



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 406 OF 2018

IN THE MATTER OF AN APPLICATION BY SAMIRA TARIQ QURESH FOR JUDICIAL REVIEW AND LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

BETWEEN

SAMIRA TARIQ QURESHI.....APPLICANT

=VERSUS=

CABINET SECRETARY FOR MINISTRY OF

INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

DIRECTOR, DEPARTMENT OF

IMMIGRATION SERVICES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 22/7/19 upon leave granted on 17/7/19, the ex parte applicant seeks mandamus to compel her registration as a Kenyan Citizen as follows:

1. ***THAT AN ORDER OF MANDAMUS*** do issue directed jointly and severally to the Cabinet Secretary for the Ministry of Interior and Coordination of National Government and the Director of the Department of Immigration Services, ***to issue all relevant and necessary documents for the registration of the Applicant as a Kenyan Citizen within thirty (30) days from the day this order is issued by the Honourable Court in the name of the Applicant in respect of her formal and official application (Immigration File Number R. No. 168252) made on 6th January, 2015 under Forms 7, 9 and K of the Kenya Citizenship and Immigration Act, 2011.***

2. ***THAT*** such further and other reliefs that the Honourable Court may deem just and expedient to grant.

3. ***THAT*** costs of and incidental to this Application be paid by the Respondents.

2. The application is based on grounds set out in the Statutory Statement filed together with the application for leave, as follows:

3. GROUNDS UPON WHICH RELIEFS ARE SOUGHT

3.1. *The Applicant has been married to a Kenyan citizen for more than seven years and it is consequently the Applicant's constitutional right and entitlement to be registered as a citizen of Kenya upon her Application for the same.*

3.2. *The Applicant has applied for the said citizenship, meeting all requirements and submitting all requisite documents to the Director of Immigration Services.*

3.3. *The Respondents have delayed to issue all relevant and necessary documents for the registration of the Applicant as a Kenyan Citizen in respect of her Application made on 6th January, 2015 under Form 9 of the Kenya Citizenship and Immigration Act 2011.*

3.4. The delay of more than 5 months is inordinate, unreasonable and inexcusable given the fact that we have a fully functional Government and Ministry for Interior and Coordination of National Government, with a duly appointed Cabinet Secretary.

3.5. The Respondents have breached the Applicant's legitimate expectation to fair administrative action to be issued within a fair and reasonable timelines the Applicant having complied with all the legal requirement for the issuance of Kenyan Citizenship.

3.6. The second Respondent, having received all the required documents and the fulfillment of all the requirements of the law by the Applicant, has failed in its statutory duties, to the detriment of the Applicant's right to administrative action that is expeditious, efficient, reasonable and procedurally fair.

3.7. Since providing all the requisite documents for the application for citizenship, the applicant has heard nothing further from the Second Respondent apart from the acknowledgement of letter.

3.8. Despite the Applicant's Advocate making numerous enquiries at the relevant counter at Nyayo House as to the progress of the application for citizenship, no satisfactory answer in regard to her said Application has been received.

3.9. The omission and Commissions of the Respondents amount to improper, arbitrary and inefficient exercise of administrative power and discretion contrary to the law.

3.10. The Respondents are subject to the supervisory jurisdiction of this Honourable Court.

3.11. Such other and further reasons to be adduced at the hearing hereof

3. The Respondent relies on its Replying Affidavit sworn by Principal Immigration Officer, Alfred Omangi, on 30/10/2018 in response to the application for leave to file judicial review proceedings, as follows:

RESPONDENTS REPLYING AFFIDAVIT

1. **THAT I am a Principal Immigration Officer in the Investigations and Prosecution Section of the Department of Immigration within the Ministry of Interior and Co-ordination of National Government which is mandated with the duties of enforcement and ensuring compliance with Kenya Citizenship and Immigration Act no. 12 of 2011 and other enabling legislations.**

