



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC. CIVIL APPLICATION NO. 406 OF 2015

**IN THE MATTER OF APPLICATION BY S N FOR JUDICIAL REVIEW AND FOR LEAVE TO
APPLY FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF ARTICLES 15(1), (16) AND 47 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTION 11 OF THE KENYA CITIZENSHIP AND IMMIGRATION
ACT, 2011**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE
LAWS OF KENYA**

BETWEEN

S N.....APPLICANT

AND

CABINET SECRETARY FOR THE MINISTRY OF INTERIOR AND CO-ORDINATION

OF NATIONAL MANAGEMENT SERVICES.....1STRESPONDENT

DIRECTOR GENERAL, KENYA CITIZENS & FOREIGN

NATIONALS MANAGEMENT SERVICES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 9th February, 2016, the *ex parte* applicant herein, S N, who wrongly described herself as the applicant seeks the following orders:

1. A declaration that the applicant S N is a Kenyan citizen.

2. That An order of Mandamus to issue directed jointly and severally to the Cabinet Secretary, Ministry of Interior and Co—ordination of National Government, the Director General, Kenya Citizens and Foreign Nationals Management Services and the Attorney General commanding them to issue to the applicant the certificate of Kenya Citizenship and all relevant and necessary documents for registration of the applicant as a Kenyan Citizen forthwith in respect of the applicant's application (Immigration File Number [particulars withheld]).

3. That the costs of and incidental to this application be paid by the respondents.

4. That such further and other reliefs that this honourable court may deem just and expedient to grant.

Ex Parte Applicant's Case

2. According to the applicant, she is Pakistani National born in Pakistan, Rawalphindi on 12th April, 1961 and married N S A A, a citizen of the Republic of Kenya, on 15th November, 1985.

3. The applicant averred that sometimes during the year 2011, she submitted to the Director General, Kenya Citizens and Foreign Nationals Management Services her application for registration as a citizen of Kenya by a spouse of a Kenyan citizen to the 2nd respondent and to that end submitted *inter alia* the following documents;-

- a. Application for registration as a citizen of Kenya by a spouse of a Kenya citizen, Form 7.
- b. Application for registration as a citizen of Kenya, Form 9.
- c. Kenya citizenship questionnaire for intending applicants
- d. Oath of allegiance, Form K.
- e. Declaration concerning residence and citizenship
- f. Affidavit in declaration of validity of marriage
- g. Certificate of good conduct
- h. Dependant's pass

4. The applicant further averred that pursuant to the provisions of Articles 15, 16 and 17 of the Kenyan Constitution she is entitled by law to Kenya citizenship because:-

- a. Her marriage was solemnized in Kenya.
- b. She has not been declared a prohibited immigrant under any law in Kenya
- c. She has never been convicted of any offence as attested by the certificate of Good Conduct.
- d. Her marriage was not entered into for the purpose of acquiring Kenyan Citizenship.
- e. The marriage is still subsists as at today.

5. The applicant contended that it is her constitutional right and entitlement to be registered as a citizen of Kenya upon application as the spouse of a Kenya Citizen, which application was upon being formally

submitted to the Director General, Kenya Citizens and Foreign Nationals Management Services approved on 16th January, 2012. She however averred that since the letter addressed by her advocates to the respondent on 8th September, 2015, no response or communication has been received from the respondents.

6. To the applicant, the respondents have refused and neglected to issue the Kenya citizenship certificate to her and have not offered any explanation for such refusal or at all for a period of more than two and a half years despite her advocates making numerous enquiries at the relevant counter at the Immigration Department as to the progress of the application for citizenship. It was reiterated that the 2nd respondent despite being in possession of all the lawful documents forwarded to him for the applicant's application as a Kenya citizen and despite having approved the same on 16th January, 2012, has acted to the detriment of the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.

