



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 2 OF 2018

(CONSOLIDATED WITH)

JUDICIAL REVIEW APPLICATION NO. 2 OF 2018

BETWEEN

IN THE MATTER OF: THE CONSTITUTION OF KENYA, ARTICLE 2, 3(1), 10, 27, 40, 47, 48 & 50

AND

IN THE MATTER OF: THE KENYA CITIZEN AND IMMIGRATION ACT NO. 12 OF 2011, KENYA CITIZENS & FOREIGN NATIONALS MANAGEMENT SERVICE ACT NO. 31 OF 2011 AND NATIONAL INTELLIGENCE SERVICE ACT NO. 28 OF 2012.

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

BETWEEN

1. CLAUDIA MARGARITA TORRIANI

2. ALLESSANDRO ATTILIO ANGELO TORRIANI

3. ALESANDRO ETTORE ARNOLDO TORRIANI

On behalf of PAMELA TORRIANI, CINZIA TORRIANI

& LUCIANO TORRIANI.....PETITIONERS

AND

THE DIRECTOR GENERAL

(In Charge of Immigration).....1ST RESPONDENT

THE CABINET SECRETARY FOR

INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. There are two Applications before this court.

a) **Mombasa Judicial Review No. 2 of 2018 filed on 16th January, 2018** whereby the Applicant seeks;

i) An order of Prohibition be issued to Prohibit the Respondents, their Officers, employees and or any other persons acting pursuant to their instructions, from issuing any deportation Orders against the Applicant, or Deporting and or in any other manner removing the Applicant from Kenya and or out of the Jurisdiction of this Court, pending the hearing and Determination of these Judicial Review proceedings.

ii) An order of Certiorari be issued directed against the Respondents, for the Court to call unto itself the decision and Orders of the 1st Respondent contained in a letter dated 11th December, 2017 replicated in another letter dated 27th December, 2017 and having so called that decision to itself, to quash the said decision.

iii) An order of mandamus, directing the 1st Respondent to consider the Applicant's application for issuance of a residence and work permit submitted to it in January, 2017 in accordance with the provisions of Sections 40 of the Kenya Citizenship & Immigration Act, 2011 and in particular Section 40(7) of the said Act.

iv) The costs of these proceedings be awarded to the Ex parte Applicant.

b) **Mombasa Constitutional & Judicial Review Petition Number 2 of 2018** by an amended Notice of Motion **filed on 19th January, 2018** whereby the Petitioner seeks:

i) A declaration that the Respondents refusal to give written reasons for refusal to renew and extend or reissue permits and Dependant's Passes to the Petitioners violates Article 47 of the Constitution and the rule of law hence null and void.

ii) A declaration that the failure to accord the Petitioners an opportunity to be heard before the refusal to renew, extend or reissue permits and dependants passes on the basis of unsubstantiated, unverified and undisclosed allegations or reasons violates the rule of law, the right to equal protection and benefit to the law under Articles 10 and 27 of the constitution as well as article 50 which guarantee the right to fair hearing and presumes innocence until the contrary is proved.

iii) An order of prohibition prohibiting the Respondents and their officers or servants from harassing and interfering with the Petitioners, and their dependants presence in Kenya, operations and work on account of work permits or dependants passes that have lawfully been withheld or declined to be issued without due process as contemplated under Articles 10, 27 and 50 of the Constitution.

iv) A declaration that the 1st Respondent's notices/letters to the Petitioners dated 11th and 27th December, 2017 respectively are null and void.

v) An order of certiorari to issue to remove to the High Court of Kenya for purposes of quashing the decision of the 1st Respondent contained in the letters/notices of 11th and 27th December, 2017 refusing to renew, extend and issue permits to the Petitioners.

vi) An order directing the 1st Respondent to remove from its **Efns Portal** and/or website any negative/adverse information posted thereto touching on the Petitioners and their dependants.

vii) An order of prohibition to prohibit the Respondents and their officers from arresting and deporting the Petitioners on account of work permits and dependant's passes.

viii) A mandatory order of mandamus directing the 1st Respondent to renew, extend and or reissue the Petitioners with work permit and dependant passes as applicable unless there is a judicial determination through the court process finding the Petitioners guilty of heinous offences which may justify refusal within the Law.

ix) Compensation by damages to be assessed by the court for the violation of Bill of Rights and the constitution.

x) Costs of the Petition be awarded.

xi) Such other reliefs (orders) as this Honourable court shall deem just.

