



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 682 OF 2017**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE BIRTHS AND DEATHS REGISTRATION ACT)**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR, CIVIL REGISTRATION SERVICES...1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**EX PARTE:**

**SIMON JOHN GITHIEYA**

**JUDGMENT**

**The Application**

1. The ex-parte Applicant herein, Simon John Githeiya (hereinafter “the Applicant”), states that he is a British and Kenyan national currently residing in the United Kingdom (hereinafter “the UK”), and that he was born on 16<sup>th</sup> September 1965 at Nyina was Mumbi maternity hospital in Dagoretti Constituency in Nairobi County. He further states that his mother is Mary Wairimu Githeiya, a Kenyan national, and his father was Dennis Wilfred Graham, a British citizen who died on 19<sup>th</sup> July 1981 in the UK.

2. The Applicant has brought the instant proceedings over the inclusion of his father’s name in his birth certificate. He has sued the Director of Civil Registration Services, which is the department in charge of registration of persons; and the Attorney General, in his capacity as the legal representative of the Government of Kenya;

3. The Applicant has in this regard moved this Court by way of a Notice of Motion dated 19<sup>th</sup> December 2017, seeking the following orders:

**a) An order of Certiorari do issue to remove to this Court and be quashed the decision of the 1<sup>st</sup> Respondent conveyed by one Mrs J.W. Mugo in a letter dated 5<sup>th</sup> May 2017, declining to amend the Applicant's birth records by deleting the name Josef Kamande and replacing it with Dennis Wilfred Graham and issuing the Applicant with a birth certificate reflecting the changes.**

**b) An Order of Mandamus be issued to compel the Director, Civil Registration Services to amend the Applicant's record by deleting the name Josef Kamande and replacing it with Dennis Wilfred Graham, and to issue the Applicant with a birth certificate reflecting the changes.**

**c) The Costs of this application be borne by the Respondents.**

**d) Such other order or direction as shall be considered fit for the Court to grant in the circumstances of the case.**

4. The application was supported by a statutory statement dated 15<sup>th</sup> September 2017, a verifying affidavit sworn by the Applicant on the same date, and a supplementary affidavit that he swore on 26<sup>th</sup> March 2018. The Applicant gave a detailed history of his relationship with his father, which he claimed was close, and which continued after his father was posted by his employer to the UK while the Applicant was still young. The Applicant annexed communication with his father and photographs as evidence of the relationship.

5. According to the Applicant, he sought to renew his passport and in the process discovered that the details about his father in his original birth certificate (hereinafter "the first birth certificate") were blank. Further, that in 2005 he decided to apply for a UK visa on ancestral grounds, since his father was a UK citizen, and he was informed by the British Embassy that he father's details must be included in his birth certificate. That upon inquiry at, and advise from the District Registrar of Births and Deaths in Kiambu County, he made the necessary application and availed his father's death certificate and his own birth certificate to facilitate the entry of his father's name in his birth certificate.

6. It is the Applicant's case that he was subsequently issued with a birth certificate serial number 840799 dated 26<sup>th</sup> October 2005 (hereinafter "the second birth certificate"), on the basis of which he was granted a right of abode in the UK, and eventually British citizenship. He attached copies of the two birth certificates. The Applicant's wife and children also consequently applied for leave to enter the UK on ancestry grounds, and all were granted entry except for his first born son, Dennis Mbuthi Githeiya, who had attained the age of majority and was required to apply in his own right. That upon his son submitting his application for entry clearance to the UK, the same was refused on the basis that he had submitted a fraudulent birth certificate of the Applicant.

7. The Applicant averred that he subsequently travelled to Kenya and sought clarification from the Civil Registration Department, whereupon he was informed that his birth records showed that his father was Josef Kamande Njoroge. The Applicant stated that he thereupon attended an interview at the said Department with his mother, and they explained that the said records were wrong. Further, that on 25<sup>th</sup> April 2017, the Applicant's Advocate wrote to the 1<sup>st</sup> Respondent attaching evidence to show that the Applicant's father's name was erroneously entered in his birth record as Josef Kamande instead of Denis Wilfred Graham, and seeking a change of the same. The Applicant attached a copy of the letter and the evidence that was submitted in support of the request.

