



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 284 OF 2016**

**IN THE MATTER OF ARTICLE 15 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 35 (1) AND (2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF A DECISION BY THE DIRECTOR OF IMMIGRATION SERVICES COMMUNICATED BY A LETTER DATED 21ST APRIL 2016**

**AND**

**IN THE MATTER OF A DECISION BY THE DIRECTOR OF IMMIGRATION SERVICES COMMUNICATED BY A LETTER DATED 10TH MAY 2016**

**AND**

**IN THE MATTER OF BREACHES OF THE RULES OF NATURAL JUSTICE**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT**

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

**THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**

**AND**

**PARESH KAMLAKAR NAIK.....1ST EX- PARTE APPLICANT**

**NASSIM MOHAMMEDALI JAMAL.....2ND EX- PARTE APPLICANT**

**JUDGMENT**

1. Pursuant to the leave of the Court granted on 29<sup>th</sup> June 2016, the *ex parte* applicant moved this Court by way of Notice of Motion dated 11<sup>th</sup> July 2016 expressed under the provisions of Order 53 Rules 1 & 2 of the Civil Procedure Rules, 2010, the Law Reform Act,[\[1\]](#) the Judicature Act[\[2\]](#) and Section 3A of the Civil Procedure Act[\[3\]](#) seeking the following Judicial Review orders:-

- a. An order of Mandamus to compel the first and second Respondent to process and issue the first applicant with a certificate of Kenya Citizenship.
- b. An order of Certiorari to quash the decision of the Director of Immigration Services communicated by the letter dated 21<sup>st</sup> April 2016.
- c. An order of Certiorari to quash the decision of the Director of Immigration Services communicated by the letter dated 10<sup>th</sup> of May 2016.
- d. An order of Certiorari to delete and destroy the "adverse security Report" referred to in the letters dated 21<sup>st</sup> April and 10<sup>th</sup> May 2016 respectively in compliance with Article 35 (2) of the Constitution.
- e. An order of Mandamus compelling to the Respondents jointly and severally to produce or otherwise give access to the applicants the alleged "adverse security report" in its entirety in compliance with Article 35 (1) of the Constitution.
- f. An order of Mandamus compelling the Respondents jointly and severally to give access or otherwise produce to the applicant's jointly and individually any adverse information, any report, any investigation file compiled in respect thereof (other than the letter aforesaid at paragraph 4) regarding the applicants jointly or individually in compliance with Article 35 (1) of the Constitution.
- g. An order of Certiorari to delete and destroy any report, investigation file or document containing statements adverse to the first and second applicants jointly and/or individually in compliance with Article 35 (2) of the Constitution.
- h. An order of Prohibition prohibiting the first and second Respondents jointly and/or severally from deporting or otherwise removing the first applicant from Kenya save with an order of this Honourable Court.
- i. That the costs of the application be provided for.

2. The grounds stated on the face of the application are:- **(a)** By dint of Section 11 of the Kenya Citizenship and Immigration Act, [\[4\]](#) the first applicant qualifies to enjoy his right under Article 15 (1) of the Constitution; **(b)** that the Director of Immigration Services failed to disclose to the first applicant details of the alleged adverse security report despite several attempts since 2000, and that the applicants have a right to have the alleged adverse reports cancelled or corrected and that the Respondents actions have been aimed at denying the applicants rights; **(c)** that the Respondent's violates the rules of natural justice.

3. In support of the application is the affidavit, **Paresh Kamlakar Naik**, the first applicant. He avers that he came to Kenya in 1991 as an employee of Shah Ladha Ltd (subsequently Kenblest Ltd.), Thika, and that he was granted a re-entry permit under class **(H)** which permitted him to work as an independent consultant in Kenya. He avers that he continued to work as a consultant for different companies and that in 1996 he was employed by United Millers Ltd in Kisumu.

