



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION (JR) NO. 510 OF 2016

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
MANDAMUS AND PROHIBITION ORDERS**

AND

**IN THE MATTER OF THE CITIZENSHIP & IMMIGRATION ACT, CHAPTER 172 LAWS OF
KENYA, FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015 CHAPTER 286 OF THE
LAWS OF KENYA, THE LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA AND
ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

BETWEEN

REPUBLICAPPLICANT

VERSUS

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

CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE: M O A

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th day of October, 2016, the ex parte applicant herein, **M O A**, seeks the following orders:

- i. An order of Certiorari to call, remove and deliver up to this Honourable Court to be quashed the decision, declaration and or directive of the Respondents to deport the Ex Parte Applicant from Kenya to Nigeria and or to restrain the Ex Parte Applicant from residing, living and or working within the Republic of Kenya pursuant to the Ex Parte Applicant's Foreigner's National Identification Certificate Number [...] and the Work Permit dated 11th**

March 2016.

ii. An order of Mandamus to compel the Respondents whether by themselves and or through their agents or officers to forthwith allow the Ex Parte Applicant peaceful entry, exit, residence, stay, working and or carry out business in Kenya pursuant to Ex Parte Applicant's Foreigner's National Identification Certificate Number [...] and the Work Permit dated 11th March 2016.

iii. An order of Mandamus to compel the Respondents whether by themselves and or through their agents or officers to forthwith return the Ex Parte Applicant's mobile phone and sim card number 0708 [...] with all data/information therein confiscated or seized from the Ex Parte Applicant on or prior to his deportation to Nigeria on 7th October 2016 by the Respondents.

iv. An order of Prohibition to prohibit and or restrain the Respondents whether by themselves or through their agents and or officers from declaring the Ex Parte Applicant a prohibited immigrant, arresting, detaining, deporting and or in any manner interfering with the Ex Parte Applicant's peaceful and lawful right to entry, exit, stay, residence and or working in Kenya pursuant to Ex Parte Applicant's Foreigner's National Identification Certificate Number [...] and the Work Permit dated 11th March 2016 without following due process of the law.

v. An order of Prohibition to prohibit and or restrain the Respondents whether by themselves or through their agents and or officers from giving effect to and or enforcing in any manner or form any fresh declarations, directives, decision declaring the Ex Parte Applicant a prohibited immigrant, arresting, detaining, deporting and or in any manner interfering with the Ex Parte Applicant's peaceful and lawful right to entry, exit, stay, residence and or working in Kenya pursuant to Ex Parte Applicant's Foreigner's National Identification Certificate Number [...] and the Work Permit dated 11th March 2016 without following due process of the law.

vi. Costs

Applicants' Case

2. According to the applicant, he is a Nigerian National and holder of Nigerian Passport No. [...] as well as Foreigner Identification Certificate Number [...]. He averred that he had been resident in Kenya from the year 2014 pursuant to a valid Class G work permit issued with effect from 11th March 2014. In 2016, he applied for renewal of the aforesaid work permit and was issued with a Class G permit which is valid with effect from 31st January 2016 and is still in force until 31st January 2018. Upon issuance of the work permit, he applied for and was issued with a Foreigner Certificate No.[...]. The applicant revealed that he procured the services of an agent **Mr. Hamed Adebola Ambaliyu** alias Saint in applying for and processing both work permits and obtaining the foreigner registration certificate and paid all the statutory fees and or charges required to obtain the work permit to the said agent to facilitate execution of the aforesaid instructions.

3. The applicant disclosed that he was the sole proprietor of a business operating under the name and style of [particulars withheld] registered to operate within the jurisdiction of this Court with effect from 27th June 2013 and that on or about 2013, he celebrated and solemnized his marriage to **M W G** a Kenyan citizen out of which union they were been blessed with one (1) child namely **C J A** who is two (2) months old and resides in Kenya with both parents.