8. On 5<sup>th</sup> May 2017, the 1<sup>st</sup> Respondent subsequently wrote to the Applicant the impugned letter, stating that the Applicant's birth records can only be amended at the joint request of his mother and father, or upon production of evidence that his father and mother were married, and that the evidence the Applicant had provided in this respect was not sufficient. The 1<sup>st</sup> Respondent further informed him that the change could only be effected in the circumstances upon production of confirmation of paternity of the Applicant issued by a court of law.

9. The Applicant thereupon carried out a DNA test with his first cousin on his father's side, one Anthony Malcolm Walsh, which established that they share a common paternal ancestor, and he annexed a copy of the said DNA report and an affidavit by the said Anthony Malcolm Walsh. It is on the basis of this evidence that the Applicant has approached this Court for the judicial review orders, and he also asked this Court to issue an order to the Government Chemist to interpret and issue a report on the DNA results. The Applicant denied that he intended to use the court process to sanctify a falsified document, and stated that he was not aware that of the existence of the name of Josef Kamande in the registration of his birth records as his father.

### **The Response**

10. The application was opposed by the 1<sup>st</sup> Respondent in a replying affidavit sworn on 4th March 2018 by Shumary Malleon, the Principal Civil Registration Officer at the Directorate of Civil Registration Services. The 2<sup>nd</sup> Respondent did not file any response to the application.

11. The 1<sup>st</sup> Respondent stated that his office did not have a record of the second birth certificate serial no 840799, and that in the circumstances the said birth certificate was not issued procedurally since the corresponding register of birth cannot be traced in their records. Further, that the birth entry number shown in the said birth certificate belongs to one Joseph Gikonyo Mucheru in the copy of the birth registers in their custody.

12. The 1<sup>st</sup> Respondent also stated that according to the records of registration in his office, the Applicant's birth was registered twice. The first registration was on 22<sup>nd</sup> October 1965 indicating that the Applicant was born on 16<sup>th</sup> September 1965 at Riruta/Dagoretti Nairobi, and that the Applicant's mother was Mary Wairimu Githieya and his father was Josef Kamande Njoroge. The second registration was on 24<sup>th</sup> December 1982, showing that the Applicant was born on 16<sup>th</sup> September 1965 at Kingeero village in Kiambu, and the name of his father was not indicated, while his mother was shown as Mary Wairimu Githieya. The 1<sup>st</sup> Respondent contended that a birth can only be registered once, and any subsequent registration of the same birth while the original is still subsisting is illegal.

13. According to the 1<sup>st</sup> Respondent, they have no record of any application by the Applicant to have the name of his father removed or inserted other than the present application before the Court, and given that the Applicant is in possession of a birth certificate showing the name of his father as Graham Dennis Wilfred, and there being no record of the said birth certificate, the court process should not be used to sanctify a falsified process.

14. The 1<sup>st</sup> Respondent confirmed receiving the Applicant's letter dated 25<sup>th</sup> April 2017 and responding thereto in the impugned letter dated 5<sup>th</sup> May 2017. He reiterated that the Applicant has not met the conditions set out by the provisions of section 12 of the Births and Death Registration Act, and that the 1<sup>st</sup> Respondent's hands are tied by the legislation. The 1<sup>st</sup> Respondent also confirmed receiving the results of DNA tests done by the Applicant and Anthony Malcolm Walsh, and stated that he lacks the capacity to independently interpret the DNA results, and is thus not in a position to verify the Applicant's paternity.

### **The Determination**

15. There are two issues for determination that arise from the pleadings and submissions filed by the parties herein. These are firstly, whether the 1<sup>st</sup> Respondent acted illegally in making the impugned decision in the letter dated 5<sup>th</sup> May 2017, secondly, whether the 1<sup>st</sup> Respondent acted fairly in reaching the said decision; and lastly, whether the Applicant is deserved of the orders sought.

16. It is important and prudent in light of the issues that the parties herein have raised and the evidence presented, to establish at the outset the purpose and reach of judicial review. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

**“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”**

17. In addition, the purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

18. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

19. The circumstances under which orders of judicial review can issue were also elaborated upon in the in Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

**“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, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

20. I have gone to great lengths to set out the parameters of judicial review so as to lay the basis of my analysis of the issues raised by the application. On the first issue, the Applicant urged that the 1<sup>st</sup> Respondent acted illegally by failing to consider the evidence before it in accordance with section 12 of the Births and Deaths Registration Act. According to the Applicant, he attached affidavits by his mother and persons who knew his mother and father, as well as the letter of the Chief, Kabete Location as proof of the marriage between his mother and father. He relied on the provisions of Order 19 Rule 2 of the Civil Procedure Rules and the decision in **Olkiombo Limited and 5 Others vs**

**the County Council of Narok (2003) e KLR** for the proposition that facts can also be proved by way of affidavit evidence.

