



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
JR MISC. APPLICATION NO. 11 OF 2016
IN THE MATTER OF AN APPLICATION BY CHEREPKOVA VLADA
FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION, MANDAMUS AND
CERTIORARI
AND
IN THE MATTER OF SECTIONS 48, 40, 57, 35, 53(1)(i) & 49(8) OF THE KENYA CITIZENSHIP
AND IMMIGRATION ACT 2011

REPUBLIC EX-PARTE APPLICANT

VERSUS

DIRECTOR IMMIGRATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

The Ex-parte Applicant herein who is a Russian entered this country on a Tourism Visa, whereupon she joined the Presbyterian Central Mission of Africa which runs an orphanage and school in Dunga area of Kisumu County. The Mission being impressed with her work in the orphanage and being desirous of her to join their team and she being interested in working there, recommended her application for a work permit. Her application was however rejected and her passport confiscated with an order that she leave the country within two days. The letter notifying her of the refusal is dated 2nd August 2016 and gives the reason for the refusal as “No merit”. Being aggrieved she sought leave to bring Judicial Review proceedings against the Respondent and leave was granted. The Court subsequently ordered that the leave would also operate as a stay pending the hearing and determination of the substantive application. In her application – Notice of Motion dated 15th December 2016 – the ex-parte applicant sought four prayers namely:-

“1. (Spent)

2. That, this Honourable Court be pleased to grant the orders of mandamus to issue to the 1st Respondent to compel him to return to the applicant her passport confiscated on 1st December 2016.

3. That this Honourable Court be pleased to grant the applicant an order of Certiorari to bring into court and quash the proceedings and decision of the 1st Respondent dated 2nd August 2016 denying the applicant an entry permit to Kenya.

4. That the costs of this application be provided for.”

The gist of the application as expressed in the grounds is that no reasons were given for the decision and that in any event declaring her an illegal immigrant ran contrary to her entry visa which expired on 18th January 2017.

In opposition to the application the Respondent filed a Replying Affidavit sworn by Peter Mbutia Karoki, Assistant Director of Immigration Services based here in Kisumu in which he deposes that after the Ex-parte applicant's application for a work permit was rejected her passport was confiscated as is done for all foreigners who are required to leave the country and who are then asked to avail an air ticket for purposes of exiting the country. He then purports to give the reasons for refusal of the work permit in paragraphs 7 – 12 of the affidavit and further deposes that the ex-parte applicant ought to have gone for review as is provided in the Kenya Citizenship And Immigration Act.

The Court heard the arguments by Counsel for the parties on 23rd January 2017.

Prayer 1 which sought orders of prohibition to the removal of the applicant pending the hearing of this application or otherwise the expiry of the applicant's visa on 18th January 2017 is spent, a stay having been issued and the visa having lapsed.

What remains are prayers 2 and 3. I shall start with prayer 3. My understanding is that what the ex-parte applicant sought was a work permit. She was already in the country on a tourist visa and her application was therefore not for an entry permit. In saying so I am fortified by the Presbyterian Central Mission of Africa letter to the Director, Kenya Citizens & Foreign National Management Service dated June 2, 2016 which is annexed as (VV-3(a)). The letter clearly indicates that the application was for a work permit under Class 1. The Notification of Refusal to Issue/Renew a Work Permit – VV-5(b) merely indicated that her application was not approved for “No Merit”. Section 40(7) of the Kenya Citizenship and Immigration Act which gives the Director discretion in the matter of permits states:-

“(7) Where the Director is of the opinion that the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason, the Director may upon giving reasons, in writing, to both the applicant and the Committee -

(a) refer the matter back to the Committee for further consideration; or

(b) decline to issue the permit to the applicant.” (underlining mine).

This section requires that reasons are given in writing to both the applicant and the committee. In my view saying the application had no merit without stating why is not enough. The Director did not comply with Section 40(7) of the Act and it is not enough that he has purported to do so in his affidavit. The prayer for Certiorari to bring up the Director's decision to be quashed by this Court is therefore merited and is granted. The ex-parte applicant's passport if it has not been returned to her must also be returned forthwith and in any case not later than seven (7) days of this judgment. Each party shall bear its own costs.

Signed, dated and delivered at Kisumu this 16th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Achura for Ex-parte Applicant

Ms Essendi for the Respondent

C/A: Serah Sidera