4. According to the applicant, on or about 6th October 2016 at around 3 pm officers purporting to be Immigration Officers and Police Officers stormed into his house without notice, arrested and thereafter detained him at Nyayo House Nairobi upto 7pm. He was later transferred to the holding cells at the Jomo

Kenyatta International Airport where he was detained incommunicado before being put on a plane and deported to Nigeria on 7th October 2016. He averred that he was neither served with an arrest warrant or deportation order or any order from the Cabinet Secretary Ministry of Interior and Coordination declaring him to be a prohibited person nor was he informed of the reasons for his deportation.

5. In addition, he was neither allowed an opportunity nor was he allowed to seek legal representation as his attempts to seek legal representation were thwarted by the arresting officers who seized his mobile phone and proceeded to remove and retain his Sim Card.

6. According to the applicant, he is the sole breadwinner to his family as well as the sole proprietor of the business hereof and his deportation has occasioned great economic hardship, anguish and emotional distress to his family while his business has suffered great financial loss as he has been unable to oversee the day to day operations.

7. It was the applicant's case that the immigration officers' action of deporting him without a formal process and without serving him with a formal deportation order or written reasons for his deportation or allowing him an opportunity to appeal against the deportation and or seek legal representation was unlawful, illegal and a violation of his fundamental rights and freedoms and contrary to immigration laws and the Constitution. He further averred that despite having known that the purported administrative actions directly affect his fundamental rights and freedoms as a person, the Respondents deliberately failed to give him prior and adequate notice of the nature of allegations against him and or reasons for the said action, an opportunity to defend himself or be heard on the allegations, obtain legal representation, review or appeal the decisions and or a formal communication of the decision to deport him and reasons thereof.

8. It was the applicant's case that the decision to deport him was malicious, unfair and contrary to the law and continued to cause him further inconvenience, injustice and prejudice not only on himself and business but also his family as his wife had to leave the said 2 month old child under the care of a nanny while the said unlawful deportation hereof has inhibited provision of his parental obligations and responsibility to the said child.

9. In a further affidavit, the applicant averred that the immigration officers who raided his residence were brought and directed by a young man known as **Kelechi Ike** who is also a Nigerian national, a dry cleaner who used to visit his residence and those of other people especially those of Nigerian' descent for the purposes of dry cleaning services whereof he specializes in Nigerian traditional attire. The applicant was informed by the said **Mr. Kelechi Ike** that the reason for his arrest was that he had been found in possession of Kshs 200,000/- in cash which the immigration officers had confiscated and demanded to know its source. The said officers had then threatened not to return the said money unless he revealed the source. To avert further harassment and in order to safeguard his money from the apparently greedy officers, he informed them that he had obtained the money from his friend who was also a Nigerian national at which point the officers demanded that he takes them to his friend's residence to which he at first declined prompting the officers to threaten him with criminal charges. Following the threats, he was compelled to bring the officers to the applicant's residence which was known to him having been his client in his dry cleaning business.

10. The applicant deposed that on 6th October 2016, when the said officers stormed his house, they immediately started harassing him and demanded to see his passport. He informed them that the same was at the British High Commission but that he had my Residence Card number [...] with me which he duly produced but they confiscated it and demanded that he accompanies them to Nyayo House. At Nyayo House, he was taken immediately to an office situated at the 4th Floor belonging to a man called **Mr. Maluta** and another man whom he believed was **Mr Muluta's** boss both of whom interrogated him. After which the latter directed the former to *"go and do what you are supposed to do"*. During the said interrogation, allegations were raised that the applicant had participated and planned in the kidnapping of a white man for a ransom and further that he had submitted fake and or forged bank statements in obtaining my Work Permit and or using fake and or stolen credit cards which allegations were not true.

11. The applicant averred that when he requested to speak to his lawyer, Ms. Mumbi from the firm of Mumbi, Wekesa & Maraga Advocates, he was ridiculed that Ms. Mumbi was an unknown lawyer and further said that he should not bother demanding for a lawyer since he would certainly be deported. He was then taken to the airport's deportation camp/room where he spent the night and the next morning after which he was deported. The applicant disclosed that during his stay in Kenya, he always held a return ticket to Ghana where he operated several other businesses and could not have voluntarily gone to Nigeria but to Ghana. Therefore the allegations made by the Respondents that he volunteered to go back to Nigeria instead of facing criminal charges here in Kenya are false, malicious, scandalous, vexatious, frivolous and baseless.

