



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO.392 OF 2016

IN THE MATTER OF: THE APPLICATION BY PLANET MOTORS COMPANY LIMITED 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.

-AND-

IN THE MATTER OF: ARTICLES 22, 23, 27, 29, 39, 47, 50 (1) AND 165 (3) (b) & (6) OF THE CONSTITUTION

-AND-

IN THE MATTER OF: SECTIONS 10 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, LAWS OF KENYA

-AND-

IN THE MATTER OF: KENYA CITIZENSHIP AND IMMIGRATION ACT,CAP 172 OF THE LAWS OF KENYA, AND REGULATIONS THEREUNDER.

-BETWEEN-

REPUBLICAPPLICANT

-VERSUS-

**DIRECTOR OF IMMIGRATION SERVICES1ST RESPONDENT
CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT.....2ND RESPONDENT
PLANET MOTORS COMPANY LIMITEDEX PARTE APPLICANT**

-AND-

SAJJAD AHMADINTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 1.9.2016 and subsequently amended on 16.11.2016, the exparte applicant **Planet Motors Limited**, a limited liability company incorporated on 12th February, 2013 in accordance with the then Companies Act, Chapter 486 of the Laws of Kenya, with its registered place of business at Planet Motors Place next to Nakumatt Prestige Plaza, off Ngong Road – Nairobi, seeks from this court orders that:

i. An order of certiorari to remove to this Honourable court to be quashed the decision of the 1st respondent purporting to vary Mr Sajjad Ahmad's pass under Rule 26(3) of the Kenya Citizenship and Immigration Regulations, 2012 signified by the 1st respondent's embossment dated 6th May, 2016 on Mr Sajjad Ahmad's Pakistani Passport No. FF1150882;

ii. an order of certiorari to remove to this honourable court to be quashed the 1st respondent's decision placing Mr Sajjad Ahmad on the immigration "watch list" communicated to the exparte applicant verbally sometimes in July, 2016;

iii. an order of certiorari to remove to this honourable court to be quashed the decision of the 2nd respondent to return the exparte applicant's appeal to the 1st respondent for his review and recommendations;

iiia. an order of certiorari to remove to this honourable court to be quashed the decision of the 1st respondent communicated verbally to the exparte applicant sometimes in June, 2016 rejecting the exparte applicant's application for Class G work permit on behalf of the interested party;

iv. an order of mandamus compelling the 1st respondent to remove Mr Sajjad Ahmad from the immigration "watch list";

iva. an order of mandamus compelling the 1st respondent to allow the exparte applicant's application for Class-G work permit on behalf of the interested party;

v. an order of mandamus compelling the 2nd respondent to discharge its mandate and impartially consider the exparte applicant's appeal dated 16th June, 2016 for Class-G permit on behalf of Mr Sajjad Ahmad, independent of the recommendations of the 1st respondent;

vi. An order of mandamus compelling the 2nd respondent to allow the exparte applicant's appeal dated 16th June, 2016 for Class G permit on behalf of Mr Sajjad Ahmad;

vii. an order of prohibition to prohibit the respondents acting either in their person or through their servants, agents, police officers, employees or anyone else claiming to derive authority from the respondents, from arbitrarily arresting, detaining and or impeding Mr Sajjad Ahmad, or in any manner whatsoever curtailing/impeding Mr Sajjad Ahmad's liberty/freedom of movement with regard to the matters herein; an order of declaration declaring that the 1st respondent's rejection of the exparte applicant for Class G work permit on behalf of Mr Sajjad Ahmad due to " failure by the exparte applicant to disclose a previous application", confiscating Mr Sajjad Ahmad's Pakistani Passport No FF1150882 and varying his pass thereby causing Mr Sajjad Ahmad's removal from the country, and placing Mr Sajjad Ahmad on the immigration "watch list"; and the 2nd respondent's refusal /failure to promptly consider the exparte applicant's appeal for Class-G work permit on behalf of Mr Sajjad Ahmad, are a breach of the exparte applicant's rights to fair administrative action, freedom and security of Mr Sajjad Ahmad's person, his right to freedom of movement and right to secure protection of the law;

viii. an order of declaration declaring that the variation of Mr Sajjad Ahmad's pass before expiry thereof and his consequent removal from the country without any lawful reasons/cause, and without a formal process and /notice as contemplated under Rule 26(3) of the Kenya Citizenship

and Immigration Regulations(2012), is/was a violation of Mr Sajjad Ahmad's right to fair hearing;

ix. compensation for violations of Mr Sajjad Ahmad's rights and fundamental freedoms (to be assessed by the honourable court;

x. Costs.

2. The application is predicated on the statutory statement, verifying affidavit and annexures in support of the application for leave and a further affidavit.

3. The exparte applicant is Planet Motors Limited, a limited liability company registered in Kenya under the Companies Act, Cap 486 Laws of Kenya. Its case is that Mr. Sajjad Ahmad (Interested Party herein) is a national of Pakistan and a shareholding director of the Applicant (to be in charge of operations); and was at all material times hereto present in the country on a visitor's visa which was scheduled to expire on 11th July, 2016.

4. That the Interested party has previously worked in the country for Tokyo Trading Global Limited, a sister Company of the Applicant, as a technician and during that period, he held a Special Pass dated 1.09.2015.

