



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 20530

**KEMBOI, PATRICK KIPKURUI ROTICH
P.O. BOX 16973
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**DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324**

Name: KEMBOI, PATRICK KIPKURUI R... A 097-683-060

Date of this notice: 5/29/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Manuel, Elise

browser

Userteam: Docket

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Falls Church, Virginia 20530

File: A097 683 060 – Dallas, TX

Date: MAY 29 2014

In re: PATRICK KIPKURUI ROTICH KEMBOI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

The respondent appeals from the January 17, 2013, Immigration Judge's decision denying the respondent's motion to reopen removal proceedings which had been conducted in absentia on September 5, 2012. The Department of Homeland Security (DHS) has not filed an opposition to the appeal. The record will be remanded for the entry of a new decision.

The Board reviews findings of fact by an Immigration Judge under the clearly erroneous standard of review, and may review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

An in absentia removal order may be rescinded where an alien files a motion to reopen within 180 days establishing that exceptional circumstances caused the failure to appear. *See* section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent filed his motion within 120 days of the September 5, 2012, order. Consequently, the Immigration Judge's denial based upon the motion not being filed within 90 days of the final order is in error.¹

The Immigration Judge also denied the motion on the basis that the respondent's former counsel appeared on September 5, 2012, and represented that he had informed the respondent of his hearing. The respondent's motion includes an affidavit, and appears to comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), alleging that his former counsel advised the respondent that he would be re-scheduling the September 5, 2012, hearing and that the respondent should secure new counsel. The record appears not to contain any rebuttal filed by his former counsel, and the Immigration Judge did not indicate whether the respondent's filings comply with *Matter of Lozada*, *supra*.

¹ The Immigration Judge also denied the motion for failure to include the requisite filing fee. However, there is no indication that the motion was returned to the respondent by way of a rejection notice with a warning that a fee must be paid, which would have allowed the respondent an opportunity to re-file the motion with the proper fee. Considering that the motion was filed pro se, we find failure to pay the filing fee in these circumstances insufficient alone to deny the motion.

Because the Board may not engage in factfinding in the course of deciding appeals (*See* 8 C.F.R. § 1003.1(d)(3)(iv)), we find remand appropriate for further fact-finding by the Immigration Judge, including an evaluation of the respondent's claim of ineffective assistance by his former counsel. In remanding this case, we intimate no opinion as to the ultimate merits of the respondent's appeal.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Emmanuel

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

KEMBOI, PATRICK KIPKURUI ROTICH
5008 OVERTON RIDGE CIRCLE 213
FORT WORTH, TX 76132

IN THE MATTER OF FILE A 097-683-060 DATE: Jan 18, 2013
KEMBOI, PATRICK KIPKURUI ROTICH

___ UNABLE TO FORWARD - NO ADDRESS PROVIDED

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

X OTHER: Motion to Reopen Denied.

AT
COURT CLERK
IMMIGRATION COURT

FF

CC: JAVIER, LYNN
125 E. HWY 114, STE 500
IRVING, TX, 75062

United States Department of Justice
Executive Office of Immigration Review
Immigration Court
Dallas, Texas

In Re: Patrick Rotich Kemboi

Case No. A097-683-060

Order Denying Motion to Re-Open

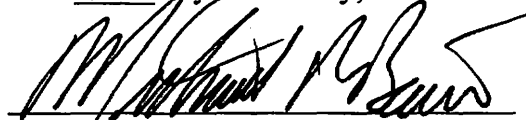
This matter is before the Court pursuant to the Respondent's January 3, 2013 Motion to Re-Open. For the reasons set forth below, the Motion will be Denied.

The Court is without jurisdiction to hear the current Motion to Re-Open because no filing fee has been paid. 8 C.F.R. §1003.23(b)(1)(ii) specifies that a motion "must be filed in duplicate with the Immigration Court, **accompanied by a fee receipt**." (emphasis supplied). A review of the record reveals that no filing fee was paid. None of the exceptions allowing for the Motion to Re-Open to be filed without a filing fee set forth in 8 C.F.R. §1003.24(b)(2) apply in this case. Even though the Court entered an *in absentia* order, Respondent does not base his motion on a lack of notice. He acknowledges knowing of the hearing and deciding not to appear. Therefore a filing fee is required. The Motion to Re-Open was improvidently filed and the Court has no jurisdiction over the issues presented.

Additionally and as an alternative ground, the Motion to Re-Open is untimely filed. 8 C.F.R. §1003.23(b)(1) provides that the motion must be filed within 90 days of the entry of the final order. The Court entered a final order of removal on September 5, 2012. The motion was not filed until January 3, 2013. Therefore it is temporally barred and will also be denied on that alternative basis.

Additionally, there is no sua sponte basis upon which to re-open the case. The transcript of the September 5, 2012 hearing contradicts the allegations made by the Respondent against Mr. Stewart. Mr. Stewart was present for the hearing and waited hours for the Respondent to appear and stated on the record that Respondent knew of the court date and his obligation to be present.

This 17 day of January, 2013.



Michael P. Baird

United States Immigration Judge