REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATIO NO. 350 OF 2018

In the matter of an application by Abdulahi Said Salad for Judicial Review Orders of *Certiorari* and *Mandamus* against the decision of the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government.

and

In the matter of section 57(1) of the Kenya Citizenship and Immigration Act, Cap 172, Laws of Kenya

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

AND

ABULAHI SAID SALAD.....EX- PARTE APPLICANT

RULING

1. By a Notice of Motion dated 18th December 2018, the applicant sought the following orders:-

a. This application be certified as urgent.

b. Pending the hearing and determination of the application, the honourable court be pleased to order a stay of implementation of the decision of the Respondent dated 11th April 2018 signified by his declaration under section 33(1) of the Kenya Citizenship and Immigration Act, 2011.

c. In the alternative to (b) above, the ex parte applicant be allowed to travel to India for treatment and permitted entry into the country upon return for purposes hereof.

d. The honourable court be pleased to review and set aside its judgment dated 17th December 2018 and the consequential orders, and allow the ex parte applicant's Notice of Motion dated 12th September 2018 as prayed.

e. Costs.

2. The application is supported by the grounds listed on the face of the application and the annexed affidavit of **Abulahi Said Salad,** the applicant herein. Essentially, the core grounds are that:-

a. That the court dismissed the applicant's judicial review application on grounds that the applicant had failed to implead the Attorney General, yet, the applicant had actually served the Attorney General and the court allowed the case to proceed ex parte.

b. That despite the foregoing the court ordered the applicant to pay costs to the Attorney General.

c. As a legal adviser to the government under Article 156 of the Constitution, the Attorney General cannot be a principal Respondent in this case because the Respondent in this case is not the national government.

d. That the application was dismissed for failure to avail the decision which was the subject of challenge in the proceedings. However, the decision was furnished to the applicant's advocates after the delivery of the judgment.

e. That the honourable courts judgment sanctions illegalities by the Respondent through the decision made on 11th April 2018, but communicated to the applicant on 8th August 2018.

f. That by reason of innocent mistakes, the honourable court failed to judiciously exercise discretion in the determination of the judicial review application.

g. That the applicant is in dire and urgent need of medical attention and treatment from his doctors which is only tenable through the orders sought.

h. That there are errors apparent on the face of the record warranting the review sought, and, sufficient reasons necessitating a review.

i. No prejudice will be occasioned to the Respondent and that this application was filed without delay.

The Respondent

3. Miss Chilaka, appearing for the Respondent stated that she was unable to file a response to the application but asked to make oral submissions.

The arguments

4. Mr. Miyare, counsel for the applicant, adopted the above grounds and the supporting affidavit and the authorities filed in court and submitted that this court has jurisdiction to review the decision and placed reliance on *Nakumatt Holdings Limited v The Commissioner of Value Added Tax*.[1]

5. Counsel argued that the applicant was not supplied with the impugned decision, and, that, it was only availed after the judgment and that the same was annexed in the supporting affidavit. He urged the court to treat the decision as new evidence.

6. Counsel also argued that the Respondent had no powers to make the impugned decision, hence, it was made *ultra vires*. He invited the court to consider the reasons given by the Cabinet Secretary whom he argued exceeded his jurisdiction in making the decision. He urged the court to be guided by the authorities he filed.

7. As for the error on record, counsel submitted that though the Attorney General was served, he did not attend, hence, it was wrong for the court to state that the Attorney General ought to have been impleaded in this case. He invoked Article 159 of the Constitution and urged the court to review its decision.

The Respondent's Advocates submissions

8. Miss Chilaka, counsel for the Respondents argued that the applicant is asking this court to sit on appeal on in its own decision. She argued that the applicant can only review the judgment on the grounds set out in order 45 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.[2] She also argued that the applicant failed to attach the decision he was challenging contrary to the requirements of Order 53 of the Civil Procedure Rules.