4. Further, he avers that on 22<sup>nd</sup> November 1996, he got married to the second applicant herein with whom they have children who are all Citizens by birth, and that they settled in Kisumu where the second applicant operated a business.

5. **Mr. Naik** further avers that in or about December 1999, he left the employment of United Millers Ltd. under adverse circumstances. He avers that strained relations with its managing director compelled him to forego his **Ksh. 800,000/=** dues. Further, he averred that the company feared that having accumulated immense information about it, its disclosure to the Kenya Revenue Authority would be detrimental to it. He also avers that on 6<sup>th</sup> April 1999, he applied for Kenya Citizenship with the knowledge of a one **Sunil Shah**, the Managing Director of United Millers Ltd. He states that he was issued with a certificate of good conduct by the Criminal Investigation Department, and that upon visiting the Immigration Department in Nairobi to establish the status of his application, he was arrested by an Immigration Officer who informed him verbally that he would be deported on allegations that he was a Tamil Terrorist. He avers that the officer took possession of his Passport and released him into the care of his brother in law as he awaited receipt of an air ticket to travel to Mumbai.

6. He avers that he was deported to India without any official information or explanation as to the cause of his deportation, and that he was never accorded an opportunity to defend himself nor was he given any deportation order and that his passport was not endorsed with a deportation order. He avers that the said Immigration officer informed him that his ticket was provided by the person who was behind his deportation, and that on arrival in India, he applied for a certificate of Police Clearance, which he submitted to the Kenya High Commission in New Delhi and it was transmitted to the Principal Immigration Officer, Nairobi.

7. He also avers that the said **Sunil Shah** informed his wife that he was a criminal, a confirmation that he was behind the deportation, and his subsequent request to be allowed to return to Kenya was declined. He avers that in February 2007, while in Uganda, he was commandeered by armed men to the Joint Anti-terrorism headquarters (JATT) where he was notified that he had ran away from Kenya and that he was a terrorist. He avers that he was cleared upon production of documentary evidence, and his passport was returned to him and he was allowed to remain in the country. He also avers that he was issued with a Certificate of Good Conduct by the International Criminal Police Organization.

8. **Mr. Naik** also averred that he successfully obtained court orders in High Court Misc. Appl. No. 93 of 2006, Busia quashing the decision of the Principal Immigration Officer dated 5<sup>th</sup> June 2006 and compelling him to hear a fresh his application for re-entry. He deposed that the Principal Immigration Officer failed to comply with the said order prompting him to institute contempt proceedings and as a consequence the Minister for State, Immigration and Registration of Persons issued an order revoking the status of prohibited immigrant and a further order that all adverse references be removed/deleted from prohibited immigrants records and that the deletion be circulated to all relevant offices. He avers that he was allowed re-entry to Kenya.

9. He also avers that he returned to Kenya on a visitor's pass in May 2013 with his family, and was compelled to leave the country every three months in order to renew his visitors pass. He further states that on 29<sup>th</sup> October 2013, he applied for permanent Residence and on 9<sup>th</sup> July 2015, he was called to the Immigration Department to complete a form entitled 'Residence Status.' He states that on 21<sup>st</sup> April 2016 he received a communication to the effect that his application could not be approved on grounds that the "security check came with an adverse report" which was followed by a notification of the refusal of issue or renewal of an entry permit dated 10<sup>th</sup> May 2016. He states that he has never received details of the alleged report, which he avers is a violation of the rules of natural justice. He further avers that on 25<sup>th</sup> September 2015, he submitted his application as a spouse of a Kenyan citizen, but he has not been give reasons why his application cannot be considered.

10. Also, in support of the application is the affidavit of his wife, the second applicant herein **Nassim Mohamedali Jamal**. She averred that they got married on 22<sup>nd</sup> November 1996. She attributed her husband's deportation to his differences with his former employer.

