REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 318 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF KENYA CITIZENSHIP AND IMMIGRATION ACT 2011

AND

IN THE MATTER OF THE NATIONAL INTELLIGENCE SERVICE ACT, 2012

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 25, 27, 28, 29 (B), 49 (A) (F) (G) (H) 50 (1) AND (2) (A) (B) (C) (D) (E) AND 51 (1) (2)

BETWEEN

REPUBLIC …….....…….APPLICANT

VERSUS

THE CABINENT SECRETARY,

MINISTRY OF NATIONAL SECURITY & INTERIOR CO-ORDINATION…....1ST RESPONDENT

NATIONAL INTELLIGENCE SERVICE…..….....……..…2ND RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES.….....…..3RD RESPONDENT

ATTORNEY GENERAL…….....…….....……..……4TH RESPONDENT

***EX PARTE*:**

SHUKRI ABDIHAFID

MOHAMMED ADEN ISMAIL

JUDGEMENT

Introduction

1. By a Notice of Motion dated 26th August, 2014 filed on 28th August, 2014, the ex parte applicants herein, **Shukri Abdihafid** and **Mohammed Aden Ismail**, seek the following orders:

1. **An order of Certiorari do issue to bring this honourable court for purposes of being quashed the order, and/or directive of the 1st Respondent by which he ordered the 2nd *Ex parte* Applicant be denied entry, detained, kept and remain in the immigration holding facility at Jomo Kenyatta International Airport awaiting further order by the 1st Respondent for his removal out of the Country to his Country of origin and thus breaching the rules of natural justice and constitutional rights of the Applicant to receive fair administrative action, consequently the 2nd Applicant be allowed entry into the Country.**
2. **An order of prohibition directed against the Respondents barring them or any officer acting under them or on their express instructions from removing or deporting the *Ex parte* 2nd Applicant or in any manner howsoever interfering with his status of work.**

Applicants' Case

2. The said Motion is supported by a verifying affidavit sworn by **Shukri Abdihafid**, the 1st applicant herein on 15th August, 2014.
3. According to the deponent, the 2nd Applicant is an Ethiopian National and holder of passport No. EP2954606 who has worked in Kenya for many international humanitarian organizations since the year 2009 and is working as a Consultant for Crown Agents Limited in the field of stabilization in Jubaland Somalia.
4. Crown Agents Limited, it was averred is a partner organization of the European Union and though based in Somalia the 2nd Applicant is required from time to time to travel to Nairobi to brief the EU delegation to Somalia. On the 13th day of August 2014, the 2nd Respondent was arrested and detained at a holding facility of the Immigration Department at the Jomo Kenyatta International Airport and held incommunicado.
5. In the deponent's view, the Immigration officials could not have acted on their own but on the express orders of the 1st Respondent as provided for under Section 43 (2) of the ***Citizenship and Immigration Act of 2011***, (hereinafter referred to as the Act) and that the exercise of any such powers as indicated above must be carried out having regard to the constitution and other related laws.
6. It was deposed that the 2nd Applicant and the deponent have a family together of 3 children who have now been violently separated from their father thus occasioning deprivation of parental care and love of their father but also visiting upon them psychological trauma through the impugned actions of the Respondents.

Respondent's Case

7. In opposition to the application, the Respondents filed two replying affidavits sworn by **Alfred Abuya Omangi** the Chief Immigration Officer in the investigations and prosecution section of the department of immigration within the Ministry of Interior and Co-ordination of National Government, a section tasked with removal of foreign nationals unlawfully present in Kenya on 20th August, 2014 and 1st September, 2014 respectively.
8. According to the deponent, the 2nd Respondent was denied entry into the country by the agents of the 3rd Respondent on 13th August, 2014 for being an inadmissible person within the meaning of the Act on the strength of an advisory by the director general of intelligence service.
9. It was averred that the Department of Immigration was requested to ensure that the Electronic border management did not allow the free passage of the 2nd *Ex parte* Applicant into the Country on grounds of National Security. This was because there was reason to believe that the Applicant was engaged in activities which are detrimental to the security of the nation.