Determination

9. The starting point in is to examine the provisions of section **80** of the Civil Procedure Act[3] and Order **45** Rule **1** of the Civil Procedure Rules, 2010. It is common ground that the High Court has power to review its own decision. However, such power must be exercised within the framework of Section **80** Civil Procedure Act[4] and Order **45** Rule **1**.[5]

10. Section **80** of the Civil Procedure Act[6] provides as follows:-

80. *Any person who considers himself aggrieved-*

(a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is allowed by this Act,*

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

> ***45*** *Rule* ***1 (1)****Any person considering himself aggrieved-*
>
> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."*

12. A clear reading of the above provisions shows that section **80** gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:-

> *a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*
>
> *b) On account of some mistake or error apparent on the face of the record, or*
>
> *c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

13. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.[7]

14. In *Nyamogo & Nyamogo v Kogo****[8]*** discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

> *"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."*

15. The Indian Supreme Court[9] observed that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

16. In *Attorney General & O'rs v Boniface Byanyima*,[10] the court citing *Levi Outa v Uganda Transport Company*,[11] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[12]

18. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.[13]

20. The ground cited by the applicant is that the court dismissed the applicant's judicial review application on grounds that the applicant had failed to implead the Attorney General, yet, the applicant had actually served the Attorney General and the court allowed the case to proceed

ex parte. Differently put, this, according to the applicant's counsel constitutes an apparent error on the face of record and therefore a ground for review.

21. I find the applicant's argument and the ground cited to be legally frail, misleading and totally inconsistent with the judicial construction of what constitutes an error on the face of the record. The argument depicts a worrying failure by counsel to appreciate what constitutes a *ratio decidendi* of a decision. The judgment contains clear sub-headings. The actual determination and reasons for so determining are to be found under the sub-title issues for determination. This is the section of the judgment where the issues for determination were distilled, analysed, conclusions made and reasons for so deciding stated.

22. The earlier observation on the failure to implead the Attorney General falls under courts observations which in legal parlance are described as *orbiter dictum*. It is in this context that a related observation was made later in the judgment. I find it strange that counsel could pick courts observations and classify them as the reasons for the decision. Such observations do not and cannot form part of the reasons for the decision. One thing is clear, counsel does not seem to understand why his client's case was dismissed. I will address it shortly.

23. In addition, it is in this same section where I referred to the clear provisions of Article 156 of the Constitution and stated that under the said provision, the Attorney General represents the national government in court proceedings where the government is a party. The impugned decision was made by a Cabinet Secretary, representing an organ of the National Government. I note that the applicant's counsel took a totally erroneous view that since the decision was made by the Cabinet Secretary, the Attorney General could not be the principal Respondent.

24. Review is impermissible without a glaring omission, evident mistake or similar ominous error. The power of **review** is available only when there is an **error appare**nt on the **face** of the **record.** I emphasize that **review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[14]

25. The applicant argues that the judgment sanctions illegalities by the Respondent. The applicant also states that the court failed to judiciously exercise it discretion in determining the application. The foregoing reasons are attacks on the judgment and grounds of appeal. They cannot and do not qualify to be grounds for review. It is a clear invitation to this court to exercise appellate jurisdiction on its own judgment.

26. Discussing the scope of review, the Supreme Court of India[15] had this to say:-

> *"the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*

27. The argument that the applicant was not supplied with the impugned decision fails on four fronts. *First*, Order 53 of the Civil Procedure Rules provides that the decision sought to be reviewed be annexed to the application. *Second*, such a ground does not qualify to be a ground for review. At the least, it is a ground of appeal. *Third*, Order 45 Rule 1 of the Civil Procedure Rules talks on new and important evidence which was not available and could not be obtained by the applicant despite the exercise of due diligence. *Fourth*, the applicant's case was that the decision was communicated to him orally. In this regard, the court observed as follows:-

> *"Curiously, the ex parte applicant states that his lawyer went to the immigration offices and was verbally notified of the decision. It would have assisted the court if the ex parte applicant exhibited a written request by his advocate requesting for the decision. Alternatively, the ex parte applicant ought have included a prayer in this case asking for an order compelling the Respondent to be supply him with the decision. I find glaring omissions and gaps in the ex parte applicant's case which raise more questions than answers on the veracity of the version presented by the ex parte applicant."*

28. The application was not dismissed for failure to attach the decision. On the contrary, the court analysed the material before it and concluded that the application did not meet the tests for granting the judicial review orders sought. It stated:-

> *"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 Respondent acted outside its statutory mandate. The need for courts to scrupulously guard against such intrusions cannot be overemphasized."*

29. In addition, the following excerpt reveals the core grounds upon which the application fell.

> *"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. The ex parte applicant states that he was put in the list of prohibited immigrants.*
>
> *The fact that this case proceeded ex parte makes it imperative for the court to be extra careful and scrutinize the material before it.*

The absence of the Respondent does not lighten the ex parte applicant's burden to establish its case on a balance of probabilities.

