



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO 299 OF 1983**

**MWAU.....APPLICANT**

**VERSUS**

**PRINCIPAL IMMIGRATION OFFICER.....DEFENDANT**

**JUDGMENT**

December 8, 1983, **Simpson CJ, Sachdeva & Gachuhi JJ** delivered the following Judgment.

The applicant is a Kenyan citizen by birth who was issued with a Kenya passport No R 256086 in the year 1968. On February 25, 1983, the Assistant Immigration Officer in charge of investigations, acting for the Principal Immigration Officer, withdrew the applicant's passport without giving any reason for so doing. The Principal Immigration Officer refused to see the applicant.

On September 21 1983, the applicant wrote to the Principal Immigration Officer demanding the return of his passport since he wished to leave Kenya in order to conclude an important business transaction. The Principal Immigration Officer in a reply dated October 4, 1983, informed the applicant that the reasons surrounding the withdrawal of his passport were well-known to him. He was therefore instructed to let the applicant know that his passport remained withdrawn until further notice. The applicant states that he knows of no reason for the withdrawal of his passport. He has accordingly, having first obtained leave, filed this application for an order of *Mandamus* directed to the Principal Immigration Officer to return Passport Number R 256086.

He relies on section 81 of the Constitution of Kenya subsection (1) of which provides-

**“81. (1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.”**

Subsection (3) reads

**“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision...for the imposition of restrictions on the movement or residence within Kenya of any person or on any person's right to leave Kenya that are reasonably required in the interests of defence, public safety or public order.”**

The applicant in an affidavit states that he does not fall within these provisions nor has he contravened any Act of Parliament or any by-laws made thereunder. No replying affidavit has been filed.

Mr. Kinyanjui, appearing with Mr. Wambeu for the applicant, submitted that although a passport remained the property of the Government of Kenya and could be withdrawn at any time it could only be withdrawn in accordance with the due process of law since it was a document enabling the holder to enjoy the right vested in him by section 81 to leave and reenter Kenya. The withdrawal of this document amounted to the withdrawal of a constitutional right. The withdrawal of the applicant's passport had been arbitrary and had not been done under the authority of any law. It followed that the Principal Immigration Officer had a legal duty to return the passport.

Supplementing these submissions Mr. Wambeu said that by virtue of section 81 of the Constitution freedom of movement was a public right and it was the duty of the Principal Immigration Officer to ensure enjoyment of that right. The applicant he said had an international business requiring him to leave the country from time to time and accordingly had an interest in seeing that the Principal Immigration Officer carried out his duty by returning to the applicant his passport. He had disclosed all relevant facts and had made a demand for the return of his passport which had been met with a refusal. The Principal Immigration Officer had taken the passport and was therefore in a position to return it.

Mr. Shields, who appeared with Mr. Ole Keiwua, stressed that they were appearing for the Principal Immigration Officer and that it was not an application against the executive arm of the Government by means of proceedings against the Attorney-General under section 12 of the Government Proceedings Act (Cap 40) but an application for *mandamus* against a named officer of the Government. The issue of passports he submitted was the prerogative of the President and section 81 of the Constitution did not impose an obligation to see that any particular person enjoyed these rights. The Principal Immigration Officer had not statutory duty to issue or return a passport to any person.

There is no statutory provision for the issue of passports. As Alverstone, CJ said in *Rex v Brailsford & Another (1905) 2 K B D 730* (at page 745) "It would be well to consider what a passport really is". He continued –

"It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for the individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named."

The front cover of every Kenyan passport contains the following request:-

"These are to request and require in the Name of the President of the Republic of Kenya all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need."

It is signed by a Passport Officer.