21. In addition that the DNA results that he submitted were self-explanatory and did not require any further interpretation as it was expert evidence and confirmed that he shared a relative with Anthony Malcolm Walsh. The Applicant cited various judicial decisions for this position

22. The Applicant also contended that the 1<sup>st</sup> Respondent based its decision solely on the said section without considering the provisions of Articles 27 and 28 of the Constitution as regards his right to non-discrimination and dignity. The Applicant relied on the decision in **L.N.W vs Attorney General & 3 Others (2016) e KLR** that the Registration of Births and Deaths Act was enacted before the Constitution of 2010, and must be looked at against the developments in the human rights field. Further, that it was held therein that a child has a constitutional right to know the identity of his or her father, which according to the Applicant is effected through the processes of registration of birth.

23. The Respondent on the other hand submitted that the Applicant's mother, having confirmed during her interviews with the 1<sup>st</sup> Respondent's office that Josef Kamande Njoroge was the father of one the Applicant's sisters, could not therefore be married to Dennis Wilfred Graham at the time of the Applicant's birth. Reliance was placed on the decision in **Kimani vs Gikanga (1965) EA 739** that any person propounding customary law would have to prove the relevant facts of his case. Therefore that the Applicant had not proved the marriage between his mother and Dennis Wilfred Graham, and that under section 118 of the Evidence Act it is a non-rebuttable presumption that children born within the subsistence of a marriage belong the man in that union.

24. Besides the argument that the said marriage had not been proved, the 1<sup>st</sup> Respondent also urged that the Applicant's cause of action is a concern of a constitutional petition or legislative amendment and not judicial review, and therefore the matters raised by the Applicant as regards infringement of his constitutional rights should be raised in the proper form for redress, and not in judicial review proceedings.

25. I have considered the arguments made by the parties on the issue at hand. The 1<sup>st</sup> Respondent has stated that the applicable law in resolving the application the Applicant made to it is section 12 of the Births and Death Registration Act, which is not disputed by the Applicant, and which provides as follows:

**“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.”**

26. The Applicant however submitted that the 1<sup>st</sup> Respondent also ought to have considered applicable provisions of the Constitution and particularly Article 28 thereof, which provides that every person has inherent dignity and the right to have that dignity respected and protected, and decisions made on the constitutionality of section 12 of the Births and Death Registration Act.

27. In **L.N.W vs Attorney General & 3 Others (2016) e KLR** the High Court (Mumbi Ngugi J.) did indeed find that section 12 of the Births and Death Registration Act was inconsistent with Articles 27 of the Constitution on freedom from discrimination, and Article 53 of the Constitution on the rights of a child to a name and nationality and parental care, and was therefore null and void. The Court further ordered that the said section be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it with conformity with Articles 27 and 53 of the Constitution.

28. Even though that case may be distinguished on the ground that the issue therein was that section 12 discriminated against children who were born out of marriage when it came to registration of their fathers in the birth certificate, whereas in the present application the Applicant's case is that his father was married to his mother, it is still applicable in the present application for two reasons.

29. In the first place the 1<sup>st</sup> Respondent has argued that their hands were tied by the provisions of section 12 of the Births and Death Registration Act. However, it is also bound by the Constitution and Court orders, and relied on a section of the law which has been declared null and void by a court of law, and therefore essentially of no effect in terms of application. Secondly, the import of the decision in **L.N.W vs Attorney General & 3 Others** is that marriage is no longer the only determinant in deciding the issue of registration of a father in a birth certificate, and that the provisions of the Constitution take precedence in this regard.

30. It is also important in this respect that one of the main rules of statutory interpretation is that in the absence of express words or a necessary implication, a legislative provision will not be construed as authorizing an interference with constitutional rights. This position was confirmed by the House of Lords in **R vs Secretary of State for the Home Department ex parte Simms (2000) 2 AC 115**. I therefore find that to this extent the decision by the 1<sup>st</sup> Respondent of 5<sup>th</sup> May 2017 was illegal.

