



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.205 OF 2016

L O C.....1ST PETITIONER
G C.....2ND PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES.....1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF
INTERIOR & CO-ORDINATION OF THE
NATIONAL GOVERNMENT.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petition herein is dated 19th May 2016 and was filed by L O C and G C, the 1st and 2nd Respondents, respectively, against the Director of Immigration Services and the Cabinet Secretary, Ministry of Interior & Co-ordination of National Government. The 1st Petitioner is a Kenyan citizen with roots in Nyahera, Kisumu County and currently resides in Nairobi while the 2nd Petitioner is an Italian national currently residing in Italy. The 1st Petitioner is the lawful wife of the 2nd Petitioner having been married on 21st December 2001, about 14 years as at the time of filing the Petition. The Petitioners have 3 children together namely R N, K D and T D, a minor.
2. The 1st Respondent is a public officer responsible for matters relating to citizenship, issuance of travel documents, immigration and connected purposes and his office falls under the docket of the 2nd Respondent.

The Petitioner’s case

3. The Petition is supported by an affidavit dated 19th May 2016 sworn by the 1st Petitioner together with its annexures as well as the Petitioner’s written submissions and list of authorities all dated 3rd August 2016. The circumstances leading to the Petition are that the 2nd Respondent in 2011 charged the 2nd Petitioner with the offence of being in the Country without a valid permit or visa vide **Malindi**

Immigration Case No.92 of 2011. The 2nd Petitioner pleaded guilty to all the charges against him and was convicted and fined a total of Kshs.33,000/-. In addition, the Court ordered the repatriation of the 2nd Petitioner to Italy until such time that he had obtained a proper permit or visa allowing him to re-enter Kenya.

4. Thereafter, the 1st Respondent included the 2nd Petitioner in the list of prohibited immigrants effectively ensuring that the Petitioner would not be allowed to return to Kenya again. Aggrieved by the 1st Respondent's actions, the Petitioners filed **Judicial Review Application No.73 of 2014** at the High Court in Nairobi against the 1st Respondent in which case they challenged the procedure that had been adopted by the 2nd Respondent in including the 2nd Petitioner in its list of prohibited immigrant. Pending the hearing of the substantive motion, the Court granted orders staying the 1st Respondent's decision. That order allowed the 2nd Petitioner to apply for and obtain a visa which allowed him to re-enter Kenya on 21st February 2014.

5. Subsequently, on 9th May, 2014, the 2nd Respondent again issued a directive declaring the 2nd Petitioner a prohibited immigrant and requiring his deportation. Accordingly, the 2nd Petitioner was arrested and detained for 4 days and eventually deported on 20th May 2014.

6. The Petitioners once again filed **Judicial Review Application No.266 of 2014** at the High Court in Nairobi against the Respondents challenging the procedure adopted by the 2nd Respondent in declaring him a prohibited immigrant. By a judgment delivered on 11th March 2015, the Petitioners' application was allowed with the Court granting an order of *certiorari* quashing the decision to declare the 2nd Petitioner a prohibited immigrant for reasons that the Respondents had misapplied **Sections 33 and 34 of Kenya Citizenship and Immigration Act** (hereinafter KCIA) and that their decision was tainted with illegality, irrationality and procedural impropriety.

7. The 2nd Petitioner was still denied entry into Kenya by the Respondents ostensibly on the basis of the actions subject to **Judicial Review Application No.73 of 2014** as the said **Judicial Review Application No.73 of 2014** was later dismissed on the ground that the Petitioners had filed the judicial review application after more than the six months period allowed by statute within which the Petitioners should have challenged the decision.

8. The Petitioners, appreciating the limited scope of judicial review proceedings under **Order 53 of the Civil procedure Rules** not to inquire into the merit of the decision complained of have now filed the present Petition to challenge the Respondents' actions on their merit and under the **Constitution**. The Petitioners thus allege several contraventions on the part of the Respondents in including the 2nd Respondent in the list of prohibited immigrants.

9. Firstly, the Petition faults the Respondents' actions in so far as the 2nd Petitioner does not fall under the categories of persons listed under **Section 33(1)(a) to (u)** of the **KCIA**. The Petitioners also deny that the 2nd Respondent's declaration aforesaid was approved by Parliament in terms of **Section 33(1)(v)** of the **KCIA**.

