



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.587 OF 2013 AS CONSOLIDATED WITH PETITION NO.220 OF 2014**

**BETWEEN**

**HANNAN LUCY ELIZABETH.....PETITIONER**

**AND**

**THE DIRECTOR GENERAL, KENYA CITIZENS AND FOREIGN**

**NATIONALS MANAGEMENT SERVICES.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**INFORMACTION LTD.....INTERESTED PARTY**

**AND**

**PETITION NO.220 OF 2014**

**BETWEEN**

**HANNAN LUCY ELIZABETH.....PETITIONER**

**AND**

**THE CABINET SECRETARY INTERIOR AND COORDINATION**

**OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

**Background**

1. Before me are two Petitions later consolidated. The first is Petition No.587 of 2013, dated 16<sup>th</sup> December 2013 and which was filed in Court on the same day. It is supported by the Affidavit of Hannan Lucy Elizabeth sworn on that same day. It challenges the 1<sup>st</sup> Respondent's decision refusing to grant her renewal of an existing work permit. She therefore seeks the following orders:

- (i) A declaration that the Respondent has violated the rights of the Petitioner under Article 47(1) to an administrative action that is efficient, lawful, reasonable and procedurally fair.*
- (ii) A declaration that the Respondent has violated the rights of the Petitioner under Article 47(2) to be notified in writing of any adverse action against her.*
- (iii) A declaration that the Respondent has violated the rights of the Petitioner to the renewal of her work permit.*
- (iv) A declaration that the Respondent has acted in breach of Section 40 of the Citizenship and Immigration Act.*
- (v) A conservatory order allowing the Petitioner to continue working in Kenya pending hearing and determination of this Petition.*
- (vi) A conservatory order prohibiting the Respondent, his agents or servants or any other person from removing the Petitioner from Kenya, arresting or charging her pending hearing and determination of the Petition.*
- (vii) An order of certiorari to bring to the High Court to be quashed the decision of the Respondent of 16<sup>th</sup> October 2013 rejecting the Petitioner's application for the renewal of her work permit.*
- (viii) An order for mandamus directing the Respondent to issue the Petitioner with written reasons for rejection of the application for renewal of her work permit.*
- (ix) An alternative to order 8 above for an order of mandamus do issue directing the respondent to renew the Petitioner's work permit.*
- (x) Costs of the Petition.*
- (xi) Such other orders as this Court may deem fit.*

2. The second is Petition No.220 of 2014, dated 8<sup>th</sup> May, 2014, and filed in Court on 9<sup>th</sup> May, 2014. It is supported by the Affidavit of Hannan Lucy Elizabeth sworn on 8<sup>th</sup> May 2014. The Petition in it challenges the constitutionality of the 1<sup>st</sup> Respondent's decision dated 30<sup>th</sup> October 2013 declaring the presence of the Petitioner in Kenya to be contrary to national Interest and also declaring her a member of the Prohibited Class as well as a prohibited immigrant under **Section 33 of the Kenya Citizenship and Immigration Act 2011**. That Petition therefore seeks the following orders:

- (i) A declaration that the 1<sup>st</sup> Respondent's decision dated 30<sup>th</sup> October 2013 and his actions have violated the fundamental rights of the Petitioner under Article 47(1) of the Constitution to an administrative action that is efficient, lawful, reasonable and procedurally fair.*
- (ii) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions have violated the fundamental rights of the Petitioners under Article 47(2) of the Constitution to be notified in writing of the reasons for any adverse action taken against her.*
- (iii) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions have violated the Petitioner's fundamental rights to recognition and protection of her*

*family life under Article 45(1) of the Constitution.*

*(iv) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions are in breach of, and threatened further violation of the fundamental freedom of expression under Article 33 of the Constitution.*

*(v) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions are in breach and threatened further violation of the fundamental freedom of the media under Article 34 of the Constitution.*

*(vi) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions are in breach and threatened further violation of the fundamental freedom of association protected under Article 36 of the Constitution.*

*(vii) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions are in contravention of Articles 10 and 259(1) of the Constitution.*

*(viii) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions have violated the rights and fundamental freedoms of the Petitioner under Article 24 of the Constitution.*

*(ix) A declaration that the decision of the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 is ultra vires the Kenya Citizenship and Immigration Act.*

*(x) A declaration that the decision by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013 and his actions contravene the Kenya Citizenship and Immigration Act and the Regulations made thereunder.*

*(xi) A declaration that Section 33 of the Kenya Citizenship and Immigration Act is inconsistent with Article 47(1) and (2) of the Constitution and to that extent it is void under Article 2(4) of the Constitution.*

*(xii) A declaration that Section 33 of the Kenya Citizenship and Immigration Act is inconsistent with Article 24 of the Constitution and to that extent it is void under Article 2(4) of the Constitution.*

*(xii) A declaration that the 1<sup>st</sup> Respondent has no lawful power to determine that a person's presence in Kenya is contrary to national interests, and that such power lies only with a court of law and none other.*

*(xiv) An order of certiorari to quash the decision of and by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> October 2013.*

*(xv) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be condemned to pay the costs of the Petition.*

3. On 12<sup>th</sup> May 2014, the Petitioner filed an application dated 9<sup>th</sup> May 2014 in Petition No.587 of 2013 seeking that the Petition be consolidated with Petition No.220 of 2014. Subsequently on 15<sup>th</sup> July 2014, by consent of the parties, the two Petitions were consolidated with Petition No.587 of 2013 being the lead file.

4. Further, on 8<sup>th</sup> December, 2014, by consent of the parties, an application dated 5<sup>th</sup> December 2014 filed by the proposed Interested Party, M/s InformAction Ltd, seeking to be enjoined as an interested party was allowed. In addition, the Petitioner was granted conservatory orders in the form of a temporary work permit, pending determination of the consolidated Petition.