2. Since both Applications raise similar issues against the Respondent, both Applications were consolidated on 8th October, 2018 and proceedings recorded in JR No. 2 of 2018 wherein a Petition is filed.

Background facts and the Petitioners' case

3. The Petitioners case may be gathered from the Petition as well as the Affidavit sworn by **TORRIANI ALLESSANDRO ETTORE ARNOLDO** on 9th January, 2018, which may be stated as follows:

4. The Petitioners contend that they reside and work at Funzi Island within Kwale County with the 3rd Petitioner having been residing in Kenya since 1984 where all his children with the 1st Petitioner were born and reside.

5. The 2nd Petitioner was born on 2nd April, 1990 at Nairobi Hospital. His siblings PAMELA TORRIANI was born on 9th December, 1985 at Nairobi Hospital while CINZIA TORRIANI & LUCIANO TORRIANO were born on 10th November, 2003 and 22nd July, 2005 respectively at the Mombasa Hospital within the Republic of Kenya and that the 2nd Petitioner was educated at the Aga Khan Academy where his siblings are currently attending school.

6. The Petitioners state that they are entitled to the protections guaranteed by the Constitution of Kenya including the right to equal protection and benefit of the law under Article 27, the right to property under Article 40, the right to fair administrative action under Article 47, right to access justice under Article 48 and the right to fair Hearing under Article 50 of the constitution.

7. The Petitioners state that the 1st and 3rd Petitioners have been carrying on business and working in Kenya on diverse dates since 1997 pursuant to the permission from the relevant Government departments of the Republic of Kenya while the 2nd Petitioner has been doing so since 2011 whereby the 1st and 3rd Petitioners are subsequently directors of various companies which include Marine Power House Limited, Tanjo Developers Limited, Tudor Development and Slumber Springs Limited.

8. The Petitioners state that for a while now the Respondents have ignored or declined to renew/reissue permits to the Petitioners despite Applications made from January, 2017 since its last reunion being in 2015 and as a result the Petitioners have been operating on Special Permits from the Respondent while awaiting extension of the same and as a result the 1st Petitioner is a dependant of the 3rd Petitioner occasioned by the Closure of Funzi Keys Resort due to low levels of Tourism business in the coastal Region.

9. The Petitioners further state that due to delayed processing of the permits the 3rd Petitioner visited the office of the 1st Respondent in July, 2017 where it was indicated that the original file was missing and that the 2nd and 3rd Petitioners have received communication/notices dated 11th and 27th December, 2017 informing them of the rejection of their applications on the basis that “**presence contrary to national interest**” and that no reasons have been given for the rejection and that the Petitioners have never been given any opportunity to be heard, interviewed and to respond to allegations by any government agency.

10. The Petitioners further state that the Respondents have acted in breach of the values enshrined under Article 10 of the Constitution and in contravention of the spirit, purposes, values and principles of the Constitution of Kenya Contrary to Articles 2(1), (2), (10), 20(1), (2), (4), 21(1), 47, 50, 238(2) (b) 259 (1) as read together with Sections 40 of Act No. 12 of 2011, Section 7 of Act No. 31 of 2011 and Section 3 of Act No. 28 of 2012 that require the Petitioners being persons prejudiced by decision of an Administrative body ought to be given reasons for a decision without any discrimination.

11. The Petitioners further allege that in the event the Respondents are in possession of tangible evidence of commission or involvement in criminality or heinous crimes on the part of the Petitioners and or dependants, then they are bound to avail the same to the Director of Public Prosecution to exercise his constitutional mandate of investigation and prosecution in compliance with the rule of law.

Respondent's case

12. The Respondent's case may be retrieved largely from the Grounds Of Opposition filed on 17th September, 2018.

13. The 1st Respondent has authority on matters concerning immigration and registration of persons and that the 1st and 2nd Respondents have authority to issue resident permits and related documents under the Immigration of Persons Act.