10. The 2nd Petitioner contends further that he was neither informed of any specific allegations against him nor the reasons for his inclusion in the list of prohibited immigrants before such inclusion. In addition, he protests that his inclusion in the list at the first instance in the year 2011 was not in writing and the only official communication to that effect was made through the Notice to Prohibited Immigrant/Inadmissible Person dated 21st February 2014 in contravention of the right to fair administrative action as set out in **Article 47(2)** of the **Constitution** and **Article 50(1)** of the **Constitution** which require the resolution of a dispute by the application of the law decided in a fair and public hearing by an independent and impartial body.

11. The Petitioners in addition submit that the Respondents attempted to justify their decision by alleging

that the 2nd Petitioner is a fugitive from law wanted by the Italian Government and he rebutted that claim by a confirmation obtained from the Italian Government through the Office of the Public Prosecutor dated 29th October 2013 and also a letter dated 13th March 2014 from the Consular Section of the Embassy of Italy in Nairobi confirming that the 2nd Respondent is not a fugitive from justice.

12. The Petitioners argue further that the continued inclusion of the 2nd Petitioner's name in the list of prohibited immigrants infringes on the Petitioners' constitutional rights and freedoms. For instance, the Petitioners argue that their family has been torn apart with the 2nd Respondent being separated, from his children in the last five or so years and the 1st Petitioner, as his wife, has been denied the ability to consort with her husband leading to untold suffering infringing on the family unit recognised under **Article 45(1)** of the **Constitution**. In the same breadth, the Petitioners have allegedly been denied equal protection of the law as enjoyed by other married couples, thereby contravening the provisions of **Article 27(1)** and **(2)** of the **Constitution**.

13. It has also been alleged that the 2nd Petitioner has been denied the ability to apply for citizenship despite having been married to a Kenyan for over 7 years by dint of **Sections 33(5)** and **40** of the **KCIA**, all of which result in the contravention of **Article 15** of the **Constitution**.

14. On the alleged contravention of **Article 29(d)** of the **Constitution**, the Petitioners allege that they have been subjected to torture in the separation of their family forcing the 1st Petitioner to move their children from Malindi to Nairobi in order to ease their psychological torture from the chiding they encounter from members of the society. The 2nd Petitioner also alleges to have been tortured when he was detained for 4 days at the Kenya Ports Authority holding cell prior to his deportation.

15. The Petitioners also allege violation of **Article 35** of the **Constitution** by the Respondents' refusal to give the Petitioner written reasons for their continued inclusion of the 2nd Petitioner's name as a prohibited immigrant and instead they have concealed any necessary information. The Petitioners also contend violation of the right to property as enshrined under **Article 40(3)** of the **Constitution** on the basis that the 2nd Petitioner's business competitors and former partners have grabbed his hotel and apartments in Malindi in his absence.

16. The Petitioners lastly accuse the Respondents of infringing on the 1st Petitioner's and her children's right to enjoy adequate housing, food and healthcare enshrined in **Article 43** of the **Constitution** and claim that the 1st Petitioner and her children have been rendered homeless and rely on the 1st Petitioner's relatives for sustenance in the absence of the 2nd Petitioner who was their sole breadwinner.

17. The Petitioners thus prays for judgment against the Respondents as follows:

a) A declaration that the inclusion of the 2nd Respondent's name in the list of prohibited immigrants is in breach of the Petitioners' constitutional rights and fundamental freedoms;

b) An order of mandamus compelling the Respondents to remove the 2nd Petitioner's name from the list of prohibited immigrants;

c) The Petitioner be awarded the costs of the Petition;

d) The Honourable Court be pleased to issue any other orders that meet the ends of justice.

The Respondents' case

18. The Respondents were all served with the Petition and despite the Court's leave granted to them to file any responses and written submissions, none were filed as per the Court record. The Respondents were nevertheless represented by Counsel from the office of the Attorney General at all times.

Issues for determination

19. Since the Petition is unopposed, I will consider it on its own merit and the petitioners having not framed any issues for determination, I find it appropriate to frame them as follows:

- a) Whether the Respondents' actions in declaring the 2nd Petitioner a prohibited immigrant were unlawful.
- b) Whether the Petitioners' constitutional rights were thereby violated by the Respondents.
- c) Whether the Petitioners are entitled to the remedies sought.

Were the Respondent's Actions unlawful?