## The Petitioner's case

5. The Petitioner's case is as contained in the Petition and supporting affidavit dated 16<sup>th</sup> December 2013, together with submissions dated 19<sup>th</sup> March, 2015.

6. In that regard, the Petitioner states that she is a Citizen of the United Kingdom and has been living and working in Kenya as a journalist, human rights author and film maker since 1988. She states that with her in Kenya are five dependants being; four children aged between 24 and 12 years and an 87 year old mother, who currently is unwell. That also she owns property in Kenya, is a director of Voxcom Limited and a Co-director of nformAction Limited.

7. The Petitioner submits that as a director of Voxcom Limited, she applied for and acquired a work permit which has been renewed from time to time since 1988. She adds that her last work permit expired in June 2013 and when she sought its renewal, she was verbally advised by an unnamed Immigration Officer that due to the existence of a huge backlog of such applications occasioned by change of Government in 2002, the Immigration Department was no longer handling renewal of permits. On that basis, she was advised to acquire a visitor's visa, which she did. She also made an application for citizenship and had it been successful, the renewal of work permit would have been unnecessary. It is also her case that on 19<sup>th</sup> September, 2013, she applied for renewal of her work permit and upon making inquiries in November 2013 she was verbally advised by an unnamed officer at the Immigration Department Offices that her application for a work permit had been rejected on 16<sup>th</sup> October 2013.

8. The Petitioner submits in the above context that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated her rights under **Article 47(1) and (2) of the Constitution** by failing to formally communicate the reasons for rejecting her application for renewal of her work permit. She contends further that even after requesting for a formal notification of the reasons for rejection of her application under **Article 47 of the Constitution**, the 1<sup>st</sup> Respondent has failed to provide the said reasons. Instead that the 1<sup>st</sup> Respondent, in a replying affidavit dated 11<sup>th</sup> March 2014 and sworn by Alfred Omangi, alleged that “according to *adverse confidential security reports the Petitioner has been engaged in subversive activities against the Kenyan Government and therefore her presence in Kenya is contrary to national interest.*”

9. It is the Petitioner's submission in the above regard that the decision of the 1<sup>st</sup> Respondent dated 16<sup>th</sup> October 2013, declining to grant the work permit is unlawful, unreasonable, and tainted with procedural impropriety as it is based on the fact that the Petitioner had allegedly been declared a prohibited immigrant, which decision was in any event made on 30<sup>th</sup> October 2013, two weeks after the decision of the 1<sup>st</sup> Respondent dated 16<sup>th</sup> October 2013.

10. The Petitioner is also challenging the 1<sup>st</sup> Respondent's decision dated 30<sup>th</sup> October 2013 declaring her a prohibited immigrant and the act of concealing such information and states that the said decision is unlawful, unreasonable, unprocedural and in breach of the rules of natural justice and as such is void *ab initio*. In that regard, the Petitioner submits that her right to a fair hearing which includes the right to be informed of any charge against her and to be allowed adequate time and facilities to respond to the charge before any action is taken was breached. She relies on the decisions in ***Bashir Mohamed Jama Abdi v The Minister of Immigration and Registration of Persons and 2 Others***; ***Charkaoui v. Minister of Citizenship and Immigration (2007) SCR 350***; ***R v Civil Service Appeal Board (1991) 4 ALL ER***; ***Onyango Oloo v Attorney General (1986-1989) EA 456*** and ***R v Minister of State for Immigration and Registration of Persons Ex-parte C.O (2013) eKLR*** to emphasis on the importance of adherence to the principles of natural justice.

11. Petitioner further submits that she had a legitimate expectation that she would continue enjoying her resident status in Kenya because she has been residing and working in Kenya as a human rights journalist since 1988 and that the sudden criminalization of her presence in Kenya without any reason and without being accorded an opportunity to be heard, violated that legitimate expectation to continue working and earning income in Kenya. In that context, she relies on the case of ***Council of Civil Service Union v***

***Minister for the Civil Service (1984) 3 All ER.***

12. It is the Petitioners' other submission that the 1<sup>st</sup> Respondent acted in breach of **Section 40** of the **Kenya Citizenship and Immigration Act** as the use of the word 'shall' in that section makes it mandatory for the 1<sup>st</sup> Respondent to issue a work permit upon an applicant in his application satisfying the conditions of a particular class of permit which in her case she did and therefore the 1<sup>st</sup> Respondent's actions were unlawful, unreasonable, irrational and procedurally unfair.

13. The Petitioner contends in addition that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are public officers and are bound by **Articles 10(2), 73(2)(d) and 232(1)e** of the **Constitution** and that the 1<sup>st</sup> Respondent is specifically required under **Section 4(2)** of the **Kenyan Citizenship and Immigration Act** to perform his duties in accordance with the principles prescribed in the Constitution but in the instant case, the Respondents' actions are a breach of **Articles 32, 33, 34, 36, and 39** of the **Constitution**.

14. The Petitioner alleges furthermore that as an investor in Voxcom Ltd and InformAction Ltd, she is being penalized for her works and publication on human rights and yet she has not engaged in any prohibited activities as listed under **Section 33** of the **Kenyan Citizenship and Immigration Act**. She also submits that the burden is on the 2<sup>nd</sup> Respondent to prove that she has indeed been engaged in such prohibited activities which he has failed to do yet pursuant to the declaration that she is a prohibited immigrant by the 2<sup>nd</sup> Respondent, her freedom of movement has been curtailed and her right to recognition and protection of her family life under **Article 45(1)** had also been violated thus subjecting her family to a state of being *personae non grata*.

