REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC CIVIL APPLICATION NO. 5 OF 2013

IN THE MATTER OFAN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011

AND

IN THE MATTER OF DECISION BY THE MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS FOR DEPORTATION OF CHRISTOPHER NNANYERU

BETWEEN

REPUBLIC.....
.....APPLICANT

VERSUS

MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS .....RESPONDENT

C.O…….....INT ERESTED PARTY

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 21st January 2012 (sic), filed in Court on 22nd January 2013, the ex parte applicant herein, C.O, a Nigerian National, who is wrongly described in the Motion as the Interested Party seeks the following orders:

1. **An order of Certiorari to bring into the High Court and quash the decision of the Minister for Immigration and Registration of persons declaring the Applicant a Prohibited Immigrant and in directing his removal from Kenya be made.**
2. **An order staying the implementation of the said decision pending the hearing of the**

application for judicial review.

3. **An order for costs**

APPLICANTS' CASE

2. The said Motion is supported by the Statement of facts filed on 14th January 2013 and the verifying affidavit sworn by **Purity K Makori**, the applicant's advocate on 11th January 2013.
3. According to the deponent, on in instructions from the Applicants' friends she proceeded to Kilimani Police Station on 11th January, 2013 where the Applicant is being held and received further instructions and particulars from the Applicant to move to this Honourable Court on his behalf for the orders sought in the Application filed herein. According to the deponent, the ex parte applicant was arrested at Busia, Kenya while on his way to Nairobi from Kampala where he had gone to visit his In-Laws and was arraigned before the Chief Magistrate at Busia charged with trafficking Narcotic drugs in Criminal case *[Particulars Withheld]*. The substance the Applicant was accused of trafficking was 3 kgs of Millet, a gift from his In-Laws and had nothing to do with drugs and upon the same being confirmed by the Government Analyst, the state withdrew the charges under section 87A of the Criminal procedure Code Chapter 75 of the Laws of Kenya and the exhibits returned to the Applicant. The Applicant was however not released but was taken to a police station in Kisumu where he was detained for one night and thereafter to Kilimani police station where he is currently being held. The Applicant sought an explanation for his detention and was informed that the Minister of state for Immigration and Registration of Persons had directed that he be deported from Kenya and that he was being detained bending such removal. As the Applicant's Counsel the deponent sought to be given and or shown the orders by the Minister of State for immigration and Registration of Persons or any lawful Authority but has not been shown any or any explanation advanced for failure. To the deponent, the Applicant has demanded and has continued to demand that he be served with any such orders or be given a copy but that request has been declined. Similarly, the Applicant was not served with the said order form the Minister of Immigration and Registration of person.
4. It is therefore contended that the Minster's order is unfair, discriminatory, arbitrary, inconsistent and capricious as the Applicant has been lawfully domiciled and resident in Kenya for the last six years with his wife **N.O.K** with whom they have two children **E.O** and **F.C.O** who attend school in Nairobi. To the ex parte applicant, the Ministers' decisions are an abuse of power, oppressive, punitive and unlawful as the Applicant is now still being held in Police Custody in excess of the period prescribed by Law and without any Lawful order or excuse. It is further contended that the Ministers' conduct is unprocedural, inconsistent and *ultra vires* the provisions and procedures under Article 47 of the Constitution guaranteeing fair administrative action to every person as the decision was never communicated to the Applicant.
5. It is deposed that the Applicant is a Director of *[Particulars Withheld]*, a company that is duly registered in the Republic of Kenya and carrying on business in Nairobi, Kenya.
6. To the applicant, the Ministers' decisions constitute an illegal exercise of discretion as the applicant has been in Kenya for over 6 years stays at *[Particulars Withheld]* in Lang'ata, and he has businesses at *[Particulars Withheld]*, Nairobi in Kenya in the name of *[Particulars Withheld]* and is a tax payer to the government of Kenya. He and his wife through their company *[Particulars Withheld]* own land at *[Particulars Withheld]* in the Republic of Kenya as Share holders of *[Particulars Withheld]* hence the Ministers' decisions are irrational and unreasonable considering that he has never been arraigned in any court of law or faced any charges in a court of law with the exception of criminal case *[Particulars Withheld]* in the Chief Magistrate Court at Busia which was withdrawn under Section 87A of the ***Criminal Procedure Code*** Chapter 75 of the Laws of Kenya.
7. The applicant's position is that the Minister's order is null and void as the Minister can only make such orders where stay in Kenya by the person against whom the orders is made in unlawful under the Act or where it has been recommended to the Minister under Section 26 A of the ***Penal Code*** Chapter 63 of the Laws of Kenya and such orders can only be made on grounds other than stated in the Act with approval of parliament and in this case no such approval has been exhibited to have been made before the order. To him, the Minister's order is unlawful for reasons that the Applicant has not been given any explanation in wiring justifying the making of the orders against