5. On 11th July, 2014, the Applicant applied to the 1st Respondent Director of Immigration Services for a “Class - D” work permit on behalf of the Interested Party whom the Applicant intended to contract as a business development and automotive maintenance manager. The said application was rejected by the 1st Respondent on the ground that **“the Interested Party’s intended role/duty could be performed by a local as opposed to a foreign employee.”**

6. It is alleged that the decision to reject the Applicant’s application for **“Class - D” work permit** was not lawfully communicated to the Applicant or the Interested Party, or at all; and that the Ex Parte Applicant only learnt of the above decision while on a visit to the Immigration Department at Nyayo House, Nairobi to follow up on the said application.

7. That sometimes in February, 2016, the Applicant again applied for a **“Class - G” work permit** on behalf of the Interested Party to whom it had allocated shares and made a director. While the application aforesaid was pending determination by the 1st Respondent, the 1st Respondent Director of Immigration Services served Summons to the Interested Party through the Applicant requiring the Interested Party to appear before him to furnish information, documents and other particulars for undisclosed purposes as shown by copy of summons dated 21.04.2016 issued to the Ex Parte Applicant.

8. That since the application aforesaid for the Interested Party’s work permit was unresolved, the Interested Party could not work with the Applicant; and, the Applicant was unable to locate the Interested Party who was present in the country only as a visitor, to attend the 1st Respondent for purposes of the Summons aforesaid.

9. That in obedience to the said Summons, the Interested Party’s co-director (Mr. Maratab Bashir) appeared before the 1st Respondent acting through Mr. Kavoi (Principal Immigration officer) on 27th April, 2016 and explained the Interested Party’s non-attendance. That the Ex Parte Applicant unsuccessfully sought another opportunity/date at which it would make efforts towards securing the Interested Party’s attendance as required; and, that the said Mr. Kavoi threatened to have the Interested Party immediately arrested.

10. On 4th May, 2016, Mr. Maratab Bashir accompanied the Interested Party to the 1st Respondent to explain the Interested Party’s non-attendance on 27th April, 2016 and to furnish the 1st Respondent with the information he had sought vide the Summons aforestated. The 1st Respondent acting through the said Mr. Kavoi immediately confiscated the Interested Party’s Pakistani passport No. FF1150882 without proffering any reasons, or hearing the Interested Party; and thereafter ordered/coerced the Interested Party

to avail a return ticket out of the country, as shown by copy of **acknowledgment by the 1st Respondent dated 4.05.2016.**

11. On 6th May, 2016, the Interested Party availed a return air ticket as ordered by the 1st Respondent. The 1st Respondent acting through Mr. Kavoi then immediately varied the 1st Interested Party's visitor's visa meant to expire in July, 2016, without any formal process, notice, lawful reason or a hearing. The 1st Respondent subsequently ordered the Interested Party to depart from the country within 5 (five) days of that decision, as shown by annexed copy of acknowledgment by the 1st Respondent dated 4.05.2016.

12. That the reason given to the Ex Parte Applicant's directors verbally by the 1st Respondent for the foregoing decision was the **"suspicion"** by the 1st respondent that the Interested Party was working in the country without a permit. Following that suspicion, the 1st Respondent thus caused the Interested Party's arbitrary removal from the country and according to the applicant; the removal was without any hearing or lawful basis/justifications. The 1st Respondent however "advised" the Interested Party to leave the country to give the immigration Department ample opportunity to consider the applicant's application that was still pending.

13. The Interested Party left the country as ordered, pending determination of the Ex Parte Applicant's application on his behalf for a "Class - G" work permit aforesaid, as shown by annexed return ticket.

14. The applicant alleges that the removal of the Interested Party was unprocedural, arbitrary, unreasonable, and unlawful and made in bad faith to frustrate and circumvent the above application for "Class-G" work permit, and that the foregoing decision violated the rights of the Applicant and the Interested Party to fair administrative action.

15. That sometimes in June, 2016 while on a visit to the Department of Immigration Services at Nyayo House, Nairobi to confirm the status of the Ex Parte Applicant, the exparte applicant' said co-director was verbally informed by the 1st Respondent acting through Mr. Kavoi that the said application for the by the exparte applicant on behalf of the interested party had been rejected, this time for the different reason that **"the Applicant had not disclosed the previous application for a "Class – D" work permit" on behalf of the Interested Party.**

16. It is alleged that the reason given by the 1st Respondent for the above decision was not lawfully communicated to the Applicant or the Interested Party **and therefore it is patently malicious, replete with bias, and made in bad faith;** hence the decision and the reason[s] therefore cannot stand.

17. According to the applicant, the Information alleged to have been concealed by the Applicant while making the relevant application had been duly furnished, and was available in the 1st Respondent's records at the time of the above decision.

18. On 16th June 2016 the Cabinet Secretary Ministry of Interferer and Coordination of National Government instead of the Cabinet Secretary independently acting on the Appeal as mandated by law, the 2nd Respondent referred the Appeal to the 1st Respondent for its review and recommendations, in breach of the law and principles of natural justice.

19. That in consequence of the 2nd Respondent's conduct/action aforesaid, the Ex Parte Applicant's forthright Appeal has not been determined to date as contemplated by law, in violation of the legitimate expectations of the Ex Parte Applicant and the Interested Party to expeditious, lawful, impartial and procedurally fair administrative action.

