REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 166 OF 2018

IN THE MATTER OF AN APPLICATION BY OLAMILEKAN GBENGA FASUYI, OLUWASEYI RICHARD OLORUNGBEMI AND EUPHRASIA ATIENO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI, PROHIBITION* AND *MANDAMUS* AGAINST THE DECISIONS OF THE DIRECTOR OF IMMIGRATION SERVICES AND THE CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF IMMIGRATION SERVICES.....1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT.....2NDRESPONDENT

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

AND

OLAMILEKAN GBENGA FASUYI.....1ST EX- PARTE APPLICANT

OLUWASEYI RICHARD OLORUNGBEMI.....2ND EX- PARTE APPLICANT

EUPHRASIA ATIENO.....3RD EX- PARTE APPLICANT

JUDGMENT

1. Pursuant to the leave of the Court granted on **20th** April 2018, the *ex parte* applicants filed a Notice of Motion dated **25th**April 2018 expressed under the provisions of Order **53** Rules **3 & 4** of the Civil Procedure Rules, 2010, Section **8 (2)** and **9 (1) (b)** of the Law Reform Act,[1] seeking the following Judicial Review orders:-

> ***a.*** *An order of* ***Certiorari*** *to quash the decision of the first Respondent varying* ***Olamilekan Gnenga Fasuyi's*** *and* ***Oluwaseyi Richard Olorungbeemi's*** *passes as signified by the first Respondent's embossment dated* ***8th*** *September 2017 on their respective Passports numbers* ***A07437638*** *and .* ***A05075480.***
>
> *b. An order of* ***Certiorari*** *to quash the first Respondent's decision placing the first and second applicants on the immigration "watch list" communicated to them verbally on various dates to wit,* ***14th*** *November 2017,* ***23rd*** *January 2018 and* ***19th*** *March 2018.*
>
> *c. An order of* ***Mandamus*** *compelling the first Respondent to remove the first and second applicants from its immigration 'watch list."*
>
> *d. An order of* ***Mandamus*** *compelling the Respondents whether by themselves and or through their agents or officers to forthwith*

*return the third applicants motor vehicle registration number **KCL 752** (Volkswagen Polo) with all documents and items/property therein, **Ksh. 8,000/=** and USD **100;** and the applicant's ten pairs of shoes, mobile phones make I-Phone 7 plus, I-Phone 6S, Techno, Mac Book Pro, Laptop with all data/information therein confiscated or seized by the Respondents from the applicants on or prior to their deportation to Nigeria on **8th** September 2017.*

*e. An order of **Prohibition** prohibiting the Respondents acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the Respondents, from arbitrarily arresting, detaining, harassing and or deporting the first and second applicants or in any manner whatsoever curtailing/impeding their liberty/freedom of movement with regard to the matters herein.*

*f. An order of **Declaration** declaring that the variation of the applicant's pass before expiry thereof and their consequent removal from the country without any lawful reasons/cause, and without a formal process and/or notice as contemplated under Rule **26 (3)** of The Kenya Citizenship and Immigration Regulations (2012), is/was a violation of the applicants rights to fair hearing.*

g. Compensation for violations of the applicant's rights and fundamental freedoms to be assessed by the Honourable court.

h. Costs.

2. The grounds stated on the face of the application are:-

*a. **That** the first and second appliat are Nigerian nationals and students at the United States International University-Africa (USIU) pursuing courses in International Business Administration, and were both in the country on a student's pass issued on **29th** March 2017 and expiring on **29th** March 2018;*

*b. **That** the Respondents deported them to Nigeria without an arrest warrant or deportation order or any order from the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government declaring them to be prohibited persons nor were they informed of the reasons for their deportation, and that they were denied the opportunity to be heard and legal representation.*

*c. **That** the Respondents withheld the third applicants motor vehicle registration number KCL 752 H together with documents and items among them ten pairs of shoes, mobile phones make I-Phone Plus, I-Phone 6S, Techno, Mac Book Pro and Laptop with data/information.*

*d. **That** the Director of Immigration has demanded **Ksh. 200,000/=** to release the vehicle to the third applicant.*

*e. **That** the removal of the applicants was un procedural, arbitrary, unreasonable, unlawful and in bad faith and a violation of the Fair Administrative Action Act, and that the decision is malicious, biased and made in bad faith.*

*f. **That** on **14th** November 2017, **23rd** January 2018 and **19th** March 2018, the first Respondent verbally informed the third applicant on behalf of the first and second applicants that the first and second applicants had been placed on the immigration watch list following their illegal exit and cannot re-enter the country. As a consequence, the applicants have been restrained from entering the country without being heard.*

*g. **That** the deportation has gravely affected the first and second applicants studies.*

*h. **That** the impugned decision is unlawful, based on irrelevant considerations, manifestly oppressive and a violation of the applicants rights to Fair Administrative Action.*

Response to the application

3. In response to application is the Replying affidavit of **Mr. Emmanuel Simiyu**, an Immigration Officer, Department of Immigration Services dated **13th** June 2018. He averred that the application is incompetent, devoid of merit, frivolous, vexatious and an abuse of Court process as it fails to disclose any reasonable grounds sustainable in law for the orders sought.

