



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 50 OF 2011

**IN THE MATTER OF: CHAPTER 1, 3 AND 4 OF THE CONSTITUTION OF KENYA WHICH PARTS
RELATE RESPECTIVELY TO CITIZENSHIP AND THE PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF THE INDIVIDUAL**

IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION

AND

IN THE MATTER OF: THE RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS ARTICLES
3, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23,**

27, 47, 258, 259 AND THE CONSTITUTION OF KENYA

BETWEEN

MUSLIMS FOR HUMAN RIGHTS (MUHURI) ON BEHALF OF 40 OTHERS.....PETITIONERS

AND

THE MINISTER FOR IMMIGRATION.....1ST RESPONDENT

PRINCIPAL REGISTRAR OF PERSONS.....2ND RESPONDENT

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST AMICUS

NATIONAL GENDER AND EQUALITY COMMISSION.....2ND AMICUS

JUDGMENT

The Petition

1. The Petitioner initiated the proceedings herein on behalf of 40 other Petitioners by way of Petition dated 19th August 2011 in which it claimed that the fundamental rights of the Petitioners as provided under Articles 3, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 27, 47, 258, 259 of the Constitution had been violated. The Petitioner sought the following orders:

a. A declaration as unlawful, null and void the Respondents' actions of denying the Petitioners identification documents.

b. An Order directing and/or compelling the 1st and 2nd Respondents to recognize and register the Petitioners as citizens of Kenya and issue the Petitioners with national identity cards.

c. The Respondents be condemned to pay the Petitioners' costs of and incidental to this Petition.

d. Such further and consequential orders as this Honourable court may deem fit.

2. The Petitioner described itself as a non-partisan, non-profit making Human Rights Organization whose objectives, mission and vision include development, strengthening and protection of the rule of law and in particular all aspects of the rule of law and human rights within the Republic of Kenya.

3. The Petitioner alleges that in the year 1990, the 40 individuals on whose behalf this Petition is brought had their identity cards confiscated by the Government of Kenya until further notice by a state appointed task force for registration of Kenyan Somalias under the directorship of the then Hon. Yusuf Haji.

4. The Petitioners claim that they were then issued with letters by the task force to act as identification documents pending investigation. It is alleged that the investigations were completed within 20 days but the identification cards were not returned to the Petitioners.

5. Later in the year 2005, the Petitioners claim that a handful of them being twelve (12) in number were issued with waiting cards i.e

a. Khadija Madhoo Aden Serial No. 2187165836

b. Garmamo Gedi Ibrahim Serial No. 2187166572

c. Ibrahim Mohamed Yusuf Serial No. 2261309741

d. Mariam Dero Yusuf Serial No. 2173704915

e. Mohammed Aden Mohammed Serial No. 2225695473

f. Sangaba Mohamed Adan Serial No. 2187166082

g. Mohamed Adan Guyo Serial No. 2187165863

- h. Amina Duru Yusuf Serial No. 2187166125
- i. Ibrahim Aden Gumi Serial No. 2261309757
- j. Sangaba Mohamed Adan Serial No. 2253130092
- k. Habiba Madhoo Bare Serial No. 2187166152
- l. Nuno Mohamed Yusuf Serial No. 2187166143

6. The Petitioners argue that denial of national identity cards is a violation of their human right and due to the said violations they are unable to access benefits that accrue by virtue of being Kenyan citizens including the right to employment, right to acquire property, right to vote, right to education, right to acquire passports among other rights.

7. The Petitioners contend that they have been discriminated upon on grounds of their ethnic and/or social origin contrary to Article 27 of the Constitution and that the actions of the Respondents are unlawful.

Response

8. The Respondents opposed the Petition by way of a replying affidavit sworn by **JOHN MUIWA KINYUMU** on 11th January 2013. The deponent stated that he was the Principal Registration Officer with the National Registration Bureau and that by Gazette Notice No. 5319 published on 10th November, 1989, the Principal Registrar of Persons appointed various officers to verify genuine Kenyan Somalis and put in place what later came to be the Yusuf Haji Special Task Force.

9. The Respondent alleges that during the time there were numerous cases of poaching and banditry attributable to people from Somalia and thus it was imperative to differentiate Kenyan Somalis from Somali nationals that had infiltrated the area.