20. The scope of the present Petition must extend to the merits of the case in so far there is a threatened or actual infringement or violation of a fundamental right or freedom enshrined in the **Constitution. Articles 22 and 258** as read with **Article 23(3)** of the **Constitution** in that regard entitle every person to approach this Court in seeking redress to enforce or obtain protection under the provisions of the **Constitution.**

21. In that context, the genesis of the Petitioners' concerns arise from the Respondents' conduct and application of certain statutory powers set out under the KCIA. Further, the facts as presented regarding the cases concerning the parties on the issues relevant to the Petition not being in contention, I will briefly comment on their relevance to this Petition. First, all the cases to which the Petitioners were parties are concluded and no appeals have been preferred against any of them. Secondly, the 2nd Petitioner was convicted in **Malindi Immigration Case No.92 of 2011** on his own plea of guilty and thirdly, the two judicial review cases cited above have been determined with one being dismissed for non-compliance with statutory timelines and the other one in favour of the Petitioners.

22. Turning to the Immigration case, the specific charges that the 2nd Petitioner faced were not revealed from the proceedings as annexed by the Petitioners but from the said proceedings and the facts as stated by the Prosecutor in that case, the 2nd Respondent had allegedly forged a Kenyan passport No.[Particulars withheld] which he presented to an Immigration Officer upon demand, the genuine Italian passport No. [Particulars withheld] having expired on 22nd February 2002. The 2nd Respondent had therefore lived in Kenya illegally and had failed to register as an alien. The Prosecutor further produced an Italian warrant of arrest indicating that the 2nd Petitioner was wanted in Italy for criminal offences committed there and was hiding in Kenya.

23. All those allegations were put to the 2nd Petitioner who admitted them and on the warrant of arrest specifically, the 2nd Petitioner's advocate, a Mr. Binyenya, is recorded as having stated as follows:-

“We saw the document from the Italian Embassy that is when we withdrew the case that he had filed at the High Court. I am ready to mitigate.”

Of note therefore is the fact that the 2nd Petitioner confirmed all the above allegations as factual and true when presented with the charges and facts.

24. In that context, **Section 47A** of the **Evidence Act** is to the effect that a final judgment of a Court of competent jurisdiction in criminal proceedings is to be taken as conclusive evidence that the person so convicted was guilty of the offence for which he was charged. This is more so considering the higher burden of proof required in criminal cases. It is indeed not in dispute that the 2nd Petitioner was convicted of all the allegations stated above and **Section 47A** aforesaid squarely applies to his case.

25. With the facts and the law being so, my perusal of **Section 33(1) (f) (s) and (e)** of the **KCIA** would

indicate that a person whose presence in or entry into Kenya is unlawful under any written law or who is seeking to enter Kenya unlawfully or who is a fugitive from justice makes such a person, not being a citizen of Kenya, a prohibited immigrant. The 2nd Petitioner, having conceded to not having been in Kenya lawfully having used a forged passport to remain in Kenya and without a valid visa and permit, and having admitted that he was a fugitive from justice in Italy brought himself within the ambit of those legal provisions. The Petitioners did not address this particular aspect of **Section 33** of **KCIA** in their pleadings or submissions at all. It matters not that years later, they procured documents showing that he was no longer a fugitive.

26. With those facts in mind, the Respondents needed not seek Parliament's approval as contemplated under **Section 33(1)(v)** of the **KCIA** or rely on any other provision of **Section 33(1)** of the **KCIA**, each of the said provisions being mutually exclusive. Accordingly, the 2nd Petitioner, on conviction of immigration offences automatically became a prohibited immigrant regardless of any other action taken by the Respondents.

27. Further to the above, a number of authorities were cited by the Petitioners regarding the statutory exercise of powers by the 2nd Respondent including **Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons, Petition No.586 of 2012**. I have considered the same and it is distinguishable and therefore not applicable in the present circumstances. I say so because in that case nowhere had the Petitioner admitted to unlawful actions on his part before a Court of competent jurisdiction leading to his repatriation to his County of nationality as was the 2nd Petitioner.

28. But that is not the end of the matter and despite my findings above because in **Judicial Review Application No.266 of 2014**, the Court (Odunga J.) stated that although he was going to quash the decision declaring the 2nd Petitioner a prohibited immigrant, he declined to grant an order prohibiting the Respondents from ever declaring him a prohibited immigrant (in effect that he could be so declared in the future with lawful reasons being given and the right procedure followed). The Respondents took advantage of the said decision to sustain the declaration against the 2nd Petitioner and the question that arises is this; is the declaration lawful in view of that decision (i.e. **Judicial Review Application No.266 of 2014**)?

