REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 405 OF 2015

HASHMUKH DEVANI.....PETITIONER

VERSUS

CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT ……..……..1ST RESPONDENT

THE DIRECTOR OF IMMIGRATION…….....……2ND RESPONDENT

REGISTRAR OF PERSONS ……3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....……4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner by his Petition dated 23rd September 2015, seeks to be declared that he is a citizen of the Republic of Kenya.
2. The Petitioner further seeks orders directed to the Director of Immigration and Principal Registrar of persons respectively to process and issue the Petitioner with a Kenyan identification card and passport. The Petitioner in support of the Petition swore a 40-paragraphed affidavit on 23rd September 2015.
3. The Petition was opposed. A Replying Affidavit was sworn on 28th October 2015 by Alfred Omangi, a Chief Immigration Officer.

Background facts and chronology

4. The facts are largely uncontested.
5. The Petitioner was born in Nairobi on 4th May 1949. Both the Petitioner's parents were citizens of India. The Petitioner's father passed on in 1959, while still an Indian citizen. The Petitioner's mother passed on in 2005 as a Kenyan citizen. She had been registered as a Kenyan citizen on

7 February 1969. The Petitioner then left Kenya for the United Kingdom where he resided for just under ten years. He returned to Kenya in 1973. He discovered that he was not eligible for Kenya citizenship. He took up residence via the legal avenue of obtaining permits and licenses.

6. When the Constitution was promulgated in 2010, the Petitioner believed he was now entitled to the Kenya citizenship by virtue of birth and through Article 14(2) of the Constitution. He applied for the Kenya national identification card. He was denied. He applied for the Kenyan passport. He was denied. In the absence of either document, none could be processed. That was the 2nd and 3rd Respondents' reaction.
7. The Petitioner contended that the 2nd and 3rd Respondents' action contravened the Constitution. It is that action which prompted the Petitioner to file this Petition on 23rd September 2015.

The Petitioner's case

8. The Petitioner's case is clear-cut and undemanding.
9. Relying upon Article 14(2) of the Constitution, the Petitioner contends that he is a citizen of Kenya by birth. That he is entitled to all documents any citizen of Kenya is entitled to including but not limited to a national identification card to be issued by the 3rd Respondent and a Kenyan passport to be issued by the 2nd Respondent. The Petitioner avers that he could not have obtained either of these two documents prior to the promulgation of the Constitution in August 2010 as the Petitioner was then not a citizen of Kenya.

The Respondent's case

10. The Respondent's case may be obtained from the Replying Affidavit of Alfred Omangi sworn on 28th October 2015.
11. The Respondents' case may also, in few words, be stated as follows.
12. The Respondents contend that both under the retired Constitution as well as the Constitution 2010 the Petitioner was not and is not entitled to be a citizen of Kenya. The Respondents refer to Section 87 of the retired Constitution which was to the effect that if either of a person's parents was not born in Kenya then a person born in Kenya to such parents was not to become a Kenyan citizen.
13. The Respondents also contend that Articles 14(1) and 14(2) of the Constitution do not apply to the Petitioner and would not confer any citizenship to the Petitioner as neither of the Petitioner's parents at the time of the Petitioner's birth was a Kenyan citizen.
14. The Respondents contend that the Petitioner has failed to show that he is a citizen of Kenya by birth and by dint of the provisions of Article 14(1) & (2) of the Constitution or the transitional provisions of Section 30 of the Sixth schedule to the Constitution.
15. According to the Respondents the Petitioners recourse lies under Article 15(2) of the Constitution and the Petitioner has to make an appropriate application for registration as a citizen and not recognition.

Arguments

16. The Petition was urged by way of written submissions and brief oral arguments advanced on 16th December 2015.

Petitioner's submissions

17. Giving a detailed family tree and history of the Petitioner's family, Mr. Victor Githinji appearing for the Petitioner submitted that the Petitioner's parents migrated to Kenya in the first half of the 20th

century. That the father died in 1959 whilst the mother passed on in 2005. The mother however acquired her citizenship prior to her demise. The citizenship was acquired in 1969. Both parents, counsel added, were not born in Kenya.