4. He averred that the first and second applicants herein applied for and were issued with student passes on **29th** March 2017 valid for one year, but the passes were invalidated for contravening section **30 (6) (c)** of the Kenya Citizenship and Immigration Regulations, 2012.

5. **Mr. Simiyu** averred that the first and second Respondents failed to register for their summer semester 2017 (May to August) at the United States International University-Kenya (USIU) and the few classes they attended prior to their deportation, both applicants had below average GPAs. He also averred that upon making inquiries at the USIU, they were informed that the first and second Respondents could register for a class then withdraw mid-semester and that the School Registrar confirmed that both applicants had absconded from classes during the summer semester without giving any justifiable reasons.

6. He averred that on **7th** September 2017, the applicants were arrested by Immigration Officers at their house in Garden Estate, Kenia Court, Nairobi, and upon searching the premises and motor vehicle number **KCL 752 H** in the presence of the first and second applicants, the Immigration Officers found them in possession of illegal drugs as per the inventory annexed thereto. **Mr. Simiyu** denied that the Immigration Officers ever demanded cash from them. He also averred that at the Air Port, the first and second applicants received all the documents and items which had been confiscated from them.

7. He further averred that the first and second *ex parte* applicants were verbally notified the reasons for their removal and were given the option of either being charged and prosecuted for possession of illegal narcotics or return to their home country. He averred that they opted to be removed from the Country at their cost. Further, **Mr. Simiyu** averred that the State through the lawful reasonable exercise of its sovereign authority can order removal or deny entry into its territory any foreign national based on legitimate reasons as in the present case. He also averred that in the event the applicants are aggrieved the impugned decision, there exists an administrative venue for redress by appealing to the Cabinet Secretary to review the decision before invoking this Court's jurisdiction.

Applicant's further affidavit.

8. **Euphrasia Atieno**, the third applicant swore the further affidavit dated **18th** June 2018 stating *inter alia* that the University has never deregistered the first and second applicants; that the first Respondent is still holding her motor vehicle and the items mentioned above. Also, she averred that the inventory was not signed, and no analyst report was produced to prove that the alleged substance is Bhang as the law requires.

Issues for determination.

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

a. Whether this suit is a non-starter in that it was filed out of time.

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

c. Whether the applicants are entitled to the reliefs sought.

Whether this suit is a non-starter in that it was filed out of time.

10. **Mr. Odhiambo,** counsel for the Respondents submitted that this Judicial Review application is defective for offending the provisions of Order **53** Rule **2** of the Civil Procedure Rules, 2010 on grounds that it was filed out of time, that is, after the expiry of the stipulated **six** months because the first and second Respondents were removed from the country on **8th** September 2017, hence, the six months lapsed on **8th** March 2018.

11. In his rejoinder, **Mr. Midega**, counsel for the *ex parte* applicant argued that since the applicants were granted leave to institute these proceedings, the question of computation of time should not arise.

12. **Mr. Midega's** argument is a direct invitation to this Court to address the purpose of leave in Judicial Review proceedings. Differently put, does the fact that leave was granted in this case close the door for the Court to address the issue raised by the Respondents counsel?

13. The importance of obtaining leave in a Judicial Review applications was well captured in the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others**[2]*** where he stated:-

> *" is to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)*

14. In *Meixner & Another vs A.G,**[3]*** it was held that the leave of Court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of Judicial discretion and the test to be applied is whether the applicant has an arguable case. In short, the purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is a case fit for further consideration. Permission will be granted only where the Court is satisfied that the papers disclose that there is an arguable case that a ground in seeking Judicial Review exists which merits full investigation at a full hearing.[4]

15. More fundamental is the fact that a party to Court proceedings is at liberty to raise an objection on jurisdiction or competence of the Judicial Review proceedings despite the fact that leave had been granted. In other words, grant of leave is not a bar to the defence of limitation or jurisdiction or any other defence prescribed under the law.

