KENYA LAW
Where Legal Information is Public Knowledge

NAMATI

CITIZENSHIP AND NATIONALITY RIGHTS CASE DIGEST

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Glossary of terms and definition:

Fundamental rights and freedoms: A group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment

Alien/s: A resident of one country who was born in or owes allegiance to another country and has not acquired citizenship by naturalization in the country of residence **(distinguished from citizen)**. *See also resident alien, illegal alien. a foreigner. a person who has been estranged or excluded.*

Citizenship

What is Citizenship?

Citizenship is a relationship between an individual and a state to which the individual owes allegiance and in turn is entitled to its protection. A citizen can be defined as a member of a political community who enjoys the rights and assumes the duties of membership.

Other than being a member of a political community, a citizen must be a member of a state according to the law. Citizenship means that one has access to exclusive benefits offered to citizens by member states to the exclusion of members of other nationalities and stateless persons.

Kenyan Citizenship

How does one acquire Kenyan Citizenship?

The Constitution of Kenya outlines methods in which one may acquire citizenship.

The Constitution of Kenya outlines methods in which one may acquire citizenship:

i. by birth; or
ii. by registration

Citizenship by birth.

Relevant Provisions of the Law

Constitution of Kenya, 2021 article 14

Citizenship by Birth

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 citizenship of another country, is entitled on application to regain Kenyan citizenship.*

Citizenship by birth is dependent on the country one is born and the nationality of either the mother or father. Being born in Kenya is not enough qualification for one to be a citizen by birth, it must be accompanied by either parent being a Kenyan citizen.

The condition of either parent being a citizen was in the repealed constitution. It was only available to children born in Kenya. For children born outside Kenya, the condition shifted from 'either parent being a citizen' to 'if at the date of birth, the father is a citizen'. The provision was unfair because a Kenyan woman married to a foreigner could not pass on her citizenship to her child if the child was born out of Kenya. That provision was remedied by the Constitution of Kenya, 2010.

Citizenship by birth for abandoned children.

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 .

Can citizenship by birth be lost?

Under the repealed constitution, citizenship by birth was automatically lost upon acquiring a new nationality. The Constitution of Kenya 2010 brought about dual nationality and hence persons who were citizens of Kenya by birth but had lost it had the power to reapply to get back their citizenship .

It should be noted that where one has a claim for citizenship by birth against the Department of Immigration, the act of applying for citizenship has been considered by the courts as an admission that one is not a citizen.

Case Law on Citizenship by Birth.

Case Law on Citizenship by Birth.

- **An abandoned infant that was found in Kenya would be presumed to be a Kenyan citizen.**
- **Applying for citizenship was an admission that one was not a citizen.**
- **Citizenship by birth could not be taken away by refusal to provide documents of identification.**
- **Pleading guilty to a charge of being in Kenya illegally and being convicted does not revoke a person's citizenship by birth.**
- **Due process is to be accorded to every person, whether they are citizens or not.**

Comparative International Jurisprudence on Citizenship by Birth

- **Section 4 of the Botswana Citizenship Act 1984 Is unconstitutional.**
- **Prolonged detention and a conviction for unlawful entry and stay in a State where the convictee proved that he was a national of that State is a violation of various rights including the right to nationality.**
- **African Court finds that an applicant had been deprived of nationality arbitrarily.**
- **Meaning of citizenship by birth under section 2(1)(b) of the amended South African Citizenship Act.**
- **Case Law on the Property Rights of Citizens and Foreigners Lesotho**
- **The meaning of the term "real and effective nationality."**

A. Case Law on Citizenship by Birth.

1. An abandoned infant that was found in Kenya would be presumed to be a Kenyan citizen.

In re EC (Baby) [2020] eKLR
Adoption Case 113 of 2019
High Court at Nairobi
JN Onyiego, J
November 30, 2020

The case applied the presumption of Citizenship by birth under article 14(4) of the Constitution.

Summary of facts

An infant was found inside a pit latrine having been dropped there by an unknown person. It took the effort of the community by knocking down the pit latrine to rescue the baby who was by then crying from inside the latrine thus attracting the attention of a young girl who had gone to use the toilet. Despite every effort by the police, children's department and St. Francis Rescue Centre in tracing the child's relatives, none came to success.

The applicants were before the court applying to adopt the infant who had been abandoned in a pit latrine by an unknown person. The application was unopposed.

Key issues to be determined

The main issues were whether an abandoned infant that was found in Kenya would be presumed to be a Kenyan citizen and whether, based on the brief facts above, adoption was in the best interest of the child.

Summary of judgment

- On whether the child was free for adoption, the court held that the child was free for adoption. He had been placed in the protective care and control of the applicants. He had fully bonded with the adoptive family. He was aged above six weeks and below 18 years which was the legally recommended age bracket for any child to be adopted.
- On whether the child was a Kenyan citizen, the court held that according to article 14(4) of the Constitution, the child was presumed to be a Kenyan citizen. Article 14(4) of the Constitution provided that a child found in Kenya who was, or appeared to be, less than eight years of age and whose nationality and parents were not known, was presumed to be a citizen by birth. Section 157 of the Children Act read that any child who was living within Kenya could be adopted whether or not the child was a Kenyan

By virtue of article 14(4) of the Constitution and section 157 of the Children Act, the child was legally available for adoption. Since there was nobody claiming the baby, consent was done away with.

citizen, or was or was not born in Kenya. By virtue of article 14(4) of the Constitution and section 157 of the Children Act, the child was legally available for adoption. Since there was nobody claiming the baby, consent was done away with.

- On whether the adoption was in the best interests of the child, the court held that the applicants had been described as economically stable which was evident from their own four bedroomed house. Socially and morally, they were Christians with no criminal record, physically and mentally fit. They were both Kenyans aged between 25 and 65 years thus qualifying the adoption to be a local one. The applicants had exhibited their care and love to the child by providing all basic necessities which was a sign of parental responsibility. The applicants had met the conditions for adoption of the child. Hence the adoption was in the best interests of the child. Nobody had come forward to claim the baby. To deny him the opportunity for adoption would be equal to condemning the child to permanent suffering.

The applicants were authorized to adopt baby EC who was to be known as JIM. The date of birth was to be December 25, 2016 and the birth place Malindi. The child was presumed to be a Kenyan citizen.

2. Applying for citizenship was an admission that one was not a citizen.

Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service [2014] eKLR
Petition 137 of 2014
High Court at Nairobi
I Lenaola, J
December 5, 2014

In circumstances where one has a claim for citizenship, the act of applying for citizenship has been considered by the courts as an admission that one is not a citizen.

Summary of facts

The petitioner was born on June 4, 1983 and had lived in Kenya all his life. His parents were British Nationals. He was the holder of a Kenyan Identification Card Number that was issued on May 19, 2009 but when the petitioner applied for a Kenyan Passport, he was informed (verbally) that he was a person who was not considered a national by any state according to the law of the state. Despite that verbal information, he applied

for Kenyan Citizenship on February 7, 2013 but since then, the office of the Director General, Kenya Citizens and Foreign Nationals Management Service (the respondent) had not communicated its decision on that application but in verbal communication, he was informed that the application could take upwards of five years to be determined. The reason for such a delay was never given to him and yet he truly believed that he was entitled to Kenyan citizenship. Feeling unfairly treated, the petitioner, filed the instant petition.

The respondents' submissions

The respondent claimed that while it was true that the petitioner was born in Kenya, at that time, his parents were still British Nationals and his father was only registered as a Kenyan on August 21, 1987, three years after the applicant had been born. They also claimed that in that regard, citizenship in Kenya was acquired either by birth or by registration.

They claimed that the National Identity Card(ID) held by the petitioner was irregularly given and was void. Furthermore, they claimed that the ID card ought to be cancelled and deactivated.

Lastly the respondents claimed that the process of grant of citizenship was detailed and included background checks by bodies such as the National Intelligence Service and that there were no time frames set by the law for such applications to be processed.

Key issues for determination

The major issue to be determined was whether the act of applying for citizenship, was an admission that one was not a citizen of Kenya. Lastly, the court had to determine whether a delay of one and a half years in determining an application for one's citizenship status was unreasonable delay and a violation of the right to fair administrative action.

Summary of judgment

- The court held that by applying for citizenship, the petitioner was admitting that he was not a citizen of Kenya although his father was a citizen.
- The court declined to determine whether the petitioner had a legal right to a Kenyan citizenship because the Kenyan Citizenship and Immigration Act, 2013 had detailed procedures on how that matter should be addressed. Since the immigration authorities were the lawful entity granted the authority to determine who could become a citizen of Kenya, until it made that decision, the courts should not interfere with that authority.

Article 47 of the Constitution provided for fair administrative action that was "expeditious, efficient, lawful, reasonable and procedurally fair"

- On whether the petitioner's rights were violated, the court held that a delay of one and a half years in processing an application for citizenship amounted to an excessive delay. The delay in processing such an application denied the applicant from the enjoyment of certain rights given to citizens. For the immigration authorities to state that since there was no time frame for considering the application no amount of delay can be termed as excessive was irrational. Article 47 of the Constitution provided for fair

administrative action that was "fast, efficient, lawful, reasonable and procedurally fair". The right to fair administrative action also provided that written reasons for an action had to be given. No reasons were given in this case. There was a clear violation of article 47(1) and (2) of the Constitution.

The court declared that the respondents had violated the rights of the petitioner under article 47(1)of the Constitution to administrative action that was efficient, lawful, reasonable and procedurally fair and that the respondent had violated the rights of the petitioner under article 47(2) of the Constitution that entitled one to be notified in writing of any adverse actions against him. The respondent was to within 14 days of the date of delivery of the judgment to consider the petitioner's application as a citizen of Kenya and therefore comply with article 47 of the Constitution.

3. Citizenship by birth could not be taken away by refusal to provide documents of identification.

Hersi Hassan Gutale & Another v Attorney General & Another [2013] eKLR
Petition 50 of 2011
High Court at Nairobi
DS Majanja, J
January 21, 2013

Refusal of authorities to issue natural born citizens does not take away their citizenship or the privileges and benefits of being a citizen.

Summary of facts

On November 10, 1989 the Principal Registrar of Persons (the Registrar/2nd respondent) published a notice on the Kenya Gazette (Gazette Notice No. 5320) that stated:

> *"In accordance with section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic Community resident in Kenya who are eighteen (18) years and above to attend before the registration officers at the centre specified in the Second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13th November 1989 and 4th December 1989."*

Under an earlier Gazette Notice No. 5319 dated November 7, 1989, the Registrar had appointed senior public officials as registrars to confirm the accuracy of registration documents of all Kenyans of Somali origin. The task force referred to the Yusuf Haji task force.

The task force received documentary evidence in accordance with Gazette Notice No. 5320 and gave special verification certificates to persons it considered genuine Kenyan Somalis. The said Task Force submitted to the Registrar a list of persons affected and whose registration records were indicated as cancelled. The petitioners were among those persons whose registration records were indicated as cancelled.

As the petitioners were troubled by the Gazette Notice No. 5320 and the manner in which it was implemented, they filed an application to the High Court seeking relief under section 84 of the former Constitution on the ground that the notice was unfair in so far as it targeted Kenyans of Somali origin.

The petitioners' claim was that they were Kenyan citizens and holders of the old generation identity cards and Kenyan passports but had been denied new generation identity cards thereby affecting their rights, privileges and benefits of citizenship. The application Nairobi HC Misc. Application No. 774 of 2004 was heard and dismissed. The court in separate judgments concluded that the Gazette Notice No. 5320 was neither illegal nor unconstitutional in the circumstances. The result of the judgment was that the vetting process was upheld but the petitioners' right to obtain new generation identity cards was not dealt with.

The petitioners, who felt that they were unfairly treated, carefully waited for the passage of the Constitution of Kenya, 2010 and filed this petition in which they claimed that they were Kenyan citizens and holders of the old generation identity cards and Kenyan passports but had been denied new generation identity cards thereby affecting their rights, privileges and benefits of citizenship. They claimed that the continued denial of their identity cards was a violation of article 12 and 14 of the Constitution which protected their citizenship rights.

The Registrar of Persons had to act in accordance with the law bearing in mind the provisions of the Constitution particularly the fundamental rights and freedoms of the petitioners which entitled the petitioners to fair administrative action.

The respondents' submissions

In response, the respondents objected to the proceedings. They claimed the legality of the task force had been determined in Nairobi HC Misc. Application No. 774 of 2004 and that this case was *res judicata* (meaning the court should not deliberate over something it had heard before, especially when it arises from the same set of facts and the same parties). The petitioners counter argued that the judgments had only declared that the vetting exercise was constitutional and did not violate the rights of the petitioners. Consequently, this suit was not *res-judicata* (a matter decided in finality by a judge) as the previous suits dealt only with legality of the process and there was no finding made on the status of the petitioners.

Key issues for determination

The main issues was whether a citizenship by birth could be taken away by refusal to provide documents of identification.

Summary of judgment

- On the privileges of a natural born citizen, the court held that the citizenship of a natural born citizen cannot be taken away or privileges or benefits of citizenship taken away by refusal to provide documents of identification.
- On the different duties between the court and the Registrar of the Registrar of Persons Act, the court held that the duty to carry out appropriate inquiries and to hear the petitioners was a duty cast upon the Registrar by the Registration of Persons Act (Cap 107). In exercising such authority, the Registrar had to act in accordance with the law bearing in mind the provisions of the Constitution particularly the fundamental rights and freedoms of the petitioners which entitled the petitioners to fair administrative action. It was not for the Court to substitute itself as the Registrar unless the decision of the Registrar contravened the Constitution and the law.
- On whether the case was *res judicata*, (a matter decided in finality) the court held that although the High Court dealt in the previous proceedings with the issue of legality of the screening process, it specifically declined to deal with the petitioners' citizenship. Therefore, the issue of the petitioners' citizenship was not *res-judicata* (a matter decided in finality by a judge).

Court ordered the petitioners' application for new generation identity cards to be considered by the Principal Registrar of Persons within 45 days.

4. Pleading guilty to a charge of being in Kenya illegally and being convicted does not invalidate a person's citizenship by birth.

Galma Duba Gufu v Attorney General and another
Petition No 5 of 2018
High Court at Marsabit
S Chitembwe, J
November 27, 2019

The only way one could lose citizenship by birth is by giving it up. Pleading guilty and being convicted of the charge of being in Kenya illegally did not cancel one's citizenship. If a person's parents were both Kenyan citizens by birth, then the person would be assumed to be a citizen by birth unless the contrary was proved.

Summary of facts

The petitioner's case

The petitioner claimed that he was a businessman in Marsabit and was born in 1982 at Dirib Gombo in Marsabit County. He further claimed that in the year 2002 there was vetting of people for registration purposes in his location and he was examined and three months later given a Kenyan identity card. The petitioner claimed that he was arrested on August 8, 2004 and taken to Sololo Police station and that his identity card was taken away by the police. He further alleged that he was charged with the offence of moving around at night and was fined Kshs.3000 in default to serve one-month imprisonment.

The petitioner claimed that he went back to Moyale Police Station to collect his identity card and was directed to go to Sololo Police station but he was arrested again at the police station and placed in the cells for about two (2) hours and then released without being given his identity card. The petitioner claimed that he was a Kenyan and had not been charged with the offence of being a foreigner.

The respondents' case

The respondents alleged that the applicant was charged and pleaded guilty to the offence of being in Kenya illegally. They claimed that such a conviction made him to be a non-citizen of Kenya. As such, the applicant was to be sent back to Ethiopia.

Key issues for determination

The main issue was whether pleading guilty to a charge of being in Kenya illegally and being convicted cancelled a person's citizenship by birth.

Summary of judgment

- On whether the petitioner was a citizen, the court held that the petitioner was born at

Dirib Gombo area in Marsabit County. He was examined and given a Kenyan identity card. His parents were Kenyans and father was the holder of a Kenyan identity card while his mother held Kenyan identity card. Therefore, the petitioner was a Kenyan by birth. There was no evidence that the petitioner's citizenship was cancelled in accordance with section 21(2) of the Kenyan Citizenship and Immigration Act. Under article 17(2) of the Constitution, it had to be established that the person who was presumed to be a citizen by birth acquired the citizenship by fraud, false representation or concealment (failure to disclose) of any material fact or it was established that the person was a national of another country or his parentage was not Kenyan.

- On whether the petitioner had a valid National Identification Card, the court held that the petitioner's contention that his identity card was taken in 2004 was believable because that was the time he was arrested. The petitioner had continuously been following up the issue of his identity card. Though the petitioner had taken too long to complain, the reality was that he had at all times maintained that his identity card was taken by the police in 2004. Indeed, he was given an identity card and Registrar of Persons in Marsabit County confirmed that it was given to him. The identity card was given to him in his capacity as a Kenyan by birth. Therefore, the petitioner was a Kenyan citizen by birth and the identity card given to him in 2002 was not gotten through fraud or misrepresentation of facts.