18. Counsel submitted that the dispute was limited to an interpretation of Article 14(2) of the Constitution as read together with Section 30 of the Sixth schedule to the Constitution. Counsel then submitted that the Petitioner was vested with citizenship as he had met the conditions outlined in both Article 14(2) and section 30 of the Sixth Schedule to the Constitution.
19. Counsel stressed the fact that the Petitioner was born before the effective date and one of his parents was a citizen of Kenya. Counsel pointed out that the purpose of Section 30 of the Sixth Schedule was to ensure that those whose parents were citizens but were born outside Kenya were also automatically citizens on the effective date.

Respondents' submissions

20. Ms. Jennifer Gitiri urged the Respondents' case.
21. Counsel submitted that the Petitioner could not qualify for citizenship under Article 14(2) of the Constitution as neither of the Petitioner's parents was a citizen of Kenya as at the time of the Petitioner's birth on 4th May 1949. Counsel also submitted that the transitional provisions of the Constitution did not also allow the Petitioner to be a citizen as neither of the Petitioners parents was born in Kenya. Counsel added that the Petitioner was not stateless and indeed could still apply to become a Kenyan citizen under Article 15 of the Constitution.
22. For completeness, Ms. Gitiri submitted that where there was provided in law a specific procedure for the redress of any particular grievance the court should not intervene until that procedure is exhausted. In the instant case, counsel continued, there was no proof that an application had been made for citizenship and denied by the Immigration Department. For this proposition in law, Ms. Gitiri relied on the cases **Kenya National Examination Council – V- Republic, Ex Parte Geoffrey Gathengi Njoroge CACA No. 266 of 1996** and **Speaker of National Assembly –V- Karume [2000] 1 KLR 425**
23. Counsel urged that the Petition be dismissed for lack of any demonstration that the Petitioner's Constitutional rights and freedoms had been infringed.

Discussion and determination

Issues

24. Having read through the Petition as well as the supporting Affidavit and the annextures, having also read through the Replying Affidavit and listened to counsel during their oral arguments, I am satisfied that the core issue for determination is whether or not the Petitioner is a citizen of the Republic of Kenya by birth by virtue of the provisions of Article 14(2) of the Constitution. Secondly, is whether the Respondents have violated any of the Petitioner's constitutional rights and fundamental freedoms.
25. It is a finding of citizenship in favour of the Petitioner or that his rights were violated that may entitle the Petitioner to the mandatory orders or reliefs sought.

Constitutional and Statutory indexation

26. The parties made reference to various Articles of the Constitution. The parties also referred to Sections of the retired Constitution. It is an interpretation or invitation and application of such Articles or sections of the statute which will help determine the instant Petition.
27. Specifically the parties referred to Articles 14 and 15 of the Constitution as well as Section 30 of

the Sixth Schedule to the Constitution. These Articles respectively provide for citizenship by birth and citizenship by registration. Section 30 of the Sixth Schedule also provides for citizenship by birth.

28. Further, the parties also referred to Sections 87 and 88 of the retired Constitution. The retired Constitution itself had, inter alia, Sections 87 and 88 dealing with citizenship. The former section provided for those who became citizens on 12 December 1963 while the latter section provided for persons who were entitled to be registered as citizens by virtue of their connection to Kenya before independence day, 12 December 1963.
29. The Constitution 2010 however, seems to have broadened the facets of citizenship.

A question of the court's mandate

30. Foremost, it would be appropriate to deal with the issue of mandate raised by the Respondents.
31. Ms. Gitiri argued that the Petition was unmerited and abuse of the court process as there was clear procedure for the Petitioner to follow if he wanted to be registered and recognized as a citizen of Kenya. Counsel further stated that the 2nd Respondent had indeed pointed out to the Petitioner that the appropriate channel to follow was for the Petitioner to apply for registration as a citizen of Kenya under **Section 13(1)** of the **Kenya Citizenship and Immigration Act, 2011**.
32. Such advice, counsel continued, was contained in the 2nd Respondent's letter to the Petitioner dated 6th November 2014. A copy of the letter constitutes part of the Petitioner's exhibits. It is marked as 'HD-8'.
33. The Petitioner did not make any specific response to the contention as to the court's mandate but it was clear that the Petitioner was and is still convinced that the court is the appropriate forum to air his grievances.
34. There is certainly no doubt that the correct legal position is that where there exists an alternative remedy through statute law, then it is desirable that such statutory remedy rather than Constitutional relief be pursued first. This principle was clearly expressed by the Court of Appeal in the case of **Speaker of National Assembly -v- Njenga Karume [2000] 1 KLR 425(CA)** where the court stated as follows:

"In our view there is considerable merit that where there is clear procedure for the redress of any particulars grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed"

35. The same proposition has been expressed also in the cases of **Dupoto Group Ltd –v- Kenya Ports Authority [2013]eKLR, Kipkalya Kones –v- Republic & Another Ex Parte Kimani Wanyoike & Others [2008] 3 KLR 291, James Tinai Murete & Others –v- County Court of Kajiado HCCP No. 283 of 2014 (NBI) [2015]e KLR** and **Minister of Home Affairs –v- Bickle [1985] LRC (Const) 755.**
36. Yet too, there is also no doubt that the right to access justice or the court ought not be repressed or held back in a manner that stalls the advancement or enforcement of a fundamental freedom or a right : see **Article 20(3)(b)** of the Constitution and also the decision of the Court of Appeal of Trinidad & Tobago in **Damian Belforte –v- The Attorney General of Trinidad & Tobago CA 84 of 2004.**
37. In the ***Damian Belforte case*** the court stated as follows:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process <u>where there is an available common law remedy</u>. In their lordship's words:

"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."

38. It is clear that the court before shutting out the Petitioner must examine his grievances as well as the alternate statutory avenue for relief and determine whether the latter avenue is adequate and appropriate. It is not automatic that the existence of an alternative remedy or avenue locks out the Petitioner from seeking a constitutional relief.
39. The Petitioner herein commenced these proceedings claiming that his rights and fundamental freedoms under the Constitution had been violated. In particular, the Petitioner pointed to his entitlement to citizenship under Articles 13 and 14 of the Constitution. The Petitioner contends that he is a citizen and entitled to all the benefits and rights a citizen is entitled to including the right to be issued with a Kenyan passport and identification document by the State. According to the Petitioner, he is a citizen by birth.
40. The Respondent on the other hand held the view that the Petitioner ought to apply for registration as a citizen under the Kenya Citizenship and Immigration Act (Cap 172) ("**the Act**").
41. A cursory reading of the Act will reveal that citizenship under the Act can be obtained by descent (birth) under Sections 6 and 7 or by registration under Sections 8 through 19 of the Act.
42. Section 6 of the Act reads as follows:

"6*. Citizenship by birth*

A citizen by birth will carry the same meaning as provided in Article 14 of the Constitution as read together with clause 30 of the Sixth Schedule of the Constitution."

43. Section 7 of the Act on the other hand reads as follows:

"***7. Limitation as to descent***

***A person born outside Kenya shall be a citizen by birth if on the date of birth that person's mother or father was or is a citizen.*"**

44. The Petitioner contends he is a citizen by birth and his rights are being violated by the continued denial of an identification document or passport. The Respondents contend otherwise.
45. It is evident that a determination of the Petitioner's claim is dependant upon a construction of Article 14 of the Constitution and Section 6 of the Act. The ultimate mandate and jurisdiction to determine questions of violation of rights or fundamental freedoms lies in the High Court. The ultimate mandate and jurisdiction to interpret the Constitution also lies in the High Court. Article 22,23 and 165 (3) (b) and (d) of the Constitution are relatively clear on this.

The 2nd Respondent is not in a position to conclusively make that interpretation and determination.

46. Besides, the 2nd Respondent has already made his view and decision known to the Petitioner, that is to say that the Petitioner is not a citizen by birth. The Petitioner is dissatisfied and that determination can ultimately only be made through the court system starting with the High Court. Once that interpretation and determination is made as to who is a citizen by birth, then the Respondent's mandate may take forte. Ideally, the court ought not to be easily divested of its jurisdiction to arbitrate between a person and the State or between two persons.
47. The instant case is early distinguishable from the case of **Kulraj Singh Bhangra –v- Director General, Kenya Citizen and Foreign Nationals Management Service NBI HCCP 137 of 2014 [2014]eKLR** where Lenaola J held as follows:

"[18] As to whether the Petitioner is entitled to Kenyan citizenship, I decline the invitation to address that matter because the Kenyan Citizenship *and* ***Immigration Act, 2013 has elaborate mechanisms on how that matter should be addressed. Until a formal decision is made by the Respondent in that regards, it would not be prudent for this Court to take its place and make that determination"***

48. In ***Kulraj Singh Bhangra's case*****,** the respondent therein had not made any formal decision on the petitioner's application for citizenship. Herein the Respondent has determined that the Petitioner is not a Kenyan Citizen by birth. The decision which the Petitioner contests is contained in the letter of 31st March 2015 addressed to the Petitioner by the 2nd Respondent which partly read as follows:

…

Dear Sir,

RE: KENYA CITIZENSHIP

"Further to our letter dated 6th November 2014, I wish to inform you that only Kenyan citizens by birth qualify to apply to regain Kenya citizenship as provided for under Section 10 of the Kenya Citizenship and Immigration act 2011

You are ineligible since none of your parents was a [sic] Kenya Citizen at the time of your birth"

Yours faithfully,

Signed."

49. I hold the view that this decision, which the Petitioner has contested through the Petition, is not grossly and procedurally unfair or perverse to invite the purview of judicial review. It would only be appropriate to contest it by way of Petition.
50. I hold that in the circumstances of this case, this court has a mandate and jurisdiction to determine whether the Petitioner is a Kenyan citizen by birth, a determination which of necessity invites an interpretation of the Constitution.

Interpreting the Constitution

51. Any theory of Constitutional interpretation ought ordinarily to be a matter of conviction based on some theory external to the Constitution itself. The ordinary text of the Constitution ought to be read in light of its history, with necessary implications as may derive from the Constitution

structures. It must also always be remembered that a Constitution is a mechanism under which laws are made and not a mere piece of legislation which declares what the law is to be to fit specific situations. These views run from case law retrieved from both within and outside domestic jurisdiction.

52. In **Jumbuma Coal Mine -v- Victoria Coal Miners Association [1908] 6 CLR 309** at **367,** O'Connor J stated thus**:**

"*It must always be remembered that we are interpreting a Constitution broad and general in terms, intended to apply to varying conditions which development of community must involve.*

For that reason, where the question is whether the Constitution has used an expression in the wider or narrower sense, the court should in my opinion always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose"

53. In the case of **James –v- Commonwealth of Australia [1936] AC 578,** Lord Wright put it as follows with regard to liberal interpretation.

"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full importance and true meaning can only be appreciated when considered, as the years go, in relation to the vicissitudes of fact which from time to time emerge. It is not true that the meaning of words changes but the changing circumstances illustrate and illuminate the full import of that meaning".

54. Closer home the principles of Constitutional interpretation were recently well summarized in the case of **Advocates Coalition for Development and Environment & Others -v- Attorney General of Uganda & Another [2014] 3 E A 9 ,** where the Constitutional court of Uganda held as follows:

"***The principles which govern…… the construction of constitutional provisions… include the following:***

a. ***The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for.***
b. ***A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social, economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota –v- North Carolina, 192, US 268 1940 LED 448).***
c. ***The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other, but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.***
d. ***No one provision of the Constitution is to be segregated from the others and be considered alone, but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.***
e. ***Judicial power is derived from the people and shall be exercised by courts established***

under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive justice without undue regard to technicalities.

f. ***The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency.***

g. ***Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity***"

55. I am not, however, bereft of precious authority of our own jurisdiction and jurisprudence to guide me on my deliberations on the meaning of any Article of the Kenyan Constitution. I have some guidance from pronouncements of this court as well as courts of a higher hierarchy which I should follow in this matter.
56. In **Jasbir Singh Rai & 3 Others –v- Tarlochan Singh Rai & 4 Others [2013]eKLR,** the Supreme Court (per Mutunga CJ and P) drove home the need to interpret the Constitution in such a way as to develop local jurisprudence and avoidance of a fobbish adherence to foreign jurisprudence. So stated Mutunga P:

"In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the U.S. yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country. A negative side of the mechanistic approach to precedent, is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance such a pre-determined approach. All the cases cited in this matter were subjected to an inquiry into their respective contexts. We sought to find out whether they are still good law, or have been overturned. We did all this because our progressive needs, under the Constitution, are different; and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a transformative charter of good governance."

While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the Supreme Court Act."