12. The applicant disclosed that at the time he made his application in the year 2013, he had one spouse called **M A** but during his stay in Kenya, he met a Kenyan lady by the name **M W Gitonga** and they decided to get married. He asserted that both the Kenyan and Nigerian laws and cultures allow polygamy as long as the other spouse consents and as long as one can financially and materially support both wives and their respective children.

13. The applicant averred that he got to know of **Mr. Adebola** AKA the Saint in the year 2013 or thereabouts through the applicant's brothers who were then studying in Kenya and that he assured the applicant that he was a reputable travel agent and thus he could make all the arrangements for the applicant. The applicant however denied the other allegations made in the replying affidavit.

14. In support of his case the applicant submitted that the immigration officials never complied with the laid down relevant procedures, they were actuated with malice and bad faith, they grossly ignored the rules and principles of natural justice and Constitutional provisions and additionally they acted ultra vires their powers/mandate in deporting the Ex Parte Applicant. In support of his case the applicant relied on section 43 of the **Kenya Citizenship & Immigration Act** which is very clear that a person who is found to have been unlawfully in Kenya cannot be deported without a deportation order or an order from the relevant Cabinet Secretary. The Respondents have not shown that there was such a deportation order from the relevant Cabinet Secretary or that an application for such a deportation order had been made to the Cabinet Secretary. It is thus not clear under whose/what authority that the Respondents Deported the Ex Parte Applicant. It was contended that at section 43(3), the statute states that **"the issuance and execution of such an order shall be carried out in a manner that strictly complies with the Constitution and the relevant laws"** which is couched in mandatory terms.

15. According to the applicant, section 42 of the **Kenya Citizenship and Immigration Act** that the Respondents are referred to, states that in the event that a document is obtained by fraud, then the same is void and of no legal effect. Additionally, the section states that such a document should be surrendered to the Immigration Department for cancellation. It was submitted that that has never happened as the deportation was done without following due process.

16. In this case it was submitted that the Respondents never carried out any investigations before they made the decision to deport the Ex Parte Applicant. The same afternoon they stormed into his house, they arrested him, detained him and deported him early the following morning. He was not charged in a court of law for allegedly forging documents. He was presumed guilty and deported immediately. Later on after the deportation, on 18th October 2016, the Respondents wrote to Standard Chartered Bank asking for confirmations. To the applicant, it is a procedural impropriety to make a decision without first of all carrying out investigations to ascertain and establish the truth. In a fair, rational and reasonable system investigations are never done after the decision has been made. Investigations precede any decision making. The respondents clearly never made any investigations at all and proceeded to presume the Ex Parte Applicant guilty contrary to Article 50(2)(a) of the Constitution that provides that every accused person has the right to be presumed innocent until the contrary is proved.

17. It was submitted that this case demonstrates procedural impropriety, irrationality and unreasonableness on the part of the Respondents as no reasons were ever given by the Respondents for their failure to comply with the relevant procedures as brought out hereinabove. The Respondents' deliberate disregard of carrying out investigations, charging the Ex Parte Applicant or even informing him

of the nature of the crimes that they alleged he faced while actuated by bad faith, improper motive was only intended to harass, embarrass and oppress the Ex-Parte Applicant in violation of the law and the rules of natural justice. To the applicant at no time was he afforded an opportunity to defend the charges that had allegedly been levelled against him but also was denied an opportunity to be heard or even present his facts in Defence thereof. There is no evidence that he was given an opportunity to know of the charges to be levelled against him or to present his case before the decision to deport him was made. In addition, he was blatantly denied even legal representation when the Respondents stated that the Applicant's lawyer was unknown and as such should not have bothered to find a lawyer because they were certain that they were going to deport him. This was an expression of their intention to deny the Ex Parte Applicant the right to be heard let alone a fair hearing.