20. That Sometimes in July, 2016, when the Ex Parte Applicant applied for a special pass to enable the Interested Party return to the country to assist in the Ex Parte Applicant's failing operations, the 1st Respondent **verbally informed the Interested Party's said director that the Interested Party had been placed on the immigration watch-list following his exit aforesaid, and could not enter the**

country, and that in saying so, no **lawful reason[s] or justifiable cause has been given for the said decision; as the Ex Parte Applicant or the Interested Party were not heard at all** prior to the foregoing decision.

21. That as a result of the decision to “watch-list” the Interested Party and Mr. Maratab Bashir (the Interested Party’s director), all directors of the Ex Parte Applicant have been unfairly and unlawfully prohibited/restrained from leaving or entering the country without being heard.

22. The Ex parte Applicant believes the real objective of the impugned decisions/conduct by the respondents is to harass, frustrate and unlawfully force the Ex Parte Applicant to close its business and exit the Kenyan market in favour of its competitors.

23. It is claimed that The impugned decisions are unlawful, based on irrelevant considerations, manifestly oppressive; and, violate the Ex Parte Applicant’s and the Interested Party’s rights to fair administrative action; and that By their said decisions/conducts, the Respondents are keen on frustrating the Ex Parte Applicant’s business without any lawful basis/justification.

24. The Ex Parte Applicant claims that it is highly prejudiced by the Respondents’ actions and is faced with imminent loss of business and threats of closure or total collapse due to failing operations; which will lead to loss of employment/livelihoods by the Ex parte Applicant, its directors and employees, unless the orders herein are urgently issued as sought.

25. And that it is only fair and just that this application be heard expeditiously, and orders prayed granted to obviate imminent injustice/hardship to the Ex Parte Applicant and the Interested Party, and remedy maladministration by the Respondents.

26. The respondents despite being served with the pleadings and hearing notices, did not enter any appearance or defend the proceedings. The application therefore proceeded exparte with counsel for the exparte applicant Mr. Miyare filing written submissions and making oral highlights on the same, basically reiterating the facts as set out above and relying on several constitutional, statutory and case law applicable, which I have carefully considered and make the following determination, based on the exparte applicant's issues as framed for determination.

DETERMINATIONS

a. whether the decision by the 1st Respondent to vary the Interested Party’s pass is illegal, ultra vires and/or unreasonable

27. The Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011 establishes the office of the Director of the service, with functions and powers enunciated under the Kenya Citizenship and Immigration Act, Cap 172 of the Laws of Kenya (hereinafter called the Act).

28. Under Section 4(2) of the Act, the Director/Respondent, and all immigration officers are enjoined to perform their duties in accordance with the values and principles prescribed in the Constitution; including the rule of law, human rights and human dignity.

29. The Act also regulates immigration of citizens and foreign nationals alike; and subjects them to the aforementioned functions and powers of the Respondent, without discrimination. Thus, any function performed by the Director must be based on the law and must equally promote the principles of the Act.

30. Article 27 of the Constitution guarantees every person, alien or national, equality before the law and has the right to equal protection and equal benefit of the law protected by the law and Constitution. Further, equality includes the full and equal enjoyment of all rights and fundamental freedoms.

31. Kenya is a signatory to the International Covenant on Civil and Political Rights. (ICPR) which is part of the law of Kenya pursuant to Article 2(5) of the Constitution. Article 13 of the ICCPR provides:

“An alien lawfully in the territories of a state party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

32. In the case of **Knauf Vs Shaugnessy 338 US** the US Supreme Court held:

“The admission of aliens to this Country is not a right but a privilege which is granted only upon terms as the United States prescribes.”

33. Further in **Jong Yue Ting 149 US** , the US Supreme Court held that:

“The right to exclude or to expel aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace is an inherent and inalienable right of every sovereign nation.”

34. Also see **United States -versus- Verdugo-Urquidez, 494 U.S. 259 (1990), Supreme Court, No. 88-1353.**

35. Further, Rule 26 (3) of the Kenya Citizenship and Immigration Regulations, 2012 gives the 1st Respondent the discretion to vary the terms and conditions specified in a pass or cancel a pass issued under the Regulations. However, the proviso to this rule mandatorily provides that a pass shall not be varied or cancelled before the holder is given sufficient notice and an opportunity to be heard. In this case, however, the 1st Respondent’s summons dated 21st April, 2016 did not indicate the reasons why the Interested Party was required before the 1st Respondent.

36. Furthermore, the 1st Respondent varied the Interested Party’s pass without specifying the affected conditions therein. The usage of the terms “vary” and “cancel” under Rule 26 (3) connote different processes with different consequences. It is my humble view that variation only allows the 1st Respondent to interfere with some terms and conditions on a pass but not to remove a person from the country as was done herein by the 1st respondent. On the other hand cancellation is absolute and leaves a person with no chance of staying in the country.

37. In the present case, the 1st Respondent not only varied the Interested Party’s pass but proceeded to cause his removal from the country. The removal of the Interested Party was not accompanied by any form of hearing contemplated in the Fair administrative Action Act No. 4 of 2015. In the circumstances, this court would not hesitate to find that that removal of the interested party from the country was unprocedural, arbitrary, unreasonable, unlawful and done in bad faith to frustrate and circumvent the application by the exparte applicant on behalf of the interested party for a for “Class-G” work permit.