him as required by law and neither has the Applicant been accorded any hearing. It is his position that the order by the Minister is required by Section 43 (2) of the ***Kenya Citizenship and Immigration Act*** 2011 (hereinafter referred to as the Act) to state the country or place where a person against whom such order is made will be removed to or such a place of his choice. The applicant avers that there is no order by the Minister authorizing detention of the applicant in Police Custody as where such actions is necessary Section 43 (2) (b) require that the same be specified in order and the holding of the Applicant in Police detention is without authority an unlawful hence the Ministers' decision violates the principle of legitimate expectation and has been made in breach of the rules of natural justice and otherwise denies the Applicant effective access to justice. Further the Ministers' decisions are bad in law for failure to give reasons and/or sufficient reasons and are made in bad faith and are made for an improper motive or purpose and is unfairly sought to be applied and violates the principle of legitimate expectation and are based on error of fact and/or is erroneous since his interpretation of the Law is erroneous, contrary to law and established principles of statutory interpretation and policy and unconstitutional and is therefore a nullity. The same are bad in law and *ultra vires* for failure to take into account relevant factors and have been made in excess or without jurisdiction and are otherwise ultra vires.

RESPONDENT'S CASE

8. In opposition to the application, the respondent filed a replying affidavit sworn by **Alfred Abuya Omangi**, a Senior Immigration Officer in the Department of Immigration within the Ministry of Immigration and Registration of Person, working in the prosecutions and investigations section.
9. According to him, the National Intelligence Service Agency which is a Government institution vested with the mandate to carry out investigations on a person, conduct and behaviour in relation to issues of public interest and the National Security, wrote a letter to the director of immigration Services requesting him to declare the applicant a prohibited immigrant. The said request from the Director General of the National Intelligence Service was based on the fact that the applicant was involved in a syndicate of International Drug Trafficking operating in Nairobi. The Director General of the National intelligence Service's report is confidential and touches on matters of national security which cannot be disclosed or revealed to the public. Based on the information and request of the Director General of the National Intelligence Service, the Director of Immigration Services through a circular to all Entry Points dated 31st of October 2012, placed the applicant on a watch list of drug traffickers barring the entry of the applicants into Kenya. According to him, it is not true that the Minister's actions, decision or conduct is unprocedural, inconsistent and *ultra vires.* To the deponent, the applicant's affidavit sworn on his behalf by his advocate does not tally with the facts adduced in his statement which he wrote on 18th January, 2013 while in custody. Further the applicant has alleged being in Kenya with his wife, **N.O** and their two children yet in his statement he gives a contrary fact that his children lives with their mother in Uganda. Owing to the fact that the applicant has two different Passport numbers under different names is enough reason to be suspected and as a matter of National Security and sovereignty, the Minister of state for Immigration and Registration of persons has the powers to make an order in writing to deport a person upon recommendation from the Security Agency which is the National intelligence Service Agency.
10. It is contended that Section 33(1) (d) of ***Kenya Citizenship and Immigration Act***, 2011 provides for persons termed as 'Prohibited Immigrants and section 43 (1) gives power to the Minister (Cabinet Secretary) to remove persons who are unlawfully present in Kenya hence the application is not meritorious and should be dismissed with costs.

EX PARTE APPLICANT'S SUBMISSIONS

11. It is submitted on behalf of the applicant while reiterating the contents of the supporting affidavit that the facts narrated in the supporting affidavit have not been denied in the replying affidavit and are hence not in dispute. It is submitted that since the source of the information that the applicant gave a contradictory statement is not disclosed the averment to that effect ought to be struck out. With respect to the allegations of two passports, it is submitted that no evidence to that effect has been adduced. From the replying affidavit, it is submitted that a decision has been taken to remove

the applicant from Kenya on the grounds that he has been declared a prohibited immigrant.

