

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
JUDICIAL REVIEW APPLICATION NO. E 012 OF 2023

REPUBLIC.....APPLICANT

-VERSUS-

CABINET SECRETARY

MINISTRY OF INTERIOR &

NATIONAL ADMINISTRATION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

ex parte;

ASIF AMIRALI JETHA

JUDGMENT

1. This judgment is on the applicant’s motion dated 24 April 2025 expressed to have been filed under sections 8 and 9 of the Law Reform Act, cap. 26 and order 53 rule 3(1) of the Civil Procedure Rules. The prayers for reliefs sought have been couched in the following terms:

“1. That an order of certiorari to issue to bring into this court to be quashed the respondent's decision declaring the applicant to be a member of the prohibited class hence a prohibited immigrant and the further directives to have the exparte applicant arrested and placed in either police or prison custody pending his removal from Kenya to Canada/United Kingdom dated the 16th November 2022.

2. That an order of mandamus do (sic) issue against the respondents compelling the respondents to undeclared the

exparte applicant to be a prohibited immigrant hence removal from the category of members of the prohibited class.

3. That an order of prohibition do (sic) issue to prohibit the respondents acting either in person or through servants, agents, police officers, employees or anyone else claiming to derive such authority from the respondents, from arbitrarily arresting, detaining, continuous detention, harassing and or deporting the exparte applicant or in any manner whatsoever curtailing/impeding

the exparte applicant's liberty/freedom of movement with regard to the matters herein.

4. That a declaration be issued declaring that the action of the respondents in placing the exparte applicant to be a member of the prohibited class hence a prohibited immigrant and ordering for his arrest, detention, continuous detention as/is unlawful, unfair and a breach of the exparte applicant's rights to fair hearing, fair administrative action, freedom and security of the person of the exparte applicant; and exparte applicant's right to freedom of movement and secure protection of the law.

5. That an order of compensation do (sic) issue to the exparte applicant for the inconvenience & stress caused by his arrest &

confinement in police custody, resulting to his hospitalization and costs incurred as a result for the violation of the exparte applicant's rights and fundamental freedoms to be assessed by the honourable court & awarded to the exparte applicant.

The applicant has also asked for this Honourable Court's order on costs.

2. The application is based on the statutory statement dated 23 May 2023 and an affidavit verifying the facts relied upon sworn by the applicant on even date.
3. According to the applicant's affidavit, the applicant is a male adult and holds Canadian and United Kingdom passports. Nonetheless, he describes himself as "*a Kenyan citizen born abroad, and having officially returned back to Kenya in the year 1995*". Upon his return, he lodged an application to be naturalized as a Kenyan citizen. The application is said to be still pending; in the meantime, the applicant holds what he has described as "*an Identification waiting card bearing serial number 2388022305 and dated the 6th June, 2014*".
4. On 5 May 2019, police officers two of whom he has named as Paul Gathara and Joseph Munyao attached to the Directorate of Criminal Investigations, went to his house to arrest him. He knew the two officers because they had previously arrested him, more particularly on 13 April

2019. He was taken to Nyali police station where he was booked in the Occurrence Book as No. 43 of 5th May 2023.

5. Through his advocates, the applicant made an application for his release. His application was registered in this Honourable Court as no. E065 of 2023. In their response to the application, the Attorney General and the Director of Public Prosecutions informed the court that the applicant had been detained pending his deportation following a declaration by the Cabinet Secretary of the Ministry of Interior and National Administration.
6. The declarations by the Cabinet Secretary had been signed on 16th November 2022. The applicant claims that he was never served with these declarations and he only became aware of them when he was served with response to his application.
7. As far the applicant's arrest on 13 April 2019 is concerned, the applicant has sworn that he was charged with various offenses related to tax evasion and although he was convicted in the magistrates' court at Shanzu, he successfully appealed against the conviction and sentence.
8. The applicant has further deposed that he has remained in police custody since his arrest. The conditions in the remand prison are said not to be conducive and that they have contributed to his ill-health. The applicant, thus, urges this Honourable Court to stay the order of the Cabinet secretary and to order for his release unconditionally.

9. The applicant's case that in the orders by the Cabinet Secretary ordering for his arrest and subsequent deportation are tantamount to condemnation without a hearing and contrary to Article 47 of the Constitution. The orders should therefore be declared null and void.
10. The respondents filed a replying affidavit opposing the application. The affidavit was sworn by Ronnie Akedi who has described himself as an Assistant Director, Immigration services in the Compliance and Enforcement Division of the Directorate of Immigration which falls under the Ministry of Interior and National Administration.
11. Akedi has denied that the applicant is a Kenyan citizen; on the contrary, the applicant remains a foreign national with the dual nationality of Canada and the United Kingdom. Akedi has, however, admitted the applicant's application for naturalization as a Kenyan citizen is still pending but that the process of determination of citizenship by the applicant lies with the Directorate of Immigration Services as mandated by the Kenya Citizenship and Immigration Act.
12. It is also stated on behalf of the respondents that, following the declaration by the cabinet secretary, the applicant is a prohibited and inadmissible person under Section 33 of the Kenya citizenship and Immigration Act. It does not matter that the applicant is married to a Kenyan or that he has invested in this country.