### **Response to the application**

11. In response to application is the Replying affidavit of **Alfred Abuya Omangi**, a Chief Immigration Officer in the Investigations and Prosecution, within the Ministry of Interior and Co-ordination of National Government. He averred that their records show that the first applicant, an Indian national was granted a class "A" Entry permit on 16<sup>th</sup> May 1991 to work with M/s Shah Kanji Ladha, and later he applied for a class "H" entry permit as a director with M/s Parry's Software which was continuously renewed until 5<sup>th</sup> May 2000.

12. He further averred that on 16<sup>th</sup> April 1999, the first applicant submitted an application for registration as a Kenyan citizen and the same was subjected to security vetting to determine suitability by the then National Security Intelligence Service (N.S.I.S),the precursor to the present National Intelligence Service (N.I.S.),and upon conducting the vetting process as part of the due diligence, it returned a classified adverse intelligence report, and acting on the report, the second applicant declined the application for citizenship and notified the first applicant, and he was notified and collected a refund of the requisite processing fee of **Ksh. 25,000/=** which he had paid.

13. He averred that based on the adverse report, the then Minister responsible for Immigration on 17<sup>th</sup> February 2000 declared the first applicant a Prohibited Immigrant, and the deportation orders were served on the applicant and he was subsequently removed from the country in March 2000. He further averred that after his removal, the first applicant secretly returned into the country in contravention of the said deportation orders, and he was subsequently re-arrested and charged with the offence of unlawful presence in Kenya in contravention of lawful orders and on 16<sup>th</sup> June 2000 the Court ordered his re-deportation.

14. **Mr. Omangi** further averred that subsequent to his re-deportation, the second applicant made a presentation to the Cabinet Minister in charge of Immigration for a review of the first applicants immigration status as a Prohibited Immigrant and to revoke the deportation orders of 17<sup>th</sup> February 2000, but after due consideration, the same was declined and the decision was conveyed to them vide a letter by the then Principal Immigration Officer dated 5<sup>th</sup> June 2006.

15. He further averred that the first applicant, aggrieved by the said decision moved to the High Court in Busia vide Misc App No. 93 of 2006 and obtained an order of *Certiorari* quashing the decision of the Principal Immigration Officer dated 5<sup>th</sup> June 2006 and an Order of *Mandamus* compelling the Principal Immigration Officer to hear a fresh the applicant's application for entry permit. He averred that in satisfaction of the first limb of the aforesaid orders, the then Minister revoked the Prohibited Immigrant Status of the applicant on 16<sup>th</sup> July 2012. Further, he averred that in compliance with the second limb of the said orders, the first applicant was advised to submit his application for determination. He averred that the applicant submitted an application for permanent resident as a spouse of a Kenyan dated 24<sup>th</sup> July 2013 and paid processing fee of **Ksh. 5,000/=** on 29<sup>th</sup> October 2013. Further, he averred that during the pendency of the said application, he submitted another application for a class "G" Entry Permit to enable him carry the business M/s Perry's Software, a management consultancy outfit. He deposed that applications for Permanent Residency and entry permits are without exception subjected to security vetting to gauge their suitability by the National Security Intelligence Service as provided under section 5 (1) (g) (ii) of the National Intelligence Service Act.[5] He averred that the National Intelligence Service returned a classified adverse intelligence report with recommendations that the applications should not be considered, which report can only be disclosed pursuant to a disclosure process as provided under section 61 of the National Intelligence Service Act.[6] He averred that the second Respondent conveyed the decisions to the first Respondent vide letters dated 21<sup>st</sup> April 2016 and 10<sup>th</sup> May 2016. He averred that the decision was arrived at after subjecting the process to all administrative stages as provided under the provisions of Sections 37 to 40 of the Kenya Citizenship and Immigration Act.[7]

16. He also averred that the course available to the first applicant was to appeal to the Cabinet Secretary in charge of Immigration as provided under the Kenya Citizenship and Foreign Nationals Management Services Act.[8] He averred that the aforesaid decisions were arrived at independently pursuant to the statutory mandate devoid of any external influence, hence the *mandamus* sought should not be granted and also the adverse report is of such a nature that it cannot be released to the applicant.