Pleading guilty and being convicted of the charge of being in Kenya illegally did not cancel one's citizenship. If a person's parents were both Kenyan citizens by birth, then the person would be assumed to be a citizen by birth unless the contrary was proved

- On the citizenship status of the petitioner, the court held that there was no single document indicating that he was from Ethiopia or had ever lived in that county. In 2004 the Repealed Constitution did not allow dual citizenship. The letter dated June 16, 2019 did not state the reason for the invalidation of the petitioner's records. It did not make reference to the court case as the reason as to why his records were nullified. The petitioner's parents were Kenyans. They lived in Kenya. The petitioner lived in Kenya. There was no evidence that he renounced his Kenyan citizenship and became an Ethiopian. Even if the petitioner pleaded guilty to the charges of being in Kenya illegally or was convicted that did not make him a non-Kenyan. He was a Kenyan by birth and could not be stripped off his citizenship. The area chief and assistant chief had confirmed that they knew the petitioner since childhood. The position taken by the respondents that the petitioner pleaded guilty to being in Kenya illegally was not a good reason for taking away the petitioner's Kenyan citizenship by birth. Citizenship came with several advantages. The petitioner's children had been denied birth certificates since their father's ID card was invalidated. The petitioner's mobile registration was also cancelled and hence he could not enjoy the privileges which came with the possession of an identity card.
- The petitioner was a Kenyan citizen by birth. The court could not hold that he made

a fresh application for purposes of regaining his citizenship because he would have to prove the citizenship of his current country. Currently, he lived in Kenya and the evidence showed that he had all along lived in Kenya. He could not prove that he was an Ethiopian citizen and proof of citizenship of another country was a requirement when one made an application to regain Kenyan citizenship. The petitioner's parents were Kenyans. His mother testified that she obtained her first identity card when she was 20 years old. Therefore, as long as the petitioner's parents were Kenyans the petitioner would remain a Kenyan by birth unless the contrary was proved. Citizenship by birth could not be lost unless one renounced it.

The court declared that the petitioner was holder of a valid Kenya National identity card and remained the legitimate holder of the Identity Card and that the petitioner was a Kenyan citizen by birth. The respondents (Office of the Attorney General & the Minister Internal Security and National Coordination) were ordered to surrender to the petitioner his national identity card and were stopped from interfering with the petitioner's right of being a Kenyan citizen.

5. Due process is to be accorded to every person, whether they are citizens or not.

Miguna Miguna v Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government & 7 others
Constitutional Petition No. 51 of 2018
High Court at Nairobi
E C Mwita, J
December 14, 2018

Due process is to be accorded to every person, whether they are citizens or not. Every person had the right to fair administrative action.

Summary of facts

The petitioner's submissions

The petitioner was arrested at his house after members of the police force forcefully gained entry into his residence by use of explosives. Once they arrested the petitioner, they drove him to various police stations where they held him for several days and he was not allowed to communicate with others. Furthermore the petitioner was subjected to torture; inhuman treatment; was made to stand for long periods and was only given food twice for the entire period while imprisoned.

The petitioner was taken to the Kajiado Law Courts to take a plea but the court declined

to take a plea after learning that the petitioner's issue was live before the High Court in Nairobi. The petitioner was to be taken to the High Court in Nairobi but was instead taken to the Jomo Kenyatta International Airport, held in the toilets and deported to Canada.

Representatives of the petitioner filed the instant suit in which they claimed that the petitioner was a citizen of Kenya by birth and that could not be cancelled under the repealed Constitution and under the Constitution of Kenya, 2010. They argued that the petitioner had enjoyed many rights of a citizen since he changed his citizenship from Kenyan to Canadian.

Representatives of the petitioner filed the instant suit in which they claimed that the petitioner was a citizen of Kenya by birth and that could not be cancelled under the repealed Constitution and under the Constitution of Kenya, 2010. To demonstrate how the petitioner could not to be said to have lost his citizenship by birth, the petitioners legal representatives argued that even though the petitioner changed his citizenship from Kenyan to Canadian, the petitioner had enjoyed many rights of a Kenyan Citizen, including but not limited to vying for public office.

The representatives also argued that the petitioner was not accorded due process, he was deported without being presented to a court of law. As such they argued that the deportation was a violation of fair administrative action. To this end they argued that the petitioner lived in Canada until sometime in 2007 when he returned to Kenya, renewed his Kenyan Identity Card and acquired a Kenyan passport both of which showed that he was born a citizen of Kenya. He was even admitted as an advocate of the High Court of Kenya, a profession reserved for citizens of Kenya and those from the East African Community only. In the coalition government formed after the 2007 general elections, the petitioner served as a senior adviser in the Prime Minister's office. In 2013 and 2017, the petitioner had unsuccessfully ran for public office. Running for public office were preserves of Kenyan citizens and as such the petitioners argued that the petitioner was a citizen as evidenced by how the State had recognized him as in the capacities demonstrated above.

The respondent's submissions

The respondents argued that the deportation was justified on the grounds that the petitioner had lost his citizenship under the repealed Constitution when he acquired a Canadian passport. Under the repealed Constitution, one could not be a dual citizen. They argued that the petitioner had to apply for citizenship afresh. The respondents also argued that the petitioner was a prohibited immigrant as he was the leader of an organization that was declared illegal, the National Resistance Movement.

Key Issues for Determination

The main issue was whether a person who had acquired citizenship by birth could lose the citizenship by acquiring the passport of a foreign country under the repealed constitution and under the Constitution of Kenya, 2010. The court also had to decide on whether the petitioner was accorded due process as envisaged under the right to fair administrative action.

Summary of judgment

On whether a person who had acquired citizenship by birth could lose the citizenship by acquiring the passport of a foreign country under the repealed constitution and under the Constitution of Kenya, 2010; the court held that:

- Kenya was moving from colonial governance to independence and was therefore keen to make provision for accommodating interested persons to make a choice of the country they wanted to be loyal to. In that regard, section 97(3)(a) of the repealed Constitution apparently intended to prohibit acquisition of citizenship of another country by a voluntary act. However, the repealed Constitution only prohibited persons of a certain category who were citizens of other countries at the time of independence to choose to be citizens of Kenya. It did not apply to citizens of Kenya by birth. That was because citizenship by birth was a birth right and a natural and non-transferable right. The petitioner would be required to do much more than to merely acquire the passport of another country to lose it. The petitioner's acquisition of the Canadian passport was not within the confines of section 97(3)(a) of the repealed Constitution. The petitioner did not lose his citizenship upon acquiring the Canadian passport. He remained a Kenyan citizen.
- Section 33(1) of the Kenya Citizenship and Immigration Act, 2011 Act (the Act) which the Cabinet Secretary Ministry of Interior and Coordination of National Government and the Director of Immigration had heavily relied on, only provided for the circumstances under which a passport could be suspended. Those circumstances included situations where the holder permitted another person to use his passport or travel documents; the holder had been deported to Kenya at the government's expense; the holder was a convict for drug trafficking, money laundering, trafficking in persons, smuggling, acts of terrorism, a warrant of arrest had been issued against him and there was need to prevent him from running away or he was involved in passport or document fraud among others. There was no evidence in so far as the petitioner was concerned, that any of those circumstances were applicable to him.

On the legality of the decision to deport the applicant and the petitioner's right to fair administrative action, the court held that:

The 1st and 2nd respondents could not just decide to suspend the petitioner's passport and declare him a prohibited immigrant without subjecting him to any known form of due process.

- Section 43(1) of the Act provided for the removal of persons who were unlawfully in Kenya. The petitioner, as a citizen, was not unlawfully in Kenya and, therefore, the petitioner was not one of the people who fell under the category of persons who could be removed from the country under section 43(1) of the Act. Even assuming that the petitioner deserved to be removed from Kenya, he had to be subjected to the provisions of the Act and articles 47(1) and 50(1) of the Constitution and given the right to fair administrative action and fair hearing as amplified by section 21 of the Act. Whatever the respondents did had to comply with constitutional standards of procedural fairness and fair hearing. The 1st and 2nd respondents could not just decide to suspend the petitioner's passport and declare him a forbidden immigrant without subjecting him to any known form of due process. Their actions were not in line with the Constitution and the law.

- It did not matter whether the petitioner was a Kenyan citizen or not. He was entitled to due process of the law as an incidence of the rule of law. The Cabinet Secretary Ministry of Interior and Coordination and the Director of Immigration had no mandate to declare the petitioner a forbidden immigrant because he was not an immigrant. Also, they could not suspend his passport under section 33(1) of the Act since he did not fall in the category of persons whose passports could be suspended and or taken away. The petitioner had not lost, damaged or mutilated his passport for him to apply for a new one. His passport was irregularly seized by state agents.
- The petitioner was deported from his country without being subjected to any known due process and or being given an explanation. The respondents were unable to justify their actions against the petitioner. It was unthinkable that a state could deport its own citizen to a second country without regard to the Constitution and the law. Even if the state had reason to act as it did, it was under a constitutional duty to follow the law and not act at whims in complete disregard of the Constitution and the law.

The court issued an order quashing the decision of the Cabinet Secretary Ministry of Interior and Coordination under section 33(1) of the Kenya Citizenship and Immigration Act, 2011 dated February 6,2018 that declared the petitioner a non-citizen of Kenya or that his presence in Kenya was contrary to national interest. An order quashing the decision of the Cabinet Secretary Ministry of Interior and Coordination under section 43(1) of the Kenya Citizenship and Immigration Act, 2011 dated February 6, 2018 that directed the removal of the petitioner from Kenya was also issued.

Comparative International Jurisprudence on Citizenship by Birth

6. Court declares Botswana law that denied women the right to confer citizenship to their children unconstitutional

Attorney General v Dow
1994 (6) BCLR 1
Court of Appeal (Botswana)
Amissah, Aguda, Bizos, Schreiner and Puckrin, JJ A
July 3, 1992

The case addressed the discriminatory nature of the Botswana Citizenship Act. The case declared a provision of the law (section 4 and 5 of the Botswana Citizenship Act 1984) that provided that unless a child was born out of wedlock to a mother who was a citizen of Botswana, that child could not be a citizen by birth or descent in Botswana if the father was not a citizen of Botswana to be unconstitutional (rendered the provision inoperable, rendered it null and void)

Summary of facts

The respondent, Ms. Unity Dow, brought a case to the High Court of Botswana asserting that sections 4 and 5 of the Citizenship Act violated her right to equal protection of the law and protection from discrimination on the basis of sex because the sections of the Citizenship Act treated children differently depending on whether they were born to citizen mothers or to citizen fathers. The respondent had one child with an American man prior to their marriage and two children after. Botswana's citizenship requirements allowed only children born outside of marriage to inherit their mother's citizenship, so the respondent's first child was a citizen of Botswana while the two born during her marriage were not. The applicant alleged that the legislation discriminated against men from other countries(foreigners) married to Botswana women as compared to women from other countries (foreigners) married to Botswana men. The trial court found that the provisions of section 4 of the Citizenship Act 1984 were unfair and it had the effect of punishing a female citizen for marrying a non-citizen male.

The trial court found that the provisions of section 4 of the Citizenship Act 1984 were unfair and it had the effect of punishing a female citizen for marrying a non-citizen male.

The respondents' submissions

The respondents' argued that the applicants had sufficiently demonstrated that the said provisions were discriminatory. They sought and successfully got the matter dismissed.

The appeal

On appeal, the appellant stated that the applicant had not sufficiently shown that any of the provisions of section 3 to 16 of the Constitution had been violated by the provisions of sections 4 and 5 of the Citizenship Act. Among the appellant's arguments was that section 15 of the Constitution did not list sex as a ground for unlawful treatment and that the

absence of sex as a ground for unfair treatment catered to the fact that the society of Botswana was based on tracing ones origin through the male line . The appellant also added that the absence of a constitutional violation to be complained of meant that the applicant had no *locus standi* (meaning a right to sue) to apply to the High Court for redress under section 18 of the Constitution.

Summary of judgment

- Though not the central issue of the case, the court noted that an immediate effect of the law could be the expulsion of the husband and non-citizen children from Botswana. The Court of Appeal upheld the High Court's decision in finding that the Citizenship Act discriminated on the basis of gender under both the Botswana Constitution and the Declaration on the Elimination of Discrimination Against Women because it punished a female citizen for marrying a non-citizen male. In addition, the Court considered similar cases in different countries in reaching its opinion.
- If the Legislature intended that equal treatment of males and females be excepted from the application of sections 15(1) or 15(2) of the Constitution, they would have provided for that expressly. The court noted that the list of grounds upon which unfair treatment could be based was not exhaustively provided for under section 15 of the Constitution. There could be other grounds for unfair treatment that the provision did not list.
- The constitutional provisions on citizenship included section 22 of the Constitution. The provisions allowed children of Botswana men to acquire citizenship in situations where children of Botswana women would not necessarily acquire citizenship. A provision of the Constitution could not be said to be unconstitutional. The court held that the fact that the Constitution differentiated between men and women when it came to citizenship was a legitimate exception. The meaning of section 3 and 15 of the Constitution was therefore altered by the original provisions in section 22 of the Constitution.
- Under section 18 of the Constitution any person that alleged a contravention of the provisions of section 3 to 16 of the Constitution had a right to seek redress at the High Court. What was required of the applicant in order to establish *locus standi* (right to sue) was an allegation, to be established in proof, that any of those provisions had been infringed. The question about *locus standi* (right to sue) was a question on whether the applicant made an allegation that had a reasonable foundation. The applicant's case included assertions on unfair treatment and that her husband and her two children that were born in Botswana were put through alien treatment. Her husband and children had to seek permits and to have them extended periodically. She alleged that during the waiting period when a permit was to be issued there was uncertainty and they suffered anxiety and mental anguish.

The Court of Appeal upheld the High Court's decision in finding that the Citizenship Act discriminated on the basis of gender under both the Botswana Constitution and the Declaration on the Elimination of Discrimination Against Women because it punishes a female citizen for marrying a non-citizen male.

7. Prolonged detention and a conviction for unlawful entry and stay in a State where the convictee proved that he was a national of that State is a violation of various rights including the right to nationality.

Robert John Penessis v United Republic of Tanzania
Application 013/2015
African Court on Human and Peoples' Rights
S Ore, P, B Kioko, VP, G Niyungeko, EH Guisse, RB Achour, ÂV Matusse, TR Chizumila, C Bensaoula, JJ
November 28, 2019

The burden of proving a claim that one is not a citizen lies on the State and only applies where the claimant has registration documents.

Summary of facts

The applicant's submissions

The applicant, Robert John Penessis was convicted of illegal entry and presence in Tanzania and sentenced to two years imprisonment. The applicant claimed to be a citizen of Tanzania and he stated that the respondent had violated his rights to nationality, liberty and freedom of movement.

The respondent State was a signatory to the African Charter on Human and Peoples' Rights (the Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol.)

While the applicant stated that he had Tanzanian parents and that he had lived in Tanzania since his birth, the respondent claimed that it had evidence that the applicant was not a Tanzanian national and he had citizenship in South Africa and the United Kingdom.

The court held that the applicant's arrest and continued detention were a violation of article 12 of the African Charter on Human and Peoples' Rights.

The respondent's submissions

The respondent raised an objection to the court's jurisdiction on two grounds. One was that the form and content of the application was not in conformity with what was legally prescribed under the Protocol and the second was that the court lacked power to consider evidentiary matters that had been finalized by domestic courts.

Key issues to be determined

An issue was raised as to whether the form and content of the application complied with legal prescriptions and whether the domestic trial that the applicant was subjected to had met international fair trial standards. The court's finding was that it had jurisdiction notwithstanding the fact that the issue could relate to the assessment of evidence determined by domestic courts.

Summary of judgment

- Article 15 of the Universal Declaration of Human Rights recognized the right to nationality. The court noted that unreasonable denial of the right to nationality was incompatible with the right to human dignity. It noted further the expression 'legal status' in article 5 of the African Charter on Human and Peoples' Rights included the right to nationality.
- The applicant had maintained that he was a Tanzanian national and that his parents were Tanzanian by birth. To that effect he produced a copy of his birth certificate and the emergency travel document issued to him pending issuance of his passport. The applicant's mother testified that he was born in Buguma Estate in Tanzania and that her name appeared in his birth certificate as his mother. The court held that the fact that the birth certificate showed that the applicant was born in Tanzania established a presumption on the applicant's birth and it was for the respondent to rebut the presumption.
- The court held that documentary evidence including a certified copy of the applicant's birth certificate showed that the applicant was Tanzanian and the respondent had been unable to prove otherwise. Therefore, it held that the applicant's right to nationality had been violated by the respondent.
- Initially, the applicant had been detained under domestic criminal laws for having entered and stayed in Tanzania unlawfully. After serving the two years imprisonment sentence imposed by the court, he remained in prison. Therefore, the court found that the respondent had violated the applicant's right to liberty under article 6 of the African Charter on Human and Peoples' Rights.
- Given the finding that the applicant was a Tanzanian national, it followed that the applicant had the right to free movement. The applicant had remained in prison even after having served his full sentence and the respondent had not provided a justification for the restrictions placed on the applicant's freedom of movement. The court held that the applicant's arrest and continued detention were a violation of article 12 of the African Charter on Human and Peoples' Rights.
- Article 1 of the African Charter on Human and Peoples' Rights conferred on the Charter its legally binding character meaning that a violation of any right under the Charter meant a violation of article 1 of the Charter. The court held that the provision had been violated because it had found that there had been violations of the applicant's right to liberty, nationality, security of his person and the right not to be unlawfully detained.