*A core ground cited by the ex parte applicant is 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 started that the ex parte applicant's advocate visited the immigration offices and made "an oral request for reasons." He was given an oral answer. Before me is a version presented by the ex parte applicant. He wants the court to believe that his lawyer was informed orally and urges the court to fault the Respondent for not giving reasons. It is my view that nothing stopped the ex parte applicant from requesting for the reasons in writing. This would have put the court in a better picture of appreciating the truth and veracity of his assertion. Further, if the reasons were refused, the ex parte applicant had the option of moving the court under Article **35** of the Constitution and the Access to information Act.**[16]** Providing reasons is not an absolute right. In fact, section **6** of the Access to Information act**[17]** provides for limitation of rights to access information.*

*Strictly speaking, reasons can be declined if they fall under the exceptions listed in section **6** of the Access to Information act.**[18]** The ex parte applicant 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 security concerns to being undesirable aliens or persons on the police watch list. On the basis of the material before me, there are no sound grounds to fault the Respondent. The position is made difficult by the ex parte applicant's failure to enjoin the Honourable attorney General in this case even after being prompted by the court to do so. I should also mention that on several instances the court kept on ordering proper service upon the Respondent and that the court ultimately allowed the matter to proceed at the insistence of the applicant.

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 applicant. Also, 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. This was a proper case for the ex parte applicant to move the court seeking the reasons for the decision. This is because reasons with a statutory underpinning can suffice to justify such a decision. The court would have eliminated any doubts whether the reason were outside the permissible exceptions under the law. Alternatively, if at all it is true the decision was never communicated, the ex parte applicant ought to have applied to be supplied with the decision. No written communication was provided in this case showing that indeed the ex parte applicant ever requested for the decision in writing. The alleged visit by the lawyer which is not documented cannot suffice."

30. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another*[19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. **Mulla** in the *Code of Civil Procedure***[20]** (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that the *expression 'any other sufficient reason'...*means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[21]

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*[22] where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

32. I am not persuaded that the reasons offered by the applicant amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda***[23]**where the court held that *'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.*

33. The principles which can be culled out from the above noted authorities are:-

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

34. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.

35. As for the order on costs, I note that the words *"no orders"* were omitted between the word *"with"* and *"costs"* at paragraph 31 of the judgment. This was a typing error, which h I brought to the attention of the counsel at the hearing of the application. This is clerical error which the court can correct on its own motion. In this regard, the judgment date 17th December 2018 is hereby corrected by inserting the words *"no orders as to costs"* immediately after the word *"with"* and by deleting the word *"to the Respondents."*

36. Save for the above correction which I have effected on my own motion under section 99 of the Civil Procedure Act,[24] I find that the grounds cited in the application under consideration do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1 and section 80 of the Civil Procedure Act.

37. This is not a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicant. Accordingly, the applicant's application dated 18th December 2018 is dismissed with no orders as costs.

Right of appeal

Orders accordingly

Signed, Delivered and Dated at Nairobi this 20th day of November, 2019

John M. Mativo

Judge

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[1] {2011} e KLR.

[2] Cap 21, Laws of Kenya.

[3] Cap 21, Laws of Kenya.

[4] Ibid

[5] See Sinha J in *Union of India vs B. Valluvan,* AIR 2007 SC 210; (2006) 8 SCC 686

[6] Supra.

[7] See *National Bank of Kenya Ltd vs Ndungu Njau,* {1996} KLR 469 (CAK) at Page 381.

[8] {2001} EA 170.

[9]In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047.

[10] HCMA No. 1789 of 2000.

[11] {1995} HCB 340.

[12] see This Court in *Thungabhadra Industries Ltd. v. Govt. of A.P*.1

[13] *Batuk K. Vyas Vs Surat Municipality* AIR (1953) Bom 133.

[14] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[15] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[16] Act No. 31 of 2016.

[17] Ibid.

[18] Ibid.

[19] {1963}EA 557.

[20] Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (CAK)

[21] Ibid.

[22]{2004} eKLR.

[23] Civil Appeal No. 103 of 2000, Kisumu; {2000} LLR 8340.

[24] Cap 21, Laws of Kenya.