15. The Petitioner has also submitted that the decision dated 30<sup>th</sup> October 2013 is *ultra vires* **Section 33(1)** of the **Kenyan Citizenship and Immigration Act** and referred to the case of **R V Minister of State for Immigration and Registration of Persons ex-parte C.O (2013)eKLR** which defined a prohibited Immigrant. Claiming that she is not such an immigrant she has added that the 2<sup>nd</sup> Respondent ought not to have gone beyond what is provided by the statute in determining that she was a prohibited immigrant.

16. The Petitioner has further urged the point that **Section 33** of the **Kenyan Citizenship and Immigration Act** is inconsistent with **Articles 24 and 47** of the **Constitution** in that **Section 33** confers on the 2<sup>nd</sup> Respondent unfettered discretion to declare a person a prohibited immigrant whereas **Article 47(1) and (2)** entitles everyone to fair administrative action, and the right to demand and be supplied with reasons why any adverse administrative action has been taken. She therefore urges the Court to declare the said section void and in addition, she referred to **Article 24(1)** of the **Constitution** to argue that any limitation of rights and fundamental freedoms must be reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. She relies upon the decision in **R v Minister of State for Immigration and Registration of Persons Ex-parte Peter Sessy (2013)eKLR** as affirmed in **R v Minister of State for Immigration and Registration of Persons Ex-parte C.O (2013)eKLR** for that proposition.

17. The Petitioner also refers to **Articles 6 and 7** of the **Universal Declaration of Human Rights**; **Articles 2,9, 13, 16, 23, and 26** of the **International Covenant on Civil and Political Rights** in support of her case.

18. In response to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submission that due process and the principle of public participation do not apply to a foreign national, the Petitioner submits that under **Article 2(1)** of the **Constitution**, the Constitution applies to every person in Kenya including foreigners lawfully resident in Kenya.

19. The Petitioner for the above reasons prays that the Court grants the prayers as contained in the consolidated Petition with costs.

**The Respondents' case**

20. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in opposing the Petition filed a Replying Affidavit sworn by Alfred Abuya Omani on 11<sup>th</sup> March 2014, grounds of opposition dated 2<sup>nd</sup> July 2014 and 8<sup>th</sup> May 2014 together with submissions dated 23<sup>rd</sup> April 2015. They begin by referring to the Petitioner as an alien and not entitled to any remedies at all.

21. The Respondents have also set out the following issues as arising for consideration;

- (i) The legality of the application for a work permit by the Petitioner.
- (ii) Whether there is a legitimate expectation by the Petitioner to be issued with a new work permit.
- (iii) Whether the action by the 1<sup>st</sup> Respondent to deny the Petitioner renewal of her work permit is constitutional.

22. The Respondents in the above context submit that the Petitioner had violated the requirements of the **Citizenship and Immigration Act** and regulations thereby by failing to apply for the renewal of her work permit within the stipulated time and that she ought to have applied for renewal of the work permit on or before the expiry day. They allege in that regard that the work permit aforesaid expired on 28<sup>th</sup> June 2013 and the Petitioner only applied for its renewal on 19<sup>th</sup> September 2013? almost three months after it had expired thus the 1<sup>st</sup> Respondent had no legal obligation to consider such an application.

23. They further refer to **Section 41(1)c** of the **Citizen and Immigration Act** to make the point that the Petitioner's permit had also ceased to be valid and could not be renewed because the Petitioner, in her application for a work permit, applied for it work permit to work as a Director of Voxcom Limited and never disclosed that she is also a Co-director at Inform Action Limited (the Interested Party herein) a company incorporated on 20<sup>th</sup> May 2010.

24. The Respondents also contend that the right to enter and remain in and reside in or work anywhere in Kenya is vested in a Kenyan citizen and permanent citizens which the Petitioner is not. They thus referred to the case of **Ibrahim Naz v Cabinet Secretary Responsible for matters relating to Citizenship and Management of Foreign Nationals & Another Petition No.333 of 2013 eKLR(2013)** where the Court held that the right to enter and remain in and reside anywhere in Kenya is inherently vested in Kenyan Citizens to emphasize that the act of remaining in and engaging in economic activities in Kenya is a privilege regulated by law and "*where it appears that such process was followed and the petitioner removed in accordance with the law, it would be unwarranted to interfere with the sovereign power of the state*". Also cited was the case of **Kenya Airways Limited v Satwant Sign Flora eKLR(2013)** where the Court relied upon **Scott v Brown, Doering, Mcnab & Co, (3), [1892] 2 OB 724** to hold that failure of the Respondent to obtain a work permit had frustrated an employment contract between the parties.

25. In the above context, the Respondents submit further that the power to grant or refuse entry into any State is a preserve of the Executive branch of Government and consequently the Court lacks the jurisdiction to rectify the illegality of the Petitioner's current status as her work permit expired before she applied for its renewal. That it is also within the 1<sup>st</sup> Respondent's constitutional executive powers to make a conclusive determination on whether an alien can remain, reside in or work in Kenya in accordance with the law subject only to the powers of appeal and review by this Court.

26. It is the Respondents' other submission that the right to work and or engage in any economic activity is restricted and can only be exercised by non-citizens in compliance with the statutes regulating the same, and they thus urge the Court to be persuaded and guided by the holding in case of **Gebremeskel Kahsay Bhata v Attorney General and Others 2007 eKLR** wherein the Court held that it is paramount for an applicant to exhibit to Court a written approval by the immigration officer authorizing the applicant to engage in a different business from the one she was authorized to engage in.

27. The Respondents in addition submit that, as per **Section 34** of the **Kenyan Citizenship and**

**Immigration Act**, the Petitioner's immigration status ceased to exist upon the expiry of the validity of her permit on 27<sup>th</sup> June 2013, and that her continued presence in Kenya is contrary to the provisions of **Section 53(1)** of the said **Act**. They also submit that the Petitioner's application was not made on the right statutory forms as there is no class of permit known as a class H permit. That the Petitioner in any event ought to have submitted a fresh application under Legal Notice No.64 of 2015 which was operationalized on 14<sup>th</sup> June 2012 and they urge the Court to find that the 1<sup>st</sup> Respondent is under no legal obligation to consider an application that is not in the prescribed form and for a non-existent class of permit.