57. Similar sentiments had earlier been expressed by the Supreme Court of Kenya in **Advisory Opinions No. 2 of 2012 In The matter of the Principle of Gender Representation in the National Assembly and the Senate[2012]eKLR**.
58. Then even with the knowledge and conscious that the Constitution must be holistically interpreted: see **Royal Media Services Ltd & 5 Others [2014] e KLR, Tinyefunza –v- Attorney General [2002] UCCA No. 1 of 1997** and **Olum & Others –v- Attorney General [2002] 2 EA 508**,the Supreme Court of Kenya in the case of **Judges and Magistrates Vetting Board & 2 Others -v- Centre for Human Rights & 11 Others Petition No. 13A of 2013 (SCK) [2014]eKLR**, also made it clear that in interpreting the Constitution firstly, no Constitutional provision is 'unconstitutional' . Secondly, the court stated that to achieve an accurate interpretation the historical context of the various provisions and of Kenya's unique history is relevant.
59. Finally, it cannot be doubted that due regard must be had to the language and wording of the Constitution and where there is no ambiguity, attempts to depart from the straight texts of the

Constitution must be avoided. In these respects the words of the court in **Republic –v- Elman [1969] EA 357** are of relevance. The court in **Republic –v- Elman (Supra)** stated as follows:

" ***We do not deny that in certain contexts a liberal interpretation of the Constitution may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous. They are construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put on the words."***

60. **Republic –v- Elman (Supra)** has been cited with approval by this court in both **Joseph Mbalu Mutava –v- Attorney General & Another [2014]eKLR** and **Njoya & Others –v- Attorney General & Others [2004] 1 EA 194.**
61. I would still agree that notwithstanding all the aforegoing principles as well as the crucial principles that "*the language of the Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit…..particularly….those provisions which are concerned with the protection of human rights"* (see **Whiteman –v- Attorney General of Trinidad & Tobago [1991] 1 LRC (Court) 536, 551)** ,the textualized approach of **R –v- Elman** should not be ignored where the Constitutional provision is clear and unequivocal. Where, for example, the provision contains an exception, it must be given an ordinary strict textualized construction rather than a liberal and broad construction. The text ought not to be ignored, it constitutes the starting point for determining the meaning of a provision in the Constitution.
62. In **S-v- Zuma [1995]2 SA 642** Kentridge AJ warned against underestimating the importance of the text and stated as follows:

"While we must always be conscious of the values underlying the Constitution,it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that the general language must have a single 'objective meaning'. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination…I would say that a constitution's embodying fundamental principles should as far as its language permits be given a broad construction."(emphasis in original text)

63. The lesson all the foregoing principles teach however is that the very nature of the Constitution requires a broad and generous approach to be adopted in the interpretation of its provisions and that all relevant provisions bearing on the subject for interpretation be considered together as a whole in order to give effect to the objective of the Constitution. The only injunction to such an approach is Article 259 of the Constitution which is transformative and outlines the principles of Constitutional interpretation.
64. Article 259 must not be ignored. Under Article 259 the Constitution must be interpreted in a manner that promotes its purposes values and principles, advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights, permits the development of law and contributes to good governance.
65. With the foregoing principles in mind, it is now necessary to examine the reserved issues in relation to the relevant constitutional provisions.