29. It must be noted that the refusal to remove the 2nd Respondent's name from the list of prohibited immigrants was taken before the Judgment in **Judicial Review Application No.266 of 2014** was delivered and so the said refusal was invalidated. What were the 1st and 2nd Respondents expected to do? With or without an order directing them to remove his name from that list, they had to do it once that decision had been quashed by Odunga J. Whether they could subsequently re-enter his name in that list is a matter of conjecture but as things stand now, the said decision was declared unlawful and whatever my views about the matter, the Judgment in the Judicial Review Application stands.

30. That finding then takes me back to my earlier finding that the immigration case decision and the action taken thereafter was lawful but as I have shown above, that fact notwithstanding, a competent Court later specifically invalidated the decision to declare the 2nd Petitioner a prohibited immigrant and as things stand now, that is the final decision before me. How can this Court ignore that decision of a Court of concurrent jurisdiction and find the actions of the Respondent's to be other than unlawful? I cannot but answer that question by stating that it cannot and the Respondents' actions remain unlawful.

Whether the Petitioners' constitutional rights were violated

31. The Petitioners argue that the inclusion of the 2nd Petitioner's name in the list of prohibited immigrants infringes on their constitutional rights and freedoms specifically as set out in **Articles 15, 29, 35, 40, 43 and 45** which I shall now consider.

32. Before I do so however, I have once again perused the Judgment in **Judicial Review Application No.266 of 2014** and I note that Odunga J. faulted the procedure used in declaring the 2nd Petitioner a

prohibited immigrant but did not address any constitutional issues thereby arising save that he alluded to **Article 47** and **Article 50(1)** on the rights to fair administrative action and fair trial, respectively. This Petition is therefore the right forum to address those questions.

33. I will however quickly dispose of two alleged violation of rights; **Articles 29(4)(d)** and **43** on freedom and protection from torture and the right to economic and social rights, respectively.

34. It is alleged in that regard that the 2nd Petitioner was tortured for 64 days while in police custody before his deportation to Italy. It is also alleged that by separating him from his family, he and his said family were subjected to torture. Further, that his family's lifestyle drastically changed for the worse and they were denied the 2nd Petitioner's care and attention since his deportation.

35. On those two issues, the law as I understand it is that a party pleading violation of constitutional rights is at the very least expected to give credible evidence of the said violation and that it is not enough to merely plead a violation. That is partly one of the rules enunciated in **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012**. In the present case, save for the allegations made, no particulars and no tangible evidence was given of the said allegations. In the event, I am unable to accept the Petitioners' mere statements as conclusive of the allegations of violations of **Article 29(d)** and **43** of the **Constitution**.

The same finding must be made with regard to alleged breaches of **Articles 15** (right to citizenship by registration), **Article 35** (right to information held by the State) and **Article 40** (right to property).

36. Turning to **Article 47** of the **Constitution** the same provides as follows:

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

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

3. Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

37. The legislation to operationalize this Article is the **Fair Administration Act 2015** which in **Section 7** provides as follows:

1. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

a) A court in accordance with Section 8; or

b) A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

2. A court or tribunal under subsection (1) may review an administrative action or decision, if-

a) The person who made the decision-

i) Was not authorized to do so by the empowering provision;

- ii) *Acted in excess of jurisdiction or power conferred under any written law;*
 - iii) *Acted pursuant to delegated power in contravention of any law prohibiting such delegation;*
 - iv) *Was biased or may reasonably be suspected of bias; or*
 - v) *Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;*
- b) *A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
 - c) *The action or decision was procedurally unfair;*
 - d) *The action or decision was materially influenced by an error of law;*
 - e) *The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;*
 - f) *The administrator failed to take into account relevant considerations;*
 - g) *The administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions;*
 - h) *The administrative action or decision was made in bad faith;*
 - i) *The administrative action or decision is not rationally connected to-*
 - i) *The purpose for which it was taken;*
 - ii) *The purpose for which it was taken;*
 - iii) *The purpose of the empowering provision;*
 - iv) *The information before the administrator; or*
 - v) *The reasons given for it by the administrator;*
 - j) *There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;*
 - k) *The administrative action or decision is unreasonable;*
 - l) *The administrative action or decision is not proportionate to the interests or rights affected;*
 - m) *The administrative action or decision violates the legitimate expectations of the person to whom it relates;*
 - n) *The administrative action or decision is unfair; or*
 - o) *The administrative action or decision is taken or made in abuse of power.*