38. Lenaola J(as he then was) in **High Court Petition No. 586 of 2012** between **Bashir Mohamed Jame Abdi and Minister for Immigration & Others** held that:

“By denying the subject Abdi Bashir entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or orders and without according him a hearing to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subjects fundamental rights and freedoms to equal treatment and equal action/justice to deprivation of the society and recognition of his family under articles 27(1), 45(1) and 47 of the Constitution.”

39. In **Daniel Nyongesa and Others vs. Egerton University College** the Court further stated that:

“...it is the duty of the courts to curb excesses of officials and bodies who exercise

administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.”

40. In Samuel Mukira Mohochi Vs Attorney General of Uganda EAC J Ref No. 5 of 2011 the East African Court of Justice thrashed the returning of a suspect from one partner state to another while he was allegedly suspected of terrorism related activities without him being interrogated or questioned on those alleged activities.

41. In Republic –Vs- Otieno Kajwang Exparte Mohmud Siras (2009) eKL Dulu J stated:

“A suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him.”

42. In Samura Engineering Ltd. & Others –Vs- Kenya Revenue Authority High Court Petition No. 54 of 2014 Majanja J stated:

“Kenya and its people must now embrace the culture of justification which requires that every officials act must find its locus in the law and under pinning the Constitution.”

43. In Nairobi High Court Misc. Civil Application No. 430 of 2004, LEONARD SITAMZE v THE MINISTER FOR HOME AFFAIRS & 2 OTHERS Ojwang J(as he then was) stated, authoritatively, as follows:

“Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilised society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”

44. This position was restated by Odunga, J in REPUBLIC v MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS EX-PARTE C.O. [2013] eKLR where the learned Judge opined at paragraph 33 of his judgment that:

“ To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and

perhaps one of the most powerful tools against abuse of power and arbitrariness.”

45. Section 40 (7) of the Act mandatorily requires that the 1st Respondent give reasons in writing for declining an application for a permit. This requirement for reasons is in line with the provisions of the Fair Administrative Action Act, 2015. In this case, the impugned decision was given verbally contrary to the law hence illegal and such an illegality cannot be allowed to stand.

46. In addition, Section 40 (7) gives the 1st Respondent Director of Immigration Services the discretion to decline an application for a work permit if the issue of the permit is not in the interest of the country or for any other sufficient reason. The 1st Respondent rejected the Ex Parte Applicant’s application for “Class-G” work permit for the interested party on the ground that **the Ex Parte Applicant had not disclosed the previous application for a “Class - D” work permit on behalf of the Interested Party.** Assuming this was the position, this court wonders whether the 1st respondent does not keep a record of all applications for persons seeking permits. In my humble view, the 1st respondent did not demonstrate that this was a sufficient reason within the meaning of the Act hence the decision to reject the application on behalf of the interested party was unreasonable.

47. On whether **the decision by the 2nd Respondent to return the Ex Parte Applicant’s Appeal to the 1st Respondent for his review and recommendations is unfair, illegal, ultra vires and/or unreasonable.**

48. Section 22 of the Kenya Citizens and Foreign Nationals Management Service Act provides that the Cabinet Secretary, the 2nd Respondent herein, has the discretion to review the decision of the 1st Respondent.

49. Upon the Ex Parte Applicant challenging the 1st Respondent’s decision before the 2nd Respondent, the 2nd respondent, instead of hearing or considering the merits of the appeal emanating from the decision of the 1st respondent, returned the appeal to 1st Respondent for his review and recommendations, contrary to the law that one cannot sit on his or her own judgment in the same cause.

50. Obviously, the 1st respondent having rejected the application could not be asked to advise on the appeal to a higher authority challenging his decision. I find that the 2nd respondent Cabinet Secretary therefore failed to exercise his discretion and mandate independently to the detriment of the exparte applicant. He acted unreasonably and unfairly and in violation of the rules of natural justice. The Cabinet Secretary cannot abdicate from his statutory mandate of considering an appeal and even if he were to delegate that mandate, he cannot delegate it to the same authority or body whose decision is appealed against to decide the appeal.

51. In the words in **Republic vs Secretary of state for Home Department Exparte Venebles [1998] AC 407,**

“ a person on whom power is conferred cannot fetter the future exercise of its discretion by committing himself now as to the way in which he will exercise his power.....By the same token, the person on whom power has been conferred cannot fetter the way in which he will use that power by ruling out of consideration on the future exercise of power, factors which may be relevant to that exercise.”

52. It therefore follows that where there is an allegation that a body is not properly exercising its power or statutory or constitutional mandate, thereby leading to possible abuse without legal justification, the court will be called upon to investigate into the matter to establish whether the legal duty is being performed in accordance with the law and i find that this is such proper case.

53. On whether **the decision by the 1st Respondent to "watch-list" the Interested Party is illegal, ultra vires and/or unreasonable.**

54. Watch-listing is a practice not entrenched under the Act, or in any law in Kenya. It therefore offends the provisions of Article 25 of the Constitution of Kenya which expressly proscribes torture and cruel, inhuman or degrading treatment or punishment, and any limitation on the right to a fair trial. As such, am in agreement with the applicant's counsel's submission that "watch-listing" is an indirect way of declaring a person a prohibited immigrant and have such a person deported without a hearing and/or fair trial.