A question of citizenship

66. The right to a nationality (citizenship) is of great importance to the realization of other rights. Indeed, certain rights are reserved under the Constitution to only Kenyan citizens. Only citizens are accorded the Article 38 political rights and likewise only citizens can be elected or appointed as state officers (Article 78). Only citizens can vote (Article 83) and by extension be elected to Parliament (Article 99).
67. The right to citizenship has been described correctly thus as the "*right to have rights":* see **Trop –v- Dulles 356 U.S. 86 [1958]** at **101** and see also Article 12 of the Constitution. For its import, regional and international human rights conventions include the right to citizenship. Thus Article 15 of the Universal Declaration of Human Rights states that "*everyone has a right to a nationality"* and no one is to be arbitrarily deprived of his nationality.
68. Citizenship under the Constitution 2010 may be acquired through one of three ways. By birth (Article 14(1) and (2), by descent (Article 14(3) and by naturalization or registration (Article 15). It is the *jus soli* [citizenship by birth] citizenship that is at the core of the dispute herein. Like the other forms of acquisition of citizenship, *jus soli* may also have limitations. National and international laws however seek in their interpretation and enforcement not to render any person stateless. The spirit is that a party ought not be rendered stateless.
69. Thus in **Institute for Human Rights & Development in Africa & Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya –v- Kenya, Communication no. Comm/002/2009 of March 2011**, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) found that the Republic of Kenya had violated the rights of children of Nubian descent under the African Charter on the Rights and Welfare of the child, which explicitly recognizes the right to a nationality. Most of the children of Nubian descent had been left stateless when they were neither registered nor given access to Kenyan citizenship upon being born in Kenya.
70. In principle no human individual ought to be rendered stateless as statelessness affects a person's ability to enjoy and various fundamental privileges and rights. A stateless person also becomes particularly vulnerable to both detention and expulsion from country of habitual residence: see **Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status* 10 Int'l J Refuge law (1998) 156-182.**
71. A construction or deliberation on any law or question as to whether a person is a citizen, in my view and judgment, must consequently be liberal enough to avoid condemnation to statelessness.
72. The case for the Petitioner is that he is a citizen of Kenya by birth and therefore is entitled to be issued with a Kenyan passport as well as an identification document under Article 12(1) of the Constitution. He is effectively asking the Government of Kenya, to recognize him as a citizen by birth.
73. While Chapter 3 of the Constitution provides for the right or entitlement to citizenship, the technical aspects of citizenship including, acquisition, naturalization loss and proof of citizenship, duties and rights of citizenship and issuing of passports are dealt with in the **Kenya Citizenship and Immigration Act (Cap 172)** which was enacted pursuant to the provisions of Article 19 of the Constitution.
74. As already pointed out earlier in this judgment, in International law two main principles guide the acquisition of citizenship. *Jus soli* (acquisition of citizenship through birth in the territory of the State) and *jus sanguinis* (acquisition of citizenship by descent from parents who are citizens). A third principle is acquisition of citizenship by naturalization, where citizenship is granted upon application, to a person who has entered and stayed in the state legally for a period of time. The Constitution, under Articles 14 and 15, embodies all these principles.
75. The Petitioner's case is that he is entitled to citizenship *jus soli*.The Respondents deny the same

and insist that the Petitioner may only be entitled to citizenship through naturalization and must make an appropriate application under the relevant law.

76. Of relevance is Article 14 of the Constitution which provides as follows:

Citizenship by birth

"14(1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen;

(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen;

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya;

(4) A child found in Kenya who is or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth;

(5) A person who is a Kenyan citizen by birth and who has ceased to be a Kenyan citizen because the person acquired the citizenship of another county is entitled on application to regain Kenyan citizenship."

77. Article 14 is further operationalized and given force by Section 6 of the technical statute. Section 6 of the Kenya Citizenship and Immigration Act (Cap 172) provides as follows.

"6. Citizenship by birth

A citizen by birth will carry the same meaning as provided in Article 14 as read together with Clause 30 of the Sixth Schedule of the Constitution"[insert]

78. Section 30 of the Sixth Schedule of the Constitution, referred to under Section 6 of the Act, then reads as follows.

"***Citizenship by birth***

(30) A Kenyan citizen is a citizen by birth if that citizen-

(1)acquired citizenship under Article 87 or 88 (1) of the former Constitution

(2)would have acquired citizenship if Article 87(2) read as follows

" Every person who, having been born outside Kenya is on 11th December 1963 a citizen of the United Kingdom and colonies or a British protected person shall, if his mother or father becomes, or would but for his or her death have become, a citizen of Kenya by virtue of subsection (1) become a citizen of Kenya on 12th December 1963"

79. A closer and clearer reading of Article 14 in its entirety as well as Section 6 of the Act would reveal that the draftsmen of the Constitution as well as the legislature departed from the traditional formula of *jus soli*. Specific and important limitations varying the principle were enacted. The birth place was not of itself to be equivalent to citizenship. It also had to be

bequeathed. One had to be born in Kenya or even if born outside Kenya either or both parents had to be citizens at the time of birth. Parentage and place, both count for one to qualify as a citizen by birth. The Constitution itself availed these claw-back like qualifications to the principle of *jus soli*. Both qualifications have to be met.