12. It is submitted that section 33(1) of the Act does not empower the Minister to declare any person a prohibited immigrant or the power to order removal of a person(s) whose presence in Kenya is unlawful under the Act but only describes who is a prohibited immigrant while section 43(1) thereof gives a Cabinet Secretary powers to order removal from Kenya of persons whose presence in Kenya is unlawful under the Act. It is submitted that section 43 of the Act does not confer absolute powers to the Cabinet Secretary since subsection (3) thereof provides that the exercise of the power conferred by section 43(1) shall be carried out subject to the Constitution and other related laws. It is submitted that there is no attempt to lay out the basis for the averment that the applicant is involved in drug trafficking syndicate hence the allegation is based on suspicion. However, under section 33(1)(d) suspicion must be reasonable and since no reason has been given the same is baseless
13. Since under section 33 of the Act the exercise is subject to the Constitution and related laws, it is submitted that such limitation is that the Cabinet Secretary must secure the approval of [Parliament where the person does not fall into the category set out in the subsections(1)(a) to (u).
14. It is submitted that Article 47 of the Constitution of Kenya imports the right to fair hearing under Article 50 of the Constitution and reliance is placed on this court's decision in **Peter Sessy vs. The Minister of State for Immigration and Registration of Persons Nairobi High Court Miscellaneous Application No. 361 of 2012**, **Alfred Sparman vs. Gilbert Greaves and Attorney General Barbados High Court Civil Case No. 529 of 2003**, **Attorney General and Sikunda vs. Government of the Republic of Namibia [2001] NR 181** as well as **Ali Mahfoudh Salim vs. The Federal Bureau of Investigation Mombasa Miscellaneous Criminal Application No. 6 of 1999**.
15. With respect to non-disclosure of the reasons based on national security and public interest, it is submitted that public interest and national security is not a blanket override over individual rights and it has to be stated what constitutes the same hence the application ought to be allowed.

RESPONDENTS' SUBMISSIONS

16. On behalf of the Respondent, it is submitted that the Notice of Motion herein has not adduced any evidence against the respondent to warrant the issuance of the order of certiorari since order 53 of the ***Civil Procedure Act*** (sic) requires one seeking an order of certiorari to annex the decision, judgement, order or proceedings sought to be quashed. It is further submitted based on **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and ***Halsbury's Laws of England 4th Edn. Vol. II page 805*** that the issuance of judicial review is purely discretionary and that they are not guaranteed and that the Respondent was proper and justified in making the order declaring the applicant a prohibited immigrant. To the Respondent, to grant the orders sought shall be used as a medium of not only questioning bur curtailing every other operations of the Respondent. It is submitted that section 33(1) of the Act confers absolute power to the Minister to declare any person of a questionable character and who is not a citizen of Kenya a prohibited person.
17. It is submitted that the decision was based on the information of the National Intelligence Service which information is to be treated with utmost secrecy and confidentiality as it touches on matters of national security which cannot be disclosed or revealed to the public hence the Court ought to exercise its discretion and decline to issue the orders sought.

DETERMINATIONS

18. Under Order 53 rule 7 the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of

attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. Accordingly, in light of the fact that there is no allegation from the Respondent that there was a decision separate from what was contained in the letter, I will pursue the issue no further. The rationale for the requirement that what is sought to be quashed is to be exhibited is informed by the fact that the Court ought to be satisfied that there is in fact a decision that has been made and exists whose quashing is to be done since the court does not ordinarily grant orders in vain. Secondly, the court must be satisfied that what is exhibited is in fact the correct decision. Thirdly, the court must be satisfied as to the exact time when the decision was made in light of the limitation period of six months stipulated under the ***Law Reform Act*** Cap 26 Laws of Kenya.

19. In this case, however the existence of a decision declaring the applicant a prohibited immigrant is not expressly denied. In fact a reading of the replying affidavit confirms that a request was made by the Director General of the National Intelligence Service to the director of immigration Services requesting him to declare the applicant a prohibited immigrant and that the said letter was acted upon. Clearly therefore the existence of the impugned decision is not seriously contested and is in fact impliedly admitted.