14. The Respondents further contend that the 1st and 2nd Respondents considered the Applications by the Petitioners but that the Petitioners were not merited for a positive consideration and that the Respondents in making that decision acted within the law and in public interest.

15. The Respondents aver that the 1st and 2nd Respondents have jurisdiction and mandate to review or set aside its orders irrespective of an earlier successful application.

16. The Respondents state that the issue of the work permit is subject to evaluation and consideration by the 1st Respondent and the Petitioners' said application was devoid of merit and could not be awarded and that the Petitioners were promptly informed of the results that they were not merited for issuance of work permits.

17. The Petitioners were at liberty to apply for work/resident permits despite the decisions made.

Submission

The Ex-Parte Applicant's Submissions

18. With the leave of court parties filed submissions which were highlighted orally in open court on 8th October, 2018. **The Ex-Parte Applicant** (in JR No. 2 of 2018) was represented by **Mr. Buti** while the **Petitioners** were represented by **Mr. Mogaka**, the **Respondents** were represented by **Mr. Wachira**.

19. **Mr. Buti** Counsel for the Petitioners in the Judicial Review Submitted that in the 1st Application J.R No. 2 of 2018 the Respondents

failed to file a replying affidavit to the Notice of Motion dated 16th January, 2018 and therefore submitted that all the matters of fact contained in the Notice of Motion and Supporting Affidavit are all admitted by the Respondents.

20. Counsel further submitted that Article 47 (3) of the Constitution through which Fair Administrative Action Act was enacted at Section 4(2) provides that every person has the right to be given written reasons for any administrative actions taken against them. Counsel, submitted that by letter dated 11th December, 2017 in a one sentence letter the Respondent informed the Petitioner that his work permit cannot be renewed since it was against national interest. He submitted that the letter is not a response.

21. Mr. Buti submitted that the 3rd issue which was violated is Section 40 of the Kenya Citizenship Act 2011 whereby no reasons were given by the Respondents for the action taken. He further submitted that due to the same, the ex parte Applicant cannot make an appeal under Section 40(8) and (10) of the Kenya Citizenship and Migration Act and therefore sought remedy under Fair Administrative Actions Act.

22. Counsel submitted that the Immigration direction did not act according to the law and therefore prayed that the Judicial Review be allowed.

23. **Mr. Mogaka** Counsel for the Petitioners in the Petition submitted the question that has been raised on the Petition is for denial of renewal of permits and that one of the reasons stated is national security. He sought to rely on Section 40 of the Citizenship and Immigration Act as read together with Fair Administration of Actions Act as well as the Constitution on the Presumption that there must be a “hearing” when an adverse action is to be taken like in the renewal of a work permit.

24. Counsel further submitted that it is mandatory that administrative bodies making decisions must be guided by rules of natural justice and that there must be a procedural fairness whenever a party is to be affected by a decision.

25. Mr. Mogaka submitted that the immigration file for the Petitioners disappeared for a long time and it is in the cause of the disappearance that the Applicants’ license was denied renewal. He submitted that this is a proper case for the court to intervene as the Petitioner has children born in Kenya and schooled in Kenya, Counsel urged this court to allow the Petition.

Respondent’s Submissions

26. Mr. Wachira counsel for the Respondents submitted that the right to a work permit is not a guaranteed right and that under Section 40 (7) (b) of the Citizenship and Immigration Act it is discretionary for grant of the permit and that the same can be withheld.

27. Counsel further submitted that under the Fair Administration of Actions Act a hearing need not be oral and can be done through documentation and that in this matter the Petitioners have been notified that they posed a security concern and that the same was not for further debate. He submitted that the decision is normally based on facts gathered by the respondents. He further opposed the Petition and the Judicial Review and sought to have them dismissed.

Analysis and Determination

28. I have considered the issues in these consolidated causes which are similar. In my view these causes broadly disclose the following issues for determination:

- (i) Whether the 1st Respondent actions are in contravention with the law;**
- (ii) Whether the Respondents are under obligation to renew the Petitioner’s work and residence permit;**
- (iii) What orders should the Court make.**

29. Where the Constitution is shown to have been or is under a threat of being defiled or the law violated, the Court must undertake its Constitutional mandate and correct the wrong. The parameters of the remedies for judicial review in our constitutional set up are no longer just of common law offshoot but are a constitutional resort. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case.