17. The first applicant filed a further Affidavit on 28<sup>th</sup> September 2016 in reply in which he averred that he was not aware that his first application was subjected to vetting by the NSIS; and that he was not afforded an opportunity to defend himself; and that he was not told why his entry into Kenya was contrary to national interest, and that his plea of guilty alluded to above was under duress.

### **Issues for determination**

18. Upon analysing the opposing facts presented by the parties, I find that the following issues distil themselves for determination, namely:-

**a. Whether the first applicant ought to have exhausted the statutory laid down mechanism.**

**b. Whether the applicants are entitled to the reliefs sought.**

**a. Whether the applicants ought to have exhausted the statutory laid down mechanism**

19. Counsel for the Respondents cited Section 23 of the Kenya Citizens and Foreign Nationals Management Service Act<sup>[9]</sup> and argued that the first applicant ought to have submitted to the mechanism provided therein. He also cited Section 9 (2) of the Fair Administrative Action Act,<sup>[10]</sup> and argued that Judicial Review being a remedy of last resort, should only be commenced upon exhausting all other available remedies unless the party so applying for Judicial Review orders has been granted specific exemption from the requirement for exhaustion of other available remedies in terms of Section 9 (4) of the Fair Administrative Action Act.<sup>[11]</sup> Further, he argued that Judicial Review jurisdiction Should not be exercised where there is an alternative remedy.

20. In their further submissions filed on 28<sup>th</sup> March 2018, the *ex parte* applicant's advocates argued that the special circumstances in this case entitle the *ex parte* applicant to file this suit without invoking sections 22 and 23 of the Kenya Citizenship and Foreign Nationals Act.<sup>[12]</sup>

21. It seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court*<sup>[13]</sup> had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,<sup>[14]</sup>... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."*

22. The Respondent invites this court to hold that the first applicant ought to have exhausted the statutory laid down mechanism before approaching this Court. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya*<sup>[15]</sup> after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:-

*46]...while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the **Shikara Limited Case (supra)**, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*

*[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*<sup>[16]</sup>*

23. The question that begs for an answer is whether the dispute resolution mechanism established under the Acts cited above is competent to resolve the issues raised in this Judicial Review application. It is common grounds that the facts as presented in this Petition disclose an alleged failure to perform statutory duties, breach of natural justice and alleged failure to disclose details of an adverse report. All these complaints arise from a refusal to grant a foreign national married to a Kenyan citizenship as provided under the law. Differently put, the facts as presented in this application disclose a dispute under the Kenya Citizenship and Immigration Act.<sup>[17]</sup> Can such a dispute be resolved within the confines of the Act under the dispute resolution mechanism established under the Act?

24. Section 11 of the Kenya Citizenship and Immigration Act<sup>[18]</sup> provides that "A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if—

- a. the marriage was solemnized under a system of law recognized in Kenya, or outside Kenya;
- b. the applicant has not been declared a prohibited immigrant under this Act or any other law;**
- c. the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;
- d. the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship;
- e. the marriage was subsisting at the time of the application.

25. The *ex parte* applicants application as I understand it is premised on the above Section. while the Respondent's objection is premised on Section 23 of the Kenya Citizens and Foreign Nationals Management Service Act.<sup>[19]</sup> A distinction needs to be drawn between the two acts. The applicant claims that he is married to a Kenyan and seeks to invoke the above section to be registered as a citizen. Section 57 of the Act<sup>[20]</sup> provides for Review and Appeal in the following manner:- (1) Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision, (2) An appeal against the decisions of the Cabinet Secretary or of the Service under this Act may be made to the High Court.