31. On the second issue as to whether the 1<sup>st</sup> Respondent acted fairly, the Applicant relied on Article 47 of the Constitution and section 4(3) of the Fair Administrative Action Act to urge that the 1<sup>st</sup> Respondent neither gave written reasons for the impugned decision, nor gave the Applicant an opportunity to be heard before making the said decision. He also cited the decision in **Republic vs Chief Justice of Kenya & 6 Others ex parte Moiwo Mataiya Ole Keiwa (2010) e KLR** for the position that the rules of natural justice required the 1<sup>st</sup> Respondent to act judicially.

32. The 1<sup>st</sup> Respondent did not address this issue in his submissions.

33. Even though no specific procedure is provided by the Births and Death Registration Act in this regard, Article 47 of the Constitution, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. In addition it was held in **Lloyd vs McMahon (1987) AC 625** that where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, courts will imply procedural steps to ensure the said requirements are met.

1. Article 47 of the Constitution now provides as follows in this regard:

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

2. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

34. The Applicant is in this respect directly affected by the decision made by the 1<sup>st</sup> Respondent as the identity of, and registration of his father in his birth certificate is in issue, as well as the validity of his birth certificate, which if not resolved is likely to have ramifications on his continued residence in the UK.

35. There are two main areas of concern to this Court on the procedure adopted by the 1<sup>st</sup> Respondent. After receiving the Applicant's application and evidence in its letter dated 25<sup>th</sup> April 2017, the 1<sup>st</sup> Respondent wrote back in its letter dated 5<sup>th</sup> May 2017 and stated as follows:

**“From your letter and attached documents your application cannot be considered under the provisions of section 12 as none of the two conditions set out above is applicable in your case. In view of the requirements of section 12, the declaration by Mary Wairimu Gitieya (mother) and claims in your letter do not constitute sufficient grounds for us to amend the birth records of Simon John Githeiya.**

**I therefore wish to inform you that your application to have the register of birth of Simon John Githeiya amended to substitute Josef Kamande's name with that of Graham Dennis Wilfred can only be considered on production of a confirmation of paternity of Simon John Githeiya issued by a court of law in Kenya.”**

36. The first error of procedure that is evident from the said letter is that 1<sup>st</sup> Respondent made a decision that the Applicant's evidence was insufficient without stating reasons why. Either as an afterthought or to remedy the situation, the 1<sup>st</sup> Respondent then wrote a letter to the Applicant dated 17<sup>th</sup> October 2017 giving the reasons why the said evidence was insufficient, which letter was written after the filing of the instant application.

37. Secondly, and in addition, no opportunity was given to the Applicant to address any concerns the 1<sup>st</sup> Respondent had about the Applicant's application and evidence, whether in writing or by way of oral hearing, and simply refused to consider his application. It therefore denied the Applicant to provide any more evidence that was required or that may have been in its possession, including that of paternity that is alluded to in the impugned letter. In this regard, when a decision maker is charged with making a finding of fact, it is under a duty to take into account and consider all material which is of probative value, before deciding what weight to attach to it, and including the need to call any witnesses if the circumstances of a case require this to be done, as in the present case, before dismissing evidence before it.

38. The Court also finds that the arguments made by the 1<sup>st</sup> Respondent and its findings that the Applicant's mother was previously married to Josef Kamande Njoroge at the time of the Applicant's birth were not supported by any evidence, and he also made a finding in this regard that was also not supported by the evidence that was provided by the Applicant which was to the contrary. The 1<sup>st</sup> Respondent in addition did not attach any copies of its records to substantiate its claims on the entries made therein, or of the alleged fraud and forgery on the part of the Applicant. It is also notable that the no legal or statutory backing was provided for the decision by the 1<sup>st</sup> Respondent that the Applicant needed to provide a court order on his paternity.

39. The burden of proof in judicial review is upon the party who challenges the administrative decision to bring enough evidence to show that the decision is invalid. The party must prove satisfactorily that the administrative action is unjust, unreasonable, unlawful, arbitrary, capricious, or an abuse of discretion. Once such proof is provided, the onus then moves to the respondent to show the legality of its actions. In the present case, the Applicant has brought evidence as regards the errors made by the 1<sup>st</sup> Respondent which needed to be rebutted.

40. It was held as follows in this regard in the Ugandan Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

**“As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.”** See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L.); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phipps on Evidence 12<sup>th</sup> Ed Para 91; Phipps At Para 95”.