The court awarded the applicant 10 million Tanzanian shillings for the moral damage he had suffered at the date of the judgment and 300,000 Tanzanian shilling for every month he remained in detention, after the date of the judgment being notified to the respondent, until the applicant was released. The court awarded the applicant's mother 5 million Tanzanian shillings as an indirect victim. The court also ordered for the applicant to be released immediately.

8. African Court finds that an applicant had been deprived of nationality arbitrarily.

Anudo Ochieng Anudo v The United Republic of Tanzania

Application No. 012/2015

African Court on Human and Peoples' Rights

S Ore, P, B Kioko, VP, G Niyungeko, EH Guisse, RB Achour, NSO Mengue, MT Mukamulisa, TR Chizumila, C Bensaouia, JJ

March 22, 2018

Administrative actions regarding one's nationality should have the right of appeal.

Summary of Facts

The applicant stated that he was born in 1979 in Masinono, Butiama, United Republic of Tanzania. In 2012, the applicant approached Tanzanian authorities seeking to process formalities for his marriage. The police retained his passport on grounds that there were suspicions about his Tanzanian citizenship. In the months of April and May 2014, the Tanzanian immigration service inquired into the matter. Residents of Masinono village stated that he was the biological son of two Tanzanian nationals except that his uncle stated that he had been born in Kenya and then he immigrated to Tanzania. By a letter dated August 21, 2014, the Minister of Home Affairs and lmmigration informed the applicant that they had concluded that he was not a Tanzanian national and that his passport had been issued on the basis of fake documents and it was cancelled. Ultimately, on September 1, 2014, the applicant was expelled from Tanzania after being forced to sign a notice of deportation and a document confirming that he was a Kenyan national.

In Kenya, the applicant faced charges at the Homa Bay Resident Magistrates Court which declared him to be of an irregular status and fined him for an illegal stay in Kenya. He was to be expelled to Tanzania as a result of that decision. The applicant alleged that he had been living in a "no man's land" between the Tanzania-Kenya border in Sirari. He added that he was living under very difficult conditions without basic social and health services. Further, the applicant explained that his expulsion from Tanzania was because he had refused to pay immigration services a certain amount of money. He therefore alleged that his expulsion was due to corruption.

The applicant prayed for among other things, the cancellation of the prohibited immigrant notice issued against him and for a declaration that he was a citizen of the United Republic of Tanzania.

Key issues to be determined

The court was to determine whether the applicant's deprivation of nationality was unreasonable and whether a citizen could be prevented from returning to his country.

Summary of judgment

- The Universal Declaration of Human Rights 1948 guaranteed the right to nationality and protected against arbitrary deprivations of nationality. The grant of nationality to a person was within a State's sovereignty and the power to deprive a person nationality had to be exercised in accordance with international standards to avoid the risk of statelessness. There were exceptional situations under which a person could be deprived nationality and the conditions for loss of nationality were that there had to be a clear legal basis, it had to serve a legitimate purpose that conformed with international law, it had to be proportionate to the interest protected and it had to be done in accordance with procedural guarantees which allowed an affected person to have a defence before an independent body.
- The applicant's citizenship was challenged 33 years after his birth. A scientific DNA test was necessary for purposes of establishing who the applicant's parents were. In the absence of such a DNA test, the court held that the respondent did not have sufficient proof to justify the withdrawal of the applicant's nationality and the denial of nationality under those circumstances was arbitrary and contrary to article 15(2) of the Universal Declaration of Human Rights.
- Article 13 of the International Covenant on Civil and Political Rights protected a foreigner from arbitrary expulsion without legal guarantees. The court held that if the respondent regarded the applicant as an alien, the applicant should at least have had a chance to present his case before a competent authority. It held that a State should not deprive a citizen of nationality for the sole purpose of expelling him from the country.
- When the applicant was found in Kenyan territory, he was arraigned in a Kenyan court where he was fined for having an illegal stay in Kenya. The fact that both Kenya and Tanzania rejected him meant that he was a stateless person within the meaning of article 1 of the Convention relating to the Status of Stateless Persons.
- Some of the alleged violations of the rights of the applicant that arose from the difficult living conditions he had in the no man's land, would not have been there if the appellant had not lost his nationality. The court held that the applicant had established violations of the right not to be arbitrarily deprived of nationality, the right not to be arbitrarily expelled from a State and the right to a judicial remedy. The court postponed consideration of other related violations to a later stage.

The fact that both Kenya and Tanzania rejected him meant that he was a stateless person within the meaning of article 1 of the Convention relating to the Status of Stateless Persons.

The applicant had established violations of the right not to be arbitrarily deprived of nationality, the right not to be arbitrarily expelled from a State and the right to a judicial remedy.

9. Meaning of citizenship by birth under section 2(1)(b) of the amended South African Citizenship Act.

Yamikani Vusi Chisuse & 4 others v Director-General, Department of Home Affairs & another

Case CCT 155 of 2019

Constitutional Court of South Africa

Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

July 22, 2020

A citizen by birth was one who is born to atleast one South African parent.

Summary of facts

All the five applicants stated that they were born outside South Africa with at least one of their parents being a South African citizen. The High Court accepted that all the applicants, except the 2nd applicant, had at least one parent that was a South African citizen at the time they were born. At the High Court, the applicants wanted section 2(1)(a) of the amended Citizenship Act to be declared unconstitutional and invalid to the extent that it failed to recognise citizenship acquired by descent prior to the date of commencement of the South African Citizenship Amendment Act 17 of 2010 (2010 Amendment), January 1, 2013, and that the defect be remedied by reading the words "or by descent" into section 2(1)(a). They also wanted section 2(1)(b) of the amended Citizenship Act to be declared unconstitutional and invalid to the extent that it only applied prospectively to persons born after January 1, 2013 and that the defect be remedied by reading the words "or was" into section 2(1)(b).

The High Court granted the orders of constitutional invalidity of the challenged statutory provisions and also granted the applicants, with the exception of the 2nd applicant, a declaration that they were citizens of South Africa and directed the 1st respondent to register their births, enter their details into the population register, assign them South African identity numbers and give them South African identity documents and/or identity cards as well as birth certificates.

Under section 167(5) of the South African Constitution, confirmation proceedings were filed at the Constitutional Court of South Africa. The court was to confirm the High Court's findings on constitutional invalidity of the challenged statutory provisions.

The applicants challenged the 2010 amendments to the Citizenship Act, which took effect on January 1, 2013, and stated that they had the effect of depriving them of their citizenship rights. The applicants stated that the amendments did not allow certain categories of

persons born before January 1, 2013 to retain or obtain citizenship. The affected persons included those who had acquired citizenship by descent by being born to a South African parent outside the country and had registered their births before January 1, 2013 and those who were born to South African parents outside the country but had not registered their births before January 1, 2013.

Key Issue to be determined

The main issue before the court was whether the challenged provisions were, indeed, unconstitutional and therefore whether the order of invalidity should be confirmed.

Summary of judgment

- Section 20 of the Constitution stated that no citizen could be denied citizenship. The Constitution passed on the authority for defining citizenship to national legislation. The 2010 amendments to the Citizenship Act provided new definitions for citizenship by birth and citizenship by descent. Citizenship by descent previously referred to ways in which the child of a South African parent who was born outside the country could acquire South African citizenship. After the amendment, it related to the ways in which an adopted child could acquire the citizenship of their South African parent.
- The court held that the effect of the amendment was that those who were previously capable of acquiring citizenship by descent could acquire citizenship by birth as they were within the definition of a citizen by birth under the amended Citizenship Act. The individuals who had qualified for citizenship by descent under section 3(1)(b) of the 1995 Citizenship Act, as they were born outside South Africa to a South African parent, were considered citizens by birth in terms of section 2(1)(c) of the 1995 Citizenship Act. The court noted that the language of the legislature in section 2(1)(a) of the amended Citizenship Act was clear. The provision retained citizenship for those who were citizens by birth on December 31, 2012.

Under section 167(5) of the South African Constitution, confirmation proceedings were filed at the Constitutional Court of South Africa.

- In respect of section 2(1)(b), the Constitutional Court held that the purposive interpretation of the words "who is born" meant that it was a phrase that included those born both before and after the commencement of the 2010 Amendment.
- The court held that the parties were mistaken in interpreting the words as being prospective only. The words described a state of being and the word "is" was used only in that context as a linking verb. The Constitutional Court found that that was not only a reasonable and grammatically-sound construction of the phrase, but also a more constitutionally compliant one than that which gave the word "is" a narrow interpretation. In light of that conclusion, the Constitutional Court held that four of the applicants, and those similarly placed, were within the scope of section 2(1)(b), as they were all born to a South African parent.

- The Constitutional Court concluded that reading of the section would accommodate all categories of citizens who had acquired citizenship through either birth or descent in terms of the previous Citizenship Act. As a result, section 2(1)(a) and (b) was found to be capable of being read in a constitutionally compliant manner and, therefore, the confirmation of the order of invalidity by the High Court was declined.
- As the applicants fell within section 2(1)(b), however, the Constitutional Court upheld the declaratory order of the High Court which declared that four of the applicants were South African citizens.
- Finally, the Constitutional Court held that the interests of justice dictated that the applicants' prayer for consequential relief be granted and that the Department of Home must issue the applicants birth certificates and assign them South African identity numbers.

10. Acquiring the citizenship of another country may result to the loss of property rights.

Melato Caleb Mokoena v Makarabo Mokoena & 4 others
CIV/APN/216/2005
High Court of Lesotho
WCM Maqutu, J
January 16, 2007

According to Lesotho's laws, one lost property rights by acquiring the citizenship of another country.

Summary of facts

The applicant sought court orders to stop the 3rd respondent from reallocating land that belonged to Thabiso Mokoena (deceased) to the 1st respondent and to declare the 1st respondent ineligible to hold land in Lesotho. The orders sought in the application also included orders for the applicant to be considered the first in priority for purposes of re-allocation of the deceased's land. Only the 1st respondent responded to the application. The main issue that the applicant was raising was that a foreigner could not inherit rights over land. The applicant stated that by becoming a South African citizen, the deceased, who died in 2001, lost his rights over the land in question

The 1st respondent denied that her husband acquired South African citizenship through naturalisation.

Key issue to be determined

The issue to be determined was whether a citizen could lose property rights in Lesotho if he or she acquired citizenship of another country.

Summary of judgment

- In Lesotho, land could not be owned by an individual; it was held in trust for the Basotho people by the King. Through state organs, the King allocated rights or granted rights and interests in land to individuals. Rights over land were limited to occupation and use of the land.
- In terms of section 38 of the Constitution of Lesotho, every person born in Lesotho was a citizen of Lesotho especially if he was not born while his parents were on diplomatic service in Lesotho or were enemy aliens. Further sections 41(1) and 41(2) forbid persons to hold dual citizenship. Citizenship by birth or descent could be lost where, for example, a person in search for a job acquired citizenship in South Africa.
- The applicant stated that the deceased lost Lesotho citizenship and acquired South African citizenship and it was necessary for the applicant to prove that allegation. The legislature passed the Lesotho Citizenship Order 1971 where it expressed the intent that citizenship by birth should not be lost lightly. Under section 22(2) of the Lesotho Citizenship Order 1971, renunciation of citizenship had to be registered with the Registrar General and the relevant Minister could even refuse to accept the formal rejection if its acceptance was not conducive to public good.
- The court noted that when the 1st respondent married the deceased in 1975, she was entitled to citizenship of Lesotho upon taking an oath of loyalty and obedience to the state of Lesotho and applying to be registered as a citizen, under the terms of section 40 of the Constitution of Lesotho. Even though the 1st respondent had not formally rejected her South African citizenship, according to the court, she had a right to hold land by virtue of the indefinite home that her marital status entitled her to. The court noted that section 6(1)(b) of the Land Act 1979 gave any foreigner a right to possess land provided he or she had a permit of indefinite home. There was evidence that the 1st respondent possessed a permit for indefinite home given by the Government of Lesotho.
- The issue of the re-allocation of the disputed land was handled initially by chiefs and the land allocating authority but the question of citizenship was not raised in that forum. What was considered by the chiefs was the succession of the deceased's estate. The 3rd respondent, who was the Principal Chief of Likhoele, made a decision relating to succession. He refused to accept the person who was suggested as a successor and the deceased's widow was nominated as the successor in place of her husband.
- The court noted that the applicant's arguments defeated his case. If it was true as the applicant said, that the deceased got South African citizenship by naturalisation on June 17, 1992, then the land in dispute should have been returned to the state or the

the chiefs or the land allocating authority. Therefore, in that case, the Mokoena family lost the right to be considered for reallocation of the land. The 3rd respondent's hands were not tied in any way in reallocating the land.

- The court held that the basis of the applicant's claim could not be the law of succession. The court explained, if the 1st respondent had no rights to the land because it was lost by the deceased, even the Mokoena family had no rights to the land. However, that did not dispose of the dispute.
- The court held that if the applicant approached the matter from a citizenship angle, he would have no land title to claim as loss of rights to the land took place nine years before the deceased died.
- The court held that in relation to the rights of a widow, there were areas of unfair treatment in law as recognized under section 18(4)(b) of the Constitution. For example, even though a widow was not her husband's successor, she could not be evicted from her husband's house. She had to remain on her husband's land and live on its produce until she died.
- The court noted that the land allocating authority's discretion to allocate land was governed by the needs of the village and the court could not interfere with the use of that power unless it was contrary to the law or an established principle of equity.
- The court held that the power to allocate land rested in the chief and the land allocation committee. If the deceased lost his right to hold land, he had to be called during his lifetime in accordance with section 13 of the Land Act 1979 and only then would the land allocation authority invalidate his rights to the land. Further, the court held that if the land had been returned to the State, the land allocating authority was free to allocate it as it saw fit.
- The court concluded that it was wrong for the applicant to invite the court to interfere with the 2nd and 3rd respondent's power to cancel the deceased's title to land as the court had no power to do so. Before the deceased's land title could be cancelled the court held, that he had to be afforded a hearing under section 13 of the Land Act 1979. Unreasonable cancellations of land were not permitted by the law. The matter was not a succession claim and the applicant, if his own arguments were considered, could not claim a right to re-allocation. The court held that the land allocating authority had a free hand in allocating the land and the court could not interfere with its discretion.

For example, even though a widow was not her husband's successor, she could not be evicted from her husband's house. She had to remain on her husband's land and live on its produce until she died.

11. The meaning of the term "real and effective nationality."

Liechtenstein v Guatemala

Nottebohm Case (second phase), Judgment of April 6, 1955 : ICJ Reports 1955, p. 4.

Issues of nationality and genuine link for people who have multiple citizenships.

Summary of facts

The petitioner's submissions

Mr. Nottebohm was German by birth and in 1905 he went to Guatemala. He resided and engaged in business in Guatemala. When he left Guatemala, he executed a power of attorney (an official document that gives a person the power to represent another or act on their behalf) to protect his interests. A period of a little more than a month had passed after the start of the World War II when Mr. Nottebohm applied for naturalization in Liechtenstein. Mr. Nottebohm successfully acquired the nationality of Liechtenstein. After obtaining a Liechtenstein passport, he got a visa and went back to Guatemala in the beginning of the year 1940 where he continued his business activities.

The respondents' submissions

In 1943, as part of its war measures, the Government of Guatemala arrested, detained, expelled and refused to readmit Mr. Nottebohm to their territory. They had also seized and retained Mr. Nottebohm's property without compensating him. Through an application, the Government of Liechtenstein sought compensation from the Government of Guatemala. Against the admissibility of the application by the Government of Liechtenstein, the Government of Guatemala stated that further diplomatic exchanges and negotiations were necessary, that Mr. Nottebohm had through the application of the municipal laws of Liechtenstein been naturalized on October 20, 1939 and gained nationality and that Mr. Nottebohm had not exhausted local remedies before the application was filed. The Government of Guatemala challenged of the naturalization of Mr. Nottebohm and questioned whether it was of international effect.

Summary of judgment

- The court held that Liechtenstein as a sovereign state could pass legislation about acquisition of nationality in its territory. Nationality served the purpose of ensuring that the person on whom nationality was given enjoyed the rights and was bound by the obligations applicable in the State that gave nationality. It was possible for two states to give nationality to an individual and in such situations conflict could arise. However, in most cases it was only necessary to determine whether the applicant State was entitled to exercise protection for its alleged national. The court held, that preference would be given to the real and effective nationality of the individual and

that different factors would be taken into account including the habitual residence of the individual, the centre of his interests, his family ties, his participation in public life and the attachment shown by him for a given country and taught to his children.

- The court noted that in practice certain states held back from exercising protection in favour of naturalized persons where such persons had a prolonged absence and had broken links with the country in which they were naturalized. It further noted that in practice, nationality had to correspond with the factual situation.
- The court observed that a State would only be entitled to exercise protection against another State for an individual if in juridical terms the individual's connection with the State had made him its national.
- The court noted that at the time of naturalization Mr. Nottebohm had been a German national by birth and he had always maintained connections with members of his family that remained in Germany. There was no indication that his application for naturalization was motivated by his desire to dissociate himself from Germany. The court further noted that Mr. Nottebohm had been in Guatamela for 34 years and he had resided and engaged in business there. After his naturalization in Liechtenstein, he returned to Guatemala and continued to engage in business and reside there. He stayed in Guatemala until his removal as a result of war measures in 1943. He complained that Guatemala refused to allow him to return to its territory. The court further observed that Mr. Nottebohm's connections to Liechtenstein were extremely weak as he had no home there nor a prolonged residence in Liechtenstein.