26. My reading of section 57 cited above is that it provides a direct approach to the High Court. However, this section needs to be construed together with the provisions of Section 23 of the Kenya Citizens and Foreign Nationals Management Service<sup>[21]</sup> an Act of Parliament to establish the Kenya Citizens and Foreign Nationals Management Service; to provide for the creation and maintenance of a national

population register and the administration of the laws relating to births and deaths, identification and registration of citizens, immigration and refugees; and for connected purposes. Section 3 of the Act establishes the Kenya Citizens and Foreign Nationals Management Service. Under Section 4 of the Act, the service is empowered to administer the Acts of Parliament set out in the first Schedule and any other written law. The laws listed in the said Schedule include the Kenya Citizenship and Immigration Act.<sup>[22]</sup> It is my view that Parliament in enacting the Kenya Citizens and Foreign Nationals Management Service Act<sup>[23]</sup> was well aware of Section 57 cited above, but it made it possible for a person to approach the High court directly or submit to the mechanism provided under Section 23 which establishes a tribunal with the same powers as a subordinate court of the first class where any person aggrieved by a decision under the act may appeal to the Tribunal.

27. The above being the case, I am unable to uphold the objection premised on the exhaustion doctrine. However, I must restate the provisions of Section 9 of the Fair Administrative Action Act<sup>[24]</sup> which provides for procedure for Judicial Review in the following words:-

1) *Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.*

2) *The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.*

3) *The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).*

4) *Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.*

*A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.*

28. In view of the above clear provisions of the law and in particular Section 57 cited above and Section 9 (4) of the Fair Administrative Action Act<sup>[25]</sup> it is my finding that this case falls under the exceptional circumstances contemplated under the said provision. This is because section 57 of the Act cited above grants an aggrieved person the right to approach the High Court. We cannot read sections 22 and 23 of the Kenya Citizens and Foreign Nationals Management Service Act<sup>[26]</sup> alone and ignore section 57 of the Kenya Citizenship and Immigration Act.<sup>[27]</sup> It is a cardinal rule in statutory interpretation that provisions of a statute (s) concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. No one provision of a statute or statutes is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the statutory instrument. In view of my finding, I decline to uphold the jurisdictional hurdle raised by the Respondents, and hold that section 57 cited above grants an aggrieved person the right to approach the High Court.

29. Further, I am conscious of the truth that the right of access to court is entrenched in our Constitution<sup>[28]</sup> and it is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

***b. Whether the applicants have established any grounds for the grant the Judicial Review orders of Mandamus, Certiorari and prohibition.***

30. The Respondents Counsel submitted that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. (*Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others*<sup>[29]</sup> cited). He submitted that the first applicants application was considered and declined, and the reasons for declining were communicated to the first applicant and that this court has no mandate to usurp the functions of a statutory body.<sup>[30]</sup> He submitted that *Certiorari* will be made if the decision was made without jurisdiction,<sup>[31]</sup> and argued that no grounds have been established to grant the orders sought. On *Prohibition*, counsel argued that the applicants have not demonstrated grounds to warrant such an order.

31. The *ex parte* applicant's counsel cited *Bitange Ndemo vs Director of Public Prosecutions & 4 Others*<sup>[32]</sup> and submitted that statutory powers can only be exercised validly if they are exercised reasonably. He argued that the decision to deny the *ex parte* applicant Kenyan citizenship is marred by unreasonableness, irrationality, irrelevant considerations, bias, malice, bad faith and improper motive and a breach of Article 47 of the Constitution. He also argued that the decision was made without affording the *ex parte* applicant a hearing.<sup>[33]</sup>

32. It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of Judicial Review do apply. 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 the Court 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.

33. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the Rule of Law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramourcy of the law.

34. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed, the applicant will need to show either:-

- a. *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
- b. *a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

35. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* **(b)** *pursues an objective other than that for which the power to make the decision was conferred;* **(c)** *is not authorized by any power;* **(d)** *contravenes or fails to implement a public duty.*

36. Statutes do not exist in a vacuum.<sup>[34]</sup> They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.<sup>[35]</sup> The courts should therefore strive to interpret powers in accordance with these principles.