28. The Respondents also argue that the Petitioner's continued presence in Kenya without a work permit is unlawful and in violation of the privilege granted to her by the Kenyan State and therefore her status ante is irredeemable and cannot be sanitized through a Court process.

29. It is the Respondents' other contention that a decision to deny residence or presence in Kenya does not trigger due process because a foreign national has no independent or inherent right to remain in Kenya. They argue in that regard that due process applies where a right is inherent and a foreigner they reiterate, has no such inherent right.

30. It is the Respondents' final submission that the doctrine of legitimate expectation cannot apply and be used in this case because the Petitioner refused to comply with the provisions of immigration law on application and renewal of permits; that she committed an immigration offence by residing in the Country without a permit; she neglected to apply for the requisite permits in the prescribed form; she applied for a category of a permit that is unknown in law and that she continuously applied for a work permit without disclosure of the material fact that she works for the interested party herein. Further, the Respondents' submit that the fact that a work permit had been previously issued doesn't connote that when it is withdrawn or renewal is declined, the Respondents have acted contrary to her legitimate expectation. They argue therefore that renewal of a work permit is a fresh and independent determination and not dependent on earlier or preceding permits that have been issued.

31. For the above reasons they urge the Court to dismiss the Petition.

### **The Interested Party's Case**

32. The Interested Party's case is as contained in its submissions dated 18<sup>th</sup> March 2015 and it is its position that the Petitioner is its Director and as such plays a key role in the affairs of the company and that any adverse act by the Respondents against her would unfairly affect and place in jeopardy the livelihoods and jobs of more than 40 people employed by the Interested Party as well as Voxcom Ltd and also cost the Kenyan economy approximately \$ 1.5 million a year.

33. It further submits that the refusal to renew the Petitioner's work permit on the basis of her work constitutes a violation of her right to freedom of expression and an impermissible restriction on the freedom of the media as guaranteed by national and international law.

34. It refutes the claim that the Petitioner's actions/activities to promote human rights in Kenya are subversive and goes further to define subversive activities under international law in making that point. In addition, the Interested Party has discussed and analysed the definition of subversive activities as interpreted in the United States, United Kingdom and South Africa to argue that she has not acted in subversion of the Kenyan State at all. It therefore urges the Court to find that based on the definition given, the activities of the Petitioner do not fall within the definition of subversive activities as she is merely reporting on human rights' violations and advancing awareness of social justice issues within the Kenyan community. It was also the Interested Party's submission that the Petitioner is not involved in espionage terrorism or seditious action and that she was merely exercising her right to freedom by producing films on social justice issues including public concerns in the recent electoral process. It further stated that none of its staff members has ever been taken through a court process for subversive acts nor has the Petitioner ever been arrested, charged or faced any criminal process accusing her of subversive acts.

35. Furthermore it is its submission that the denial work renewal permit is a violation of the right to freedom of expression and an impermissible restriction on the freedom of the media as guaranteed under the constitution and in that regard referred to the African Commission on Human and Peoples Rights decision in ***Kenneth Good v Botswana Comm. No 313/05*** where the Commission held that “*if the government for one reason or another considers the comments to be offensive, they are the type that can and should be tolerated In an open and democratic society like Botswana Dissenting views must be allowed to flourish, even if they emanate from non-nationals.*’ Also cited was the case of ***Amnesty International v Zambia Comm. No.212/98 (May 5, 1999)*** in that regard’.

36. The Interested Party also contends that the Petitioner’s work and that of InformAction are in the national interest while the retaliatory proceedings by the 2<sup>nd</sup> Respondents were against the national interest. They thus refer to the case of ***Kulraj Singh Bhangra v Director General, Kenyan citizens and Foreign Nationals Management Service 2014 eKLR*** where it was held that it is necessary for security agencies to understand and appreciate the Bill of Rights and the Court deprecated the apparent impunity of yester years that was still thriving in the Executive.

37. It has further urged the point that the Petitioner, through her work, has contributed to the realization of the national interest of Kenya as provided for in the **Constitution** and instead that it is the Respondents’ who have failed to uphold the **Constitution**.

38. The Interested Party lastly made reference to the case of ***Jeremiah Kiereini v Capital Markets Authority (2013) eKLR; R v Ethics and Anti-Corruption Commission and 2 others Ex-parte Gatebe JR Misc Civil Application No.192 of 2014*** to emphasize on the importance of the principle of natural justice which was lacking in the actions of the Respondents aforesaid.

39. The Interested Party concludes by stating that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are unlawful, in breach of the rules of natural justice and contravenes the **Constitution** and urges the Court to grant the prayers sought in the Petition.

### **Determination**

40. Having read the Petition together with the supporting affidavits as well as, the parties’ submissions the following issues crystalise for determination:

- a) What is the validity of the 1<sup>st</sup> Respondent’s decision dated 16<sup>th</sup> October 2013 declining to grant the Petitioner renewal of her work permit?
- b) What is the validity of the 2<sup>nd</sup> Respondent’s decision dated 30<sup>th</sup> October 2013 declaring the presence of the Petitioner in Kenya to be contrary to national Interest and also declaring her a member of the prohibited class and a prohibited immigrant under **Section 33** of the **Kenya Citizenship and Immigration Act 2011**?
- c) By the actions aforesaid, did the Respondents violate any fundamental rights and freedoms that the Petitioner is entitled to?
- d) Is the Petitioner entitled to any of the remedies sought?