The definition of Lord Alverstone is thus with minor modifications applicable to a Kenyan passport. It is a document issued in the name of the President on the responsibility of a Passport Officer to a named individual, intended to be presented to the Governments of foreign nations and to be used for the individual's protection as a Kenyan citizen in foreign countries, and it depends for its validity upon the fact that the Government in an official document vouches the respectability of the person named. It is not a document issued for the purpose of enabling a citizen to leave or enter Kenya although in practice it

coincidentally fulfils that function. The back cover of the passport contains the following statement under the heading "Caution"-

**"This passport remains the property of the Kenya Government and may be withdrawn at any time."**

United Kingdom passports are issued under the royal prerogative by the Passport Office. They may be refused, revoked and impounded in the absolute discretion of the Crown and there is no formal machinery for appeal or any means by which a person aggrieved can obtain judicial review of a decision adverse to his interests (see *Constitutional and Administrative Law*, SA de Smith).

It follows from the foregoing we think that in the absence of any statutory provision regulating the issue of passports the issue and withdrawal of passports is the prerogative of the President and it is open to the Minister responsible to decide on each application whether or not to make a request in respect of the applicant. If the Minister thinks it would not be in the best interests of the country to make such a request it would be open to him to refuse to issue a passport. Subject to the directions of the President it is a matter entirely within the discretion of the Minister and being purely in the exercise of the Presidential prerogative is not subject to judicial review.

Section 81 recognizes that a citizen has a right to leave Kenya. The right is not absolute. Parliament contemplated circumstances under which a citizen could be deprived of that right although appropriate legislation has not yet been enacted. The section does not it may be observed impose any obligation on any authority to take active steps to secure this right to leave Kenya by issuing a document provided for in international law requesting other sovereign states to give certain facilities to a Kenya citizen.

If the withdrawal of a passport were subject to judicial review we should have to consider whether or not the Principal Immigration Officer had any statutory or legal duty to return the applicant's passport the performance of which is compellable by an order of *mandamus*. There is no statutory or legal duty laid upon the Principal Immigration Officer to issue or return passports. The Immigration Act (cap 172) provides in section 10(2) –

**"In the performance of these functions under this Act, immigration officers shall act in accordance with such instructions as may be given by the Minister."**

It follows we think that in the performance of such non-statutory functions as he may have the Principal Immigration Officer likewise acts in accordance with instructions given by the Minister.

In *Shah v Attorney-General of Uganda* (No 3) [1976] EA 543 Goudie, J quoted with approval the following passage from *The Judicial Review of Administrative Action* by SA de Smith (2nd Edn p 462) which had been relied upon by the Attorney General –

"In mandamus cases it is recognized that when a statutory duty is cast upon a Crown servant in his official capacity and the duty is one owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it .....Where, however, a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata* and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown, the courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of this duty .....It would be going too far to say, that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by

mandamus on the application of a member of the public, for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are it is thought, comparatively few”.

In Volume I of *Haslbury's Laws of England* (4th Edition) at page 127 para 112 under the title “Administrative Law” of which one of the co-authors is S A de Smith the following more succinct statement appears-

**“The orders of *mandamus* will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity.”**

The following passage from *Pram's Law of Writs in India, England and America* (2nd Edition) at p 385 was also quoted with approval by Goudie J in *Shah's* case and later by Chesoni J in *Republic v Director General of East African Railways Corporation ex parte Kaggwa* 1977 KLR 194 at p 201 (the concurring judgment of Kneller J has been inadvertently omitted from the reports):

“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interferences by the judicial department with the management of the executive department of the government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory”.

The Principal Immigration Officer has no duty imposed upon him as *persona designata*. In withdrawing the applicant's passport he acted as the instrument of the responsible Minister. He has no clearly established and plainly – defined peremptory duty to return the passport.

Thus *mandamus* does not lie against the Principal Immigration Officer directing him to return the applicant's passport.

The application is accordingly refused with costs including the costs of two counsel.

**Dated and delivered at Nairobi this 8th day of December , 1983.**

**A.H SIMPSON CJ**

**S.K SACHDEVA**

**J.M GACHUHI**

**JUDGE**

**JUDGE**

**JUDGE**



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