10. The Respondent claims that vide Gazette Notice No. 5320 a verification exercise was carried out to identify non-Kenyan of Somali origin that had infiltrated the country without relevant documents. The Respondent claims that the Special Task Force heard the applicants and considered all documentary and other evidence available to it and made findings in October 1991 wherein it issued verification certificates to Kenyan Somalis and confiscated Identity cards of non-Kenyan Somalis who were then required to return to Somali.

11. The Respondent alleges that the 40 Petitioners herein were among persons whose identity cards were cancelled as it was discovered that they were not Kenyans. Further, the Respondent claims that the Principal Registrar of Persons cannot issue new generation identity cards to the Petitioners because their records indicate that their registration has been cancelled and that they are not citizens of Kenya.

12. The Respondent claims that Gazette Notices No. 5319 and 5320 dated 7th November 1989 and published on 10th November, 1989 that initiated the verification process of non-Kenyan Somalis were lawful and constitutional and not in any way discriminatory.

Ruling

13. Upon the background of the above facts, the parties herein filed submissions and made

supplementary oral submissions pursuant to which on 1st August 2014, Justice Muriithi issued a Ruling ordering the 2nd Respondent, the Principal Registrar of Persons, to consider on a case by case basis the application for identity cards by the applicants as citizens of Kenya and to give reasons for its decision if it be adverse to interests of the applicants to enable them challenge the decision before the court by further proceedings and that The Kenya National Human Rights Commission and the National Gender and Equality Commission do attend court as *amicus curiae* and assist the court to fairly determine the dispute and subsequently that the two organizations furnish this court with a report on this matter.

Submissions

Joint Written Submissions of the 1st and 2nd *Amicii curiae*

14. The 1st and 2nd *Amicii Curiae* filed their joint written submissions on 15th June 2016. The two bodies are constitutional commissions established pursuant to Article 59 (4) and (5) of the Constitution and operationalized by their respective Acts namely the Kenya National Commission on Human Rights Act No. 14 of 2011 and the National Gender and Equality Commission Act No. 15 of 2011.

15. The *Amicii* submitted that reports of alleged discrimination in the issuance of national identity cards had been received by the KNCHR from various categories of Kenyans including Somalis and Nubians leading to the commission coming up with two reports; **An identity Crisis" A Study on the Issuance of National Identity Cards in Kenya, 2007 and Out of the Shadows Towards Ensuring The Rights of Stateless Persons and Persons At Risk of Statelessness in Kenya, 2010** (reports that are attached to their submissions).

16. The *Amicii* contended that without a national ID or passport, a Kenyan citizen is denied several rights including the right to equality and freedom from discrimination (Article 27), right to inherent dignity (Article 28), freedom of association (Article 36), political rights (Article 38), freedom of movement and residence (Article 39), right to property (Article 40), right to basic education (Article 53 (1) (b) and socio and economic rights (Article 43).

17. The *Amicii* argued that the action by the government to confiscate the I.D cards of the Petitioners violated the rules of natural justice as the outcome of the screening exercise has never been documented meaning that the findings of the task force are hearsay and that the Petitioners were condemned unheard.

18. In relation to the Gazette Notices establishing the Yusuf Haji led Task Force, the *amicii* indicated that it does not wish to challenge its legality and constitutionality. However, the *amicii* submitted that under the new constitutional dispensation, the Petitioners' right to fair administrative action under Article 47 was violated as the task force did not communicate to each Petitioner the status of their citizenship and their national IDs.

19. The *Amicii* availed to this Court various authorities which they argued support their contention that the Petitioners' rights under Article 47 have been violated including the case of **Geothermal Development Company Limited versus Attorney General & 3 others (2013) eKLR**, where it was held that;

“in many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be”.

In **Jeremiah Gitau Kiereini versus Capital Markets Authority & Another (2013) eKLR** it was held that the petitioner was entitled to be informed of the formal findings against him or the charges which he was to face and given adequate opportunity to make representations on those findings before enforcement action would be preferred.

20. In relation to the argument by the Respondents that the right to fair administrative action is not an absolute right, the *amici* submitted that Article 24 of the Constitution provides the criteria for the limitation of a right and the actions of the Respondents do not fit the circumstances provided under that Article.