### **Validity of the 1<sup>st</sup> Respondent’s Decision dated 16<sup>th</sup> October 2013**

41. It is the Petitioner’s submission on this issue that as a director of Voxcom Limited, she applied for, acquired and renewed her work permit from time to time since 2007. She further states that her work permit then expired in June 2013 and she was verbally informed by an officer at the Immigration Department that since the office was dealing with a huge backlog of applications since the change of Government in 2002 it would be best if she acquired a visitor’s visa as her application for renewal of her work permit was being processed. She did so.

42. Subsequently, on 19<sup>th</sup> September 2013, the Petitioner applied for renewal of her work permit and upon making inquiries in November 2013, she was verbally informed that her application had been rejected on 16<sup>th</sup> October 2013. She refers to the Respondents' Replying Affidavit dated 11<sup>th</sup> March 2014 in that regard and states that the basis of that rejection was a declaration made on 30<sup>th</sup> October 2013 by the Cabinet Secretary, Ministry of Interior and Coordination of National Government that she was a prohibited immigrant.

43. The Interested Party supports the Petitioner's submission and argues that the denial of renewal of the Petitioner's work permit on the basis of her work constitutes a violation of her right to freedom of expression and an impermissible restriction on the freedom of the media as guaranteed by national and international law.

44. In response, the Respondents state that indeed the 1<sup>st</sup> Respondent declined to grant a renewal of the work permit for the reason that the Petitioner had failed to apply for work permit before the one she was holding had expired; that she also never disclosed that she was a co-director at InformAction Limited and that the Petitioner did not use the prescribed forms and in any event, she had applied for a non-existent class of permit. The submit further that the Petitioner ought to have submitted a fresh application under legal Notice No.64 of 2015 (Kenyan Citizen and Immigration Regulations) but that she had failed to do so. The Respondents therefore urge this Court to find that the Petitioner's act of working and continued presence in Kenya without a work permit is unlawful and a violation of the privilege granted to her to reside and work in Kenya within the law.

45. In that context, **Section 40 of the Kenyan Citizenship and Immigration Act (the Immigration Act)** deals with issuance of work permits in the following terms;

**“(1) In this section—**

**“Committee” means the Permit Determination Committee established under section 7 of the Kenya Citizens and Foreign Nationals Management Service Act, 2011.**

**(2) An application for a permit shall be made to the Director in the prescribed manner**

**(3) The Director shall issue a permit of the required class to a person who is not a prohibited immigrant or inadmissible person, who has—**

**a) made an application in the prescribed manner; and**

**b) satisfied the Committee that he has met the requirements relating to the particular class of permit.**

**(4) The Director shall issue or revoke a permit on recommendations of the Committee.**

**(5) The Committee shall have power to request for additional information and where necessary, summon the applicants, require production of supporting documents.**

**(6) The Director shall, within fourteen days of receipt of recommendations of the Committee, cause to be issued a permit to an applicant who so applies and qualifies.**

**(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.**

**(8) Where the application has been referred back to the Committee, the Committee shall, within fourteen days, make its findings to the Director and such findings shall be limited to the reasons given for the referral.**

**(9) Subject to the provisions of this Act, the Committee shall regulate its own procedures.**

**(10) Any person who is aggrieved by a decision made under this section may appeal to the High Court.”** (Emphasis added)

46. Reading **Section 40 (3)** of the **Immigration Act** therefore, I decipher it to mean that the Director of Immigration is required to issue the required permit to a person who is not a prohibited immigrant or is an inadmissible person and one who has made an application in the prescribed form or manner and in addition, satisfies the Permit Determination Committee that he has met the requirement relating to the particular class of permit. Further, the Director of Immigration’s decision is based on the recommended actions of the Permit Determination Committee unless there is other sufficient, and compelling reason not to do so or when it is not in the best interest of the Country that the Director, under **Section 40(7)** of the **Immigration Act**, may, upon giving reasons in writing to both the applicant and the Committee, decline to grant the permit.

47. The question I must now ask myself is whether the 1<sup>st</sup> Respondent’s decision dated 16<sup>th</sup> October 2013 complied with the provisions of **Section 40** of the **Immigration Act**. While the Respondents’ submission is that the Petitioner did not tender her application in the prescribed form and applied for a non-existent class of permit and also applied for the permit after the one she was holding had expired, those arguments are refuted by the Petitioner. It is worth noting in that regard that the Petitioner, in her supporting affidavit to the Petition, annexed a copy of the prescribed Form 25 in which she made her application for renewal of her permit. That form is headed “**Application for Issuance or Renewal of Permit**”.

48. In that context, **Regulation 20** of the **Kenya Citizenship and Immigration Regulation 2012** provides that

**“(1) An application for a residence or work permit shall be made to the Director in Form 25 set out in the First Schedule.**

**(2) The Director shall, after considering an application made under paragraph 1;**

**(1), issue a residence or work permit, in any of the classes specified in the Seventh Schedule, in Form 26 set out in the First Schedule, upon the payment of the applicable fees prescribed in the Ninth Schedule.**

49. Apart from the contested allegations made above, none of the Respondents adduced evidence before this Court to show that either the Form 25 produced by the Petition was not the form submitted to the Director or that the original in his custody is different form the one produced by the Petitioner. I will therefore accept the Petitioner’s evidence in that regard and will now proceed to interrogate the question whether the decision not to renew the Petitioner’s work permit was arrived at procedurally and in accordance with the law.

50. In that regard, **Section 40** of the **Immigration Act** is clear, that it is the Permit Determination Committee established under **Section 7** of the **Kenya Citizens and Foreign Nationals Management Services**, that is mandated to deliberate on, make resolutions or recommendations on whether or not to grant a work permit to any applicant. Further, for the decision of that Committee to be valid, it has to be approved by the Board. The law also provides for a fourteen days’ timeline within which such actions must be undertaken.