3. The court of tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

- a) *The administrator is under duty to act in relation to the matter in issue;*
- b) *The action is required to be undertaken within a period specified under such law;*
- c) *The administrator has refused, failed or neglected to take action within the prescribed period.*

38. On this right, elsewhere above I indicated that Odunga J. in **Judicial Review Application No.266 of 2014** had found that the Respondents had violated **Section 33(1)** of **KCIA** and stated thus:

“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 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 v Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions v Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.*”*

39. While the above findings were made in the context of **Section 33(1)** aforesaid, they also speak to the expectations of both **Article 47** and **Section 7** of the **Fair Administrative Actions Act** aforesaid. I say so because where a statute is breached in the taking of administrative actions, illegality is obvious and procedural fairness lacking. I have indicated that once the procedure for declaring the 2nd Petitioner a prohibited immigrant was faulted by Odunga J, then whatever other reasons the Respondents had for doing so became irrelevant and I am unable to sustain the same. In the end, **Article 47** of the **Constitution** was violated by the Respondents and I so find.

Whether the Petitioners are entitled to the Remedies sought

40. can be seen from my analysis above, the Petitioners’ case rested on the question whether the 2nd Petitioner’s inclusion in the list of prohibited immigrants was unlawful. In their prayers they therefore sought orders;

- i) to declare that inclusion as being a breach of their constitutional rights and fundamental freedoms.
- ii) of mandamus to remove the 2nd Petitioner’s name from that list
- iii) of costs of the Petition
- iv) and any other orders that the Court may deem fit to grant.

41. On prayer (i), I have held that **Article 47** of the **Constitution** was breached and the next question to ask is whether his name should be removed from that list. In that regard in his judgment in **Judicial Review No.266 of 2014**, Odunga J held thus:

“Having so found, I have no hesitation in removing into this Court the decision of the first Respondent issued on the 9th May, 2014 declaring the Applicant’s husband, G C, a prohibited immigrant and his removal out of Kenya which decision is hereby quashed. I however cannot grant an order of prohibition in terms of the 2nd prayer as to do so would have the effect of permanently prohibiting the respondent from declaring the applicant’s husband a prohibited immigrant.

It follows that the status quo ante the deportation of the applicant’s husband is reinstated and the respondent is prohibited from taking any action against the applicant’s husband based on the quashed decision.”

42. The above decision was given on 11th May 2015 and a year later, the present Petition was filed since the *status quo ante* the 2nd Petitioner’s deportation had not been reinstated.

43. In effect the decision above was never implemented. The issue that I must determine is this; before me are two decisions of competent Courts (the Magistrate’s Court at Malindi sitting as an Immigration Court) and the High Court. Odunga J. was aware of the Immigration case when he made his decision and this Court (sitting as a Court of concurrent jurisdiction) while not bound by that decision should only depart from it for the clearest of reasons.

44. I have found in that context that whereas the 2nd Petitioner’s deportation was pursuant to a lawful Court order, his inclusion in the list of prohibited immigrants was not only quashed by Odunga J. but was also unlawful looked at from the prism of **Section 33(1)** of **KCIA** and **Article 47** of the **Constitution**. Once that is the obtaining position, how then can his name remain on that list? It must and ought to be removed.

45. Having so said however, there being no order to stop future lawful actions by the Respondents, I see no other orders to grant save that as regards costs, the nature of the matter before me would necessitate an order that each Party ought to bear their own costs.

Conclusion

46. I reiterate the position taken in **Bashir Mohamed Jama Abdi (supra)** that the Respondents may well be justified in taking action against suspects of terrorism, narcotics trade and other modern vices but there is the higher expectation that they must follow the law in doing so. Rushed, knee-jerk reaction-like actions outside the law will continue to face the sanction of our Courts.

Disposition

47. For the above reasons, the proper orders to make are that:

i) A declaration is hereby issued that the inclusion of the 2nd Respondent’s name in the list of prohibited immigrants is in breach of the Petitioners’ constitutional rights and fundamental freedoms under Article 47 of the Constitution.

ii) An order of mandamus is hereby issued compelling the Respondents to remove the 2nd Petitioner’s name from the list of prohibited immigrants;

iii) Each Party shall bear its own costs.

48. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2017

E. CHACHA MWITA

JUDGE