21. On the issue of which relief this court should grant, the *amicii* submitted that this court is obligated to invalidate an act and/or omission that contravenes the Constitution and quash any unlawful decision by way of judicial review order provided for in Article 23 of the Constitution citing the cases of **Communication Commission of Kenya and others versus Royal Media Services and others, Petition No. 14 of 2014** and **Kituo cha Sheria and Others versus The Attorney General and Others, Petition No. 115 of 2013**.

Petitioners Submissions

22. The Petitioners filed their written submissions on 23rd May 2017. Mr. Wachenje, learned counsel for the Petitioners submitted that the Petitioners were issued with IDs under the Registration of Persons Act from 1963 and in 1989 vide Gazette Notice No. 5320, a screening exercise was conducted in which the Petitioners' IDs were taken away. Counsel stated that according to Section 17 of the Registration of Persons Act, Cap 107 an ID issued under the Act is valid until such a time as the Minister through a Gazette Notice declares the ID to be invalid. While relying on this Section Mr. Wachenje submitted that after the screening exercise there was no Gazette Notice declaring the Petitioners' IDs to be invalid thus the confiscation of their IDs was unconstitutional and an infringement of their constitutional rights.

23. On the issue of the alleged infringement of the Petitioners' rights, Mr. Wachenje submitted that according to Article 47 of the Constitution, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Counsel contended that the actions of the Task Force did not meet the requirements of a fair administrative action as the Petitioners were not issued with reasons for confiscation of their IDs.

24. Mr. Wachenje submitted that an ID card is an important document and a denial of the same would lead to denial of other rights such as the freedom of movement, freedom of association, freedom from discrimination and social and economic rights which are enshrined in the Constitution.

25. Mr. Wachenje further submitted that the screening exercise was in breach of the rules of natural justice hence unlawful as the Petitioners were not afforded a hearing neither were they informed of the findings of the exercise. Counsel cited the case of **Hersi Hassan Gutale & Another versus Attorney General & Another [2013]eKLR** where the Court stated that:

“The duty to carry out appropriate inquiries and to hear the petitioners is a duty cast upon the Registrar by the Registration of Persons Act. In exercising such authority the Registrar must act in accordance with the law bearing in mind the provisions of the Constitution particularly the fundamental rights and freedoms of the petitioners which entitle the petitioners to fair administrative action guaranteed under Article 47.”

26. Mr. Wachenje submitted that the successor of the 2nd Respondent, the Ministry of Interior and Co-ordination for National Government Immigration and Registration issued a report on 6th October 2016 in

which the Petitioners were denied their requests for IDs. Counsel stated that this Report was a result of the Petitioners being made to appear before the Tana Delta Identification Committee, a committee that, Counsel argued, was not gazetted thus it was not known in law. Counsel termed the Report as unrepresentative, lacking in probative value and discriminative.

27. In terms of the report lacking probative value, Mr. Wachenje submitted that there were no annexures confirming that indeed the Petitioners had obtained their IDs through misrepresentation, while in terms of being discriminatory, counsel submitted that the Petitioners were targeted because of their ethnic and social origin.

28. Mr. Wachenje submitted that even if the Petitioners were deemed to be citizens of Somalia, Kenya is still obligated to host them as refugees by virtue of the Convention Relating to the Status of Refugees, 1951 which is incorporated into the laws of Kenya by Article 2(6) of the Constitution.

Respondents Submissions

29. The Respondents filed their submissions on 29th June 2017. Mr. Makuto, learned counsel for the Respondents submitted that two Gazette Notices No. 5319 and 5320 were published on 10th November 1989 with the former appointing persons to verify genuine Somalis and the latter requiring persons of Somali community resident in Kenya and above 18 years to appear before registration officers for screening between 13th November 1989 and 4th December 1989. Counsel submitted that the Task Force considered documentary evidence and heard all persons resulting in verification certificates being issued to Kenyan Somalis and confiscation of ID cards issued to non-Kenyan Somalis including those of the Petitioners.

30. Mr. Makuto submitted that the constitutionality of Gazette Notice No. 5319 was determined in **Hersi Hassan Gulate and Abdullahi Mohammed Ahmed versus Principal Registrar of Persons & Attorney General, Nairobi HC. Misc Application No. 774 of 2004** where the Gazette Notice was found to be neither illegal nor unconstitutional.