13. Also swearing an affidavit in opposition to the application was Paul Gathara, a senior Superintendent of police. Gathara has sworn that he is the investigation officer in the matter before court and that he is conversant with the issues raised by the applicant in his application. According to him, contrary to the allegations that the applicant is a Kenyan citizen, the applicant is, in fact, a foreign national and a holder of British Passport No. 510191627 and Canadian Passport No. HM623827.
14. Through a letter reference No. CID /SEC/TOCU/4/4VOLI/43 National Identification waiting card serial No. 2388022305, apparently belonging to the applicant, was forwarded to the National Registration Bureau for certification in the cause of investigation. The National Registration Bureau responded and informed the Officer in Charge Transnational Organised Crimes Unit that the National Identification waiting card serial No. 2388022305 had been invalidated.
15. The presence in Kenya of any person who is not a citizen of Kenya, unless authorized under the Kenya Citizenship and Immigration Act, is unlawful. But the presence of that person would be lawful if he is in possession of a valid work permit or a valid residence permit or a valid pass. Gathara has sworn that the applicant is not in possession of a valid work permit or a valid residence permit or a valid pass. Without a valid immigration status, the applicant is in the county illegally.

16. It is also sworn that the applicant was charged and convicted of several immigration offences in Shanzu Magistrate Court Criminal Case No 595 of 2019. The offences included:

a. Engaging in business without a work permit contrary to section 53(1) (m) as read with section 53 (2) of the Kenya citizenship and Immigration Act, 2011; and

b. Unlawfully employing foreign nationals contrary to section 45(1) (a) as read with section 60 of the Kenya Citizenship and Immigration Act, 2011.

17. Vide a judgment dated 26 November 2021, the applicant was convicted and sentenced to pay cash a fine of kshs.100, 000/= or in default to serve six months in prison for each of the counts. Contrary to the applicant's allegations, the sentence and conviction were upheld by this Honourable Court when the applicant appealed in Mombasa Criminal Appeal No. E103 of 2021. The judgment in the appeal was delivered on 21 October 2022.

18. On 16 November, 2022 the applicant was declared a prohibited immigrant by the 1st respondent in exercise of his powers under section 43(1) and 43(2) of the Kenya Citizenship and Immigration Act 2011.

19. A preliminary issue that may as well determine the fate of this application is whether the application is properly before court and, in

particular, whether it was open to the applicant to challenge the decision of the Cabinet Secretary by way of judicial review proceedings.

20. According to section 57 of the Kenya Citizenship and Immigration Act cap. 170, decisions made under that Act may be challenged in this Honourable Court by either of the two means; an application for review or an appeal. This section reads as follows:

57. Review and Appeal

(1) Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.

(2) An appeal against the decisions of the Cabinet Secretary or of the Service under this Act may be made to the High Court.

21. Thus, a decision made on the Authority of the Act by a public officer, can only be questioned in this court by way of an application for review but where the decision is that of the Cabinet Secretary, the only means by which it can be interrogated in this Honourable Court is by an appeal.

22. The decision impugned in these proceedings is a decision by the Cabinet secretary and no doubt, it is a decision made under the Act, more particular section 43 thereof which reads as follows:

43. Power to remove persons unlawfully present in Kenya

(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 (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

23. Under section 57(2) the only recourse open to the applicant was an appeal and not a judicial review application. That the two courses are different is beyond doubt more so when they are expressly distinguished in the Act as distinct and separate means of challenging decisions made under the Act.

24. Perhaps, only to emphasise, a judicial review application is not an alternative to an appeal and vice versa. The distinction between the two jurisdictions has been discussed by David Foulkes in his book **Foulkes Administrative Law, 7th Edition**. Citing the case of **Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72**, the learned author noted as follows:

“It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review,

reconsider etc. the decision of the tribunal likewise depend on the statute.

To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151).

25. And no doubt this was the principle applied by Lord Wright in **General Medical Council versus Spackman (1943) AC627, at 640** where he stated as follows:

"I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

26. Judicial Review would not only be the only path available to a person dissatisfied with the conduct or decision of the Appeals Tribunal but also, by its very nature, judicial review comes into play where there is no other alternative form of remedy that is as convenient, beneficial and effective. This principle was well articulated by Lord Widgery CJ in **R versus Peterkin, ex Soni (1972) Imm AR 253** where the learned judge noted as follows:

“The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere”.
(Emphasis added).

27. In the case before court, it cannot be urged that the applicant has no alternative form of remedy since the Act expressly provides, not an alternative form, but the only form of remedy that he may obtain from this court if he is dissatisfied with the decision made under the Act by the cabinet secretary.

28. Even if the judicial review course was available to the applicant, the application would still not be sustainable for the reason that the substantive motion was filed out of time. The applicant was first granted leave to file the application on 31 May 2023. He did not file it within time and, therefore, made another application for extension of time to file the application. On 18 April 2024, he was given a further extension of fourteen days but it was not until 13 May 2024 that he filed the instant application.

29. Order 53 rule 3 (1) of the Civil procedure Rules states that the substantive motion must be filed within 21 days of the date of grant of leave. This rule reads as follows:

(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

In view of this ruling, there would be no application or no proper application before court if judicial review was available to the applicant.

30. For the foregoing reasons, the applicant's application is misconceived and an abuse of the due process of this Honourable Court. It is hereby struck out with costs. It is so ordered.

Signed, dated and delivered on 31 October 2025

Ngaah Jairus
JUDGE