**This position was also reiterated by the Kenya Supreme Court in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017 .**

41. The 1<sup>st</sup> Respondent also alleged forgery on the part of the Applicant, which being a criminal offence, needed to strictly prove. The Court of Appeal in Gudka vs Dodhia (1982) e KLR held that where a respondent was being accused of fraudulent conduct, the allegations of fraud must be strictly proved, more than on a mere balance of probabilities. The 1<sup>st</sup> Respondent, did not bring any evidence of findings against the Applicant in this regard, or of the fraudulent entries they allege to have been made by the Applicant.

42. As regards the remedies the Applicant seeks in his present application, the Court of Appeal in the case in Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, (1997) eKLR held that an order of certiorari issues to quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. The findings by this Court made in the foregoing show that the decision by the 1<sup>st</sup> Respondent dated 5<sup>th</sup> May 2018 was fraught with illegality and procedural impropriety and is thus amenable to being quashed.

43. On the grant of an order of mandamus, the Applicant submitted that under section 28 of the Births and Deaths Registration Act, the Principal Registrar has the power to correct errors at a birth register, and is therefore under a legal duty to effect the changes in the birth register to have his father's name reflected correctly.

44. The 1<sup>st</sup> Respondent on the other hand submitted that the Applicant has not demonstrated under which legal provisions it is bound to make changes in the Register of Births, and that under section 8 of the Births and Deaths Registration Act, registration of births must be done within six months of the birth. Further, that section 12 provides for entering of and not the amending of a father's name in the register, while section 14 provides for a window of two years after birth to change the details in a notification of birth. Lastly, the Respondent reiterated that the second birth certificate held by the Applicant was a forgery, and the Court cannot compel it to rectify a birth certificate that was unprocedurally and illegally obtained.

45. The Court of Appeal in its decision in Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others (supra) held as follows as regards the remedy of mandamus:

**“...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...**

46. This Court has found that the 1<sup>st</sup> Respondent did not act fairly in considering the Applicant's application, and that they are under a duty

to act fairly with respect to the said application in accordance with Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act.

47. In addition, it is the 1<sup>st</sup> Respondent's officers duty and mandate under section 7 of the Births and Deaths Registration Act to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth and death notified to them. The Principal Registrar of the 1<sup>st</sup> Respondent is in addition empowered and has the discretion under section 28 of the Act to correct any error or omission in any register or index, and such corrections shall be made without erasing the original entry, and shall be authenticated by the signature of the Principal Registrar. The 1<sup>st</sup> Respondent is thus also under a legal duty to consider the Applicant's application.

48. Lastly, this Court was specifically asked to make a finding and orders as to the veracity and reliability of the DNA evidence that was produced by the Applicant. This is a finding or order that this Court cannot make for two reasons. Firstly, the DNA evidence was not before the 1<sup>st</sup> Respondent at the time it made the impugned decision that is sought to be quashed of 5<sup>th</sup> May 2018. Secondly, that would also be engaging in a merit review that is beyond the parameter of this Court's operations as explained earlier on in this judgment.

49. This Court has thus reached the conclusion that the orders of Certiorari and Mandamus the Applicant seeks are merited for the foregoing reasons. However, the order of mandamus cannot issue to require the 1<sup>st</sup> Respondents to undertake its duty and/or exercise its discretion in the particular manner and terms sought by the Applicant, especially in light of the observations made by this Court as regards the veracity of the Applicant's evidence. The Court shall therefore instead provide the Applicant with a remedy that is appropriate to the circumstances of this case.

50. In the premises, this Court orders as follows:

**1) An order of Certiorari do and is hereby issued to remove to this Court and quash the decision of the 1<sup>st</sup> Respondent conveyed to the Applicant by Mrs J.W. Mugo in a letter dated 5<sup>th</sup> May 2017 declining to consider the Applicant's application to amend his birth records by deleting the name Josef Kamande and replacing it with Dennis Wilfred Graham and to issue the Applicant with a birth certificate reflecting the changes.**

**2) The Applicant's application contained in the letter dated 25<sup>th</sup> April 2017 by the Applicant's Advocate that is addressed to the 1<sup>st</sup> Respondent be and is hereby remitted back to the 1<sup>st</sup> Respondent for consideration.**

**3) An Order of Mandamus be and is hereby issued compelling the Director, Civil Registration Services to consider the said Applicant's application dated 25<sup>th</sup> April 2017 in accordance with the provisions of the Constitution and all applicable laws, and to accord the Applicant a fair hearing and to consider all materials and evidence availed by the Applicant during the said consideration.**

51. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**P. NYAMWEYA**

**JUDGE**