The court further observed that Mr. Nottebohm's connections to Liechtenstein were extremely weak as he had no home there nor a prolonged residence in Liechtenstein.

- The court held that there was an absence of any bond of attachment between Mr. Nottebohm and Liechtenstein but that he had long-standing and close connections with Guatemala. That link between Mr. Nottebohm and Guatemala had not been weakened by his naturalization.
- The court held that Mr. Nottebohm secured nationality in Liechtenstein because it was a neutral state. He wanted to avoid being a national of a hostile and aggressive state in eyes of Guatemala by being naturalized. Therefore, the court held that Guatemala had no obligation to recognize nationality granted under such circumstances and Liechtenstein was not entitled to grant Mr. Nottebohm protection against Guatemala.

Citizenship by Registration.

The Constitution of Kenya 2010 sets out the situations in which one may be a citizenship by registration.

Relevant provision of the Law
Constitution of Kenya, 2010 article 15.
Citizenship by Registration

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.*

The Constitution of Kenya, 2010 makes no distinction between male and female persons married to Kenyan citizens. A person is entitled to be a Kenyan citizen if married to a Kenyan for at least 7 years. Children adopted by a Kenyan were also entitled to citizenship on application. Further if a foreign national had been resident in Kenya for a continuous period of seven years they can apply to be a citizen so long as they meet the requirements set under the Kenya Citizenship and Immigration Act .

It should be noted that persons applying for citizenship by registration are entitled to the right to fair administrative action which entitles them to the following benefits:

i). The right to be informed of the outcome

ii). The right for the application to be considered without any unreasonable delays.

The circumstances in which citizenship by registration may be revoked are laid out in article 17(1) of the Constitution of Kenya, 2010.

Relevant provision of the Law
Constitution of Kenya, 2010 article 17(1).
Revocation of Citizenship by Registration

1. If a person acquired citizenship by registration, the citizenship may be revoked if

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

(b) the person 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) the person 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) the person 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.

Case Law on Citizenship by Registration

Case Law on Citizenship by Registration.

- **The provision of confidential security reports about persons who had applied for citizenship by the National Intelligence Service was subject to the right to fair administrative action.**
- **A person married to a Kenyan Citizen for seven years was on application not guaranteed to be registered as a Kenyan Citizen.**
- **A delay of more than 4 years to consider an applicant's application for citizenship violated the applicant's right to fair administrative action under article 47 of the Constitution, 2010.**

International Case Law on Citizenship by Naturalization

- **Security concerns as a reason for disallowing dual citizenship in Namibia**

B. Case Law on Citizenship by Registration.

12. The provision of confidential security reports about persons who had applied for citizenship by the National Intelligence Service was subject to the right to fair administrative action.

Republic v Cabinet Secretary for the Ministry of Interior and Coordination of National Government & 2 others Ex-parte Patricia Olga Howson
Misc Civil Application No 324 of 2013
High Court of Kenya at Nairobi
G V Odunga, J
December 20, 2013

The provision of confidential security reports is also subject to the right to fair administrative action and delaying the release of such a report for an unnecessary and unjustified period of time would amount to an abuse of power.

Summary of facts

The applicant's submissions
The applicant made an application for registration as a citizen of Kenya as she was the spouse of a Kenyan citizen and her application was submitted to the Ministry of State for Immigration on April 22, 2013. She complained that there had been no response or communication received from the relevant authorities except that she had been issued with two acknowledgement slips. She was not aware of the status of her application and her questions had gone unanswered. Her complaint was that there had been a refusal and neglect to grant citizenship which she was entitled to under the law.

The respondents' submissions
In reply, on behalf of the respondents, it was explained that a confidential security report, which was to be prepared by the National Intelligence Service for persons seeking Kenyan citizenship, was yet to be received in the case of the applicant. For that reason, there had been a delay in processing the application for citizenship.

Key issues for determination
The main issues for determination were whether the grant of citizenship by registration was an automatic right or entitlement enjoyed by a person who had a subsisting marriage with a Kenyan citizen for more than 7 years; and whether the court could force immigration authorities to grant a foreign national married to a Kenyan Kenyan citizenship.

Summary of judgement
- On the delay, the court held that in the terms of article 47 of the Constitution of Kenya 2010 (right to fair administrative action), in her application for citizenship, the

ex-parte applicant was entitled to administrative action which was fair, expeditious, efficient, lawful, reasonable and procedurally fair. A delay of six months in processing the application for citizenship had prompted the applicant to apply for the judicial review orders of *mandamus* (orders compelling mandatory performance). The apparent delay of six months was unreasonable .

- On citizenship by registration through marriage to a Kenyan citizen, the court held that article 15 of the Constitution of Kenya 2010 provided that a person who had been married to a Kenyan citizen for at least seven years was entitled, upon making an application, to be registered as a citizen. However, there were conditions attached to the grant of citizenship in such situations of marriage, particularly under section 11 of the Kenya Citizenship and Immigration Act, 2011, No 12 of 2011. The import of section 11 of the Kenya Citizenship and Immigration Act, 2011, No 12 of 2011 was that the grant of citizenship to a person married in Kenya was not absolute and it would be subject to certain conditions to the effect that citizenship would not be granted unless;
  a) the marriage was performed and celebrated under a system of law recognized in Kenya, whether celebrated in Kenya or outside Kenya;
  b) the applicant had not been declared a prohibited immigrant under the Act or any other law;
  c) the applicant had not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;
  d) the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and
  e) the marriage was existing at the time of the application.

The court further observed that Mr. Nottebohm's connections to Liechtenstein were extremely weak as he had no home there nor a prolonged residence in Liechtenstein.

- Furthermore, the provision of confidential security reports about persons who had applied for citizenship was among the functions of the National Intelligence Service recognized under section 5(1)(g)(ii) of the National Intelligence Service Act, No 28 of 2012. However, the provision of confidential security reports was also subject to the right to fair administrative action and delaying the release of such a report for an unnecessary and unjustified period of time would amount to an abuse of power. The import of Article 259(8) of the Constitution of Kenya 2010 was that if a particular time was not prescribed for purposes of the performance of an act required by the Constitution such performance would be done without unreasonable delay and as often as occasion arises.
- The prayers challenging the delay were allowed. To this end the court issued an order to the Cabinet Secretary for Ministry of Interior and Co-ordination of National Government, the Director of Department of Immigration Services, to issue all relevant and necessary Documents for the registration of the applicant as a Kenyan Citizen within thirty (30) days from the order issued by this Honourable Court, excluding the vacation days, in the name of the applicant in respect of her formal and official application.

13. The grant of citizenship to persons married to Kenyan citizens is not automatic.

S N v Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals
Management Services & Attorney General [2016] eKLR
Miscellaneous Civil Application 406 of 2015
High Court at Nairobi
G. Odunga J
October 10, 2016

The grant/ conferment of citizenship for persons married to Kenyan citizens is not automatic. The relevant authorities have to investigate as whether such applicants are deserving and also reasons for the same given to them.

Summary of facts
The applicant was a Pakistani National who contracted a marriage with a citizen of the Republic of Kenya on November 15, 1985. The applicant applied for registration as a citizen of Kenya by a spouse of a Kenyan citizen to the Director General, Kenya Citizens and Foreign Nationals Management Services (2nd Respondent) in 2011, which application was approved on January 16, 2012. The applicant never received any response or communication from the respondents despite her efforts to obtain the same.
The applicant claimed that the 2nd respondent had refused and neglected to issue her a Kenya citizenship certificate and had not offered any explanation for such refusal for a period of more than two and a half years despite her advocates making numerous enquiries at the relevant counter at the Immigration Department as to the progress of the approved application for citizenship to compel the Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services and the Attorney General to issue to the applicant the certificate of Kenya Citizenship.

The respondents' submissions
The application was not opposed by the respondent.
Key issues for determination
The main issues to be determined were whether a person married to a Kenyan Citizen for seven years was on application guaranteed to be registered as a Kenyan Citizen. In that regard, could a court, via the judicial review remedy of *mandamus* (order compelling mandatory performance), direct that a person be registered as a Kenyan Citizen. The court also had to determine what was the legal consequence of an executive authority's failure to give reasons for an administrative action?

Summary of judgement
- On whether the delay was unreasonable, the court held that a delay of six months in processing an application for citizenship amounted to excessive delay. The delay

prevented the applicant from the enjoyment of certain rights conferred upon citizens. The applicant had fulfilled the requirement under article 15 of the Constitution that provided that a person who had been married to a citizen for a period of at least seven years was entitled on application to be registered as a citizen. The applicant was eligible to apply to be registered as a citizen of Kenya.

- On whether an applicant married to a Kenyan for seven years was guaranteed to be registered as a Kenyan citizen on application, the court held that an application for citizenship by a person married for seven years by a Kenya citizen was to be made in a prescribed manner as indicated under section 11 of the Kenya Citizenship and Immigration Act. The law did not state that such a person on application was to be registered as a citizen. Section 11 provided circumstances under which such a person may not be registered as a citizen. The registration of a person as a citizen by virtue of being married to a Kenyan citizen was not absolute but was subject to the conditions stipulated under section 11. It was not contended that there existed any bar under section 11 which would prohibit the applicant from being registered as a Kenyan citizen. To the contrary, the respondents approved the applicant's application.
- On the time for processing citizenship applications, the court held that while there was no specific timeline within which the application for citizenship should have been considered, article 259(8) of the Constitution provided that if a particular time was not prescribed by the Constitution for performing a required act, the act would be done without unreasonable delay, and as often as occasion arose. A period of more than 4 years delay in processing an application for citizenship without informing the applicant at what stage such application had reached was unreasonable and contrary to section 6(4) of the Fair Administrative Action Act that provided that failure by an administrator to furnish an applicant with the reason for the administrative action/decision was to be presumed to have been taken without good reason. In the ordinary way and particularly in cases, which affect life, liberty or property, the authority concerned should give reasons and if it gives none the court could infer that the authority had no good reasons since the authority must act in good faith. The respondents were bound to provide the applicant with the reasons for making a decision either way and their failure to do so could only be interpreted to mean that they had no reasons for not registering the applicant as a citizen.

Applications for citizenship ought to be processed in a timely manner, and in this case, a delay of 4 years was considered to be a very long time.

The application for the applicant to be reinstated as a citizen and challenging the delay in responding to the applicant's citizenship application was allowed. To this end the court issued declarations that the applicant was entitled to be registered as a citizen of Kenya. A mandatory order compelling the Cabinet Secretary, Ministry of Interior and Co—ordination of National Government and the Director General, Kenya Citizens and Foreign Nationals Management Services was issued commanding them to issue to the applicant the certificate of Kenya Citizenship and all relevant and necessary documents for registration of the applicant as a Kenyan Citizen in respect of the applicant's application.

14. A delay of more than 4 years to consider an applicant's application for citizenship violated the applicant's right to fair administrative action under article 47 of the Constitution, 2010.

Samira Tariq Qureshi v Cabinet Secretary for Ministry of Interior and Co-Ordination of National Government and 2 others
Miscellaneous Civil Application No. 406 of 2018
High Court at Nairobi
E M Muriithi, J
November 7, 2019

Applications for citizenship ought to be processed in a timely manner, and in this case, a delay of 4 years was considered to be a very long time.

Summary of facts
The applicant sought an order to compel her registration as a Kenyan Citizen stating that the respondents had delayed to issue all relevant and necessary documents for the registration of the applicant as a Kenyan Citizen in respect of her application; that the delay was excessive, unreasonable and inexcusable; and that the respondents had breached the applicant's legitimate expectation to fair administrative action whereas the applicant had complied with all the legal requirement for the issuance of Kenyan Citizenship.

The respondents' submissions
The respondent claimed that the applicant submitted her application for citizenship on January 22, 2015 and stated that the application could not be traced in her file prompting the 2nd respondent to write a letter dated January 10, 2015 requesting her to submit her application.

Key issues for determination
The main issues were whether a delay of more than 4 years to consider an applicant's application for citizenship violated the applicant's right to fair administrative action under article 47 of the Constitution, 2010 and whether a court could order the Director, Department of Immigration Services to grant citizenship to an aggrieved applicant.

Summary of judgement
- On the rights of the applicant the court held that the applicant had a legal right and, consequently, the respondents a legal duty to register her if she met the qualifications of article 15(1) of the Constitution of Kenya, 2010 (Constitution) (that provided that a person who had been married to a citizen for a period of at least seven years had a legal right, on application, to be registered as a citizen).
- On whether the delay was reasonable, the court held that while the court could not seize and hold the power of the Citizenship Committee of the 2nd respondent to consider

and approve the applicant's application for citizenship. The circumstances of the case were such that the 2nd respondent had taken over 4 years to consider the applicant's application. That clearly offended the applicant's right to fair administrative action under article 47(1) of the Constitution for lack of expeditious, efficient, lawful reasonable and procedurally fair process. More than 4 years delay in processing an application for citizenship without informing the applicant at what stage such application had reached was clearly unreasonable.

More than 4 years delay in processing an application for citizenship without informing the applicant at what stage such application had reached was clearly unreasonable.

- On the powers of the court in relation to the powers of the Department of Immigration, the court held that the mandate to register citizenship lay with the 2nd respondent, the court could not properly direct that the applicant be registered as a citizen as that would be taking over the power of the Immigration Authority. The court could, however, properly direct that the application for citizenship be considered within a reasonable time consistent with the right to Fair Administrative Action under article 47(1) of the Constitution.

The Director, Department of Immigration Services; ordered to consider the applicant's application for citizenship within 30 days.

International Case Law on Citizenship via Naturalization

15. Security concerns as a reason for disallowing dual citizenship in Namibia

Poppy Elizabeth Tlhoro v Minister of Home Affairs
Case No (P) A 159/2000
High Court of Namibia
Maritz & Mainga, JJ
July 2, 2008

Sometimes countries may adhere to security concerns before granting applications for dual citizenships.

Summary of facts

The applicant was a citizen of South Africa who, in addition, wanted to obtain the citizenship of Namibia by naturalisation. She was a South African Citizen at birth when she entered the then South West Africa on February 2, 1981 and remained a resident there. South West Africa was territory which became Namibia on the date of independence. The applicant's status in the territory changed to that of an alien when section 29 of the Namibian Citizenship Act, No 14 of 1990, substituted the words "South African citizen" for the expression "Namibian citizen" shortly after independence. The applicant was excused under section 12(1)(a) of the Aliens Act from the statutory requirements relating to temporary or permanent residence permits.

The applicant became concerned that she could be denied entry to Namibia in future after an incident where an immigration officer hesitated to allow her entry to Namibia without a temporary or permanent permit. She also had concerns that without official documentation recognizing her right to residence in Namibia, she was at risk of being arrested as a suspected prohibited immigrant. Her concerns could be addressed by applying for a permanent residence permit but she chose to apply for Namibian citizenship by naturalisation. Her application for Namibian citizenship was approved subject to requirements that she should renounce her South African citizenship and take an oath of allegiance to the Republic of Namibia before a certificate of naturalisation could be issued to her.

The applicant was unwilling to formally give up her South African citizenship as she intended to return to South Africa and live there in future. In the meantime, she intended to work and reside in Namibia. She filed an application seeking various declarations including those that were to the effect that section 5(1)(g) and 26 of the Namibian citizenship Act were

unconstitutional. Section 5(1)(g) of the Namibian Citizenship Act required her to formally reject foreign citizenship in order to become a citizen by naturalization while section 26 of the Namibian citizenship Act prohibited dual citizenship. The applicant was challenging the constitutionality of the statutory provisions which required her to renounce her South African citizenship before she could take up Namibian citizenship.

The applicant argued that under article 4(5) of the Constitution the formal rejection provisions had to fall within the category of health, morality, security or legality of residence in order for them to be valid and they were not in those categories. According to the applicant, those were the categories under which conditions for the grant of citizenship could be set.

The respondents' submissions

The respondent argued that the formal rejection of citizenship provision complained of were not inconsistent with the Constitution. The respondent stated that no conflict between those statutory provisions and any constitutional right, criteria or requirement was demonstrated.

Summary of judgment

- Under article 4(5)(c) of the Constitution, Parliament had power to lay down criteria pertaining to health, morality, security or legality of residence in order for a person to acquire citizenship by naturalisation. Under article 4(9) of the Constitution, Parliament had powers to make laws, that were not inconsistent with the Constitution, to regulate loss of Namibian citizenship.
- The court noted that loyalty to the Namibian State could be assumed for Namibian citizens tied to the country by birth or blood but others should be required to demonstrate their loyalty and allegiance to Namibia by formally rejecting foreign citizenship and taking an oath of loyalty to Namibia. The court therefore held that the demand for loyalty to a single State was not unknown to the Constitution but conformed to the spirit of the Constitution, it did not run counter to the citizenship scheme in the Constitution but was expressly envisaged in certain instances. The court also concluded that the word security as used in the phrase "pertaining to health, morality, security or legality of residence" in article 4(5)(c) of the Constitution could apply to the security of the State.