2. **THAT I am a member of the Citizenship Advisory Committee established under Section 7 (1) of the Kenya Citizens and Foreign Nationals Management Service 2011 which is mandated to advise the Cabinet Secretary in charge of Immigration matters on matters relating to grant and loss of Citizenship through the Director of Immigration Services pursuant to Section 4 (2) (a) of the Kenya Citizenship and Immigration Act no. 12 of 2011.**

3. **THAT I have read and understood the contents of the Chamber Summons Application, Statutory Statement, Verifying Affidavit and Annexures sworn by the Applicant herein drawn and filed by A.H. MALIK & COMPANY ADVOCATES, all dated 31st August, 2018 and wish to respond thereto as follows:**

4. **THAT the Applicant submitted her application for Citizenship on 22nd January, 2015 and was issued with an acknowledgment of the same on even date.** Annexed hereto is a copy of the Acknowledgement marked "A.O.1".

5. **THAT the Applicant wrote to the 2nd Respondent via letter dated 11th September, 2015 demanding that the Applicant be issued with a Certificate of Citizenship within thirty days from the date of receipt of the said letter.** Annexed hereto is a copy of the letter marked "A.O.2".

6. **THAT upon perusal of the Applicant's file, the 2nd Respondent's officials could not trace the Applicant's application.**

7. **THAT the 2nd Respondent wrote to the Applicant herein via letter dated 22nd October, 2015 requesting her to re-submit her application for Citizenship to enable the Department to process the application.** Annexed hereto is a copy of the letter marked "A.O.3".

8. **THAT to date, the Applicant has not complied with the 2nd Respondent's request and no official communication from the Applicant has been made to that effect.**

9. **THAT the Chamber Summons Application is unfounded and premature as it is the Applicant's delay in re-submitting her Application that has occasioned the institution of this Application.**

10. **THAT the Orders sought herein are frivolous and vexatious and constitute an abuse of court process.**

11. **THAT this Application should be dismissed and I swear this Affidavit in opposition of the Application and Orders sought herein.**

4. The consideration of the application for leave was deferred over time since its filing on 8/10/2018 as the parties sought to negotiate an out of court settlement as shown in the Record of the court proceedings as follows:

“21/11/2018

Coram: Hon P. Nyamweya J.

Court assistant: Ooko

Mr Orina holding brief for Mr. Onchacha for ex parte applicant

No appearance for Mr Munene

Mr Orina

The Chamber Summons dated 31st August 2018 is coming up for hearing. It is seeking leave for mandamus for declaration. In light of the Replying Affidavit by the Respondent, we can give out of court settlement a chance and get another mention date.

Mr Munene

The only issue is resubmission of the application. We can come back after 30 days.

Court

Mention on 21st January of 2019 to confirm the status of out of court settlement and/ or for further directions.

21/1/2019

Coram: Hon P. Nyamweya, J

Court assistant: Ooko

Mr Orina holding brief Ongicha for applicant

Mr Munene for respondent

Mr Orina

We are yet to resubmit the application as the applicant is out of the country for medical attention and we request for a mention date after March 2019.

Mr Munene

We can get another mention date for the applicant to resubmit their application.

Court

Mention on 4th March 2019 for further directions.

4/3/2019

Coram: Hon. P Nyamweya, J.

Court assistant: Ooko

Mr Ongicho for applicant

Ms. Chimau holding brief for Mr Munene for Respondent.

Mr Ongicho

The 2nd Respondent has been supplied with fresh document by the applicant. We had agreed with Mr Munene to mention the matter on 4th April 2019 when we expect the application for citizenship will have been processed.

Ms Chimau

That is the position.

Court

Mention on 3rd April 2019 for further directions.

3/4/2019

Coram: Hon P. Nyamweya, J

Court assistant: Ooko

Mr Orina holding brief for Mr Ongicho for ex parte applicant

Mr Odhiambo holding brief for Mr Munene for Respondent

Mr Odhiambo

The parties are negotiating and the citizenship committee will be sitting next week to consider the application.