10. It was deposed that the 2nd applicant had earlier arrived on 24th July, 2014 from Mogadishu Somalia aboard East Africa Safari Air express Flight B5 1825 where he was denied entry at Jomo Kenyatta International Airport pursuant to the aforesaid directive and was informed of the reasons for his inadmissibility into the country by the immigration officials and was removed to Mogadishu, Somalia his country of origin and residence on 3rd August, 2014.
11. Despite that, the 2nd Respondent attempted to re-enter Kenya on 13th August, 201 through the said Airport where he was detained awaiting removal from the country back to his country of origin.
12. It was deposed that the State through the exercise of its sovereign authority can deny entry to into its territory any foreign national based on legitimate reasons as is the case with the 2nd applicant and further, the exercise of sovereignty is riposte on the respondents as agents of the state. To the deponent, if the 1st applicant is aggrieved by the decision of the 3rd Respondent, there is an administrative avenue for redress to the Cabinet Secretary for review of the 2nd applicant's status as an inadmissible immigrant while he is outside the country.
13. To the deponent, the Petitioner has no locus standi to compel the Respondents to allow him into the jurisdiction and the court lacks the jurisdiction to grant such orders to allow him to be in the Country since any individual seeking entry into the County can only be allowed entry upon fulfilling the laid down conditions in line with safe guarding and promoting national interests and this mandate is bestowed upon the Department of Immigration and which is a sovereign function.
14. To discharge the functions of the Department of Immigration, it was deposed that a discretion is allowed albeit within the legal framework of the Act. This discretion is applied responsibly within the laid parameters in line with the constitutional provisions of fair administrative action hence the rights that the Petitioner is seeking to enforce are not absolute and have some obligatory responsibilities attached thereto.
15. It was the Respondent's case that the Notice of Motion is baseless, misconceived and devoid of any merit and the orders sought should not be granted, because if granted the functions, operations and independence of the Respondents will be prejudiced.
16. It was therefore contended that the application is preposterous and based on unfounded apprehension and is vexatious, offensive and an abuse of the court's process and ought to be dismissed with costs.

Ex Parte Applicant's Submissions

17. It is submitted on behalf of the applicant that the Respondent's action does no comply with the principles of natural justice and is in excess of jurisdiction. Further it was contended that the said action was ill motivated and an abuse of the process. It was submitted that no order contemplated under section 43(1) was made and availed to thye 2nd applicant as required by the law.
18. While citing Articles 19(3)(a), 20(1) and 21(1) of the Constitution it was contended that the said action offended Article 47(1) and (2) of the Constitution and hence the right to fair hearing envisaged under Article 50 was similarly violated.
19. According to the applicants in the absence of a replying affidavit by the Director General, national intelligence service who is a party to the suit, the replying affidavit is too general to be relied upon.
20. In his oral highlights, **Mr Amendi**, learned counsel for the applicants submitted that section 23 of the Act sets out parameters and limitations such as that the order must be in writing, served upon the victim specifying the reasons for detention or deportation which provision was not complied with.
21. He further submitted that under section 50 of the Act, the setting up of a holding facility requires an order of the Immigration Officer which was non-existent in the present case.
22. On the authority of **Republic vs. Principal Immigration Officer & Another HC JR No. 35 of 2012** and **Republic vs. Otieno Kajwang' & Another Misc. Civil Application No. 316 of 2008**, the applicants urged the Court to allow the application.

Respondents' Submissions

23. On behalf of the Respondent, it is submitted that the Respondent's actions were in accordance

with the provisions of the Act.

