiorari and mandamus sought.*

b. That *the application offends the provisions of Article 39 (2) (3) of the Constitution.*

c. That *there is no evidence that the applicant is a director and or a shareholder of the second ex parte applicant.*

d. That *courts should not be used by litigants to curtail the statutory duties of public officers/statutory bodies.*

e. That the application is based on mere beliefs, suspicion and speculation and hence incapable of any judicial review determination.

f. That *judicial review deals with the process of decision making and not the merits of the decision.*

Submissions

10. The applicant's counsel submitted that the manner in which the entry permit was cancelled violates Article 47 of the Constitution which guarantees every person the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be provided with reasons. Additionally, he submitted that the first applicant was not afforded due process as guaranteed under Article 50 of the Constitution. To buttress his argument, he cited *Hillary Kipruto Bett v Director of Public Prosecutions & 2 Others*[4] for support of his submission that the impugned decision is illegal for contravening the first applicants rights under Articles 47 and 50 of the Constitution, and argued that the decision is irrational and clouded in mystery because there was no communication prior to the decision.

11. Mr. Munene Wanjohi, counsel for the Attorney General submitted that under Article 39 of the Constitution, the right to enter Kenya is only a preserve of Kenyans, but every person has the right to leave Kenya at will. He submitted that the applicant is a Nigerian national, hence, he lacks an absolute right to enter Kenya. He argued that judicial review orders can only be issued where illegality, impropriety of procedure and irrationality. For this proposition, he relied on *Re Bivac International SA (Bureau Veritas)*[5] and *Pastoli v Kabale District Local Government Council and others*.[6]

12. Mr. Munene argued that judicial review orders are discretionary and that the Respondents acted in accordance with the law. He argued that judicial review does not deal with the merits of a decision but is aimed at ensuring that the individual is given a fair treatment. To buttress his argument, he cited *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*,[7]*Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another*[8] and *Republic v Kenya Revenue Authority & Another ex parte Bear Africa (K) Limited*. He argued that the Respondents are mandated under the law to regulate all matters pertaining to immigration and added that so long they acted within their statutory mandate, the court will have no reason to interfere.

Determination

13. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

14. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[9] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

16. 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.[10]The court cannot stop a lawful process. It can only intervene if it is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the mandate of the first and second Respondent and public interest.

16. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what

it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

17. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

18. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* ***[11]***:-

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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 maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."

19. There is not contest that the second Respondent is vested with powers to make the decision in question. It is also a correct statement of the law to state that the applicants have a duty to prove abuse of such powers or demonstrate that the power was not exercised as provided under the law. It has to be proved that the first Respondent acted outside their powers or the decision was arrived at after taking into account irrelevant or extraneous matters. The right being enforced is not absolute. It can be limited in a manner provided under the law provided that the law meets the requirements of Article **24** of the Constitution.

20. The applicants' case is anchored on a *"Notification of an approval for Renewal of an Entry Permit"* dated 19th September 2016. A reading of the said document shows that the applicant was required to forward to the immigration office the prescribed fee of Ksh. 200,000/= in Bank Draft/Bank Certified Cheque and a letter from his Bank/Insurance Company extending the validity of Security Bond held in the immigration office for a further period of 3 years. The said Notification required the first applicant to comply with the above requirements within 30 days and to register as a foreign national. There is nothing to show that the first applicant ever complied with the above conditions nor have the applicants demonstrated that the Entry Permit was ever issued. On this ground alone, the applicants' case collapses. There is nothing to show that the first applicant held a valid Entry Permit as at the time the Immigration Officer made the endorsement complained of on his passport.

21. The second ground upon which the applicants' case collapses is that even if he held a valid Entry Permit at the material time (which he did not), the law permits the Immigration Officer to cancel it if the grounds for the cancellation exist. Differently put, the cancellation has not been shown to be *ultra vires* or malicious or based on extraneous considerations. The applicants have not demonstrated illegality to warrant the orders sought.

22. Perhaps the most formidable ground cited by the applicants is alleged violation of Articles 47 and 50 of the Constitution. The first applicant claims that he was not served with a notice to show cause prior to making the decision nor was he provided with reasons. My understanding of this submission is that the applicants are trying to persuade the court that the impugned decision suffers from procedural impropriety.

23. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

24. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision of *Council of Civil Service Unions v. Minister for the Civil Service*[12] to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[13]

25. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[14] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[15]

26. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[16] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

27. Section **4** of the Fair Administrative Action Act[17] re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

28. Subsection **4** further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

29. Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.[18]

30. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. However, whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[19]

31. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects.[20]

32. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[21] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

33. I find guidance in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[22] which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1) (2)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[23] Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

34. Here is a person who had not complied with the requirements of a Notification of an Approval for Renewal of an Entry Permit. There is nothing to show that he held a valid Entry Permit at the material time. One wonders what other reasons or hearing the first applicant expected. As the Court of Appeal stated in the above case, the right implicated in Article 47 is contextual in nature and depends on the circumstances of the case. Here is a foreign national who was exiting the country after having evidently violated the conditions upon which he had been allowed into the country. The immigration officer properly exercised his duties under the law in making the impugned decision in the circumstances of the case. In fact, had he done otherwise, he would have failed in the discharge of his duties. A reasonable decision maker faced with the facts and circumstance of this case could have arrived at the same decision.

35. The other grounds upon which the applicants' case collapses is that the grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

36. Mandamus is a judicial command requiring the performance of a specified duty which has **not been** performed.' Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[24] *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[25]In the present case, the first Respondent has not refused to act. It acted and rendered a decision and provided reasons.

37. Mandamus and Certiorari are discretionary remedies, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. The discretionary nature of

the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or, where the decision is taken in public interest.

38. A core ground cited by the *ex parte* applicants is the alleged failure to be provided with reasons. There is nothing before me to show that the *ex parte* applicant ever requested to be supplied with reasons. It is not clear what other reasons the applicant expected when he himself had no valid documents authorizing his stay in Kenya. Differently put, the moment the 30 days window provided in the Notification of an Approval for Renewal of an Entry Permit lapsed, the first applicant's status changed into that of an illegal alien. He cannot be heard to claim that he required reasons when he himself was in breach of such clear conditions. In any event, it is my view that nothing stopped him from requesting for the reasons. Further, if the reasons were refused, the first *ex parte* applicant had the option of moving the court under Article **35** of the Constitution and the Access to information Act.[26] Providing reasons is not an absolute right. In fact, section **6** of the Access to Information act[27] provides for limitation of rights to access information.

39. Strictly speaking, reasons can be declined if they fall under the exceptions listed in section **6** of the Access to Information act.[28] The *ex parte* applicants made no attempts at all to apply to be provided with reasons (if at all they were declined). This would have assisted the court to weigh the refusal (if any) or appreciate that the request was made and declined. It is my view that it does not suffice for a party to simply allege failure to be provided with reasons. There are many reasons why persons are declared prohibited immigrants ranging from breach of the conditions upon which their entry was permitted to security concerns. On the basis of the material before me, there are no sound grounds to fault the first Respondent.

40. Even if the court were to fault the impugned decision, the remedies sought being discretionary in nature, the court would be reluctant to adopt a lenient exercise of its discretion in favour of the *ex parte* applicants. Discretion will not be exercised to impede an authority's ability to perform its functions or deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. This crucial test has not been demonstrated in this case.

41. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself. When a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the order is sought. The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm.[29]

42. The high court cannot completely ignore the State's legitimate interest in the security of its borders and the integrity of its immigration systems which it achieves by regulating the admission of foreign nationals to reside or work in Kenya, and their departure from the Republic under the Act. This court cannot make an order in total disregard of the Respondent's powers and duties under the Act, unless it is demonstrated beyond doubt that the Respondents acted outside its statutory mandate. The need for courts to scrupulously guard against such intrusions cannot be overemphasized.

43. In view of my determination of the issue discussed herein above, the conclusion becomes irresistible that this application is fit for dismissal. The effect is that the orders sought herein are hereby refused and the application dated **5th** May 2018 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 3rd day of March 2020

John M. Mativo

Judge.

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[1] Cap 486, Laws of Kenya (Repealed by Act No. 17 of 2015).

[2] Act No. 12 of 2011.

[3] Ibid.

[4] {2016} e KLR.

[5] {2005} 2 EA 43.

[6] {2008} 2 EA 300.

[8] {2014} e KLR.

[9] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[10] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300.

[11] {2014} eKLR.

[12] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[13] Ibid.

[14] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.*

[15] Supra, note 18.

[16] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[17] Act No. 4 of 2015.

[18] *In the South African Case Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.*

[19] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[20] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[21] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[22] {2015}eKLR

[23] Ibid.

[24]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[25] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[26] Act No. 31 of 2016.

[27] Ibid.

[28] Ibid.

[29] *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 CC.