Applicant. We ask for a mention within 60 days to confirm settlement.

Mr Orina

That is the position.

Court

Mention on 26th June 2019 to confirm settlement and for further directions.

26/6/19

Coram: Hon P. Nyamweya, J

Court assistant: Ooko

Mr Orina holding brief for Mr Ongicho for ex parte.

No appearance for Respondent.

Mr Orina

The applicant's application for citizenship is receiving consideration. We ask for another mention date for direction for the matter.

Court

Mention on 17th July 2019 for directions. The applicant to serve the Respondent with the direction within 7 days.

17/7/19

Coram: Hon. P Nyamweya, J

Court assistant: Ooko

Mr Orina for ex parte

Mr Munene for Respondent.

Mr Orina

We have no information to report on settlement. We wish to proceed to hearing of our Chamber Summons.

Mr Munene

We had filed a Replying Affidavit to the Chamber Summons that we will rely on a response to the Notice of Motion. Our view was that this application is on a matter that can still be negotiated.

Court

1. The Chamber Summons dated 31st August 2018 is hereby allowed in terms of prayer 2. The cost of the chamber summons shall be on the cause.
2. The ex parte applicant shall file and serve their substantive Notice of Motion and their submission therein within 21 days of today's date.
3. The Respondent's Replying Affidavit to the Chamber Summons filed on 1st March 2018 shall be deemed to be the response to the substantive Notice of Motion and the Respondents granted leave to file and serve reply submissions within 21 days of service of the Applicant's submission.
4. Mention on 4th September 2019 to reserve a judgment date or record a settlement as the case may be.

4/9/19

Coram: Hon E. Muriithi, J

Court assistant: Ooko

Mr Ongicho for applicant

Ms Nyakora for Mr Munene for Respondent

Court

Judgment on 31/10/19.”

5. Perhaps in exasperation, counsel for the ex parte applicant on 17/7/2019 reported that no settlement had been reached and moved the court to grant the leave as prayed and the court made the directions of 17/7/19 as follows:

“Court

1. The Chamber Summons dated 31st August 2018 is hereby allowed in terms of prayer 2. The cost of the chamber summons shall be on the cause.
2. The ex parte applicant shall file and serve their substantive Notice of Motion and their submission therein within 21 days of today's date.
3. The Respondent's Replying Affidavit to the Chamber Summons filed on 1st March 2018 shall be deemed to be the response to the substantive Notice of Motion and the Respondent is granted leave to file and serve reply submissions within 21 days of service of the Applicant's submission.
4. Mention on 4th September 2019 to reserve a judgment date or record a settlement as the case may be.”

6. On 4/9/2019, judgment date was reserved, the parties having filed their respective submissions on the matter. In the further application the long delay of over 4 years in processing the applicant's entitlement to citizenship under Article 15 of the Constitution was urged as follows:

“Despite the applicant having complied with all the legal requirements for the issuance of a Kenyan Citizenship, the Respondents have breached her legitimate expectation to a Fair Administrative Action as provided for under Article 47 of the Constitution and failed to issue her with a Kenyan Citizenship certificate within a fair and reasonable timeline.

Your Ladyship, there has been inordinate delay of more than four years in processing the Applicant's citizenship. This is aggravated by the Respondent's lack of explanation for such refusal or at all which is unlawful. The second Respondent despite being in possession of all the lawful documents forwarded to them for the Applicant's application as a Kenyan citizen has not made any communication notwithstanding the fact that the Applicant's advocates have made several enquiries at the relevant counter at Immigration Department at Nyayo House on the status of her Application.

It is our humble prayer, that this court declares the Applicant a Kenyan citizen and issues an order of mandamus as prayed in the Notice of Motion compelling the First and Second Respondents to issue all relevant and necessary documents for the registration of the Applicant as a Kenyan citizen within thirty (30) days from the date of the Order being issued by this Honourable Court in the name of the Applicant in respect of her formal and official application (Immigration File Number R. No 168252) made on 6th

January, 2015 under forms 7,9 and K of the Kenya Citizenship and Immigration Act, 2011 and that the costs of this Application be borne by the Respondents.”