30. In this case it is alleged that the 1st Respondent failed to act in accordance with the law and in particular the provisions of Article 40 of the Kenya Citizenship & Immigration Act 2011 by failing to disclose to the Petitioners the reason as to why the Petitioners had been denied renewal of their work and resident permit. The court in **Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others NBI HC Petition No. 278 of 2011** held that:

“the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information. It is, however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed. The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be

clear, narrow and subject to strict 'harm' and 'public interest' tests, and to the rights and interests of others."

31. It is the view of this Court that the Respondents despite rejecting the Petitioners' application for renewal of work permit on the grounds that the Petitioners "**presence contrary to national interest**" have failed to adduce further reasons for the rejection. On this I associate myself with the Petitioners Submissions in that the thresholds of Article 47 of the Constitution as well as Section 4(2) and (3) of the Fair Administrative Act have not been met by the Respondents.

32. On whether the Respondents are under obligation to renew the Petitioners work and residence permit, it is the view of this Court that the 1st Respondent has not adduced grounds to controvert the petitioners' presence in the country, the 1st Petitioner having come to the country in the year 1989 and being a Director of a Company, Marine Power House Limited through which company he obtained work permits allowing him to stay in Kenya up to the year 2015 and from then onwards he has been issued with special permits which expired in February 2017 and upon several applications to have the permits renewed, the same has not been done on pretext that his Immigration file is missing.

33. The fact that the 1st Petitioner's work permit has been renewed in the previous instances raises concern as to the sudden revocation of the same. The **Constitution** and the **Fair Administrative Action Act, 2015** also has other objectives namely to promote the integrity and fairness. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of expedition.

34. Section 33(1) and (2) of the Kenya Citizens and Immigration Act Cap 172 Laws of Kenya is clear. It states that:

"33. Prohibited Immigrants and inadmissible persons

(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—

(a) not having received a pardon—

(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;

(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;

(iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;

(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;

(c) a person who procures or attempts to engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;

(d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;

(e) a person who, there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;

(f) a person whose presence in or entry into Kenya is unlawful under any written law;

(g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;

(h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;

(i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;

(j) a person involved in or is reasonably suspected to be engaged in money laundering;

(k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;

(l) a person engaged in or suspected to be engaged in illicit arms trade;

(m) a person engaged in or suspected to be engaged in illegal human body organs trade;

(n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cybercrimes and related crimes;

- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- (q) a person whose conduct offends public morality;
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;
- (s) a person who is seeking to enter Kenya illegally;
- (t) a person who is a fugitive from justice;
- (u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006); and
- (v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed).

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—

- (a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;
- (b) the family and dependants of a prohibited immigrant;
- (c) incapable of supporting himself and his dependants (if any) in Kenya;
- (d) is adjudged bankrupt;
- (e) anyone who has been judicially declared incompetent;
- (f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or
- (g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.

(3).....”

35. The above elaborate Section creates two categories of persons who are not wanted in Kenya. Sub-section (1) refers to prohibited immigrants whereas Sub-section (2) deals with inadmissible persons, that is to say persons who are not supposed to enter Kenya in the first place. In my opinion the Petitioners do not fall under either of the categories.

36. The upshot is that the Petitioners having been in Kenya for many years and having continually enjoyed their legal status as considered under the said Act they acquired a right of renewal. This right cannot be revoked arbitrarily. The revocation can only be done pursuant to Article 47 of the Constitution and the Fair Administrative Action Act 2015. There is no evidence in these causes that the legal process provided under the said Act was followed. The result is that the purported denial of the Petitioners/Applicants rights is void *ab initio* with the result that both the Judicial Review and the motion herein are granted with costs except that there shall be no damages payable in any event.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 1st day of April, 2019.

E. OGOLA

JUDGE

In the presence of:

N/A for Petitioner

Kiti h/b Wachira for Respondent

Mr. Kaunda Court Assistant