80. Relating the above to the facts of this case, it would logically follow that the Petitioner does not qualify for citizenship under Article 14(1) or 14(2). It is admitted that the Petitioner though born in Kenya in 1949 was not born of Kenyan parents. Both the Petitioner's parents were Indian citizens. The mother acquired Kenyan citizenship in 1969. The father never did. The Petitioner would meet the first qualification being born in Kenya, but fail the second qualification not being born to parents who were then citizens of Kenya.
81. It brings me to Section 30 of the Sixth Schedule to the Constitution, which the Petitioner contended was relevant to him. Section 6 of the Kenya Citizenship and Immigration Act also provides that citizenship by birth could be acquired as stated under section 30 of Sixth Schedule. Section 30 of the Sixth Schedule is a transitional provision.
82. It is common ground that the Petitioner was born in Kenya. Section 30(2) of the Sixth Schedule, and by extension Section 87(2) of the retired Constitution, is in-applicable to the Petitioner for the simple reasons that the Petitioner was born in Kenya. Section 30(1) is therefore the applicable provision since the Petitioner was born in Kenya.
83. Article [Section] 87 of the retired Constitution stated as follows.

87. Persons who become citizens on 12th December 1963

(1) Every person who, having been born in Kenya, is on 11th December 1963 a citizen of the United Kingdom and colonies or a British protected person shall become a citizen of Kenya on 12th December 1963: provided that a person shall not become a citizen of Kenya by virtue of this subsection if neither of his parents was born in Kenya. (emphasis)

(2)…..

84. Article [Section] 88 of the retired Constitution on the other hand provided as follows :

88. Persons entitled to be registered as citizens by virtue of connexion with Kenya before 12th December 1963.

(1) A person who, but for the proviso to Section 87.

1. ***Would be a citizen of Kenya by virtue of that subsection shall be entitled, upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya.***

Provided that a person who has not attained the age of twenty-one years(other than a woman who is or has been married) may not himself make an application under this subsection but an application may be made on his behalf by his parent or guardian.

2. ***A woman who on 11th December 1963, has been married to a person-***

a. ***Who becomes a citizen of Kenya by virtue of Section 87; or***
b. ***Who, having died before 12th December 1963, would but for his death, have become a citizen of Kenya by virtue of that Section.***

Shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya.

3. ***A woman …..***
4. ***A person who, on 11th December 1963 is a citizen of the U.K and colonies or of the Republic of Ireland and is on that day ordinarily and lawfully resident in Kenya (otherwise than under the authority of a pass issued under the Immigration Act as then in force and conferring on him the right to remain in Kenya only temporarily) shall be entitled upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament to be registered as a citizen of Kenya. Provided [applications to be made on behalf of minors].***
5. ***A person who, on 11th December 1963 is a citizen of the UK and colonies-***

a. ***having become such a citizen under the British Nationality Act, 1948 by virtue of his having been naturalized in Kenya as a British subject before the Act came into force, or***
b. ***having become such a citizen by virtue of his having been naturalized or registered in Kenya under that Act, shall be entitled, upon making an application before the specified date in such manner as may be prescribed by or under an Act of Parliament to be registered as a citizen of Kenya….***

a. ***in relation to a person to whom subsection (1),(4), or (5) refers, 12th December 1965 and in relation to a woman…***