7. The Respondent’s relied on well-known principles for the grant of judicial review order of mandamus as regard the existence of a legal right or duty and the discretionary nature of the remedy where the Court will only grant if there is no more appropriate remedy, and submitted that:

“The applicants have not demonstrated any breaches of law or procedure which would entitle the court to intervene in this matter and grant the order sought”.

Determination

8. It is clear that the ex parte applicant has a legal right and, consequently, the Respondents a legal duty to register her, if she meets the qualifications of Article 15 (1) of the Constitution that:

“A person who has been married to a citizen for a period of at least seven years is entitled on application, to be registered as a citizen”.

9. At paragraph 4 of the Replying Affidavit, the Respondent admitted that the applicant submitted her application for citizenship on 22/1/2015 and at paragraph 6 thereof asserted that the application could not be traced in her file prompting the 2nd Respondent at paragraph 7 to write by letter dated 22/10/2015 requesting her to submit her application.

10. The parties confirmed during the court appearance of 4/3/19 that the 2nd Respondent had been supplied with fresh documents and on the court appearance of 3/4/2019, Mr Odhiambo for Mr Munene for the Respondent confirmed that “the citizenship committee will be sitting next week to consider the applicant’s application”.

11. While the Court cannot usurp the power of the Citizenship Committee of the 2nd Respondent to consider and approve the applicant’s application for citizenship (*See R v. KRA ex p. Yaya Towers Ltd (2008)* eKLR the circumstances of this case are such that the 2nd Respondent has taken over 4 years to consider the applicant’s application. This clearly offends the applicant’s right to Fair Administrative Action under Article 47 (1) of the Constitution for lack of “expeditious, efficient, lawful reasonable and procedurally fair” process.

12. I respectfully agree with Odunga, J, in *S. N. v Cabinet Secretary for the Ministry of Interior and co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General [2016]* eKLR that a delay of 4 years in a citizenship application is unreasonable, as follows:

“Whereas there is specific timeline within which the application for citizenship ought to be considered Article 259 (8) of the Constitution provides that if a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. **More than 4 years delay in processing an application for citizenship without informing the applicant at what stage such application has reached is clearly unreasonable.**”

See also *R v. Cabinet Secretary for Ministry of Interior & 2 Ors exp. Patricia Olga Howson (2013)* eKLR.

13. The 2nd Respondent did not raise any objection in the merits of the applicant’s application, merely averring that the original application had been misplaced and calling for re-submission of the application. Although, as urged by Counsel for the Respondent, the purpose of judicial review proceedings is to ensure fair treatment of the individual and not to ensure that the authority reaches a correct conclusion in the eyes of the court, citing *Seventh Day Adventist Church (E.A) Ltd v. Permanent Secretary, Ministry of Nairobi Metropolitan Development and Anor. (2014)* eKLR, it would appear that the 2nd Respondent has no defence to the claim for registration of citizenship by the applicant.

14. However, as the mandate to register citizenship lies the 2nd Respondent, this Court cannot properly direct that the applicant be registered as a citizen as that would be usurping the power of the Immigration Authority. The Court may, however, properly direct by an order of Mandamus, not the grant of citizenship, but the consideration of the application for citizenship within a reasonable time consistent with the right to Fair Administrative Action under Article 47 (1) of the Constitution.

Orders

15. Accordingly, for the reasons set out above, the Court make an order for Mandamus compelling the 2nd Respondent to consider the applicant’s application for citizenship within the next 30 days.

16. The 2nd Respondent has unreasonably delayed in the consideration of the applicant’s application for citizenship and the ex parte applicant is entitled to costs of the application to be paid by the 2nd Respondent.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2019.

J.M. MATIVO

JUDGE

Appearances:

M/S A.H. Malik & Company Advocates for the Applicant.

Mr. Munene Wanjohi for the Respondent.