37. 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 administrative 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.

38. 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.<sup>[36]</sup> 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. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others*<sup>[37]</sup> while citing Lord Denning:-<sup>[38]</sup>

*"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."(Emphasis added).*

39. In the present case, the first and second Respondents have not refused to act. They acted and made a decision and gave reasons for the decision. 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.<sup>[39]</sup> The reasons offered by the first and second Respondents have not been shown to be unlawful or malicious. 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. The applicant has not proved malice or illegal process. The allegations made here do not disclose breach of Rights, nor has any breach been proved at all in the circumstances of this case.

40. Also, it has not been shown that the first and second Respondents acted illegally. The Respondents are vested with powers to make the decision in question. No abuse of such powers has been proved. It has not been shown that this power was not exercised as provided under the law. It has not been proved that the first or second Respondent acted outside their powers or the decision was arrived at after taking into account irrelevant or extraneous matters. The reasons given for the refusal are in my view relevant considerations. Also, the reasons offered for the refusal can pass Article 24 analysis test. In fact they reasons given falls squarely under section 11 (b) of the Act which provides that the applicant has not been declared a prohibited immigrant under this Act or any other law. In my view, section 11 (b) cited above is justifiable in a modern democratic society. In any event, 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.

41. An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety.** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent. Its legal because its premised on the four corners of Section 11 (b) cited above. 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.

42. *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.<sup>[40]</sup> *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.**<sup>[41]</sup> In the present case, the first Respondent has not refused to act. It acted and rendered a decision and provided reasons.

43. *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. I am not persuaded that the applicant has demonstrated sound grounds for the court to exercise its discretion in his favour and grant the Judicial Review reliefs sought.

44. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

45. 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. There are adverse reports in international police records which have not been rebutted, it is on record that the first applicant was removed from the country, it is on record that he secretly re-entered the country and was arrested and charged with the offence of unlawful entry into the country, he was re-deported and security concerns have been raised. With all these adverse details, even if the Court were to fault impugned decision, the remedies sought being discretionary in nature, the Court would be reluctant to adopt lenient exercise of its discretion on the face of the foregoing information. In other words, such information would be relevant considerations to be considered by the Court while exercising its discretion.

46. Also, discretion will not exercised where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to perform its functions or deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

47. 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. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.<sup>[42]</sup> It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.<sup>[43]</sup>

**c. Whether the applicants have demonstrated grounds to warrant the Court to invoke Article 35 (2) and order the adverse report to be released to the first applicant.**

48. Counsel for the Petitioner submitted that a report by the NIS cannot bear a classified tag or classification if it is readily available for any official of the Immigration Department, hence the prayer for the information is merited under Article 35 of the Constitution. On his part, the Respondent's counsel submitted that the first applicant, is a foreigner, hence, he is not entitled to rights under Article 35 (1) of the Constitution.<sup>[44]</sup>

49. Article 35 of the Constitution reads as follows:-

“Access to information.

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

(3) The State shall publish and publicize any important information affecting the nation.”

50. Access to information is fundamental in a society that is governed by the rule of law. However, under the Constitution of Kenya, 2010, access to information is a right to be enjoyed by all Kenyans. The Access to Information Act defines a "citizen" as:- "means any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens. Section 4 (1) of the Act provides "Subject to this Act and any other written law, every citizen has the right of access to information held by— (a) the State..."

51. In the case of *Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others*<sup>[45]</sup> the Court stated that the right to access information was only available to citizens and in arriving at that conclusion, the Court relied on the decision of *Famy Care Limited vs Public Procurement Administrative Review Board & another & 4 others*.<sup>[46]</sup> The above decisions were made before the enactment of Access to Information Act, in 2016. However, the definition of a citizen under the act cited above is clear. The first applicant is not a Kenyan citizen, hence, by dint of Article 35 of the Constitution and the definition of a citizen under the Access to Information Act, the first applicant is not entitled to the information sought. This leads to the question whether the second Petitioner who is said to be a Kenyan citizen is entitled to the information sought.