55. According to the applicant, a corollary of watch-listing is the inability of the Ex Parte Applicant's directors to travel in and/or out of the country; in order to aid the Respondent in arresting and deporting the said directors and that "watch-listing" may separate family members for months or years, ruin employment. **See article on American Civil Liberties Union (ACLU): U.S. Government Watch-listing: Unfair Process and Devastating Consequences. March, 2014 (P.1).**

56. Watch-listing, and therefore declaring one a prohibited immigrant as indirectly attempted by the 1st Respondent herein through watch-listing, it must involve a trial by a court of law of an alleged offence. **See Sections 33 and 43 of Kenya Citizenship and Immigration Act, No. 12 of 2011. Also see Section 26A of the Penal Code, Cap 63 Laws of Kenya.**

57. Under Article, 25 of the Constitution of Kenya, the right to fair trial is absolute. By placing the Interested Party on the immigration "watch-list" and coercing the interested party to leave the country, the 1st Respondent circumvented the Ex interested party's right to fair trial, and in violation thereof. The right to a hearing is well protected in the Constitution and is the cornerstone of the rule of law. **See Suchan Investment Limited -versus- Ministry of National Heritage & Culture & 3 others [2016] eKLR; and Onyango Oloo -versus- Attorney General [1986-1989] EA 456 and section 12 of the Fair Administrative Action Act, No. 4 of 2015.**

58. Before making the impugned decision with devastating and shattering consequences upon the livelihoods of the Ex Parte Applicant and their employees/dependants, the Respondent was enjoined by the principles of natural justice to hear the Ex parte Applicant; and, the Ex Parte Applicant had legitimate expectation that due process of the law would be followed by the Respondent.

59. Article 47 of the Constitution as read with sections 4, 5 and 6 of Fair Administrative Action Act require that written reasons for administrative decision. in the absence of any written reasons by the 1st respondent for the decisions that were arrived at refusing to consider the application for Class G permit and varying the interested party's passport without any hearing or written reasons for such actions, and placing the interested party on the immigration "watch list" and asking him to leave the country within 5 days or in default face deportation from the country without following due process, I am persuaded that the decisions by the 1st respondent are *ultravires*, illegal and unreasonable and spew abuse of power.

60. As a result of the decision to "watch-list" the Interested Party and his co-director (Managing Director) Mr Maratab, who was prohibited from leaving the country vide a similar decision of the 1st Respondent placing the said director on the immigration "watch-list", all directors of the Applicant were unfairly and unlawfully restrained from travelling in and out of the country without being heard. This court notes that it has already determined the case involving Mr Maratab vide judgment in JR 393 of 2016. The Ex parte Applicant and the Interested Party were not heard at all before the Respondents' decisions challenged herein was taken; hence the decision deserves to be interfered with by certiorari remedy.

61. **Under section 43 of the Act**, only the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals is empowered to remove persons whose presence in Kenya is unlawful, or in respect of whom recommendations have been made under Section 26A of the Penal Code by a court of law upon trial and conviction.

62. Section 43 (3) of the Act further provides that an order to remove persons found unlawfully present in the country shall be carried out in such a manner as the Cabinet Secretary may direct, subject to the Constitution and related laws. However, the decision by the 1st Respondent has prohibited the Interested Party from entering the country upon his unlawful deportation without following due process in sending him out of the country.

63. Article 47 of the Constitution of Kenya guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The procedure for fair administrative action is elaborated in section 4(3) and (4) of the *Fair Administrative Action Act* No. 4 of 2015 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 of the Act;**
- 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.”**

64. In the instant case, there is absolutely no evidence to show that the exparte applicant was heard or given an opportunity to be heard before the decision to watch list the interested party by the immigration department was made. Accordingly, i find that the provisions of Article 47 of the Constitution on the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action; and the provisions of Article 50(1) of the Constitution on the right to a fair hearing were violated. In addition, the Fair Administrative Action Act No4 of 2015 was violated by the respondent.

65. Furthermore, Section 33(1) and (2) of the Kenya Citizens and Immigration Act Cap 172 Laws of Kenya is clear that:

“33. Prohibited Immigrants and inadmissible persons

(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—

(a) not having received a pardon—

(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;

(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;

(iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;

(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;

(c) a person who procures or attempts to engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;

(d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;

(e) a person who, there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;

(f) a person whose presence in or entry into Kenya is unlawful under any written law;

(g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;

(h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;

(i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;

(j) a person involved in or is reasonably suspected to be engaged in money laundering;

(k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;

(l) a person engaged in or suspected to be engaged in illicit arms trade;

(m) a person engaged in or suspected to be engaged in illegal human body organs trade;

(n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber crimes and related crimes;

(o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;

(p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;

(q) a person whose conduct offends public morality;

(r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;

(s) a person who is seeking to enter Kenya illegally;

(t) a person who is a fugitive from justice;

(u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006); and

(v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed).

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—

(a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;

(b) the family and dependants of a prohibited immigrant;

(c) incapable of supporting himself and his dependants (if any) in Kenya;

(d) is adjudged bankrupt;

(e) anyone who has been judicially declared incompetent;

(f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or

(g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.

