



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO 333 OF 2013**

**MOHAMED IBRAHIM NAZ ..... PETITIONER**

**VERSUS**

**THE CABINET SECRETARY RESPONSIBLE FOR MATTERS**  
**RELATING TO CITIZENSHIP AND THE MANAGEMENT**

**OF FOREIGN NATIONALS .....1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

**Introduction**

1. This petition was filed together with a Chamber Summons application dated 25<sup>th</sup> June 2013 in which the petitioner sought orders to restrain the respondents from deporting him from Kenya, and for his release on bail pending the hearing of the application.
2. The application was supported by an affidavit sworn by one Sumaira Ibrahim Naz, said to be the wife of the petitioner. When the matter first came before me, Mr. Gathaiya, Learned Counsel for the petitioner, submitted that the petitioner was seeking orders as he was going to be placed on a plane and deported that afternoon at 5p.m; that no reasons had been given for the deportation; that the petitioner had been in Kenya pursuant to a valid work permit, and his application would be rendered nugatory if he was not granted interim orders. The petitioner was then held at the holding area, International Arrivals, Jomo Kenyatta International Airport. I certified the matter urgent and directed that he should be held at the airport holding area for a period of 24 hours pending inter partes hearing of the application.
3. The matter came up for inter partes hearing before me on 1<sup>st</sup> July 2013 when, in view of the fact that the matters raised in the application are the same as are raised in the petition, the parties elected to argue the substantive petition with a view to a determination of the matter in its entirety.

**The Facts**

4. The undisputed facts that emerge from the pleadings before me are that the petitioner is a Pakistani national who has been in Kenya on the basis of a work permit issued on 3<sup>rd</sup> November 2011. He was arrested on 5<sup>th</sup> June 2013 and held in custody for a period of four days. On 9<sup>th</sup> June

2013, he was deported to Islamabad in Pakistan, his home country. On 23<sup>rd</sup> June 2013, the petitioner arrived at the Jomo Kenyatta International Airport and sought to enter the country but was denied entry into Kenya, leading to the filing of this petition.

### **The Petitioner's Case**

5. The petitioner's case as presented by Mr. Gathaiya is that the petitioner was in Kenya pursuant to an H-Class work permit issued on 3<sup>rd</sup> November 2011; that the said permit is an investor's permit which is still in force; that he is married to a Kenyan and has 4 children, 3 of whom are living with the petitioner in Kenya.
6. The petitioner alleges that he was arrested from his house without a warrant by officers purporting to be from the National Security Intelligence Service (NSIS), detained for 4 days, then put on a plane and told to go to Islamabad, Pakistan; that at no time was he told the reasons for his removal from Kenya; he has never been served with a declaration by the Cabinet Secretary declaring him to be a prohibited immigrant, nor was he served with any order for his removal. He asserts that he only learnt of the orders declaring him prohibited and ordering his removal from the replying affidavit of the respondent sworn and filed on 1<sup>st</sup> July 2013.
7. According to the petitioner, since he was not made aware of the reasons for his deportation, he came back to Kenya on 23<sup>rd</sup> June 2013 and the officers from the respondents have refused him entry despite his having an H-class permit. Mr. Gathaiya submitted that the decision by the Cabinet Secretary to declare the petitioner prohibited, and the reasons for the decision, were not communicated to him; that he was also not given an opportunity prior to his deportation to question the decision; that due process as envisaged Article 47 of the Constitution was not followed.
8. Mr. Gathaiya relied on the decision of the East Africa Court of Justice in **Samuel Mukira Mohochi -vs- The Attorney General of Uganda EA Court of Justice Ref. No 5 of 2011** for the proposition that the conduct of legal proceedings must be in accordance with the rules of national justice. This reference, according to Mr. Gathaiya, was dealing with section 86 of the Uganda Citizenship and Immigration Act which is similar to Section 33 of the Kenya Citizenship and Immigration Act.
9. Mr. Gathaiya submitted that section 40 of the Kenya Citizenship and Immigration Act sets out the process for issue of work permits and the manner of their invalidation; that the petitioner's work permit, has not been invalidated, and he therefore has a right to enter and remain in Kenya; that the holding of a valid work permit entitles the holder to unfettered entry during its validity and he would not require any other document to enter; that the petitioner has already entered Kenya, and the denial of entry is by Kenyan Authorities; that accordingly, the court has jurisdiction under Article 20 and 21 of the Constitution to protect his rights, and the court should therefore exercise its jurisdiction to grant the prayers sought by the petitioner which are as follows:

***A declaration that the 1<sup>st</sup> Respondents directive deporting the Petitioner from Kenya is void and illegal.***

- a. ***A declaration that the petitioner do remain in Kenya pending the hearing of this application.***
- b. ***An order for review of the 1<sup>st</sup> Respondent's directive the Kenya Citizens and Immigration Act 2011 deport the petitioner (sic).***
- c. ***An order for compensation.***