16. The objection raised by the Respondent's counsel as I understand it is premised on the provisions of Sections **8** and **9** of the Law Reform Act[5] and Order **53 (2)** of the Civil Procedure Rules, 2010.

17. Section **9 (3)** of the Law reform Act[6] provides as follows:-

> *"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave **shall** not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by*

law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

18. The above provision is replicated in Order **53** Rule **2** of the Civil Procedure Rules, 2010 in the following words:-

[Order 53, rule 2.] Time for applying for certiorari certain cases.

*"Leave **shall** not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

19. The above provisions have been the subject of numerous judicial determinations in this county. In *Ako vs Special District Commissioner, Kisumu & Another*,[7] the Court of Appeal was emphatic that *"it is plain that under sub-section **(3)** of section **9** of the Law Reform Act**[8]** leave shall not be granted unless application for leave is made inside six months after the date of the judgment."* The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.

20. Similarly, the Court of Appeal in *Wilson* ***Osolo -Vs- John Ojiambo Ochola & Another**[9]*expressed itself thus:-

"It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act." There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''(Emphasis added)

21. The above decisions were rendered by the Court of Appeal. They are binding to this Court. I find no reason to depart from them. My finding is reinforced by the clear language of the above provisions.

22. The operative word in the above provisions is ***"shall."*** The Black's Law Dictionary, defines the word **"shall"** as follows:-

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

23. The definition goes on to say *"but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may*."

24. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[10] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[11] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

25. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

26. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.[12] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[13]

27. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[14] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[15]

28. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which

deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:-

> *"…. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…**[16]** - Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

29. The above being the clear prescriptions of the meaning of the word ***shall,*** Parliament in its wisdom prescribed a period of six months within which applications for *Certiorari*, may be brought. Time starts running from the date of the challenged decision. I find and hold that the above provisions are couched in mandatory terms and must be complied with. On this ground alone, this Judicial Review application fails.

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

30. **Mr. Midega** submitted that this Court has jurisdiction to entertain this case. On his part, **Mr. Odhiambo,** argued that the applicants ought to have exhausted the statutory laid down mechanism and appeal to the Cabinet Secretary.

31. 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*[17]had this to say:-

> *"Jurisdiction is determined on the basis of the pleadings,**[18]**… 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…"*

32. The Respondent's counsel invites this court to hold that the applicants 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**[19]*** 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.)**[20]***

33. The Respondent's objection as I understand it is premised on Sections **22** and **23** of the Kenya Citizens and Foreign Nationals Management Service Act.[21]

> 22. *Review of Director's decisions*
>
> *(1) A person aggrieved by a decision of the Director made pursuant to any of the Acts specified in the First Schedule may apply to the Cabinet Secretary for review of the decision of the Director.*
>
> *(2) The application under subsection (1) shall be in such manner as shall be prescribed.*
>
> 22. *Review of Director's decisions*
>
> *(1) A person aggrieved by a decision of the Director made pursuant to any of the Acts specified in the First Schedule may apply to the Cabinet Secretary for review of the decision of the Director.*
>
> *(2) The application under subsection (1) shall be in such manner as shall be prescribed.*
>
> 23. *Establishment of the Tribunal*
>
> *(1) There is established a tribunal to known as the Kenya Citizenship and Immigration Service Appeals Tribunal.*
>
> *(2) The Tribunal shall consist of the following members appointed by the Cabinet Secretary—*

(a) a chairperson who shall be a person qualified to be appointed a judge of the High Court;

(b) two persons qualified and experienced in matters relating to public administration, immigration or demography.

(3) The Tribunal shall have the same powers as a subordinate court of the first class.

(4) Any person aggrieved by a decision of the Board or Director under this Act may appeal to the Tribunal in accordance with subsection (5).

(5) The Chief Justice shall prescribe the manner of appeal and rules of procedure for the Tribunal.

(6) A person aggrieved by a decision of the Tribunal under this section may appeal to the High Court in such manner and time as may be prescribed under subsection (5).

34. Section **57** of the Kenya Citizenship and Immigration Act[22] 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.*

35. 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[23]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.[24] It is my view that Parliament in enacting the Kenya Citizens and Foreign Nationals Management Service Act[25] 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.

36. 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[26] 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.

37. 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[27] 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[28] alone and ignore section **57** of the Kenya Citizenship and Immigration Act.[29]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. I find no difficulty holding that section **57** cited above grants an aggrieved person the right to approach the High Court.

Whether the applicants have established any grounds for the grant the Judicial Review orders sought.