7. It was the applicant's case that the omissions and commissions of the respondents amount to improper arbitrary and inefficient exercise of administrative power and discretion contrary to the law and that the delay in approving her said application is inordinate unreasonable and inexcusable given the fact that there is a fully functional government and a Ministry of Interior and Coordination of National Government, with a duly appointed Cabinet Secretary. It was the applicant's case that the inordinate delay in registering her as a Kenya Citizen has operated and continues to operate to the detriment of her lawful rights under all known laws in Kenya.

8. The application was not opposed by the Respondent.

Determinations

9. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.

10. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

11. Article 47 of the same Constitution which provides:

(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.

12. Since the provisions applies the phrase“every person” as opposed to “every citizen”, it follows that though the applicant herein is not a citizen of Kenya, she is nevertheless entitled to the protection of her as rights enshrined in Article 47 of the Constitution. This position was the position adopted by Nyamu, J (as he then was) in Republic vs. Minister For Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 in which he expressed himself as follows:

“Although the applicant as a foreigner may not have the same standing as the Kenyan Citizens in respect of some of the rights in the Constitution, section 74(1) is available to protect the applicant because it applies to all persons and it echoes human rights which are recognised by all modern and democratic societies and Kenya is one of such states. Further, the provisions of section 74(1) of the Constitution of Kenya are echoed in article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Kenyan provision applies to all persons and not only to citizens. Therefore the applicant has a right as a foreigner not to be subjected to torture, inhuman or degrading treatment or punishment both under the Constitution and also under the said ICCPR. The right cut across board, and it is inherent in mankind. However, the applicant must demonstrate that section 74(1) has been infringed in relation to him and onus of doing so is purely on him. Although his right under the said section is guaranteed, evidence must be availed to the Court to determine if there is any infringement.”

13. Similar views were expressed in Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375 in which it was held:

“The right to protection of law under section 70 of the Constitution has been accorded to every person. The Constitution gives equal protection in relation to enjoyment of fundamental rights and freedoms and it is only where a right or freedom has permissible limitations when the court is called upon to consider competing values and interests such as necessity of limitation, reasonableness, whether reasonably justifiable in a democratic society, proportionality (whether the means justify the end).....Except where there are limitations clearly set out in the Constitution or any written law made pursuant to the Constitution a court of law cannot impose a limitation to the enjoyment of the right at all. Even when there is a specific limitation to the enjoyment of a right or freedom such a limitation is designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. Thus, the limitations are aimed at ensuring that the rights and freedoms are equally enjoyed and the enjoyment achieves common good and also exercised responsibly so as to achieve the equilibrium and an orderly society...The fundamental rights and freedoms have over the years acquired an international dimension which can no longer be ignored by the municipal courts and courts should therefore recognise that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should also be guided by the underlying purpose of the right and freedom...One of the principles in the case concerning reasonableness of the limitation is that the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of limitation. Since what is at stake is the limitation of fundamental rights, that must mean the legislative objective of the limitation law must be motivated by substantial as opposed to trivial concerns and directed towards goals in harmony with the values underlying a democratic society...The rights of each person are limited by the rights of other, by the security of all, and by the just demands of the general welfare in a democratic society.”

14. It follows and I so hold that the applicant herein is entitled to the rights enshrined in Article 47 of the Constitution.

15. The applicant's case which case is not controverted factually is that she applied for registration as a citizen of Kenya by a spouse of a Kenyan citizen to the Director General, Kenya Citizens and Foreign Nationals Management Services in 2011, which application was approved on 16th January, 2012. She however averred that since then no response or communication has been received from the respondents despite her efforts to obtain the same. To the applicant, the respondents have refused and neglected to issue the Kenya citizenship certificate to her and have not offered any explanation for such refusal or at all for a period of more than two and a half years despite her advocates making numerous enquiries at the relevant counter at the Immigration Department as to the progress of the application for citizenship. It was reiterated that the 2nd respondent despite being in possession of all the lawful documents forwarded to him for the applicant's application as a Kenya citizen and despite having approved the same on 16th January, 2012, has acted to the detriment of the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.