Namibian State could be assumed for Namibian citizens tied to the country by birth or blood but others should be required to demonstrate their loyalty and allegiance to Namibia by formally rejecting foreign citizenship and taking an oath of loyalty to Namibia

- The court explained that unwavering loyalty and obedience to Namibia and a willingness to sacrifice – if required – even one's life for Namibia was clearly one of the most important underlying reasons for the citizenship requirement in the Act. Persons serving in the Force could not be persons with divided loyalties more so if foreign countries threatened the territorial or internal security of Namibia. The court

noted that allowing persons to become citizens of Namibia without requiring them to formally reject foreign citizenship could mean that the door would be opened certain persons with foreign citizenship to join the Namibian Defence Force and even gather and pass intelligence to enemy forces. The court also observed that if persons that held foreign citizenship did not renounce it before being granted Namibian citizenship by naturalisation, they could be elected as Members of the National Assembly or National Councils, Regional Councils and Local Authority Councils wherein they could fail to put the interests of Namibia and her people first and they could be compromised by loyalty to a foreign State. The court also noted that security concerns for a dual citizen could arise in the field of employment. Therefore, the court concluded that such security considerations meant that those that sought to gain Namibian citizenship by naturalisation had to renounce their foreign citizenship.

Case Law on Dual Citizenship

Case Law on Dual Citizenship.

- **A person nominated/appointed to be a state officer, possessing dual citizenship, ought to renounce their foreign citizenship in order to hold state office.**
- **One could not acquire dual citizenship through the courts.**
- **Legal procedure applicable to a person who sought to regain Kenyan citizenship and had been a Kenyan citizen by birth but had lost Kenyan citizenship by acquiring foreign citizenship.**

Dual citizenship

Under the old Constitution, no one could be both a Kenyan citizen and citizen of another country. The only exception was that children who were citizens of Kenya and another country (perhaps because one parent was non-Kenyan and the law of each parent passed their citizenship to their children) did not have to decide which citizenship to keep until they reached adulthood. Such a person who reached the age of 23 without having given up the other citizenship automatically ceased to be a Kenyan citizen . A Kenyan citizen, who by a voluntary act took another citizenship, automatically lost the Kenyan citizenship (automatically becoming a foreign national by marrying a foreigner did not have this result, but that would be very unusual). The most obvious voluntary act would be to apply to become a citizen of that other country. No act of renouncing Kenyan citizenship was required.

To remedy this, the Constitution of Kenya, 2010 has in place provisions for dual citizenship. The amendment was inspired by the struggles of persons married across various nationalities, children of a Kenyan and foreign national, by the struggles of trans-border communities and by the struggles of pastoralist communities that often crossed boarders to graze cattle.

Can dual citizen hold a public office?

For one to hold public office, one must always put the interest of the Republic of Kenya first. Dual citizens, being of two nationalities, had a conflict of interest, and therefore they cannot hold public office.

C. Case Law on Dual Citizenship

16. A person nominated/appointed to be a state officer, possessing dual citizenship, ought to renounce their foreign citizenship in order to hold state office

Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs and 2 others
Petition No 367 of 2019
High Court Nairobi
J A Makau, J
November 14, 2019

A dual citizen could not be appointed as a State Officer because of the competing interests that a Dual Citizen held....State Officers that acquired dual citizenship would lose their position as a state officer.

Summary of facts

Mwende Maluki Mwinzi (the petitioner) was born in the United States of America (USA) and was a citizen of USA by birth. The petitioner was born to a Kenyan father and lived and schooled in Kenya. The petitioner was a dual citizen of USA and Kenya.

The petitioner was appointed by the President to be an Ambassador of Kenya to the Republic of Korea. The petitioner returned an acknowledgement and an acceptance letter to the offer of appointment together with her academic certificates and other testimonials as was required by the letter of appointment to the Director, Human Resource Management as the Ministry of Foreign Affairs. Thereafter, the petitioner was vetted by the National Assembly Departmental Committee on Defence and Foreign Relations.

The Committee (3rd respondent) recommended her appointment to the position of Ambassador of Kenya to the Republic of Korea on condition that she renounced her American citizenship.

The petitioner filed this case to challenge the decision of the National Assembly Departmental Committee on Defence and Foreign Relations. She claimed that the conditional approval of the 3rd respondent was illegal, that the petitioner's citizenship was acquired by birth and therefore she could not opt out of it and that the condition that the petitioner renounce her American citizenship was discriminatory and violated her freedom to discrimination as stated in article 27 of the Constitution of Kenya, 2010 (Constitution).

The respondents' submissions

The respondents argued that when a dual citizen was nominated to state or public office,

they ought to formally reject their foreign nationality to take up the position because a person with dual citizenship had two competing interests. They argued that the loyalty and actions of a dual citizen would be divided and as such, a dual citizen could not serve as a State Officer as such a person would not be guaranteed to put Kenya's national interests first.

Key issues to be determined

The main issue for the court to determine was whether a person nominated/appointed to be a state officer, possessing dual citizenship, had to formally give up their foreign citizenship in order to hold state office.

Summary of judgment

- On whether a dual citizen could hold a State office, the court held that although the Immigration and Citizenship Act had no specific provision for the giving up of citizenship of another country by a dual citizen, section 20 which applied to voluntary formal giving up of citizenship by a foreign national upon application for registration as a citizen of Kenya presumably applied to dual citizenship. Such a person was required to provide the Cabinet Secretary with evidence of their formal giving up of citizenship of the other country. A state officer who acquired dual citizenship would lose his or her position as a state officer. A state officer or a member of the defence forces would not hold a dual citizenship, however that did not apply to judges and members of a commission or any person who had been made a citizen of another country by operation of that country's law without ability to opt out.
- On whether the 3rd respondent acted beyond their authority to recommend for the petitioner to formally give up her US citizenship, the court held that no one chose their parents or the place of birth. That was beyond anyone's control. Parliament therefore could not force or demand that the petitioner formally gives up her U.S citizenship unless she voluntarily decided to do so. The National Assembly had to approve the appointment of an individual where the Constitution clearly required that for valid appointment to take place.

The risk of a dual citizenship could threaten the national interest of the Republic of Kenya against the interest of the foreign state. Therefore, the 3rd respondent had demonstrated that in the process of examining and approving of the petitioner, the same was conducted fairly and within the law.

- On the role of a diplomat and whether a diplomat could be a dual citizen, the court held that the role of a diplomat was to represent the interest of the sending state including national security and any individual who had the duty to be loyal to another state, unless they had been made a citizen of another country by operation of that country's law without ability to opt out under provisions of article 78(3) (b) of the Constitution of Kenya 2010, ought not be an ambassador unless he/she formally gave up the citizenship of the foreign state. The risk of a dual citizenship could threaten the national interest of the Republic of Kenya against the interest of the foreign state. Therefore, the 3rd respondent had demonstrated that in the process of examining and

approval of the petitioner, the same was conducted fairly and within the law.

- On whether the court had the power to make a decision on the petitioner's nomination by the president, the court held that the President of the Republic of Kenya was yet to make the appointment formally on the advice of the National Assembly. As such, the court could not decide on a decision that had not been made. The petition was premature.

The petitioners case was dismissed on all grounds.

17. One could not acquire dual citizenship through the courts.

Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration & another

High Court at Nairobi

Petition No. 251 of 2014

I Lenaola, J

September 17, 2015

When one had lost citizenship under the Repealed Constitution by acquiring the citizenship of another country, then such a person had to follow right procedure to re-acquire his/her citizenship. By-passing the process by applying for a National ID would not be interpreted as being a dual citizen.

Summary of facts

The petitioner claimed to be Kenyan citizen and further claimed that his parents were Kenyan citizens and holders of Kenyan Passports. He claimed that having been born in Kenya, he was issued with a certificate of registration as a Kenyan citizen on August 19, 1968. The petitioner also claimed that he had a British passport which was renewed from time to time and had lived in Kenya for 62 years, that he had established businesses and investments and employed fellow citizens, contributed to the building of the nation like any other Kenyan citizen and since then had been enjoying every right and entitlement just like any other Kenyan citizen.

On November 24, 2011 the petitioner applied for a Kenyan Identity card which was given to him on March 1, 2012. On January 31, 2013, he applied for a Kenyan passport and was given to him with a receipt and was allocated a tracking Number. On realization by the respondent that the petitioner had a British passport, his application for the Kenyan passport was subsequently rejected on the grounds that he had ceased to be a Kenyan

citizen by virtue of section 97 of the Repealed Constitution having his British Citizenship by March 21, 1975. The petitioner contested that the action by the respondent was unconstitutional, illegal, invalid and was also a violation of his constitutional rights. He claimed that, by being a citizen by birth and as a Kenyan citizen, having been given an identity card, he was equally entitled to a Kenyan passport as a matter of right.

The respondents' submissions

The respondent claimed that the petitioner was not a citizen of Kenya because he was born before his father acquired Kenyan citizenship (his parents were born in India and not Kenya). In the circumstances, the principle applicable to his case was acquisition of citizenship by blood and not by place of birth.

They also claimed that the fact that the petitioner held a birth certificate issued in Kenya was only proof of birth in Kenya and not citizenship. They claimed that the Kenyan identity card given to him was invalid as it could have been given to him while he continued being a British citizen. They also claimed that the said identity card ought therefore to be surrendered back to the Government of Kenya for cancellation.

The respondents argued that the petitioner had admitted that he was not a citizen of Kenya by formally applying for such citizenship since prior to 2010, dual nationality was not lawful in Kenya. Lastly they claimed that the petitioner could not be given a passport until he was registered as a citizen of Kenya.

Key issues to be determined

The main issues for determination were whether the petitioner had followed the right procedure to be entitled to acquire dual citizenship, whether one could by-pass the Department of Immigration and attain dual citizenship via the High Court.

Summary of judgment

- On whether the petitioner had ever acquired Kenyan citizenship, the court held that as of December 12, 1963 when Kenya became a Republic and the petitioner was only 11 years old and a foreign national. He attained the age of twenty-one years on March 22, 1973 and as at that date; he had already acquired the citizenship of Kenya by fact of registration on the August 19, 1968. At both dates the petitioner had not formally given up his other country's citizenship (whether British or Indian) neither had he taken an oath of loyalty and obedience as required by law, therefore the petitioner ceased to be a citizen of Kenya by virtue of section 97(3) of the repealed Constitution on March 22, 1973 and he only retained his foreign nationality whether Indian or British as at that date.

The court held that the petitioner could not be given a Kenyan Passport while still holding the British nationality and a British passport the petitioner had neglected and or refused to renounce formally give up that nationality as at the time when he had the legal capacity to acquire either a Kenyan Identity card and or Kenyan passport.

- On whether the petitioner had a valid claim to be a dual citizen, the court held that dual nationality was not recognized by the repealed Constitution or any statute enacted pursuant to section 97 of the repealed Constitution.

- On whether, the petitioner could be given a Kenyan passport, the court held that the petitioner could not be given a Kenyan Passport while still holding the British nationality and a British passport the petitioner had neglected and or refused to renounce formally give up that nationality as at the time when he had the legal capacity to acquire either a Kenyan Identity card and or Kenyan passport.
- On whether the petitioner could get citizenship via the courts, the court held that section 8 of the Kenya Citizenship and Immigration Act, provided for the procedure of acquiring Kenyan Citizenship. There was no way the petitioner could acquire dual citizenship through the court at the first instance.
- On whether the petitioner's rights were violated, the court held that the petitioner had received a letter from the department of immigration citing section 97 of the repealed Constitution, a letter of which sought to cancel the citizenship of the petitioner in self-created difficult position of not formally giving up the citizenship of the other country other than Kenya as per the legal requirement. The decline by the respondent to grant Kenyan citizenship to the petitioner was for valid and lawful reasons. There was no violation of any right including that of fair administrative action.

18. Legal procedure applicable to a person who sought to regain Kenyan citizenship and had been a Kenyan citizen by birth but had lost Kenyan citizenship by acquiring foreign citizenship.

E W A & 2 others v Director of Immigration and Registration of Persons & another
Petition No 352 of 2016
High Court at Nairobi
Constitutional and Human Rights Division
February 22, 2018
J M Mativo, J

Persons who had lost their citizenship by birth by acquiring another nationality under the Repealed Constitution were entitled to regain their citizenship by birth (and dual citizenship) upon application. Citizenship by birth could not be lost.

Summary of facts

The petitioners were born as Kenyan citizens at hospitals in Nairobi, Kenya. They were adopted by two British citizens. Their adoption orders did not state that they would be presumed to be Kenyan citizens and pursuant to the adoption, they acquired British

citizenship.

The petitioners sought to regain Kenyan citizenship and applied for Kenyan passports but the 1st respondent declined to issue the passports. The petitioners said that the denial of the passports was a violation of their rights guaranteed by the Constitution under article 14 and 27 and they wanted the court to declare that they were Kenyan Citizens.

The respondents' submissions

The respondents admitted that the petitioners, at birth, were Kenyan citizens. However the respondents claimed that the petitioners lost their citizenship when they were adopted by British parents and acquired British nationality. Since dual citizenship was not allowed in the Repealed Constitution, the respondents argued that the petitioners lost their Kenyan citizenship. As such, the respondents stated that the petition was premature and that the petitioners needed to follow the procedure provided for in section 10 of the Kenya Citizen and Immigration Act in order to regain citizenship.

Key issues for determination

The main issue for the court to determine was what legal procedure was applicable to a person who was a Kenyan citizen by birth and was seeking to regain Kenyan citizenship after having lost it by acquiring foreign citizenship? Secondly, the court had to outline the circumstances in which a person would be entitled to a Kenyan passport.

Summary of judgment

- On whether the petitioner's citizenship by birth was officially cancelled after being adopted by British parents, the court held that given that the petitioners were Kenyan citizens by birth, their citizenship could not be officially cancelled or lost merely because they acquired citizenship of another country. Under article 14(5) of the Constitution, a person who was a Kenyan by birth, on the effective date, but ceased to be a Kenyan by acquiring foreign citizenship, was entitled upon application to regain Kenyan citizenship. The petitioners fell within the terms of article 14(5) of the Constitution and they were entitled to regain citizenship after making an application. What the petitioners were required to do was to apply to regain their citizenship. The provisions of article 14(4) of the Constitution and section 9 of the Kenya Citizenship and Immigration Act would not apply to the applicants because those provisions applied to children who were apparently under the age of 5 years with unknown parents.

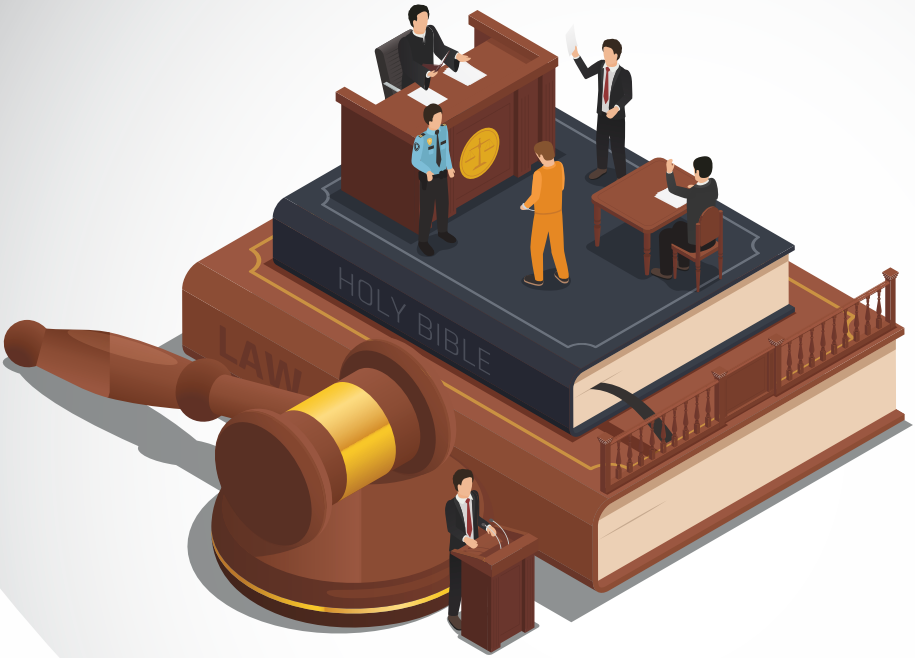
The rights and privileges of citizenship under article 12(1) of the Constitution, included the giving of passports, documents of registration or identification given by the State to its citizens.

- On whether citizenship by birth could be lost, the court held that a person born in Kenya with at least one Kenyan parent would enjoy Kenyan citizenship by birth under the terms of article 14(1) of the Constitution. That citizenship could not be lost or cancelled under any circumstances. The rights and privileges of citizenship under

article 12(1) of the Constitution, included the giving of passports, documents of registration or identification given by the State to its citizens. Such documents could only be denied, suspended or taken away in accordance with an Act of Parliament which satisfied the criteria set out in article 24 of the Constitution.