(3).....”

66. The above exhaustive Section creates two categories of persons who are not wanted in Kenya. **Sub-section (1)** refers to **prohibited immigrants** whereas **Sub-section (2)** deals with **inadmissible persons**, that is to say persons who are not supposed to enter Kenya in the first place.

67. The provision relevant to this case is **Sub-section (1)**. Odunga, J dealt with the same issue on the powers of the 2nd Respondent under that **Sub-section** in **Ex-parte C.O.** (supra), at paragraph 22 of his judgment where the learned judge opined and I concur that:

“It has been contended that the impugned decision was made pursuant to section 33(1) of the Act. It is important to note that section 33(1) employs the phrase “a prohibited immigrant is” rather than “a prohibited immigrant includes.” It is my view therefore that where the legislature uses the word “is” there is no room for extension of the circumstances enumerated thereunder. No material has been placed before the court upon which the court can find that the criteria stipulated in section 33(1) aforesaid applied to the present circumstances. Instead the respondent has hidden under the principle of national security. Where an authority decides to keep certain crucial information from the Court which information may enable the Court to form a view favourable to the authority, the said authority must take the risk that the Court may find that the decision was not warranted.”[Emphasis added].

68. I am further in agreement with the learned Judge that a person can only be declared a prohibited immigrant on the grounds found in **Section 33(1)**. Those grounds cannot be inflated at the whim of the Cabinet Secretary in charge of immigration affairs. Further, the class of persons who can be declared prohibited immigrants is closed. This closure is emphasized by **Section 33 (1) (v)** where Parliament gives the Cabinet Secretary the power to declare a person a prohibited immigrant for any other reason subject to approval by Parliament. It is not therefore open to the 2nd Respondent to go out of **Section 33(1)** and declare a person prohibited immigrant. Doing so will be *ultra vires* the clear provisions of the Act and therefore invite the court's intervention.

69. Assuming that the reason given by the Respondent for the watch listing of the interested party is indeed a valid reason, the question is whether the 1st Respondent's exercise of power was reasonable, or whether he acted within the rules of natural justice. As already stated, the applicant was never given any hearing and or an explanation or reasons for the decision to watch list the interested party and or to demand that he leaves the country within 5 days.

70. There are differing decisions as to the extent to which a Court can interrogate the executive's exercise of power in matters of national interest or national security. In this case, however, no evidence has been laid on what national interest the interested party had threatened or is likely to threaten. I therefore agree

with J. B. Ojwang, J (as he then was) in the **Nairobi High Court Misc. Civil Application No. 430 of 2004, LEONARD SITAMZE v THE MINISTER FOR HOME AFFAIRS & 2 OTHERS**) case that a judge is among the very few people who are entitled to know the reasons behind the deportation of a foreign national. Odunga, J extended the above observation further to assert in **Ex-parte C.O.** (supra) case that the State must exhibit the evidence in support of the decision to deport a foreign national.

71. A foreign national has rights and is entitled to equal protection of the law. He is a human being and is not to be denied any of the inherent human rights or those rights that our Constitution guarantees, even if limited to some extent. He is entitled to know the specific reasons for his deportation or for refusal to grant a Class- G work permit applied on his behalf by the exparte or to be “watch listed.” That is why Parliament in **Section 33(1)** of the Act listed all the reasons that can form the basis for the deportation of an immigrant.

72. With utmost respect to the 1st respondent, he acted illegally, arbitrarily and unreasonably when he caused the deportation of the interested party from the country without giving him a hearing and even without a deportation order signed by the 2nd respondent declaring the interested party declared a prohibited immigrant on any of the grounds found in Section 31(1) of the Act. Those grounds cannot be enlarged at the whims of the Respondent. The class of persons who can be declared prohibited immigrants is closed. This closure is emphasized by Section 33 (1) (v) where the Act gives the Cabinet Secretary the power to declare a person a prohibited immigrant for any other reason subject to approval by Parliament. It is not therefore open to the Cabinet Secretary to go out of the dictates of Section 33(1). Doing so was clearly *ultra vires* the clear provisions of the Act. See **Republic -versus- Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad [2015] eKLR** at page 8.

73. It is worth noting that it was never disputed that the Interested Party had previously worked in the country for Tokyo Trading Global Limited, a sister Company of the Applicant, as a technician and therefore for him to be declared a prohibited immigrant, it must be shown that he did something which qualify him to be declared as a prohibited immigrant or an inadmissible person warranting the subject decision/actions of the 1st Respondent.

74. By its said decision, the Respondent has indirectly declared the Interested Party a prohibited Immigrant contrary to law, and in violation of the 2nd Ex Parte Applicant’s right to fair hearing as guaranteed under Article 50(1) of the Constitution. Furthermore, the 1st Respondent Director of Immigration Services has no authority or power under the relevant Act whatsoever to declare one a prohibited immigrant.