52. It is not disputed that the first applicant in the exercise of due diligence while processing first applicants application sought security information from the relevant state organ and an unfavorable report was filed which influenced its decision. Section 4 of the Access to Information Act<sup>[47]</sup> provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6 which provides that:- *Limitation of*

right of access to information

(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

- (a) undermine the national security of Kenya;
- (b) impede the due process of law;
- (c) endanger the safety, health or life of any person;
- (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
- (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

(2) For purposes of subsection (1)(a), information relating to national security includes—

- (a) military strategy, covert operations, doctrine, capability, capacity or deployment;
- (b) foreign government information with implications on national security;
- (c) intelligence activities, sources, capabilities, methods or cryptology;
- (d) foreign relations;
- (e) scientific, technology or economic matters relating to national security;
- (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
- (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
- (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;
- (i) cabinet deliberations and records;
- (j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;
- (k) information that is referred to as classified information in the Kenya Defence Forces Act; and
- (l) any other information whose unauthorized disclosure would prejudice national security.

(3) Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

(4) Despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.

(5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

(6) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—

(a) promote accountability of public entities to the public;

(b) ensure that the expenditure of public funds is subject to effective oversight;

(c) promote informed debate on issues of public interest ;

(d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and

(e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

(7) Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if the information has been held for a period exceeding thirty years.

53. I need not elaborate the above sections. The information sought to be released falls under the exceptions under Section 6 reproduced above, particularly paragraphs **6(1)(a), (e),(g),(k)&(l)**.

### **Disposition**

54. In view of my determination of the issues 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 **11<sup>th</sup>** July 2016 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **5<sup>th</sup>** day of **July** 2018

**John M. Mativo**

**Judge**

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[1] Cap 26, Laws of Kenya.

[2] Cap 8, Laws of Kenya.

[3] Cap 21, Laws of Kenya.

[4] Act No. 12 of 2011.

[5] Act No. 28 of 2012.

[6] Ibid.

[7] Act No. 12 of 2011.

[8] Act No. 31 of 2011.

[9] Act No. 31 of 2011.

[10] Act No. 4 of 2015.

[11] Ibid.

[12] Act No. 31 of 2011.

[13] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[14] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[15] {2017}eKLR.

[16] {2016}eKLR.

[17] Act No.12 of 2011.

[18] Ibid.

[19] Act No. 31 of 2011.

[20] Ibid.

[21] Act No. 31 of 2011.

[22] Supra.

[23] Supra.

[24] Act No. 4 of 2015.

[25] Ibid.

[26] Supra.

[27] Supra.

[28] See Article 48.

[29] {1997} eKLR.

[30] Counsel cited *Egal Mohamed vs Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 Others* {2015} eKLR.

[31] Counsel referred to *Kenya National Examination Examinations Council vs Re Ex paryte Geoffrey Gathenji & 9 Others*, supra.

[32] {2016} eKLR.

[33] Counsel cited *Republic vs Commissioner for Co-operative Development & 3 Others ex parte Elisha Otieno & 22 Others* {2016} eKLR

[34] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: “Parliament does not legislate in a vacuum. Parliament legislates for a...liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”).

[35] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become “the ultimate controlling factor in our unwritten constitution”; and see J. Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 262.

[36] 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.

[37] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[38] Lord Denning, *The Discipline of Law*, 1979 London Butterworth, at page 12.

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

[40]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.

[41] *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).

[42] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.

[43] See *Patel vs Witbank Town Council* 1931 TPD 284 Tindall J said (at 290).

[44] Counsel cited Famy Care Limited vs Public Procurement Administrative Review Board & Another {2013}eKLR.

[45] {2013} eKLR.

[46] {2012} eKLR.

[47] Supra.