- On the procedure for reapplying for Kenyan citizenship, the court held that nationality or citizenship by birth meant nationality that an individual was automatically validated/approved by law from the moment of birth rather than citizenship acquired as an adult or following any administrative process. The determination of citizenship would be a basic element in obliging the state to protect its citizens and to let them enjoy certain constitutional rights which were related to citizenship, for example, the right to vote. Section 10 of the Kenya Citizenship and Immigration Act provided that a person who had been a Kenyan citizen by birth but lost Kenyan citizenship after acquiring foreign citizenship could apply in the prescribed manner to the Cabinet Secretary to regain citizenship. The requirement was that such an application would be accompanied by proof of the applicant's Kenyan citizenship. The application would have to be accompanied by proof of applicant's previous Kenyan citizenship and proof of citizenship of the foreign country.
- Lastly, the court held that there was no basis for the 1st respondent to refuse to grant the petitioners Kenyan passports. Under article 14(5) of the Constitution, the petitioners were entitled to regain citizenship upon making an application and under section 10 of the Kenya Citizenship and Immigration Act, the Cabinet Secretary was instructed to issue the necessary certificate in the prescribed form. The High Court was empowered to fashion appropriate reliefs for purposes of the enforcement of fundamental rights and freedoms pursuant to article 23(3) of the Constitution. Such relief would take various forms and it could include fashioning new reliefs that the circumstances of the case required.

A declaration was issued to the effect that the refusal by the 1st respondent to grant the petitioners Kenyan Passports was an infringement of their constitutional rights under article 14(5) of the Constitution. The petitioners were Kenyan citizens by birth as provided under article 14(1) of the Constitution and were all entitled to rights of a citizen as provided under article 12(1) of the Constitution. 1st respondent to admit and process the petitioners; applications to regain their citizenship under article 14(5) of the Constitution and section 10(3) & (4) of the Act. An order of mandamus was issued compelling the 1st respondent to issue the petitioners with Kenyan passports.



Case Law on the Right to Fair Administrative Action

Case Law on the Right to Fair Administrative Action.

- **Authorities had to submit confidential information in court where a decision based on the said confidential information was being challenged in court.**

Citizenship and the Right to Fair Administrative Action.

The constitution of Kenya 2010 grants everyone the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Post 2010, courts have on occasion ruled on the process on which the authorities determine applications for citizenship and other immigration applications. The courts have held that in determining such applications, the process should be:

1. Expeditious. Such applications should come to a conclusion in a reasonable time and shouldn't be delayed unreasonably without explanation.

2. The reason behind the decisions should be explained to the applicants.

D. Case Law on the Right to Fair Administrative Action

19. Authorities had to submit confidential information in court where a decision based on the said confidential information was being challenged in court.

Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others [2014] eKLR

Petition 586 of 2012

High Court at Nairobi

I Lenaola, J

March 7, 2014

Even if certain material was considered classified, when a challenge was made in court, the authorities should apply for the court to view the "closed" material for it to understand the enormity of the threat posed by the aggrieved party. By keeping silent, the actions of the authorities, however noble, could not pass the test of legal scrutiny.

Summary of facts

The petitioner's son had travelled from the United Kingdom (UK) to Kenya and on arrival at the Jomo Kenyatta International Airport, he was stopped at the Immigration Desk and informed that he was not allowed to enter Kenya because he was involved in terrorist activities. He was thereafter put on the next flight to the United Kingdom where he had been living freely and without any charges being preferred against him and from evidence on record, he was not even interrogated by British authorities on the allegations levelled against him. The petitioner's case was that his son was entitled to the citizenship of the Republic of Kenya and that although his son was a naturalised citizen of the United Kingdom, he was still entitled to the citizenship of Kenya as a dual citizen under the Kenya Citizenship and Immigration Act, 2011. That although he had applied for a Kenyan passport, the same had been denied unlawfully on the grounds that he was involved in terrorist activities which allegation was unproven.

The respondent's submissions

The respondents' case was that the petitioner's son was put on the Terrorist Watch List and he was prohibited from entering Kenya in accordance with the provisions of section 33 of the Kenya Citizenship and Immigration Act, 2011.

Key issues for determination

The main issues for determination were what was the process for re-acquiring citizenship

by birth where one had lost it pre the Constitution of Kenya, 2010 by acquiring the citizenship of another country? Whether a person who was entitled to citizenship of Kenya by birth but had acquired the citizenship of another country before 2010 could regain citizenship by simply just applying for a national identity card. The court also looked into whether the petitioner's declaration as a prohibited immigrant was done according to the law and whether the authorities had to submit confidential information in court where a decision based on the said confidential information was being challenged in court. Lastly, the court reviewed whether the petitioner's right to fair administrative action had been violated.

Summary of judgment

- Cabdiqani Bashir Maxamed was the biological son of the petitioner and his wife, Halima Jama Hassan. The petitioner and his wife were citizens of the Republic of Kenya and were both of the Somali Community. The petitioner's son would have been entitled to the citizenship of Kenya as a birth right. It was not in doubt that both his parents were citizens of Kenya at the time of his birth and that explained the fact that he was indeed issued with a birth certificate and a Kenyan Passport.
- Prior to the Constitution of Kenya, 2010, Kenya did not have any provision for dual citizenship and so upon acquiring the citizenship of the United Kingdom (by falsely pretending that he had been born in Somalia), the petitioner's son automatically lost his Kenyan citizenship and he could only regain it through an application, under article 14(5) of the Constitution. Whereas the petitioner's son had framed his petition as if the petitioner was entitled to citizenship as a birth right, that was not the legal position because he voluntarily applied for the citizenship of another County, (the United Kingdom) and thereby lost his Kenyan citizenship as a matter of law. He could only therefore regain it by the procedure above and not as a matter of right.

Denying the petitioner's son entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or order/s and without according him a hearing; denying him to contact his family or counsel to appeal against the order of denial of entry into Kenya and deportation to the UK, was a violation of the subject's fundamental rights

- Rule 5 of the Kenya Citizenship and Immigration Regulations, 2012 (L.N. No.64/2012) created Form 1 which was an application to regain Kenyan Citizenship and upon the Cabinet Secretary considering that application, he could issue a certificate in Form 2. There was no application in the nature of Form 1. What was before the court was an application for an Identity card according to the provisions of the Registration of Persons Act, Cap.107. That application could only be made after and not before an application to regain citizenship had been made and so it was premature.
- The Kenya Citizenship and Immigration Act (the Act) gave the Cabinet Secretary certain powers regarding persons considered to be undesirable in Kenya because of their actions including support for terrorism. In the case of the petitioner's son, there

was no direct action taken by the Cabinet Secretary. There was only a recommendation from the Director of the National Security Intelligence Service to the Director, Immigration Services who acted by having the petitioner denied entry into Kenya. Whatever the reasons for denying the petitioner's son entry into Kenya, some measure of due process should have been followed including letting him know of the reasons why, while he had left Kenya without incident, he was now being denied entry because of alleged terrorist links.

- Whether or not there were plausible grounds on account of national security as against the petitioner, the respondents breached the law in the casual nature they treated the petitioner's son in the circumstances. Even if certain material was considered classified, when a challenge was made in Court, the respondents could and should have applied for the court to view the "closed" material for it to understand the enormity of the threat posed by the petitioner. By keeping mum, its actions, however noble, did not pass the test of legal scrutiny. Due process was not followed in denying the petitioner's son entry into Kenya and the procedure followed was not in line with the expectations of the Act and the Constitution. Denying the petitioner's son entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or order/s and without according him a hearing; denying him to contact his family or counsel to appeal against the order of denial of entry into Kenya and deportation to the UK, was a violation of the subject's fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family under articles 27(1)(freedom from discrimination), 45(1)(provisions that recognized the family as the natural unit of society) and 47 (right to fair administrative action) of the Constitution.

An an order also issued compelling the Cabinet Secretary Ministry of Interior and Coordination and the Director of Immigration to facilitate, and expedite the processing of an application for regaining Kenyan citizenship by the subject the petitioner's son in his name of birth of "ABDI BASHIR MOHAMED" at any of the Kenyan diplomatic missions abroad and for a decision to be made one way or the other regarding that application.

Case Law on Identification Documents

Case Law on Identification Documents.

- **Requirements for applicants to go to particular places designated by the Principal Registrar to register for a National ID were against the spirit of the Constitution.**

- **The court could not compel immigration authorities to register a person as a citizen where that person is already legally designated as a refugee.**

- **Courts could not order for aggrieved parties to be registered as citizens without reviewing the decision that deregistered the aggrieved parties.**

- **The court had no authority to declare anyone a citizen of Kenya nor could it compel the Principal Registrar of Persons to issue persons with identity cards.**

- **The court could not intervene and declare that the applicant was entitled to Kenyan citizenship no matter how compelling an applicant's case may be.**

The National Identification Card

A citizen has access to many rights that would ordinarily be hard to achieve for a non-citizen. The most fundamental one, is the right to access registration documents. Registration documents are in most instances used as proof of citizenship. In particular, the national identification card. The national identification card provides one with the following benefits:

1. With an identity card one may have access to all the social and economic services. Lack of an identity card may mean inability to access admission to colleges and universities, acquire a driving license, access banking services, acquire a sim card, enter government buildings and obtain services from government offices and government platforms such as e-Citizen.
2. An identity card allows one to marry and found a family: Under existing statutory laws regulating marriages, one must submit proof of adult age-an ID card for purposes of registration of the marriage union.
3. An Identity Card (ID) allows one's child to obtain a National Identification Card. Identification cards are used as proof of citizenship. Proof of one's parent's citizenship is necessary when acquiring national identification cards in Kenya.
4. An ID grants an adult the freedom of movement. IDs or Birth Certificates are a requirement when registering for a passport. So without an identity card, one's freedom of movement outside of Kenya's borders is curtailed. Freedom of movement also entails freedom of movement within Kenya. Non-citizens are often subjected to arbitrary requests to produce registration documents by police. Where one does not have registration documents, one may be susceptible to harassment and intimidation from the authorities.
5. A citizen has the right to own property. Registration of property in Kenya prioritises the citizens. Citizens have the right to own property without restrictions. Proof of ownership in this process is the submission of the ID and KRA Pin. Without those documents, one is treated as a foreigner. An example is of how non-citizens need an exemption from the President of Kenya to own agricultural land. Their land ownership is restricted to land in cities, towns or urban areas.
6. An ID grants one the right to participate in Kenya's political process. An ID is a fundamental requirement in voting or in proving citizenship to be able to vie for a public elective position.
7. Citizens face a lower tax rate than foreigners and can access Kenya's locations at a cheaper cost. Proof of citizenship is the ID. Without one, one cannot obtain a KRA Pin that registers one as a Kenyan in Kenya's tax system. Non-citizens also face higher charges when accessing Kenya's social amenities. An example is of how in national parks, Kenyan citizens pay a lower rate than non-citizens. Proof of citizenship in National Parks for adults is by providing a national ID.

8. Citizens can easily access employment opportunities without the need to acquire work permits. As an entry requirement, most employers require an ID. A non-citizen may only acquire a work permit if they can prove that their field of expertise is outside the scope of a Kenyan. It is a stringent requirement that locks out non-citizens from citizenship opportunities.

Legal Framework for the Issuance of National Identification Cards.

As already shown, the national identity card has numerous benefits. In acquiring an ID, one is required to provide two things: proof of age and proof of citizenship. The proof of citizenship and age are the most important elements of then registration process.

In order to prove age, the law states that the registration officer shall demand the production of a birth certificate or an age assessment certificate issued by a Government medical officer of health, or a baptismal certificate issued by a minister of a recognised religious organisation immediately following his birth or some other evidence acceptable to the registration officer.

However, for proof of citizenship, the law does not specify what documentation may be used for that purpose and seems to give the Principal Registrar discretion to decide on which documents are relevant for proof of citizenship. The law also states that every person shall present himself before a registration officer and register himself by "giving to the registration officer the particulars specified..." The law also states, without specifying, that the registrar shall "demand proof of Kenyan citizenship" from the applicant.

Nonetheless, the practice has been to have all Kenyan citizens by birth to prove citizenship by producing their parent's identity cards. Citizens by registration or naturalisation have to produce respective certificates. The fact that the law is not specific on this question shows there is a gap where unlimited discretion is granted to the registration officer by omission.

Can the court order for persons to be issued with identification documents?

The Constitution is clear on the legal framework of division of powers. Whereas the High Court has the power to review decision making process, it does not have the power of the Principal Registrar of Persons under the Department of Immigration of giving citizenship or documents such as identity cards and passports.

The court can review the decision making process and check if it adhered to the right to administrative action under article 47 of the Constitution of Kenya. If the High Court finds that such a process violated article 47, it can give orders for such a process to be restarted and for the process to follow the laid out procedures as stipulated by the law. The court also has the powers to issue prerogative orders, such as an order for *mandamus* (order of compelling mandatory performance), to compel the relevant parties to provide applicants with the documents, reports or decisions they need to apply for citizenship or to challenge the decision not to grant them citizenship.

E. Case Law on Identification Documents

20. Requirements for applicants to go to particular places designated by the Principal Registrar to register for a National ID was against the spirit of the Constitution.

Mohamed Mire v Attorney General & another
Petition No 232 of 2015
High Court of Kenya at Nairobi
JL Onguto J
February 29, 2016

The spirit of the Constitution was that a person should be able to reside and remain anywhere in Kenya, unless proven or shown otherwise. To consider and insist that an applicant must go for registration at particular places to be designated by the Principal Registrar would be to over-stretch and abuse the spirit as to freedom of movement.

Summary of facts

The petitioner's submissions.

The petitioner, a Kenyan of Somali descent was born in Nairobi in 1980 and schooled in Nairobi. The petitioner's parents were both deceased. He applied for his identification card in Nairobi but the respondents after a brief vetting allegedly directed that he applied for his identification card in the North Eastern part of Kenya. His request to be issued with an identification card was rejected but no reason was advanced.

In the petition, the petitioner sought various declaratory orders as well as costs of the petition. In particular, the petitioner sought an order that the petitioner had been discriminated against contrary to article 27 of the Constitution. The petitioner also sought for the court to declare that his right to fair administrative action under article 47 of the Constitution of Kenya, 2010 had been abused. Finally, the petitioner sought to be registered as a citizen and be duly provided with both an identification card as well as a passport.

The respondent's submissions

The respondents' stated that if the application was made it was denied for lack of sufficient information. The respondents also stated the application for identification card ought to be made at the petitioners place of domicile or at his place of permanent residence.

Key issues for determination

The main issues that the court was to determine was whether the respondents or the respondents' officers had not observed and accorded the petitioner the right to fair

administrative action when he applied for his national identification card; whether it was lawful to require a person that applied for an identity card to go to a particular region to have it processed; whether a person's nationality and religion of a person mattered in the issuance of national identification cards and whether the petitioner was a citizen of Kenya entitled to be registered and issued with a national identification card.

Summary of judgment

- The court held that every citizen was entitled to the rights, privileges and benefits of citizenship as provided by the Constitution. The citizen was also entitled to a Kenyan passport and a document of registration or identification issued by the State.
- The Kenya Citizenship and Immigration Act as well as the Registration of Persons Act, respectively, provided detailed mechanisms and procedures for the issuance of the Kenyan passport and national identification card by the State. The manner of application was outlined and had to be formal. The forms were prescribed and the information to be availed was also itemized in the case of both statutes. The process was clearly outlined. In the case of registration of persons and issuance of identification cards a principal registrar appointed under section 4 of the Registration of Persons Act was in charge.
- On the other hand, in the case of issuance of passports under the Kenyan Citizenship and Immigration Act, a Director- General appointed under the Kenya Citizens and Foreign Nationals Management Service Act was in charge. Both the Principal Registrar and the Director General were appointees of the 2nd respondent to whom they were answerable and accountable. Both had directors, immigration officers and registrars, as the case could be, deputizing them.
- The offices of the Director- General as well as the Registrars were independent under law. It was for any applicant to avail all the necessary information as prescribed and required and for the Director- General or his officers processing the application for a passport or citizenship on the other hand or the Registrar processing an application for identification document, to consider and decide independently whether the application had merit. Indeed, the statutes even provided for instances when the officer could request for additional information to enable him process the application better.
- In exercise of such powers however and in making the decision or determination, the Director-General as well as the Principal Registrar were to afford any applicant fair administrative action as guaranteed by article 47 of the Constitution and by the Fair Administrative Action Act, 2015.
- The court was to restrain itself from interfering with the duties that had been expressly provided by statute to specific authorities but only to the extent that the authorities met the requirements of fair administrative action had not been observed.
- The 2nd respondent's duty; acting through the Principal Registrar of Persons, and

its officers was to quickly, reasonably and procedurally consider the application. Ultimately, a decision whether or not to issue the petitioner with an identification document or card had to be made and that was bound to affect the petitioner either way. The law required the decision- maker to give written reasons for any action or decision taken (article 47(2) of the Constitution) or give a statement of reasons for any decision reached (section 4(3) (d) of the Fair Administrative Action Act 2015). Such written reasons could be given voluntarily or upon request.

- Section 8 of the Registration of Persons Act stated that a registration officer could require any person who had given any information to furnish such documentary or other evidence of the truth of the information given. The section also required the 2nd respondent's officers to appoint a committee or a person to assist in the authentication of information furnished by an applicant. The 2nd respondent's officers did not invoke those provisions. The respondents acted contrary to the provisions and spirit of article 47(2) of the Constitution as to justice, fairness and reasonableness. The respondents' officers apparently abdicated their statutory duty to receive, consider and determine in an expeditious, fair, lawful and reasonable manner an application made by the petitioner for a national identification document. In that respect, the petitioners right to fair administrative action was violated.