75. **On whether The impugned decisions are unreasonable:**

76. Section 7 (2) (k) of the Fair Administrative Actions Act, No.4 provides that an administrative action can be reviewed if the impugned decision is unreasonable. An unreasonable decision is a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See **Associated Provincial Picture Houses Ltd. -versus- Wednesbury Corporation [1948] 1 K.B. 223.**

77. As already stated, the reason given for the decision to vary the Interested Party’s pass was on the “**suspicion**” by the 1st Respondent that the Interested Party was working in the country without a permit. This is unreasonable since the said decision was based on a mere suspicion without ascertaining the veracity of those suspicions prior to the said decision. In any event, the decision is disproportionate as the reasonable action to be taken by the Respondent was to seek explanations from the Interested Party pursuant to its summons dated 21st April, 2016 and not immediately confiscate and vary his pass.

78. Rule 26 (3) gives the 1st Respondent the discretion to **vary** the terms and conditions specified in a pass or **cancel** a pass. The 1st Respondent varied the Interested Party’s pass without specifying the affected conditions therein for the benefit of the Interested Party. In the circumstances, I find the

impugned decision/actions are unreasonable, malicious, made in bad faith, and is clearly intended for extraneous ends not contemplated under the Act, in abuse of statutory power and discretion.

79. As was rightly observed G.V. Odunga, J in **Ex-parte C.O.** (supra):

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based on irrelevant matter.”

80. On whether the **Ex Parte Applicant and the Interested Party were not heard prior to the impugned decisions:**

81. As already stated, the proviso to rule 26 (3) of the Kenya Citizenship and Immigration Regulations, 2012 mandatorily stipulates that a pass shall not be varied or cancelled before the holder is given sufficient notice and an opportunity to be heard. This was not done. The 1st Respondent’s summons dated 21st April, 2016 did not even indicate the reasons why the Interested Party was required to appear before the 1st Respondent.

82. Yet on 4th May, 2016, upon the appearance by the interested party, the 1st Respondent immediately confiscated the Interested Party’s passport No. FF1150882 without tendering any reasons and thereafter ordered the Interested Party to avail a return ticket out of the country. On 6th May, 2016 when the Interested Party availed a return ticket as ordered, the 1st Respondent immediately varied the Interested Party’s visitor’s visa and subsequently ordered the Interested Party to depart from the country within 5 (five) days of that decision.

83. There was no notice for the impugned decision. The 1st Respondent further failed and/or refused to hear the Ex Parte Applicant or the Interested Party’s views prior to the said decision. I find that the removal of the Interested Party was unprocedural, arbitrary, unreasonable, and unlawful and made in bad faith to frustrate and circumvent the application for “Class-G” work permit on behalf of the interested party. The foregoing decision violated the rights of the Applicant and the Interested Party to fair administrative action.

84. **On the Appropriate remedies in the circumstances, the applicant sought for the following judicial review orders**

a. Certiorari:

85. The impugned decisions were informally made by the 1st Respondent in bad faith to “catch the Interested Party unawares” and prevent him from entering the country upon the decision of the 1st Respondent to vary his pass. This in my view, was maliciously done at the behest of the Ex Parte Applicant’s business competitors to stall the operations of the Ex Parte Applicant and push them out of business.

86. Under Order 53, rule 7 of the Civil Procedure Rules, an Applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in a deserving case as herein, the Honourable Court may call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. While doing so, the court only needs to satisfy itself that such a decision was made. **See Republic -versus- Minister of State for Immigration and Registration of Persons Ex-Parte C.O [2013] eKLR (at paras. 18-20).** in this case, the existence of the impugned decisions is not contested at all; it is in fact impliedly admitted.

87. As a result of the decision to “watch-list” the Interested Party and his co-director (Managing Director of the Ex Parte Applicant) Mr Maratab Bashir who had been denied entry into the country vide a similar decision of the Respondent placing the said director on the immigration “watch-list”, all directors of the Ex Parte Applicant were unfairly and unlawfully restrained from travelling in and out of the country without being heard.

88. The decision to reject the Ex Parte Applicant’s application for work permit on behalf of the Interested Party was actuated by malice, bad faith, and extraneous considerations. The Interested Party’s right to freedom and security of person, and the right to freedom of movement has and will continue to be violated by the threatened actions abovementioned, unless this Honourable Court intervenes as sought herein. I find that the Ex Parte Applicant deserves the orders of certiorari.

b. Mandamus:

89. The Ex Parte applicant has also sought an order of mandamus firstly to compel the 1st Respondent to remove the Interested Party from its immigration “watch-list and to compel the 2nd Respondent to allow the Applicant’s Appeal dated 16th June, 2016 for “Class-G” permit on behalf of the Interested Party.

90. The general rule is that the reviewing court has no mandate to substitute its own decision for that of the administrator since the court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. **See Suchan Investment Limited -versus- Ministry of National Heritage & Culture & 3 others supra** at pages 15, 16 and 17 thereof.

91. However, there are circumstances under which the court would be entitled to intervene even in the exercise of discretion. These circumstances are:

- i) where there is an abuse of discretion;
- ii) where the decision maker exercises discretion for an improper purpose;
- iii) where the decision-maker is in breach of the duty to act fairly;
- iv) where the decision-maker has failed to exercise statutory discretion reasonably;
- v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- vi) where the decision-maker fetters the discretion given;
- vii) where the decision-maker fails to exercise discretion; and
- viii) where the decision-maker is irrational and unreasonable.