85. Under Section 87 of the retired Constitution, three factors need be satisfied by the claimant, in this case the Petitioner. The person needs to have been born in Kenya on or before 11th December 1963. Secondly, he ought to be a citizen of the United Kingdom and colonies or a British protected person. Thirdly, either of his parents ought to have been born in Kenya.
86. Assimilating the above with Article 14(1) & (2) of the Constitution and Section 30 of the Sixth Schedule to the Constitution, it is clear that citizenship by birth has three factors and categories. These would be;(i) one needs to be born or have been born in Kenya with both or either parent a Kenyan citizen, (ii) was born outside Kenya and either of his parents was a Kenyan citizen at the time of his birth and,(iii) a person was a citizen of the United Kingdom or protected colonies who was born in Kenya as of 11 December 1963 of a parent who was himself or herself also born in Kenya. In all instances, at the time of being born, either or both of the person's parents must have been a Kenyan citizen or must have been born in Kenya. The third category was essentially to ensure that all locals or 'natives' or residents who then held United Kingdom citizenship with a parent born in Kenya, did not continue with foreign citizenship as Kenya attained independence.
87. In the instant case, it is not in dispute that the Petitioner was born in Kenya. However neither of his parents was born in Kenya. Without even determining whether or not the Petitioner was a citizen of the United Kingdom and colonies or a British protected person, the Petitioner would never have qualified for citizenship under Section 87(1) of the retired Constitution. As already pointed out, Section 87(2) of the retired Constitution would also be inapplicable to the circumstances of the Petitioner as he was born in Kenya.
88. The argument of the Petitioner that he was a citizen of Kenya by birth and by parentage does therefore indeed appear fragile and unconvincing. He was born in Kenya but to parents whose nationality was clearly and unquestionably Indian. That automatically disqualified him under both the retired Constitution and the current Constitution from acquiring citizenship by birth.
89. The Petitioner would likewise also not qualify for citizenship by dint of the provisions of Section 88 of the retired Constitution through the transitional Section 30 of the Sixth Schedule to the

Constitution. The Petitioner is not a person who was a British subject immediately before the commencement of the British Nationality Act of 1948 to have made him become a citizen of the United Kingdom and colonies. The Petitioner was born on 4th May 1949 after the British Nationality Act of 1948 had come into effect on 1st January 1949.

Conclusion

90. Even though the importance of citizenship as a right is underscored by both International and national laws which reserve certain rights to citizens, in International law, States are in principle allowed to determine own rules on acquisition of citizenship. The Constitution as well as the **Kenya Citizenship and Immigration Act (Cap 172)** have done just as much. One may acquire citizenship through descent or naturalization subject to certain qualifications. Citizenship by descent or birth will arise by operation of the law or biological factors to which the claimant has no control. It is transmitted down the line. Citizenship by registration is however bequeathed after its registration. It may only be transmitted to children born after it has been acquired.
91. In the instant case the Petitioner has not met the qualifications of citizenship by birth under Article 14 (1) or (2) of the Constitution. Clause (1) does not apply to the petitioner because he was born before the effective date of the Constitution. He also does not qualify under Clause (2). Neither could the Petitioner's parents also transmit Kenyan citizenship to the Petitioner at the time of the petitioner's birth. The father was never a citizen of Kenya. The mother on the other hand became a citizen by registration in 1969, long after the Petitioner had been born. Citizenship by registration cannot be transmitted to those who have already been born and certainly Article 14(2) did not intend otherwise.
92. It was also not suggested to the court that the Petitioner is a stateless person. The evidence abounds that the Petitioner has travelled out of the country. The evidence abounds too that work permits as well as residence permits have been given to the Petitioner before. These thrust the fact of a person holding a nationality. This is not a case of the benefit of doubt being extended to a stateless person.
93. My view is that it must be presumed that the Petitioner acquired the citizenship of his parents when he was born. His parents were both Indian nationals with Indian citizenship. At the time the Petitioner was born, India had existed as an independent nation with its own nationals and citizens. It was no longer a British colony when the Petitioner was born in 1949.There must be a presumption that the Petitioner is an Indian citizen unless there is evidence to rebut such a presumption.
94. Nothing, however, stops Petitioner from applying for citizenship under Article 15 of the Constitution.
95. I am unable consequently on the basis of the evidence available and the clear provisions of the Constitution to direct or order the Respondents to take appropriate measures to recognize the Petitioner Hashmukh Devani as a citizen of Kenya by birth.

Disposal

96. In disposition, I now answer the reserved issues as follows:
    a. As to whether the Petitioner is a citizen of Kenya by birth, the answer is no.
    b. As whether the Respondents have violated any of the Petitioner's constitutional rights and fundamental freedoms, I find none has been proven or shown to have been violated and, the answer is, therefore, no.
    c. As to whether the Petitioner is entitled to the reliefs sought or any other relief(s), the answer is also no.
97. The Petition, in sum, must be and is hereby dismissed.

Costs

98. Orders as to costs are ordinarily discretionary.
99. The circumstances of this case however dictate that I do not condemn any party to cost. Each party will consequently bear its own costs.

Dated, signed and delivered at Nairobi this 29th day February, 2016

J.L.ONGUTO

JUDGE