20. Section 33(1) of the Act provides:

1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is–

(a) not having received a pardon–

(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;

(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;

(iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;

(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;

(c) a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;

(d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;

(e) a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;

(f) a person whose presence in or entry into Kenya is unlawful under any written law;

(g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;

(h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;

(i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;

(j) a person involved in or is reasonably suspected to be engaged in money laundering;

(k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;

(l) a person engaged in or suspected to be engaged in illicit arms trade;

(m) a person engaged in or suspected to be engaged in illegal human body organs trade;

(n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber-crimes and related crimes;

(o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;

(p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;

(q) a person whose conduct offends public morality;

(r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;

(s) a person who is seeking to enter Kenya illegally;

(t) a person who is a fugitive from justice;

(u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006; and

(v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed).

21.Section 43 of the Act provides as follows:

43. (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

(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.

(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.

22. It has been contended that the impugned decision was made pursuant to section 33(1) of the Act. It is important to note that section 33(1) employs the phrase "a prohibited immigrant is" rather than "a prohibited immigrant includes". It is my view therefore that where the legislature uses the word "is" there is no room for extension of the circumstances enumerated thereunder. No material has been placed before the court upon which the court can find that the criteria stipulated in section 33(1) aforesaid applied to the present circumstances. Instead the respondent has hidden under the principle of national security. Where an authority decides to keep certain crucial information from the Court which information may enable the Court to form a view favourable to the authority, the said authority must take the risk that the Court may find that the decision was not warranted.
23. In this case, the closest ground upon which the respondent relied was that the applicant is a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances. Reasonable suspicion requires a consideration of some facts disclosed to the authority and what is reasonable depends on the facts of a particular case. In this case, the closes disclosure of the reasonable grounds for the suspicion is that the applicant has two different Passport numbers under different names. Whether that ground is sufficient or not may not necessarily be a ground for faulting the respondent's decision in these kind of proceedings. However, the Court does not see why it was so difficult to exhibit evidence of the existence of the two different passport numbers under different names as alleged. Surely that cannot be said to be a threat to national security or public interest.
24. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.**
25. With respect to the necessity for a hearing the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...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...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

26. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister 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 Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister 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 and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

27. Article 47(1) and (2) of the Constitution 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.

28. Article 50(1) of the Constitution on the other hand provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

29. In this decision we are not concerned with the merits of the respondent's decision. The Respondent may well have had good reasons for taking the decision it did. We are however concerned with the process of arriving at the said decision. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
30. As was held by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77**:

"We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed.....The courts must continue to give justice to all and sundry irrespective of their status or former status."

31. Similarly, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, it was held *inter alia*:

"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

32. Kenyans have chosen the path of democracy as recognized in Article 4(2) of the Constitution and must live by the democratic ideals recognized the world over and as was aptly put by the Court of Appeal in **Judicial Commission of Inquiry into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249,** democracy is normally a messy, and often times, a very frustrating, way of governance.
33. To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas)**

[2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

34. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, **Nyamu, J** (as he then was) recognised the public interest in the enactment of the Act when he stated as follows

"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."

35. It is therefore clear that the Respondent's action was tainted with irrationality and procedural impropriety and was contrary to the applicant's legitimate expectations and was a prime candidate for quashing by an order of certiorari.

36. That however, is not the end of the matter. The law is that the decision whether or not to grant the remedy of judicial review is discretionary. 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 and hence the Court will refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. 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 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. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

37. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be

exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances."

38. In this case it is clear that the applicant has since the grant of leave to institute these proceedings been deported. The Court is not aware of the circumstances under which the said deportation was undertaken whether it was in respect of these circumstances or under new circumstances. What this Court wishes to note is that in recent past there has been a concerted effort from certain quarters in this country to ignore Court orders with impunity. That is a course of event that cannot be allowed to take root in any democratic society and must be stemmed. Disobedience of Court orders inevitably leads to lawlessness and Courts will not sit back and watch as the Country descends into the state of lawlessness as a result of the failure to obey their orders. This country has in the not too distant past experienced a state of lawlessness as a result lack of trust in the courts. Courts will not hesitate to take appropriate measures to stem the same and will where necessary declare persons who have a tendency to disobey court orders with impunity unfit to hold public offices if that is the only way in which law and order will be restored.
39. However as I am not in possession of all material facts I will say no more on the deportation of the applicant during the pendency of these proceedings.

ORDER

40. In the result and taking into account the developments which have taken place since leave was granted I disallow the Notice of Motion dated 21st January 2012 (sic) filed on 22nd January 2013 as it will serve no useful purpose. The respondent will however bear the costs of these proceedings.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Oundu for the applicant and Ms Chege for the respondent