31. Mr. Makuto submitted that this court directed that the 2nd Respondent considers on a case by case basis the application for ID cards by the Petitioners and give reasons for its decision if it is adverse. Counsel submitted that this was done and by a letter dated 6th October 2016 and filed in court on 3rd November 2016, the 2nd Respondent informed this court that the applications were considered and it was found that the ID cards issued to the Petitioners were obtained by misrepresentation of facts and the 2nd Respondent declined to issue the Petitioners with ID cards which decision Counsel submitted was communicated to each Petitioner.

32. Mr. Makuto submitted that none of the Petitioners has challenged the findings of the 2nd Respondent. Further, Counsel submitted that the right to citizenship by registration is not absolute, but qualified therefore the 3rd Respondent can exercise his discretion to deprive the Petitioners IDs.

Determination

33. Having carefully analyzed the petition herein and the submissions of the parties, the following issues arise for determination:

a. Whether the action by the Respondents denying the Petitioners national identity cards is unlawful.

b. Whether the 1st and 2nd Respondents should be mandated to recognize the Petitioners as citizens and subsequently issue them with national identity cards.

34. Chapter 3 of the Constitution of Kenya provides for citizenship and at Article 14 and 15 details citizenship by birth and registration as:

“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, on the effective date, has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

15 (1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.

(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.

(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.

(5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.”

On the same breath Article 17 of the Constitution provides for revocation of citizenship acquired by registration as follows:

“17 (1) If a person acquired citizenship by registration, the citizenship may be revoked if the person—

(a) acquired the citizenship by fraud, false representation or concealment of any material fact;

(b) has, during any war in which Kenya was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in

such a manner as to assist an enemy in that war;

(c) has, within five years after registration, been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or

(d) has, at any time after registration, been convicted of treason, or of an offence for which—

(i) a penalty of at least seven years imprisonment may be imposed; or

(ii) a more severe penalty may be imposed.

(2) The citizenship of a person who was presumed to be a citizen by birth, as contemplated in Article 14 (4), may be revoked if—

(a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;

(b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or

(c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.”

35. In this case the Respondents allege that the Petitioners had their ID cards revoked by the Task Force as they had falsely represented themselves as being Kenyan Somalis. However, the Petitioners claim that they were not give reasons for confiscation of their ID cards and that later on some of them were issued with waiting cards which never materialized into national ID cards.

36. The validity of Gazette Notice No. 5320 was dealt with in **Nairobi HC Misc. Application No. 774 of 2004 Hersi Hassan Gulate and Abdullahi Ahmed versus Principal Registrar of Persons & Attorney General** where it was found to be neither illegal nor unconstitutional. This court will therefore not deal with this issue as the same is res judicata.

37. A Ruling was made in this matter by Justice Muriithi on 1st August 2014 in which he stated:

“The direction that therefore commends itself to the court in the circumstances of this case is an order that the 2nd Respondent, the Principal Registrar of Persons, considers on a case to case basis the application for identity cards by the applicants as citizens of Kenya and to give reasons for its decision if it be adverse to interests of the applicants to enable them challenge the decision before the court by further proceedings.”

38. The 2nd Respondent in compliance with the order filed in court a letter dated 6th October 2016 and indicated that the Petitioners appeared before the Tana Delta Identification Committee and the committee found out that they were from the Galjee community. They had entered Kenya from the Somalia border and impersonated Wardies and Degodias with the intention of obtaining national ID cards leading to the conclusion that their ID cards were obtained through false misrepresentation. At pages 1-2 of the letter it is stated that:

“Galjees impersonated Wardies and the Degodias with a view of obtaining National Identity cards, a fact they have all accepted/confirmed during vetting. All the 1st generation Identity cards

they had obtained were through misrepresentation of actual facts.

“After deliberation, they were found not to have satisfactorily provided proof that they were Kenya citizens to warrant issuance of identity cards. In this regard their intention to Register and be issued with Kenyan Identity Cards was declined by the Committee.”

39. The Petitioners contend that the Tana Delta Identification Committee is an alien committee unknown in law thus it did not have the power to conduct the screening exercise and also that the report by the committee was unrepresentative, lacking in probative value and discriminatory.