51. In addition, under **Section 40(7)** of the **Immigration Act**, if the Director is of the opinion that the permit should not be issued, the law places a duty upon him to give reasons in **writing** to both the applicant and the Committee before referring the matter back to the Committee or declining to grant the

permit without referral to the Committee.

52. In the instant case, the Petitioner made her application for renewal of her work permit on the 19<sup>th</sup> September 2013 and I have stated that she used the correct form. In November 2013 as she made a follow up of the said application she was orally notified that her application for the renewal of the said permit had been rejected. The Petitioner alleges further that she has not received any formal notification or reasons for such a denial despite requesting for the same. That position has not been contested by the Respondents at all and at the very least, I expected them to say something about that matter. They did not.

53. The Petitioner also states that she came to know of the reason for the denial in the replying affidavit of Alfred Obuya Omangi dated 11<sup>th</sup> March 2014 which stated in part;

***“5. That the Petitioner /Applicant applied for renewal of work permit but the same was not renewed due to adverse security reports.***

***6. That indeed the confidential security reports indicate that the Petitioner/ Applicant has been engaged in subversive activities against the Kenyan Government and therefore her presence in Kenya is contrary to national interest.***

***7. That pursuant to the security reports, the Cabinet Secretary proceeded to declare the Petitioner/ Applicant a member of the prohibited class and a prohibited immigrant. Attached is the copy of the declaration by the Cabinet Secretary marked AAO1.” (Emphasis added)***

54. From an analysis of the above facts, and the evidence on record, it emerges that;

i) While it has not been denied that the Petitioner made an application for renewal of her work permit on 19<sup>th</sup> September 2013 on the advise of an Immigration Department official, to-date no written communication of the rejection of the said application has been made to her. The contents of the affidavit of Alfred Obuya Omangi filed in this Court cannot be such written reasons.

ii) There is no evidence before me that the Permit Determination Committee ever sat to recommend renewal or non-renewal of the Petitioner’s work permit.

iii) The reasons later given for the rejection of the application for renewal of the work permit including adverse security reports on the Petitioner’s alleged subversive activities against the national interest of Kenya were only raised in this Court and not within the time frame envisage by **Section 40(8)** of the **Act**. In addition to the above, it is obvious to me that even if the Petitioner had made the application three months late, there is no denial that she was issued with a visitor’s visa by the 1<sup>st</sup> Respondent because of the backlog of applications which assertion has not been contested at all.

In concluding this issue, It is my finding that for the above reasons, the 1<sup>st</sup> Respondent’s decision arrived at on 16<sup>th</sup> October 2013 to deny renewal of the Petitioner’s work permit was unprocedural and therefore invalid. It is also a clear violation of **Article 47(2)** of the **Constitution** and **Section 4** of the **Fair Administration Actions Act 2015**.

#### **The validity of the 2<sup>nd</sup> Respondent’s decision dated 30<sup>th</sup> October 2013.**

55. On this issue, the Petitioner submits that the 2<sup>nd</sup> Respondent’s decision declaring her a prohibited immigrant is unconstitutional and invalid for reasons that it violates and is ultra vires **Section 33(1)** of the **Kenyan Citizenship and Immigration Act 2011**. In addition, she states that she was not informed of the decision neither was she given an opportunity to be heard before the decision was arrived at contrary to **Article 47(2)** of the **Constitution**. She further states that as a result of this declaration, her freedom of movement has been curtailed and her rights to recognition and protection of her family and family life under **Article 45 (1)** had been violated.

56. Further, that whereas **Section 33** of the **Kenyan Citizenship and Immigration Act** confers on the 2<sup>nd</sup> Respondent unfettered discretion to declare a person a prohibited immigrant, **Article 47 (1) and (2) of the Constitution** entitles everyone to fair administrative action and the right to demand and be supplied with reasons why any adverse administrative action has been taken.

57. In response, it was the Respondent's submission that the rights to remain, reside in or work in this Country is a right and preserve of Kenyan citizens and permanent residents only. They state therefore that the decision to allow a non-citizen to reside or work in its territory is also a matter for the State and a State's decision in that regard should be final.

58. In addition, the Respondents allege that the Petitioner's status is irredeemable and cannot be sanitized through a Court process as a result of her continued work in Kenya without a work permit.

59. In that context, the decision dated 30<sup>th</sup> October, 2013 read in part as follows;

**“DECLARATION UNDER SECTION 33 OF THE KENYA CITIZEN AND IMMIGRATION ACT 2011, LAWS OF KENYA**

*I JOSEPH J. OLE LENKU CABINET SECRETARY , Ministry Of Interior And Coordination Of National Government in exercise of the powers vested in me by Section 33(1) of the Kenya Citizen and Immigration Act 2011 do hereby declare that the entry or presence of:*

**LUCY ELIZABETH HANNAN**

*Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest in consequence of this declaration the said;*

**LUCY ELIZABETH HANNAN**

*Is for all purposes of the Immigration Act, other than for purpose of Sub-section (1) of Section 33 a member of the Prohibited Class and a Prohibited Immigrant.”*

60. In addressing the above issue, I note that **Section 33** of the **Kenya Citizenship and Immigration Act 2011** provides for the grounds upon which one can be declared a prohibited immigrant. It states that;

***“33. (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) and remain out of Kenya;*

*(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). (Emphasis added)*

61. I have reproduced the entire Section because the 2<sup>nd</sup> Respondent, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, in his letter dated 30<sup>th</sup> October, 2013 declared the Petitioner a prohibited immigrant under **Section 33(1)** of the **Act** on grounds that her presence is against the national interest. However, in **Section 33** aforesaid, ‘national interest’ has not been listed as one of the grounds for declaring one a prohibited immigrant and that is why in the case of **Republic v Cabinet Secretary for Ministry of Interior and Co-Ordination of National Government & another Ex-Parte Director of Immigration Service [2015] eKLR** the Court, while dealing with a similar situation stated that at paragraph 23;