16. From the documents exhibited by the applicant it is clear that the application for citizenship was made on 13th March 2013. The present application was filed on the 13th September 2013, six months later. *Prima facie* a delay of six months in processing an application for citizenship, in my view amounts to inordinate delay yet that delay deprives the applicant from the enjoyment of certain rights conferred upon citizens.

17. Article 15(1) of the Constitution provides as follows:

A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

18. It is not disputed that the applicant has fulfilled the requirement under the aforesaid Article. It follows that the applicant is therefore eligible to apply to be registered as a citizen of Kenya. Section 11 of the ***Kenya Citizenship and Immigration Act*** No 12 of 2011, a legislation enacted pursuant to Article 18 of the Constitution:

A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if—

(a) the marriage was solemnized under a system of law recognized in Kenya, whether solemnized in Kenya or outside Kenya;

(b) the applicant has not been declared a prohibited immigrant under this Act or any other law;

(c) the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;

(d) the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and

(e) the marriage was subsisting at the time of the application.

19. It is however clear that once a person shows that she/he has been married to a citizen of Kenya for a period of at least seven years, he/she is entitled, on application, in the prescribed manner to be registered as a citizen. The law does not state that such a person shall on application be registered as a citizen since under the said section there are circumstances under which such a person may not be registered as a citizen. Therefore the registration of a person as a citizen by virtue of being married to a Kenyan citizen is not absolute but is subject to the conditions stipulated under section 11 of the said Act. In the instant case it is not contended that there exist any bar under the said section which prohibit the applicant from being registered as a Kenyan citizen. To the contrary the Respondents did approve the applicant's application

for the same.

20. From the documents exhibited by the applicant it is clear that the application for citizenship was made in 2011 and the approval given in January, 2012. The present proceedings were instituted in November, 2015, 4 years after the application and a year after the approval. *Prima facie* the delay in registering the applicant is contumelious and inexcusable and falls foul of Article 47 of the Constitution and would in my view amount to an abuse of power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

21. Whereas there is specific timeline within which the application for citizenship ought to be considered Article 259(8) of the Constitution provides that if a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. More than 4 years delay in processing an application for citizenship without informing the applicant at what stage such application has reached is clearly unreasonable. Section 6(4) of the *Fair Administrative Action Act, 2015* provides that:

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons

for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

22. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court held that in the ordinary way and particularly in cases, which affect life, liberty or property, the authority concerned should give reasons and if he gives none the court may infer that he had no good reasons since the authority must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law. Similar position was adopted by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it held that It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.

23. It is therefore clear that the Respondents were bound to furnish the applicant with the reasons for making a decision either way and their failure to do so can only be interpreted to mean that they had no reasons for not registering the applicant as a citizen.

24. Since no reason has been advanced by the Respondents why the applicant's application cannot be allowed it is my view that the Notice of Motion dated 9th February, 2016 is merited.

25. The applicant seeks an order declaring her to be a Kenyan Citizen. It is however clear that the applicant can only become a Kenyan Citizen on registration. Whereas this Court is empowered pursuant to section 11(1)(a) of the ***Fair Administrative Action Act, 2015*** to make declaratory orders, in light of the order issued hereinbelow and as the same is yet to be implemented to grant the declaration in the manner sought would be both unnecessary and premature. I however declare that the applicant is entitled to be registered as a citizen of Kenya.

26. Accordingly, an order of *mandamus* is hereby issued directed jointly and severally to the Cabinet Secretary, Ministry of Interior and Co—ordination of National Government and the Director General, Kenya Citizens and Foreign Nationals Management Services commanding them to issue to the applicant the certificate of Kenya Citizenship and all relevant and necessary documents for registration of the applicant as a Kenyan Citizen forthwith in respect of the applicant's application (Immigration File Number [particulars withheld]).

27. The applicant will have the costs of this application to be borne by the 1st and 2nd Respondents.

28. Orders accordingly.

Dated at Nairobi this 10th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Mwangi