See New Milimani Sacco Limited -versus- Sacco Societies Regulatory Authority [2016] eKLR at pages 9 and 10 thereof.

92. As was submitted by the applicants' counsel, the Respondents' decisions are unlawful, disproportionate and unreasonable. The Ex Parte Applicant’s business majorly concerns importing of cars for sale. The same involves frequent travel by the Ex Parte Applicant’s directors, who are unable to travel freely and oversee the Ex Parte Applicant’s business. The impugned decision has unfairly hindered the Ex Parte Applicant’s operations and interests.

93. In **New Milimani Sacco Limited -versus- Sacco Societies Regulatory Authority(supra)**, the Honourable court issued an order of Mandamus compelling a respondent to act on an applicant’s application for a license within 30 days with the rider that in the event that the order was not complied

with within the said period then an order of mandamus would issue compelling the Respondent to grant the said application. The exparte applicant's counsel submitted that the circumstances of this case have satisfied the above conditions.

94. The Ex Parte Applicant believes that the real objective behind the impugned decision/conducts is to harass, frustrate and force the Ex Parte Applicant to close its business and exit the Kenyan market in favour of its competitors. The decision impugned herein is thus unlawful, based on irrelevant considerations, manifestly oppressive; and, violates the Ex Parte Applicant's rights to fair administrative action.

95. It is not disputed that the Ex Parte Applicant and the Interested Party are highly prejudiced by the Respondents' actions/decision, and have suffered financial loss and loss of business as a result.

96. Further, it is not dispute that the Ex Parte Applicant is faced with imminent loss of business and threats of closure or total collapse due to failing operations; which will lead to loss of employment/livelihoods by the Ex Parte Applicant's employees/dependants, unless the orders herein are urgently granted as sought.

97. The impugned decisions are arbitrary, unreasonable, malicious and unlawful, hence unjustified; and the Interested Party's freedom of movement is unfairly and unlawfully curtailed thereby. The prayer for mandamus is justified.

c. Prohibition:

98. It was submitted that the Respondents are hell-bent in having the Interested Party deported. The Ex Parte Applicant and the Interested Party are at the undue mercy of the Respondents and their officers unless the Honourable court intervenes as prayed. The Exparte Applicants are also reasonably apprehensive that unless this application is allowed and a prohibition issued as sought herein, the Respondent will cause the Interested Party's arbitrary arrest, harassment, detention and/or deportation to their detriment/prejudice, and to the detriment of the Ex Parte Applicant's business and prejudice to their employees'/dependants' livelihoods. having found that the 1st respondent's actions and decisions are unlawful, the befitting order is that of prohibition to prohibit him from continuing to carry out any other unlawful acts

d. Declaration and Compensation:

99. it was submitted that due to the Respondents' flagrant breaches of the law, the decisions herein and consequent actions of the Respondents are thus unlawful, unfair and a breach of the Ex Parte Applicant's right to fair hearing, fair administrative action, freedom and security of the person of the Interested Party; and, the Interested Party's right to freedom of movement and secure protection of the law. Further, that under sections 11 (1) (a) and (j) of the Fair Administrative Actions Act, the court may declare the rights of the parties and award costs or other pecuniary compensation in appropriate cases, as herein. See **Suchan Investment Limited -versus- Ministry of National Heritage & Culture & 3 others supra at pages 15 and 16** thereof. In the instant case, however, i find that the applicant did not on a balance of probabilities establish its claim for compensation. There was even no attempt to quantify what loss it suffered as a result of the unlawful decisions taken by the respondents. Accordingly, I decline to make any orders for compensation.

100. In the end, I grant to the exparte applicant prayers No. **i, ii, iii,iv,v,vii,viii and ix**, of the amended Notice of Motion dated 16th November, 2016.

101. I decline to grant prayers **iiia, iva ,vi and x** of the Amended Notice of Motion for reasons that the exparte applicant amended the Notice of motion to include two extra judicial review prayers **iiia and iva** for certiorari and mandamus for which leave had never been sought and or obtained, contrary to the express provisions of Order 53 (1) of the Civil Procedure Act and section 8 and 9 of the Law Reform Act that prohibits the granting of the Judicial review orders of Mandamus, Prohibition and certiorari unless

leave is sought and obtained in accordance with the rules under Order 53 of the Civil procedure Rules.

102. On the other hand, prayer vi would not be available as it is subject to a hearing and consideration of the appeal lodged by the exparte applicant with the 2nd respondent. However, in view of the circumstances of this case where there is outright evidence of highhandedness and abuse of power by the 1st respondent and abdication of statutory mandate by the 2nd respondent, I direct the 2nd respondent to consider and determine the appeal filed by the applicant regarding issuance of Class-G work permit for the interested party, in accordance with the provisions of the law, within 21 days from the date of service of this judgment upon the 2nd respondent and in default, the 1st respondent be and is hereby compelled to issue to the exparte applicant a Class-G permit on behalf of the interested party.

103. As earlier stated, there is no proper basis laid for grant of compensation sought in prayer x. The prayer for compensation is therefore declined and dismissed.

104. The exparte applicant shall bear its own costs of these judicial review proceedings as the respondents did not participate.

Dated, signed and delivered in open court at Nairobi this 23rd day of January, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Mr Midega for the exparte applicant and for the interested party

N/A for the Respondents

CA: George