18. It was submitted that it was unlawful and illegal for the Respondents to have allegedly given the Ex Parte Applicants a choice of leaving the country as opposed to facing criminal charges here in Kenya. It sets a bad precedent for criminals who will commit criminal offences and then get choices to leave the country as opposed to being prosecuted for committing offences against the state. Forgery and fraud charges are weighty and serious offenses that can only be proved in a court of law as the standard and threshold of proof are very high with dire consequences. In this respect the applicant relied on Articles 48, 49 and 50 of the Constitution and sections 42 and 43 of the **Kenya Citizenship & Immigration Act**, where they deported the Applicant without a cabinet secretary's order/directive and or an order of this Court following deportation proceedings. As such their actions are marred by illegalities and unlawfulness and are beyond their scope and mandate to carry out such actions without the proper authority.

19. It was the applicant's case that the actions of the Respondents are in violation of Article 53 of the Constitution and the **Children's Act** that state that the rights, best interests and the welfare of children are paramount and should be given priority and upheld at all times by any Court of Law. The Ex Parte Applicant was the breadwinner for the family and deporting him without lawful and factual cause was an affront to the minor's best interests. The minor's best interests and welfare demand that he be allowed to come back into the country so that he can be allowed to discharge his parental responsibilities and duties to the minor.

20. It was therefore the applicant's case that he had demonstrated a case of abuse of power, acting ultra vires, unlawfully and illegally and contrary to the Statute and the Constitution by the Respondents. For those reasons he prayed that the Notice of Motion Application dated 28th October 2016 be allowed with costs.

Respondents' Case

21. In opposition to the application, the Respondents averred that on the 5th October, 2016, the 1st Respondent received information from member of public, which information they believed to be true on illegal activities of a **Mr. Stanley Mburuti Kinuthia**. On the same day a raid was conducted on the said **Mr. Kinuthia's** premises at Uganda House along Kenyatta Avenue where two foreign nationals were arrested and items suspected to be forged were recovered in his office. Among items recovered were immigration receipts, bank deposit slips, suspected forged bank statement and 40 Nigerian passports.

22. It was averred that upon interrogation and investigation of the said **Mr. Kinuthia's** activities it was established that he was involved in a syndicate, together with one **Mr. Adebola Ambaliyu** aka the **Saint**, a Nigerian national for processing forged immigration papers for foreigners particularly Nigerians to enable them acquire illegal residence in the country. One of the two foreigners arrested during the raid at Uganda House took the Respondent's officers to his place of abode in Nyayo Estate Embakasi where the said officers found the Applicant and upon being requested to provide his passport and immigration status, the Applicant did not have his passport and said that the same was with British High Commission. The Respondents' officers requested the Applicant to accompany them back to the Respondents' Headquarters at Nyayo House to verify his immigration status in the Country and upon verification and perusal of the Applicant file R.1861108 held by the Respondent it was established that the applicant applied for an Investor Class "G" permit on the 9th January, 2014 as a Director of M/S World Access Affordable Web. In support of his application he submitted a bank statement purported to be issued by

Standard Chartered Bank account number [...] with investment capital of Kshs. 46,636,800 and that the said permit was approved and a two year permit no.[...] issued on the 31st January, 2014. On the 11th March 2016, the applicant made an application for renewal of his work which was consequently approved and a further two year permit no.061010 was issued on the 31st January, 2016.

23. It was averred that the Applicant acknowledged that he submitted the said application for an entry permit together with the supporting documents through his authorized agent a **Mr Hamed Ambaliyu Adebola** aka the **Saint**. Facing the possibility of being charged with forgery of documents, the Applicant volunteered to go back to Nigeria and purchased a one-way ticket to Nigeria than to face forgery charges in Kenya. Consequently, the Applicant was escorted to Jomo Kenyatta International Airport by Respondent Officers and boarded a flight to Lagos Nigeria. In the Respondent's view, at all material time the Applicant was at liberty to seek legal representation but he chose to waive this right. It was asserted that the Respondent's officers who brought in the Applicant for questioning did not at any time seize the Applicants mobile phone nor his SIM card as alleged by the Applicant.