38. The aapplicants' counsel argued that no reasons were offered for the impugned decision and that if the government is to maintain its watch lists, it must be targeted at genuinely dangerous individuals.[30]

39. The Respondents counsel argued that under the Regulations, it is a condition that if a student fails to register at the academic institution, the visa lapses. He argued that the impugned decision was undertaken as provided under the act.

40. It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of Judicial Review orders 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.

41. 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 paramountcy of the law.

42. 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.*

43. 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.*

44. 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.

45. 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.[31]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.

46. It is common ground that the first and second applicants entered into the country under a Students pass. Regulations **30 (6)** provides as follows:-

> *(5) A student's pass shall, subject to the terms and conditions specified in the student’s pass, entitle the holder to enter Kenya within the period specified in the pass, to remain in Kenya for such period from the date of his or her entry into Kenya as may be specified in the pass and if the holder is a citizen of an East African Community Partner State, to re-enter Kenya at any time during validity of the pass.*
>
> *(6) Where the holder of a student's pass—*
>
> > *(a) fails to enter Kenya, within a period of thirty days from the date of issue of such pass;*
> >
> > *(b) fails within a period of thirty days from the date of entry into Kenya to take up admission as a student at the educational or training establishment in respect of which the pass was issued;*
> >
> > *(c) has taken up admission in such establishment as a student and at any time thereafter leaves or ceases to be retained as a student in such establishment, the student's pass shall be deemed to have expired and shall be invalid.*

47. The Respondents maintained that the first and second Respondents breached the above Regulations. They exhibited letters from the University stating that the applicants had not registered as required. Breach of the above provision brought into play the above provision which clearly states in mandatory terms that the pass shall be deemed to have expired and shall be invalid. So serious is such a scenario, that subsection (7) of the same Regulation makes it an offence for a principal of an educational or training institution who allows a student who is required under this regulation to obtain a student's pass to attend training in such an institution without a student's pass.

48. To me, the above breach was a valid ground to warrant the impugned decision.

49. Then there is the second reason. It is alleged that the first nd second ex parte applicants were found in possession of bhang. It is stated that they were given the option of leaving the country or being prosecuted. They opted to leave the county. The argument by the

Respondents co8unsel that the substance was not tested to prove it was Bhang ca make sense in a criminal trial but not in the present case. The ex parte applicants did not contest the alleged possession at the material time. They cannot now turn around and raise such a defence.

50. The Respondents acted in accordance with the law 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.[32] 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 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.

51. 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 removal from Kenya are in my view relevant considerations. Also, the reasons offered can pass Article **24** analysis test. 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.

52. The *ex parte* applicants allege that their items including a vehicle were impounded. The Respondents argue that all the impounded items were surrendered back before the deportation. I find that there is no sufficient evidence to support the applicants allegations. First the applicants are disputing the existence of an inventory which could have helped in supporting their allegations. On a balance probabilities, I find that there is no sufficient evidence to find i favour of the applicants on the alleged impounding of items.

53. 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.

54. *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.[33] *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**.[34]In the present case, the first Respondent has not refused to act. It acted and rendered a decision and provided reasons.

55. *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.

56. 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.

57. 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 allegations that the applicants breached their visa conditions. It is alleged they were found in possession of Bhang. With all these adverse details, 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 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. 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.

58. 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.[35]

Disposition

59. 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 **25th** April 2018 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 11th day of September 2018

John M. Mativo

Judge.

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[1] Cap 26, Laws of Kenya.

[2] Mombasa HCMISC APP No 384 of 1996.

[3]{2005} 1 KLR 189.

[4] *R vs Legal Aid Board Ex p Hughes* {1992} Adm. L. Rep. 623}.

[5] Cap 26, Laws of Kenya.

[6] Ibid.

[7] Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

[8] Cap 26, Laws of Kenya.

[9] **{1995} eKLR.**

[10] *Dr Sanjeev Kumar Tiwari*, *Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[11] Ibid.

[12] *Subrata vs Union of India* AIR 1986 Cal 198.

[13] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.

[14] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[15] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[16] *Sutter vs Scheepers* 1932 AD 165, at 173 - 174.

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

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

[19] {2017}eKLR.

[20] {2016}eKLR.

[21] Act No. 31 of 2011.

[22] Act No. 12 of 2011.

[23] Act No. 31 of 2011.

[24] Supra.

[25] Supra.

[26] Act No. 4 of 2015.

[27] Ibid.

[28] Supra.

[29] Supra.

[30] Citing U.S. Government Watchlisting: Unfair Process and Devastating Consequences, March 2014, American Civil Liberties Union.

[31] 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.

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

[33]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.

[34] *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).

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