*“According to him [the Respondent], the Applicant’s presence in Kenya was contrary to national interest. However, one’s presence in Kenya contrary to national interest is not one of the grounds specified in section 33(1) under which the Cabinet Secretary purported to make the said declaration. 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. To do so would give more powers to the executive than the ones contemplated by the Legislature.....”*

62. The above finding was repeated in **Republic v Cabinet Secretary in Charge of Internal Security & 2 Others Ex-parte Nadeem Iqbal Mohammad [2015] eKLR** where the Court stated that;

*“The provision relevant to the case before me is Sub-section (1). G. V. Odunga, J had the occasion to address the powers of the 1<sup>st</sup> Respondent under that Sub-section in Ex-parte C.O. (supra). At paragraph 22 of his judgment he opined 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.”*

The learned Judge then concluded as follows:

*“I agree with the learned Judge that a person can only be declared a prohibited immigrant on the grounds found in Section 31(1). Those grounds cannot be enlarged at the whim of the Cabinet Secretary in charge of immigration affairs. 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 1<sup>st</sup> 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.”*

63. I agree with the above finding and I reiterate that national interest however attractive the term may be to the Respondents, is not one of the grounds specified under **Section 33(1)** of the **Immigration Act** and in which the Cabinet Secretary can purport to declare a person a prohibited immigrant and I so hold.

64. The other issue to address is the Petitioner's submission that she was neither informed of the above decision nor was she given an opportunity to be heard before the decision was arrived at contrary to **Article 47(2) of the Constitution**. In that regard, I note that the Petitioner came to learn of the 2<sup>nd</sup> Respondent's decision in an affidavit filed in Court by Alfred Obuya Omangi dated 11<sup>th</sup> March 2014. Indeed the 2<sup>nd</sup> Respondent in exercise of his powers has a duty to inform those who are affected by any adverse decision of the reasons thereof. That is why in **Republic v Cabinet Secretary for Ministry of Interior and Co-Ordination of National Government & another Ex-Parte Director of Immigration Service [supra]** where the Court observed that;

*The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, an executive authority 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 executive is not one of the reasons upon which the executive is legally entitled to act, the Court is entitled to intervene since the action by the executive would then be based on an irrelevant matter.*

*In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.*

Further, on the submission that the decision to declare a person a prohibited immigrant is final and that this Court cannot do anything about it, the court stated thus;

*To hold that the executive 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 like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, 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. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century."*

65. I adopt the above reasoning as applicable to the present case and similarly, in the case of **S N v Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management**

**Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General [2016] eKLR** the Court, while holding that the Respondents were bound to furnish the applicant with the reasons for making a decision either way, their failure to do so could only be interpreted to mean that they had no reasons for not registering the applicant as a citizen.

66. Further, in the case of *Bashir Mohammed Jama Abdi the minister of Immigration and Registration of Persons and 2 Others-[2014] eKLR* the Court observed that even in cases of national security the least that is required of the Respondents is a concise statement of the factors that have been considered in reaching that decision.

67. It follows from that above, that the weak and unsubstantiated allegation that a decision of a Minister in-charge of immigration matters is final and that this Court has no jurisdiction to overturn it is both fallacious and not borne out by case law or indeed any law. Furthermore, it is obvious to me that whereas security considerations under **Section 33(1)(h)** of the **Kenya Citizenship and Immigration Act** are relevant to the decision to declare a non-citizen a prohibited immigrant, **Article 47(1) and (2)** of the **Constitution** as well as **Section 4** of the **Fair Administration Actions Act, 2015** nonetheless entitle such a person to “written reasons for the action” and contrary to the Respondents’ assertion, **Article 47** rights are envisaged by “every person” and not just citizens of Kenya. This is quite different for example where the right to access information under **Article 35** is concerned because in that case the right is restricted to “every citizen” only.

68. In finalizing on this issue, I can only conclude that in the present case, the 2<sup>nd</sup> Respondent’s decision dated 30<sup>th</sup> October 2013 declaring the Petitioner, a prohibited immigrant is illegal, irrational and procedurally improper a violation of **Article 47(2)** of the **Constitution**, **Section 4** of the **Fair Administration Act, 2015** as well as **Section 33** of the **Kenya Citizenship and Immigration Act 2011**.

**Were the Petitioner’s Fundamental Rights and Freedoms violated by the Respondents actions aforesaid?**

69. I have elsewhere above addressed alleged violations of the right to fair administrative action under **Article 47(1) and (2)** of the **Constitution** and **Section 4** of the **Fair Administration Act, 2015**. In addition, the Petitioner pleaded alleged violations of **Article 10** (national values and principles) **Article 33** (freedom of expression) **Article 34** (freedom of the media) **Article 36**(freedom of association) **Article 45(1)** (family) and **Article 259(1)** (construing the Constitution) as well as **Article 24** (limitation of rights). The Interested Party also submitted on the alleged violation of freedom of expression and the media in support of the Petitioners position.

70. The Respondents denied all such violations and on my part, I am aware that where a violation of fundamental right and/or freedom is alleged, the complainant is obligated under **Rule 10** of the **Constitution of Kenya (Fundamental Rights and Freedoms) Practice and Procedure Rules 2013** as well as the decision in *Anarita Karimi Njeru v Republic [1976-1980]KLR* and *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others Civil Appeal No. 290 of 2012 [2013]eKLR* to particularise those violations with relevant facts and a measure of detail and clarity. It is therefore not enough to list the Articles of the Constitution that were allegedly violated and not give specific facts making up the violations.