40. Justice Muriithi in his ruling required the 2nd Respondent to consider the applications by the Petitioners on a case to case and if the decision is adverse to give reasons so as to enable the Petitioners affected by the decision to challenge it.

41. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and 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.

42. The importance of the right to fair administrative action was explained in the case of **Judicial Service Commission versus Mbalu Mutava & Another [2015] eKLR** where the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

43. Did the actions of the 2nd Respondent infringe on the Petitioners right to fair administrative action" The report and/or letter dated 6th October 2016 indicates that the Petitioners appeared before the Tana Delta Identification committee. However, it is unknown whether the Petitioners were given an opportunity to be heard or whether they tendered any evidence. The report simply puts it that the Petitioners were found to be from the Galjee community which impersonated Wardies and Degodias with a view of obtaining national identity cards and that the Petitioners accepted/confirmed this during vetting. In the case of **Republic versus National Police Service Commission Ex parte Daniel Chacha Chacha [2016] eKLR**, the case of **Baker versus Canada (Minister of Citizenship & Immigration) 2 S.C.R. 8176** was quoted where it was held that:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have the decision affecting their rights, interests or privileges made using a fair impartial and open process, appropriate to the statutory, institutional and social context of the decisions”.

44. The report by the Tana Delta Identification Committee did not indicate that the Petitioners were given the opportunity to be heard whether orally or by way of evidentiary documentation. Fair administration

action as envisaged by the Constitution seeks to ensure that administrative bodies carry out their mandate within the confines of the law and in adherence to the rules of natural justice.

45. Although the right to citizenship is not an absolute right under the Constitution, the same should not be belittled. As correctly put by the Petitioners, several other rights accrue from acquisition of an identity card such as freedom of movement, freedom of association and economic and social rights. The committee should have been aware of what was at stake for the Petitioners and ensured that the process was fair and adhered to the rule of law. The report should have indicated how the Petitioners were heard and any documentation that was considered by the committee. The manner in which the committee carried out the screening process was not in line with the dictates of Article 47 of the Constitution.

46. The 2nd Respondent was also required to give reasons for the decision so as to allow the Petitioners against whom an adverse decision is issued to challenge the decision. In the report the 2nd Respondent states:

“Galjees impersonated Wardies and the Degodias with a view of obtaining National Identity cards, a fact they have all accepted/confirmed during vetting. All the 1st generation Identity cards they had obtained were through misrepresentation of actual facts.

“After deliberation, they were found not to have satisfactorily provided proof that they were Kenya citizens to warrant issuance of identity cards. In this regard their intention to Register and be issued with Kenyan Identity Cards was declined by the Committee.”

The reason for the committee declining to issue the Petitioners with ID cards can be said to be misrepresentation of actual facts. However, the committee does not enumerate the exact facts that were misrepresented and whether all the applicants misrepresented the same facts. For this failure the Petitioners are not able to individually challenge the decision. The committee should have endeavored to give each applicant reasons for declining their individual application.

47. The second issue is whether the 1st and 2nd Respondents should be mandated to recognize the Petitioners as citizens and subsequently issue them with national identity cards. The 2nd Respondent under the Registration of Persons Act, Cap 107 is mandated with the issuance of national identity cards. This court has no authority to declare the Petitioners citizens of Kenya nor can it compel the 2nd Respondent to issue them with Identity cards. The appropriate order would be to declare, which is hereby done, that the actions of the 2nd Respondent are infringing on the Petitioners’ right under Article 47. It is hereby ordered that the 2nd Respondent receives fresh applications from the Petitioners for ID cards, and that the said applications shall be considered afresh by the 1st and 2nd Respondents in accordance with the principles of the law.

48. For the foregoing reasons the Petition dated 19th August 2011 succeeds partly, and orders made as follows:

- i. That the Respondents have violated the Petitioners’ right under Article 47 of the Constitution.
- ii. That the Petitioners shall within thirty (30) days from the date hereof make fresh applications for national identity cards.
- iii. That the Respondents shall consider the said fresh applications in accordance with the principles conferred in the Kenyan Laws.

iv. Parties to bear own costs.

Dated, Signed and Delivered in Mombasa this 17th day of October, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Wachenje for Petitioner

Mr. Makuto for Respondents

Mr. Kaunda Court Assistant



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