The process was clearly outlined. In the case of registration of persons and issuance of identification cards a principal registrar appointed under section 4 of the Registration of Persons Act was in charge.

- The spirit of the Constitution was that a person should be able to reside and remain anywhere in Kenya, unless proven or shown otherwise. To consider and insist that an applicant must go for registration at particular places to be designated by the Principal Registrar would be to over-stretch and abuse the spirit as to freedom of movement. It would also be unreasonable. The relevant statutes already provided for sufficient details and information to be provided. The anticipation was that an application for an identification document to be issued by the State under article 12 of the Constitution could be made anywhere within the Republic of Kenya. The inconvenience of directing and shepherding applicants to apply at particular places was baseless. A person should and must be able to apply for an identification card at any registration station within the Republic of Kenya and where the Principal Registrar determined otherwise written reasons for such a decision were to be availed.
- The petitioner on a preponderance of fact had established that he applied for registration of an identification document. Even if the petitioner was not qualified to be issued with one, the respondents' officers were required to follow the due process consistent with articles 12, 27 and 47(1) of the Constitution. The action of the respondents' officers of verbally directing the petitioner to go and apply elsewhere was unreasonable and amounted to a violation of the petitioner's fundamental rights and freedoms.
- The 2nd respondent had statutory power to consider applications for registration of Kenyan citizen and issuance of identification documents. The court had no such

powers as the capacity to make such determination was with the 2nd respondent's officers and not the court.

- *The petition was partly allowed. The court directed for the petitioner's application to be considered on its merit at the place lodged. The court issued a declaration that the respondents violated the petitioner's rights to fair administrative action by not affording the petitioner a hearing and not giving written reasons for the denial of the identification card.*

21. The court could not compel immigration authorities to register a person as a citizen where that person was already legally designated as a refugee.

Abdikadir Salat Gedi v Principal Registrar of Persons and Another
Judicial Review Miscellaneous Application No.15 of 2012
High Court of Kenya at Garissa
SN Mutuku, J
March 31, 2014

Even where one was a Kenyan by birth, should one register as a refugee for whatever reason, the court was not in a position to order for the person's citizenship status to be changed from refugee to a citizen.

Summary of facts

The applicant claimed that he was a Kenyan citizen by birth, born to parents who were Kenyan citizens and who had Kenyan national identity cards. He alleged that he was misled to register as a refugee at IFO Refugee Camp using the name Mohammed Ahmed Ibrahim in order to get food rations. When he applied for a Kenyan national identity card he was not able to obtain it. The applicant made a statutory declaration to clarify his status as a Kenyan citizen and obtained a letter from the Chief of Damaljaf location confirming that he was a resident there.

The applicant tried to be registered as a citizen, however the authorities found that he had previously registered as a refugee and as a result, denied his application. The applicant claimed that the Principal Registrar of Persons' and the Commissioner for Refugee Affairs' (hereafter referred to as respondents) refusal to deregister him as a refugee and to issue him with the identity card was beyond their powers, an error in law, in bad faith, an abuse of power, irrational, biased, illegal, oppressive and was against his legitimate expectations.

The respondents' submissions

The respondents claimed that they relied on an administrative system and procedure for addressing the problem of citizens registering as refugees. They claimed that they had not refused to issue an identity card to the applicant but that the process of determining the applicant's application had not been fully concluded.

Key issues for determination

The main issue for the court to determine was whether immigration authorities could change the citizenship status of an individual from refugee to citizen on grounds that the person had mistakenly registered as a refugee.

The court's findings

- The court held that persons registered as refugees were so registered after the process of refugee status determination was completed and the status of refugee was only granted to foreign nationals who sought asylum in Kenya and had fulfilled the conditions set out in the Refugees Act.
- All Kenyan citizens were entitled, by law, to the rights, privileges and benefits of citizenship. One of these rights was to be issued with a Kenyan passport and any documents of registration or identification issued by the State to citizens. A passport or other document might be denied, suspended or taken away only in accordance with an Act of Parliament that satisfied the criteria mentioned in Article 24 of the Constitution.
- The Government of Kenya was under a duty to register all its citizens and to issue them with documents of registration or identification. This was a statutory duty firmly anchored in the Constitution and in the Registration of Persons Act which was an Act of Parliament. However, while there was a statutory duty in existence, it was only applicable to Kenyan citizens.

They claimed that they had not refused to issue an identity card to the applicant but that the process of determining the applicant's application had not been fully concluded.

- The court was not the right forum to determine whether the applicant was a Kenyan citizen. The duty of the court was to determine if *mandamus* should issue commanding the respondents to deregister the applicant as a refugee, register him as a citizen and issue him with an identity card.
- The discretion to register and issue applicants with identity cards was left with the respondents. They received applications, screened applicants and ascertained that the set criteria for issuing identity cards were met. This court could not purport to tell the respondents how to exercise that discretion.
- The court could not compel or command the respondents to deregister applicant as a refugee and to issue him with the identity card because the applicant failed to demonstrate that he deserved those orders.

22. Courts could not order for aggrieved parties to be registered as citizens without reviewing the decision that deregistered the aggrieved parties.

Muslims for Human Rights (Muhuri) On behalf of 40 others v Minister for Immigration & 5 others

Constitutional Petition 50 of 2011

High Court at Mombasa

EM Muriithi, J

August 1, 2014

A court could review the decision making process of a citizenship application or the process of deregistering a person as a citizen and give prerogative orders on the process. So as to determine the propriety of the process, the court may order for the report or other information on the deregistration of an aggrieved person as a citizen to be produced and reviewed.

Summary of facts

The petitioner's submissions

The petitioner alleged that in the year 1990, the 40 individuals on whose behalf the instant petition was brought had their identity cards taken away by the Government of Kenya until further notice by a state appointed task force for registration of Kenyan Somalis. The petitioners claimed that they were then given letters by the task force to act as identification documents awaiting investigation. It was claimed that the investigations were completed within 20 days but the identification cards were not returned to the petitioners. Fifteen years later, in 2005, the petitioners claimed that a handful of them being twelve (12) in number were given waiting cards.

The petitioners argued that denial of national identity cards was a violation of their human rights and because of the said violations they were unable to access benefits that flow 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.

The respondents' submissions

The respondents claimed that through Gazette Notice No. 5320 a verification exercise was carried out to identify non-Kenyan of Somali origin that had entered the country without relevant documents. The respondent claimed that the Special Task Force heard the applicants and considered all documentary and other evidence given to it and made findings in October 1991 wherein it issued verification certificates to Kenyan Somalis and took away Identity cards of non-Kenyan Somalis who were then required to return to Somalia. The respondent alleged that the 40 petitioners were among persons whose identity cards were cancelled as it was discovered that they were not Kenyans. Further, the respondent

claimed that the Principal Registrar of Persons (2nd respondent/Registrar) could not hand out new generation identity cards to the petitioners because their records indicated that their registration had been cancelled and that they were not citizens of Kenya.

Key issues for determination

The main issues were whether the courts could order for aggrieved parties to be registered as citizens without reviewing the decision that deregistered the aggrieved parties. Secondly the court had to determine whether the act of not informing the petitioners of the results of a report that deregistered them as citizens violated their rights to fair administrative action.

Findings of the court

- On whether the court could seize and hold the powers of the immigration authorities, the court held that it was the duty of the Principal Registrar of Persons (hereafter referred to as Registrar) to consider applications for registration of persons as citizens and issue them with identity documents and the court could not assume that role unless the decision of the Registrar contravened the Constitution and the law.

On the petitioner's right to fair administrative action, the court held that:

- The act of not informing the applicants of the outcome of the investigations by the Task Force with respect to the status of applicants and their applications for the new generation identity cards, since the Task Force investigations of 1990 and the application for new identity cards in 2005 was in clear violation of the principle of fair administrative justice as entrenched in article 47 of the Constitution of Kenya which was a right available to every person including non-citizens.
- Without the reasons for the rejection of their registration and handing out of identity cards, the applicants could not challenge in court the decision of the registrar and or the findings of the Task Force with respect to their citizenship status. The applicant would still be able to launch a judicial challenge of the decision of the Registrar and that of the Task Force upon which the former's was allegedly based.

The Task Force Report in the material facts affecting the applicants must therefore be availed to the applicants and the court so that the applicants could have an opportunity to challenge the findings of the Report.

- Lastly, the court was not able to declare the applicants' citizens of Kenya without determining the validity and accuracy of the Report of the Task Force. The Task Force Report in the material facts affecting the applicants must therefore be availed to the applicants and the court so that the applicants could have an opportunity to challenge the findings of the Report.
- The Report by the Muslim for Human Rights published in the book Banditry and the Politics of Citizenship: The Case of Galjeel Somali of Tana River, Muhuri (1999), on Galjeel Somalis of Tana River with a population of 2400 as at the year 1999, of whom the applicants were said to be members, persuaded the court that the matter was serious and important enough to warrant the calling in of expert assistance of the specialized state organizations on human rights and equality to aid in the determination of the truth as to the applicants' citizenship. The court invited the two human rights and

equality Commissions, The Kenya National Human Rights Commission and the National Gender and Equality Commission, to attend court as *amici curiae* (friends of the court) and assist in the fair determination of the dispute.

- *The prayers for the Principal Registrar of Persons to consider the applicants' application for identity cards was allowed. To this end the court ordered 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 was issued. An order that further proceedings should be heard before the Registrar with the assistance of the two national Human Rights and Equality Commissions with report to the court before final orders were made.*

23. The court had no authority to declare anyone a citizen of Kenya nor could it order the Principal Registrar of Persons to issue persons with identity cards.

Muslims for Human Rights (Muhuri) On behalf of 40 others v Minister for Immigration & 5 others
Constitutional Petition 50 of 2011
High Court at Mombasa
E. K. O. Ogola, J
October 17, 2017

A court of law could not assume the powers of immigration and internal security authorities. A court of law could not declare one a citizen nor could it grant national identification and travel documents to an aggrieved party. A court could only review the decision making process and give prerogative orders on the process.

Summary of facts

Muslims for Human Rights (Muhuri) (petitioner) claim was that in the year 1990, the 40 individuals on whose behalf the petition was brought had their identity cards repossessed by the Government of Kenya by a state appointed task force for registration of Kenyan Somalis. The petitioners claimed that they were then given letters by the task force to act as identification documents awaiting investigation. It was stated that the investigations were completed within 20 days but the identification cards were not returned to the petitioners. Fifteen years later, in 2005, the petitioners claimed that twelve were issued with waiting cards.

The petitioners argued that denial of national identity cards was a violation of their human rights and due to the said violations they were unable to access benefits that are a result of being Kenyan citizens including the right to employment, right to own property, right to vote, right to education, right to acquire passports among other rights.

The respondents' submissions

The Minister for Immigration claimed that through Gazette Notice No. 5320 a verification exercise was carried out to identify non-Kenyan of Somali origin that had gotten to the country without relevant documents. The respondent claimed that the Special Task Force heard the applicants and considered all documentary and other evidence and made findings in October 1991 wherein it issued verification certificates to Kenyan Somalis and took away Identity cards of non-Kenyan Somalis who were then required to return to Somalia. The respondent claimed 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 claimed that the Principal Registrar of Persons could not issue new generation identity cards to the petitioners because their records indicated that their registration had been cancelled and that they were not citizens of Kenya.

Key issues to be determined

The main issue for the determination by the court was whether the courts had powers to order for the registration of the aggrieved persons as citizens.

Summary of judgment

- The court held that the Report and/or letter dated October 6, 2016 indicated that the petitioners appeared before the Tana Delta Identification committee. However, it was unknown whether the petitioners were given an opportunity to be heard or whether they gave any evidence. The report simply showed 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 confirmed that during vetting.
- 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 provided by the Constitution sought to ensure that administrative bodies carried out their mandate within the law and in adherence to the rules of natural justice.
- The court was of the view that although the right to citizenship was not an unconditional right under the Constitution, the same should not be undervalued. Several other rights arise from possession 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 followed to the rule of law. The report

The manner in which the committee carried out the screening process was not in line with the dictates of article 47 of the Constitution.

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 article 47 of the Constitution.

- The committee did not state the exact facts that were misrepresented and whether all the applicants misrepresented the same facts. Because of that failure the petitioners were not able to individually challenge the decision. The committee should have given each applicant reasons for denying their individual application.
- The court stated that the Principal Registrar of Persons (2nd respondent/Registrar) under the Registration of Persons Act, Cap 107 was mandated with the issuance of national identity cards and therefore the court had no authority to declare the petitioners' citizens of Kenya nor could it compel the 2nd respondent to issue them with identity cards.

The actions of the Principal Registrar of Persons were interfering with the petitioners' right under article 47 of the Constitution. The Principal Registrar of Persons was ordered to receive fresh applications from the petitioners for ID cards, and the said applications were to be considered afresh by the Minister for Immigration and the Principal Registrar of Persons in accordance with the principles of the law. The court also ordered that the respondents violated the petitioners' rights under article 47 of the Constitution.

24. The court could not intervene and declare that the applicant was entitled to Kenyan citizenship no matter how compelling an applicant's case could be.

Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others [2015] eKLR
Petition 176 of 2014
High Court at Nairobi
I Lenaola, J
February 13, 2015

A court of law could not assume the powers of the Department of Immigration and declare one a citizen. A court could however review the decision making process and give prerogative orders on the process.

Summary of facts

The petitioner's submissions

The petitioner claimed that he legally entered Kenya and held a legal entry permit and currently worked in Kenya as a lecturer in an international university. The petitioner was married to a Kenyan citizen and together they had five children. The petitioner claimed that he applied for citizenship by registration based section 11 of the Kenya Citizenship and Immigration Act (the Act) and invoking the rights under article 15(1) of the Constitution of Kenya, 2010 (Constitution). That despite many visits to the Director of Immigration (3rd respondent's) offices, he never received any communication as to why his application had not been considered. However, on May 12, 2014, he received verbal communication that his application for renewal of his entry and work permits had been denied without reasons being given for such drastic action. The petitioner claimed that he had been continuously harassed, threatened and intimidated by persons calling themselves National Intelligence Service (NIS) officers with the sole intention of frustrating his continued stay in Kenya.

The respondents' submissions

The respondent claimed that the reason why the petitioner's application for Kenyan Citizenship had never been considered was because there was a freeze on all applications and his application had never been considered due to the freeze. The respondent also claimed that the petitioner's entry pass had expired and that the petitioner had been declared a prohibited immigrant on July 22, 2007 and the law prohibited issuance of citizenship to such persons.

Key issues for determination

The main issues for the court to determine were whether a court of law could take hold the

powers of the Director of Immigration and other relevant authorities and grant citizenship to an applicant before the court; whether the reason for not processing an application because of a freeze of the process and where such application had taken 3 years without being processed was a violation of the right to fair administrative action. The court also had to determine whether the procedure in which the applicant was declared a prohibited immigrant was legal.

Summary of judgment

On whether a court of law could take hold the powers of the Director of Immigration and other relevant authorities and give citizenship to an applicant before the court, the court held that:

- The court could not intervene and declare that the applicant was entitled to Kenyan citizenship because his spouse was a Kenyan. Where there was clear procedure for the resolving of any particular injustice prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Making an application presupposed that the application would be considered on its merits and a decision made one way or the other. If the decision was grossly unfair and if the decision was not equitable, then the same could be challenged either by way of judicial review.

The court also had to determine whether the procedure in which the applicant was declared a prohibited immigrant was legal.

- The court could not and had no authority to unlawfully exercise the statutory authority of other agencies and appear to make decisions on their behalf, however merited the case of an applicant may be. Until the petitioner's application was considered and a decision made one way or the other, it would be premature for the court to get into the issue and either declares that he was entitled to citizenship or that he was not so entitled.

On whether the reason for not processing an application because of a freeze of the process and where such application had taken 3 years without being processed was a violation of the right to fair administrative action; and the legality of the order declaring the petitioner a prohibited immigrant, the court held that:

- Applications for citizenship are serious constitutional matters under article 15 of the Constitution as well as relevant parts of the Kenya Citizenship and Immigration Act (the Act). Section 33 of the Act had elaborate grounds for declaring a person to be a prohibited immigrant and section 33(5) specifically provided that the entry and residence of a prohibited immigrant in Kenya was unlawful. It had also not been shown that there were reasons under section 33(6) why the petitioner was allowed into Kenya and on what conditions he was so allowed and there were also no reasons to presuppose that section 34 of the Act applied to him.
- An unreasonable delay in processing applications for registration was an insult to the right to fair administrative action under article 47 of the Constitution. A delay of 3 years was unreasonable.

- Since the petitioner was threatened with deportation even when it was proved that he was legally in Kenya; and given that the intimidations and harassments had not been denied; it followed that his rights under article 39 of the Constitution (freedom of movement) had been violated.

The prayers of the petitioners challenging the delay and challenging the deportation order were allowed. To that end the court ordered the petitioner's fundamental rights and freedoms under 27(1) and (2) (freedom from discrimination), 39(1), (2) and (3) (freedom of movement and residence) and 47(1) and (2) (right to fair administrative action) of the Constitution of Kenya 2010, had been and continued to be contravened by the Cabinet Secretary, Ministry of Interior and Coordination and the Director of Immigration.