24. According to the Respondents, records held by the Respondent indicate that the Applicant has always declared one spouse namely **M A** and the introduction of his Kenyan family is an afterthought meant to buttress his illicit immigration status in the country.

25. It was averred that upon his removal, the Respondent wrote to Standard Chartered Bank on the 17th October, 2016 requesting the bank to verify the Authenticity of the Bank statement provided by the Applicant on his application for work permit dated 9th January, 2016 and the said bank wrote back to the Respondent confirming that the said bank statement was forged and pursuant to sections 42 of the **Citizenship and Immigration Act, 2011** (hereinafter referred to as "the Act") the said work permit was voided.

26. In their submissions the Respondents reiterated the contents of the replying affidavit and contended that the applicant does not meet the basic tenets of judicial review application and should be dismissed with costs.

Determinations

27. Section 43 of the Act provides as follows:

(1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person against whom an order has been made under this section shall-

(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or

(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.

(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.

(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.

(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.

(7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.

28. In the instant Motion, the applicant's case is that he was unlawfully deported from Kenya. That position is however contested by the Respondents whose position is that the applicant voluntarily chose to leave the country instead of facing criminal proceedings. Either way, the applicant is now out of the country whether forcefully or voluntarily.

29. I associate myself with the decision on **Mumbi Ngugi, J** in **Mohammed Ibrahim Naz vs. Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another [2013] eKLR**: that:

“...the right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law. While Article 39(1) and (2) with regard to freedom of movement and the right to leave Kenya are guaranteed to all persons, the right to enter, remain and reside anywhere in Kenya is the preserve of citizens. Thus, in my view, the petitioner, who has of his own volition come back from his country of origin, Pakistan, after being deported from Kenya, and been denied entry into Kenya at the airport, cannot demand that he be allowed entry and, upon denial thereof, allege violation of his right under Article 39 or the provisions of the international conventions cited above. The requirement in removing an alien from a state's territory, as provided under the above conventions and in accordance with the constitutional provisions contained in Article 47, is that such removal should be ‘in accordance with the law’, that due process should be followed.”

30. Under section 43(6) of the Act, ***an order made or deemed to have been made under section 43 of the Act shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly.***

31. In my view this Court cannot direct that the applicant be allowed into the country without the order deporting him, assuming he was in fact deported, being quashed.

32. That then brings me to the issue whether the applicant was deported. In this case there is a conflict of evidence between the applicant and the Respondents as to the circumstances under which the applicant left the country. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it

may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

33. Where there is a conflict of evidence which cannot be reconciled without straying into a merit determination, a judicial review court would not, based on cold print affidavits, purport to resolve the same particularly if the resolution may well require *viva voce* evidence and even cross-examination thereon. Based on the state of the evidentiary conflict, I am unable to reconcile the two versions of the parties herein in these proceedings hence I cannot quash the decision that led to the applicant leaving the country more so as the decision which is sought to be quashed has not been exhibited as required under Order 53 rule 7(1) of the ***Civil Procedure Rules***.

34. Without quashing the decision in question the other prayers cannot be issued as sought.

35. It is however contended that the applicant was never deported from the country. If that position is true, then the applicant must when he intends to come back to the country be treated in the same manner as any other person applying for re-entry. In other words the Respondent are not warranted to treat his application as made by a person who had been deported. In considering his application the Respondents must comply with the provisions of Article 47 of the Constitution and if there was any offence committed by the applicant, he must be subjected to the due process of the law. Unfortunately the applicant has not disclosed that he has made an application seeking re-entry into the country which application has been denied unreasonably.

36. Whereas this Court sympathises with the plight of the applicant's family, judicial review reliefs are not grounded on sympathy but are based on illegality, irrationality and impropriety of procedure.

37. Accordingly, the Notice of Motion dated 28th day of October, 2016 fails and is dismissed but with no order as to costs.

Dated at Nairobi this 4th day of April, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wageche for the applicant

CA Mwangi