24. According to the Respondents, the applicant is in essence mounting a challenge to the original decision not to allow him entry into the country despite having been deported previously from which he attempted to come back.
25. In support of their submissions, the Respondents relied on Article 39(1) of the Constitution and contended that whereas the freedom of movement and the right to leave Kenya are guaranteed to all persons, the right to enter, remain and reside anywhere in Kenya is the preserve of citizens. As the applicant had been denied entry and deported back to his country of origin in the first instance, he should not demand to be allowed back into the country.
26. It was the Respondents' case that the applicant has other avenues of seeking to be reconsidered and allowed into the country and as a non-citizen he has no right of re-entry.
27. In support of their submissions the Respondents relied on **Mohammed Ibrahim Naz vs. Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another [2013]** and **Republic vs. Commissioner of Customs Services ex parte Africa K-Link International Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR**.

Determinations

28. Section 43 of the Act provides as follows:

> ***(1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.***
>
> ***(2) A person against whom an order has been made under this section shall-***
>
> ***(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or***
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> ***(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.***
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> ***(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.***
>
> ***(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.***
>
> ***(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.***
>
> ***(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.***

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

29. In the instant Motion, the applicants are seeking an order quashing the 1st Respondent's order or directive denying the 2nd Applicant entry into the country and detaining him in the immigration holding facility at the Airport awaiting his removal out of the country. They further seek an order prohibiting the Respondents from deporting the 2nd Applicant.
30. The Respondents' case however is that the 2nd Applicant had already been deported to his country of origin and attempted to sneak back into the country. Annexed to the replying affidavit is a document showing that indeed the 2nd Applicant had earlier on been deported out of the Country. Although the 2nd applicant contends that there was no order made pursuant to section 43 of the Act, the instant application does not seek to challenge the said deportation but only seeks to quash the decision denying the 2nd applicant entry into the country.
31. I associate myself with the decision on **Mumbi Ngugi, J** in **Mohammed Ibrahim Naz vs. Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another** (supra) that:

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

32. Under section 43(6) of the Act, a***n order made or deemed to have been made under section 43 of the Act shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly.***
33. In my view what the applicants are challenging in the present application is a decision made pursuant to an order deporting him out of the country. In other words the applicants are seeking to challenge the decision giving effect to that earlier order. In the light of that fact the implementation or the giving effect of the earlier order cannot be the subject of judicial review proceedings. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."

34. The court further recognises that the decision whether or not to grant remedies of judicial review is an exercise of judicial discretion. In deciding whether or not to grant the discretionary judicial review remedies the Court must take into account whether or not the grant thereof is efficacious in the circumstances obtaining. In **Republic vs. Judicial Service Commission *ex parte* Pareno**

[2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000**.

35. To grant the orders sought herein would have the effect of leaving the decision to deport the 2nd applicant intact whether it is legal or otherwise hence it would not achieve the purpose which the applicants set out to achieve.

36. Whereas this Court sympathises with the plight of the 1st applicant and the family of the applicants, judicial review reliefs are not grounded on sympathy but are based on illegality, irrationality and impropriety of procedure. As the applicants are not seeking to impugn the original decision to deport the 2nd applicant this court cannot in these proceedings embark on a legal voyage of investigating whether the original decision was legally sound. Since the applicants may if they deem fit still challenge the earlier decision I will say no more on the legality or the correctness of the said decision in order not to prejudice the said proceedings if the same were to be instituted. However, as **Mumbi Ngugi, J** rightly appreciated in **Mohammed Ibrahim Naz vs. Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another** (supra):

> **"The deportation of the petitioner is now complete. As a non-citizen, he has no right of re-entry. Should he wish to be permitted entry into Kenya, given his allegation that he has a family and business in Kenya, then he must make an appropriate application for consideration by the state in accordance with the provisions of the Citizenship and Immigration Act."**

37. Accordingly, the Notice of Motion dated 26th August, 2014 fails and is dismissed but with no order as to costs.

Dated at Nairobi this day 8th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ndegwa for Mr Amendi for the Applicant

Mr Odhiambo for the Respondents

Cc Richard