### **The Respondents' Case**

10. The respondents oppose the petition and have filed grounds of opposition dated 1<sup>st</sup> July 2013 and two affidavits both sworn by Justin Moseki Maranga on 27<sup>th</sup> June and 1<sup>st</sup> July 2013. At the hearing of this matter, Mr. Kakoi, Counsel for the respondents, indicated that they would rely on the affidavit of Mr. Maranga sworn on 27<sup>th</sup> June 2013 only partially as the contents thereof, pertaining to the officers who effected the arrest of the petitioner, had been modified by Mr. Maranga's further affidavit sworn on 1<sup>st</sup> July 2013.
11. The facts according to the respondents are that the petitioner was an alien from Pakistan staying in Kenya; that he was declared a Prohibited Immigrant on 5<sup>th</sup> June, 2013 by the Cabinet Secretary Ministry of Interior and Coordination of National Government based on his involvement in activities that were contrary to Kenya's national security interests; that he was arrested by officers from the Kenya Police Service, Special Crimes Prevention Unit, on 5<sup>th</sup> June 2013 and detained while awaiting transport arrangements to remove him to his country of origin, Pakistan. The respondents aver that the petitioner was removed from Kenya on 9<sup>th</sup> June 2013 and advised not to return to Kenya as he was a Prohibited Immigrant.
12. The respondents assert that the contention that the petitioner has been residing in Kenya for 15 years, as set out in his petition, or 20 years, as averred in the affidavit of Sumaira Ibrahim Naz, is untrue as he has been in Kenya on the basis of a two year work permit which was issued on 15<sup>th</sup> November 2011 and was set to expire on 12<sup>th</sup> August 2013. They allege further that the petitioner obtained the Certificate of Good Conduct dated 1<sup>st</sup> November 2012 after he failed to disclose that he had a criminal conviction on his own plea of guilty in 2008.
13. The respondents contend further that the right of removal of undesirable aliens under section 33 and 43 of the Citizenship and Immigration Act, including removal of those involved in criminal activities such as drug trafficking and other transnational organized crimes is a sovereign act. They point out that had the petitioner been aggrieved by the order of the Cabinet Secretary declaring him a Prohibited Immigrant and authorizing his detention and subsequent removal, he would have challenged it by way of judicial review or through an application for habeas corpus.
14. According to the respondents, the removal of the petitioner and his deportation were lawful and there was no procedural lapse; that an order declaring the petitioner a prohibited immigrant, annexed to the further affidavit as 'JMN1' and an order for his removal (annexure 'JMN2'), both of which had not been challenged by the petitioner, had been served on him.
15. Mr. Kakoi submitted that section 33(1) of the Kenyan Citizenship and Immigrants Act gives the class of prohibited immigrants; that the petitioner falls within that category; that once a person is declared a prohibited immigrant and taken to his country of origin, he ceases to enjoy all the rights enjoyed before such removal. He contended that the petitioner cannot be said to be in Kenya until he has cleared all the immigration requirements; that the only issue that the court is required to answer is whether it has jurisdiction to allow an alien who was taken back to his home country, back into the country.
16. Mr. Kakoi submitted that Article 39(3) of the Constitution provides the right to enter the country, but that right is confined to citizens, not nationals of another country, and that there is therefore no protection afforded to the petitioner under the Constitution to claim the right to enter the country. He submitted, further, that the provisions of Article 39(3) are in line with the provisions of international conventions; that such conventions do not give a right of entry to aliens; that neither the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) nor the African Charter on Human and People's Rights (the Charter) give a right of entry to aliens; and that the ICCPR gives states parties the right to remove any alien for compelling reasons, or for national security.
17. With regard to the decision of the East Africa Court of Justice in **Samuel Murila Mohochi –vs- A.G of Uganda** (supra), Mr. Kakoi was of the view that it is distinguishable from the present case

as it related to citizens of East Africa and there is a treaty, the Treaty for the Establishment of the East African Community, and how it modifies the rights of partner states with regard to nationals of other partner states and makes it possible to consider the citizens of East Africa as being of the same state; that the situation was different with regard to nationals of other states such as Pakistan.

18. Mr. Kakoi submitted that once the petitioner was taken to Pakistan, he does not have the unfettered right to enter the country and his privileges have come to an end. He drew an analogy between the provisions of section 39(c) of the Citizenship and Immigration Act and the current situation by submitting that even in the case of permanent residents, a removal order has the effect of invalidating a permanent residency and submitted that such an order would have the same effect with regard to a work permit. There was no merit in the petition in the respondents' view, and it ought to be dismissed with costs.

### **Determination**

19. The petition before me is a constitutional petition brought under the provisions of Articles 22, 23, 27, 28, 29 and 165(3) of the Constitution, as well as sections 43(2)(b), 43(3), 49, 50 and 57(1) of the Kenya Citizenship and Immigration Act, 2011. In keeping with the dicta of the court in the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**, the petitioner has an obligation to show the provisions of the Constitution that have been violated and the manner of violation with regard to him.