71. I note in that regard that the present case turns on whether the non-renewal of the Petitioner’s work permit and reasons thereof were lawful or not. There is also the issue whether she was properly declared a profited immigrant. I have above addressed the above issues extensively and all the others alleged violations are lacking in significant detail and particularity for me to make any serious decision on them. Whether or not they were added to the Petition and submissions because the Petitioner is a journalist and a mother is not enough to warrant any interrogation of those alleged violations. In the event, I decline the invitation to delve into those matters in an evidentiary vacuum. Infact, the Interested party went to unnecessary lengths to justify why the Petitioner cannot possibly be a threat to Kenya’s national interest when in fact no evidence was laid before this Court to show that she was. The detail in its response, while commendable, cannot be properly addressed when the Respondents have laid no facts before me to

warrant contrary fact by the Interested party, let alone the Petitioner. I also decline the invitation to address the question of legitimate expectation as my findings above adequately cover that subject.

### **Whether the Petitioner is entitled to the Remedies Sought**

72. Elsewhere above, I indicated that the consolidated Petitions are principally anchored on **Article 47** of the **Constitution** and relate to two decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whose legality I have already determined. In that context prayers (i), (ii), and (iv) of Petition No.587 of 2013 must be granted as they all seek orders rotating around breach of **Article 47(1) and (2)** of the **Constitution** as well as **Section 33** and **40** of the **Citizenship and Immigration Act**. Prayers (iii), (v) and (vi) are misplaced because the latter two seek conservatory orders which cannot be granted in a judgement while prayer (iii) seeks a declaration of violation of unspecified rights. They cannot therefore be granted as framed.

73. Prayers (vii) and (viii) are consequential orders of certiorari and mandamus quashing the decision of 16<sup>th</sup> October 2013 and directing the 1<sup>st</sup> Respondent to give reasons why the Petitioners work permit was not renewed. These prayers are merited from what I stated earlier. I will revert to prayer (ix) later.

74. Regarding Petition No.220 of 2014 prayers (i) and (ii) are predicated on a violation of **Article 47(1) and (2) of the Constitution** as regards the 2<sup>nd</sup> Respondent decision of 30<sup>th</sup> October 2013 and I have shown why they are merited. Prayers (iii) (iv) (v) (vi) (vii) (viii) as alleged violation of fundamental freedoms of rights other than those in **Article 47** cannot be granted for reasons that I have given above.

75. Regarding prayer (ix) and (x) on the legality of the 2<sup>nd</sup> Respondent's decision of 30<sup>th</sup> October 2013 and the same being *ultra vires* the **Citizen and Immigration Act**, I have said that it was and so those prayers must be granted. Prayers (xi) and (xii) seek orders that **Section 33** of the **Citizenship and Immigration Act** are inconsistent with **Article 47(1) and (2)** and also **Article 24** of the **Constitution** and should be declared as such. I have reflected on that prayer and in the context of the matter at hand, such an order would not be tenable. Misapplication of the law as the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have done is a ground for declaring their actions as unconstitutional but not the statute or part of it being declared unconstitutional.

76. Prayer (xiii) seeks a declaration that the 1<sup>st</sup> Respondent cannot determine that a person's presence in Kenya is against the national interest. Merited as the prayer sounds, I do not see its value in the context of this Petition. Prayer (xiv) seeks orders to quash the decision of 30<sup>th</sup> October 2013 and having held that it was unlawfully made, that prayer must be granted.

77. On costs while they follow the event, this is not a fit case for grant of costs to the Petitioner. The tax payers should not be burdened with costs of litigation caused by public officials misapplying the law.

78. Returning to prayer (ix) of the Petition, having nullified the decisions made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, there is still one question to be answered; what happens to the Petitioner's work permit? By orders of this Court, that work permit has been periodically renewed since the petition was filed. I see no option in the circumstances but to order that the said work pursuit be renewed for a period of two years for both the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to resolve all outstanding applications including the one for citizenship. Thereafter the law will take its natural course.

79. In conclusion, the 1<sup>st</sup> Respondent's officers ought to go back to the drawing board in the manner they are dealing with immigrants. The law is in their hands but it would seem that they prefer erratic knee jerk reactions as opposed to the simple act of following the law and the many decisions of this Courts pointing out procedural errors of their part. This case is an example of that erratic, irrational and unlawful conduct. I digress.

### **Disposition**

80. For the above reasons, the proper orders to make in the consolidated Petitions are the following;

(i) It is hereby declared that the 1<sup>st</sup> Respondent's decision arrived at on 16<sup>th</sup> October 2013 refusing to renew the Petitioner's work permit was unprocedural, contrary to **Article 47(1) and (2) of the Constitution, Section 4 of the Fair Administrations Act, 2015 and Section 40 of the Kenya Citizenship and Immigration Act, 2011.** The said decision is consequently declared null and void, and is hereby quashed by an order of certiorari.

(ii) It is hereby declared that the 2<sup>nd</sup> Respondent's decision arrived at on 30<sup>th</sup> October 2013 declaring the Petitioner a prohibited immigrant was illegal, irrational, procedurally improper and a violation of **Article 47(1) and (2) of the Constitution, Section 4 of the Fair Administrations Actions Act, 2015** as well as **Section 33 of the Kenya Citizenship and Immigration Act, 2011.** It is hereby declared null and void and is quashed by an order of Certiorari.

(iii) To enable the Respondents and the Petitioner finalise all pending applications by the Petitioner including that for citizenship, in the interests of justice, under **Article 23(3) of the Constitution,** I shall direct the 1<sup>st</sup> Respondent to extend the Petitioner's work permit for a further two years from the date of this Judgment. Thereafter the law will take its course.

(iv) Let each party bear its own costs.

81. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MAY, 2017**

**E. CHACHA MWITA**

**JUDGE**