20. The rights of the petitioner allegedly violated by the respondents are set out in the Supporting Affidavit sworn by Sumaira Ibrahim Naz on 1<sup>st</sup> July 2013. In the said affidavit, the deponent alleges violation of the petitioner's right to dignity and liberty under Articles 28 and 29, the right to equality before the law under Article 27, the right to freedom of movement under Article 39, and to property under Article 40, as well as the right to family under Article 45 and fair administrative action under Article 47.

21. The petitioner, while alleging violation of his rights under the above provisions of the Constitution, is in effect mounting a challenge to the original decision made on 5<sup>th</sup> June 2013 to declare him a prohibited immigrant and to remove him from the country, and his actual removal from the country on 9<sup>th</sup> June 2013. He is also asserting an unfettered right, in the words of his Counsel, to freely enter into the country on the basis of his work permit despite his having been deported to his country of origin from where he attempted to return to Kenya two weeks later.

22. The constitutional right that is at the core of this petition is Article 39 of the Constitution with regard to freedom of movement and residence. It provides as follows:

***39. (1) Every person has the right to freedom of movement.***

***(2) Every person has the right to leave Kenya.***

***(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.***

23. These constitutional provisions are in accord with the provision of the UDHR, the ICCPR and the ACHPR relied on by both the petitioner and the respondent. Article 13 of the UDHR provides that:

***1. Everyone has the right to freedom of movement and residence within the borders of each state.***

***2. Everyone has the right to leave any country, including his own, and to return to his country.*** (Emphasis added)

24. At Article 12, the ICCPR provides that:

- 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.**
- 2. Everyone shall be free to leave any country, including his own.**
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.**
- 4. No one shall be arbitrarily deprived of the right to enter his own country.**

25. With regard to the rights of aliens in states parties, Article 13 of the ICCPR provides as follows:

***‘An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.***

26. At Article 12, the ACHPR provides that:

- 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.**
- 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.**
- 3.....**
- 4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.**

27. As correctly argued by Mr. Kakoi for the respondents, 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. This, I believe, is also the essence of the decision in the case of **Samuel Murial Mohochi –vs- The Attorney General of Uganda**, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process.

28. It has been alleged on behalf of the petitioner, in the affidavit of Sumaira Ibrahim Naz sworn on 1<sup>st</sup> July 2013, that he was not served with an order declaring him a prohibited immigrant and for his deportation before he was handed an air ticket and boarding pass for Pakistan. It is therefore asserted that due process was not followed in his deportation, and that he should be allowed entry as he has a valid work permit, class H, issued under the provisions of the Citizenship and Immigration Act, 2011. The question is what is the effect of this permit vis a vis a deportation and removal order?
29. The respondents take the position that the work permit is invalidated by the declaration of the petitioner to be a prohibited immigrant. They have annexed to the affidavit of Justin Moseti Maranga annexure 'JMM1' a declaration issued under section 33 of the Immigration and Citizenship Act declaring the petitioner a prohibited immigrant. They have also annexed as 'JMM2' a removal order issued under section 43(1) of the same Act for the removal of the petitioner to his country of origin. Both documents are dated 5<sup>th</sup> June 2013, the date on which the petitioner was arrested as averred in the affidavit in support of the petition. The reasons given in the said declarations are reasons of national security.
30. It is noteworthy that the said declaration and removal order were not challenged by the petitioner, with Counsel for the petitioner confining himself to the submission that they had seen the said documents only on the morning of the hearing. On the face of it therefore, due process was followed in the deportation of the petitioner. Had such process not been followed, the petitioner had four days between the date of his arrest on the 5<sup>th</sup> of June 2013 and his deportation on 9<sup>th</sup> June 2013 to challenge the process as provided under section 57 of the Citizenship and Immigration Act, but it appears that no effort was made to do so. As the provisions of international instruments set out above indicate and the Constitution at Article 47 require, the obligation on the state is to follow due process. Where it appears, as in this case, that such process was followed and the petitioner removed from the country in accordance with the law, it would be an unwarranted interference with the sovereign power of the state were the court to make orders allowing the re-entry of the petitioner.
31. 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.
32. For the above reasons, this petition is dismissed with no order as to costs.
33. The state is at liberty to remove the petitioner from the holding area at the Jomo Kenyatta International Airport and return him to his country of origin as was the intention prior to the issue of conservatory orders in this matter.

**Dated, Delivered and Signed at Nairobi this 3<sup>rd</sup> day of July 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. James Gathaiya instructed by the firm of Gathaiya & Associates Advocates for the Petitioner**

**Mr. Edward Kakoi, Litigation Counsel, instructed by the State Law Office for the Respondents**