The court also issued an order directed to the Director, Department of Immigration, compelling the Department to consider the petitioner's application for citizenship within 45 days and file a Report in that regard before the Court.

The court also issued an order against the Cabinet Secretary, Ministry of Interior and Coordination and the Director of Immigration prohibiting them from arresting, harassing and/or deporting the petitioner or in any manner whatsoever curtailing the petitioner's freedom of movement until his application for registration as a citizen had been duly considered.

Digital Identities and the Freedom against discrimination.

Digital Identities and the Freedom against discrimination.

- **Participation in the collection of personal information and data in National Integrated Information Management System (NIIMS) was not compulsory**
- **The Collection of DNA and GPS Co-Ordinates for Purposes of Identification Was Intrusive and Unnecessary, and to The Extent That It Was Not Authorised and Specifically Anchored in Empowering Legislation.**
- **The implementation of National Integrated Identity Management System (NIIMS) should not be undertaken without the enactment of an appropriate and comprehensive regulatory framework.**
- **The Republic of Kenya's Treatment of the Nubian Community was Discriminatory.**
- **Children of Nubian descent in Kenya have a right to acquire nationality in a non-discriminatory manner.**

F. Digital Identities and the Freedom against discrimination.

To discriminate is to deny one equal protection of the law or to not treat them the same as others[1]. Article 27(1) of the constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27(4) provides that The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

A digital ID is the use of digital technologies to identify a person. A digital identity can be defined as an online or networked identity adopted or claimed in cyberspace by an individual, organization or electronic device. Digital identities must however meet the standards set by data protection laws and must not violate a person's fundamental rights and freedoms. Discrimination in the realm of immigration law mostly occurs during the issuance of identification documents. As already evidenced by some of the decisions on the chapter on the National ID, authorities may on occasion discriminate based on social origin or ethnicity. This has often been passed on to emerging digital identities. The same biases used to discriminate in decisions to not issue registration documents to qualified persons is extended further in the issuance of digital identities. Just like the old identification systems, digital identities use identifiers; including but not limited to Names, National ID Card Numbers, emails, phone numbers, DNA etc. These identifiers are sometimes often used to discriminate.

In 2019, Kenya rolled out the National Integrated Identity Management System in which Kenyan Citizens were required to register so as to get a Huduma Namba and a Huduma Card which would help them access services offered by the Government of Kenya. The roll out was challenged in court on grounds that the roll out did not observe Kenya's data protection laws. The High Court made three landmark decisions on the matter, the three are summarised below:

1 The Law Dictionary; available at https://thelawdictionary.org/discrimination/?1639021916_kes_cup_C6FA3ED5_6D17_47D1_B6E2_F4B02CC905E0_ Accessed on December 9, 2021

Kenyan Case Law

25. Participation in the collection of personal information and data in National Integrated Information Management System (NIIMS) was not compulsory

Nubian Rights Forum & 2 others v Attorney General & 6 others
Consolidated Petitions No. 56, 58 & 59 of 2019
High Court at Nairobi
P Nyamweya, M Ngugi, W Korir, JJ
April 1, 2019

Summary of Facts

On November 20, 2018 the National Assembly voted in favour of the enactment into law of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 (the Act). The Act commenced operation on January 18, 2019. The effect of the Act was *inter-alia,* to amend several provisions of a number of statutes, among them the Registration of Persons Act. The amendments to the Registration of Persons Act established a National Integrated Information Management System (NIIMS) that was intended to be a single repository of personal information of all Kenyans as well as foreigners resident in Kenya, introduced new definitions of biometric and global positioning systems coordinates, among others.

The petitioners, aggrieved with the amendments filed various petitions in the Court. Simultaneously with the petitions, they also filed applications for various conservatory orders. The 1st petitioner's application was dated February 14, 2019 whereas both the 2nd and 3rd petitioners' applications were dated February 18, 2019. They sought to suspend the amendments arguing, among others, that the impugned amendments were unconstitutional because the correct procedure for amendment was not followed; that there was no public participation and that the amendments threatened violations of their rights and of the public and especially as regards the right to privacy, in light of the nature of personal information that would be collected in the NIIMS and the lack of any security in the manner of storage of and access to the collected data.

The respondents on the other hand argued that the amendments were minor and as such the proper procedure was used; that there was sufficient public participation; made an undertaking that they would not be collecting personal information on Deoxyribonucleic Acid (DNA) and on the Global Positioning System (GPS) co-ordinates; conceded that a Data Protection Bill was in the process of being finalised, but stated that there were laws in existence to provide security of data.

Key Issue for Determination

The key issue for determination was whether conservatory orders (Decisions arrived at by a Court of law to maintain status quo/current status of affairs) would be granted against the implementation and for suspension of legislations.

Summary of Judgement

Strong and cogent reasons and a constitutional basis had to be shown before legislation could be suspended at an interlocutory stage. Once such cogent reasons had been established, the Court had power to suspend impugned provisions of a statute. The extent and effect of the amendments made to the Act was not an issue that could be decided at the interlocutory stage and would have to await the final determination of the petitions. That could not, therefore, be a ground for suspending the said amendments.

The respondents placed before the Court evidence of public participation carried out. In the light of that evidence and given that the issue of whether the said public participation was sufficient would have to await the final determination of the petitions, that ground did not warrant the suspension of the amendments at an interlocutory stage. At least one of the laws cited by the respondents as providing protection for data, the Computer Misuse and Cyber Crimes Act, 2018 had been suspended. As matters stood, there was no or no specific legislation that provided for the collection, storage, protection and use of data collected by or held by government or other entities.

As regards where the public interest felt in light of the respective prejudices that would be caused if the implementation of NIIMS was stayed, it was in the public interest to have an efficient and organised system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that had been illustrated by the respondents. There was, however, also a public interest in ensuring that the said system did not infringe on fundamental rights and freedoms. There was, thus, a need for a balancing of the competing public interest rights while the consolidated petitions were heard, so as to safeguard rights and resources, and ensure that the petitions were not rendered nugatory.

It required a person to provide an identity document issued under a different piece of legislation in order to be registered under NIIMS.

While on the face of it a case had been made out as regards some elements of the petitioners' case, the court was not satisfied that the conservatory orders (Decisions arrived at by a Court of law to maintain status quo/current status of affairs) had to issue in the terms prayed by the petitioners.

Application partly allowed. The inclusion of Deoxyribonucleic Acid (DNA) as one of the unique identifiers or attributes in the definition of biometric in section 3 of the Registration of Persons Act was suspended, pending the hearing and determination of the consolidated petitions. For the avoidance of doubt, the remaining unique identifiers and attributes contained in the definition of biometric in section 3 and section 5 of the Registration of Persons Act would continue to apply and be in operation. The definition of Global Positioning System Co-ordinate in section 3 of the Registration of Persons Act and the inclusion of Global Positioning System co-ordinates in section

5 (g) of the said Act was suspended, pending the hearing and determination of the consolidated petitions. Respondents were at liberty to proceed with the collection of personal information and data under the National Integrated Information Management System (NIIMS) pursuant to the operational provisions of the Registration of Persons Act. However, pending the hearing and determination of the consolidated petitions, the respondents were not to:

a) *Compel any member of the public to participate in the collection of personal information and data in NIIMS.*

b) *Set any time restrictions or deadlines as regards the collection of the said personal information and data in NIIMS.*

c) *Set the collection of personal information and data in NIIMS as a condition precedent for the provision of any government or public services, or access to any government or public facilities.*

d) *Share or disseminate any of the personal information or data collected in NIIMS with any other national or international government or non-governmental agencies or any person.*

26. The Collection of DNA and GPS Co-Ordinates for Purposes of Identification Was Intrusive and Unnecessary, and to The Extent That It Was Not Authorised and Specifically Anchored in Empowering Legislation.

Okiya Omtatah Okoiti & 4 others v Attorney General & 4 others; Council of Governors & 4 others (Interested Parties) [2020] eKLR
Petition 163 of 2019
High Court at Nairobi
P. Nyamweya, Mumbi Ngugi & W. Korir, JJ
January 30, 2020

Summary of Facts

The petitioners challenged the constitutionality of amendments made to various statutes vide the Statute Law (Miscellaneous Amendments) Act, 2018 (the impugned Act). They argued that the amendments were unconstitutional and therefore invalid, null and void. The reasons they advanced were that the manner in which the amendments were effected violated various constitutional provisions. In particular, they argued that the impugned Act introduced substantive amendments which ought to have been done through stand-alone Bills and was an abuse of the proper purpose of miscellaneous amendment Bills. It was

also, in their view, in contempt of court for disregarding precedents that prohibited use of miscellaneous amendments to effect substantive amendments in the law.

The petitioners further argued that the enactment of the impugned Act was in violation of the constitutional principle that required participation of the public in the enactment of legislation. It was their case that the period of seven (7) days given to the public to participate in the process of amendment was so short that no meaningful participation would have taken place in view of the fact that there were 69 pieces of statutes contained in the Bill. They urged the court to declare the entire impugned Act unconstitutional, null and void.

Key Issues for Determinatiom

The major issues that the court was to determine were whether the process of enactment of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 as an omnibus bill constituted contempt of court; whether the enactment of the impugned Act required the participation of the senate; whether the fact that some of the statutes amended by the impugned Act had previously been amended or passed with the participation of the Senate meant that those laws concerned county governments; whether the collection of biometric data, Deoxyribonucleic acid (DNA) data, Global Positioning System (GPS) data and any other information required under National Integrated Identity Management System (NIIMS) as per the impugned amendment would amount to violation of the right to privacy; whether the amendment to the Kenya Information and Communications Act which vested the power of appointment of the board of the Communication Authority of Kenya solely on the President and the Cabinet Secretary violated the Constitution and whether the legislative process leading to the enactment of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 rendered the whole Act unconstitutional.

Summary of Judgement

- On the issue of the law making process, the court held that the failure to comply with the laid down mechanism for the passing of legislation could lead to invalidation of statutes by courts. Legislation had to conform to the constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation would render the legislation invalid and courts had the power to declare such legislation invalid. Courts not only had a right but also a duty to ensure that the law-making process prescribed by the constitution was observed. If the conditions for law-making processes were not complied with, it had the duty to say so and declare the resulting statute invalid.
- On whether the amendments could be effected via an omnibus bill, the court held that the National Assembly had improved the manner in which it deployed the use of omnibus bills in its legislative business. The decisions relied on by the petitioners to assert that omnibus Bills should not be used to effect substantive amendments to statute were made in different circumstances and they could only be applied with

necessary modification, taking into account the prevailing parliamentary practices. The targeted amendments were conveyed in a single Bill; however, the individual statutes were flagged out and committed to the relevant Departmental Committee for consideration and collection of public views. That information was relayed to the public when they were invited through the newspaper adverts to present their views on the Bill. It could not be concluded that the use of an omnibus bill to effect the amendments *ipso facto* impeded public participation. However, the use of an omnibus bill to effect amendments to several Acts of Parliament was likely to hinder the participation of the people in the legislative process. Depending on the number of the proposed amendments, the time given might not be sufficient. That was not the same as saying that public participation was not conducted or that it was inadequate

- On public participation, the court held that there were efforts made by the National Assembly in facilitating public participation when using the omnibus bill mechanism in the Statute Law (Miscellaneous Amendments) Bill 2018. The legislature intended to carry amendments on the targeted Acts without the use of the term "minor". From the advertisement of May 7, 2018, it was clear that each Act targeted for amendment was linked to the relevant committee. Only a part of the amendments and not all of them were subject to stakeholder engagement in the Committees. Coupled with the fact that there was sufficient time availed to the public to give their views on the amendments, public participation in the circumstances of the petition was sufficient.
- On the right to privacy the court held that Information privacy included the rights of control that a person had over personal information. Such personal information would in the first place concern information which closely related to the person and was regarded as intimate, and which a person would want to restrict the collection, use and circulation thereof. Examples include information about one's health. But other information about that person could also be considered private and hence protected under the right to information privacy, even if that information related to their presence or actions in a public place or a place accessible for the public. Such information over which individuals had an interest to keep private also included information and data about their unique human characteristics, which allowed them to be recognized or identified by others, as it was information about one's body and about one's presence , image and identity, in both private and public places.
- The applicable test in determining whether there was an invasion or violation of the right to privacy essentially involved an assessment as to whether the invasion was unlawful. The presence of a ground of justification (such as statutory authority) meant that an invasion of privacy was not wrongful. Under the Constitution, by contrast, a two-stage analysis had to be employed in deciding whether there was a violation of the right to privacy. First the scope of the right had to be assessed to determine whether law or conduct had infringed the right. If there was an infringement it had to be determined whether it was justifiable under the limitation clause.
- Specifically as regards a determination of whether there was a violation of the right to

informational privacy, the court ought to take into account the fact;

- Whether the information was obtained in an intrusive manner,
- Whether it was about intimate aspects of an applicants' personal life;
- Whether it involved data provided by an applicant for one purpose which was then used for another purpose; and
- Whether it was disseminated to the press or the general public or persons from whom an applicant could reasonably expect that such private information would be withheld.
- Biometric data, by its very nature, provided information about a given person, and was therefore personal information that was subject to the protection of privacy in article 31 of the Constitution. The Data Protection Act, No 24 of 2019 adopted at section 2 the definition of personal data that was in the European Union's General Data Protection Regulations (GDPR), namely, any information which was related to an identified or identifiable natural person. The unique attributes and identifiers that were included in the definition of biometric data as defined in section 3 of the Registration of Persons Act, GPS coordinates, and the data collected by NIIMS as evidenced by the NIIMS data capture form, clearly fell within the above definition of personal data. The qualification of biometric data as personal had important consequences in relation to the protection and processing of such data, and as such invited a risk of violation of the right to privacy in the event of inadequate protection measures.
- The main utility of biometric data was with regard to identification of a natural person. Therefore, the only relevant consideration as regards the necessity of biometric data was its utility with respect to the authentication or verification of a person. The article 29 Data Protection Working Party in its Working Document on Biometrics identified the necessary qualities required of biometric data for purposes of authentication and verification were that the data should have attributes that were:
- Universal, in the sense that the biometric element exists in all persons;
- Unique, in that the biometric element had to be distinctive to each person, and
- Permanent, in that the biometric element remained permanent over time for each person, and a data subject was in principle not able to change those characteristics
- The biometric attributes required by the impugned amendments met those criteria, as most of them were universal and unique to the data subjects.
- Unlike other biometric characteristics, the technique used in DNA identification, which was a DNA comparison process, did not allow for the verification or identification to be done "in real time", the comparison was also complex, required expertise, and took time. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* had to be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of that

On the right to privacy the court held that Information privacy included the rights of control that a person had over personal information.

information was actually extracted or used by the authorities through DNA profiling and that no immediate detriment was caused in a particular case would not change that conclusion. DNA profiles contain a more limited amount of personal information extracted from cellular samples in a coded form. The limitations observed on the use of DNA equally applied, to the Kenyan situation, given the concession by the respondents of their inability to process DNA information for the entire population.

- The necessity of GPS monitors in identification was even less evident, given the risk they posed to the right to privacy. The privacy implications and risks arising from the use of GPS monitors was that the devices could be used to track and monitor people without their knowledge. GPS monitoring generated a precise, comprehensive record of a person's public movements that reflected a wealth of detail about their familial, political, professional, religious, and sexual associations. Disclosed in GPS data would be trips the indisputably private nature of which took little imagination to conjure. The Government could store such records and efficiently mine them for information years into the future. And because GPS monitoring was cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it would evade the ordinary checks that constrain abusive law enforcement practices. Other than the DNA and GPS coordinates, information to be collected by NIIMS pursuant to the impugned amendments was necessary and was therefore not unconstitutional.
- On whether the roll out of NIIMS violated data protection laws; the court took judicial notice of the fact that the Data Protection Act 24 of 2019 was enacted and the law contained therein was taken. The protection of personal data depended largely on a legal, regulatory and institutional framework that provided for adequate safeguards, including effective oversight mechanisms. That was especially the case with NIIMS, whereby a vast amount of personal data was accessible to the state, and data subjects at the time had limited insight into and control over how information about them and their lives was being used.
- The Data Protection Act had included most of the applicable data protection principle, however, the Registration of Persons Act was not one of the Acts to which the Data Protections Act applied as part of the consequential amendments. That notwithstanding, since one of the objectives of the Act was the regulation of the processing of personal data, whose definition included biometric data collected by NIIMS, it also applied to the data collected pursuant to the impugned Act. There were a number of areas in the Data Protection Act that required to be operationalised by way of regulations, including circumstances when the Data Commissioner may exempt the operation of the Act, and may issue data sharing codes on the exchange of personal data between government departments. Those regulations were necessary, as they would have implications on the protection and security of personal data.
- Once in force, data protection legislation had to be accompanied by effective implementation and enforcement. The implementation of the Data Protection Act 24 of 2019 required an implementation framework to be in place, including the

appointment of the Data Commissioner, and registration of the data controllers and processors, as well as enactment of operational regulations. Therefore, there was in existence a legal framework on the collection and processing of personal data, adequate protection of the data required the operationalisation of that legal framework.

- The respondents explained the measures they put in place to ensure the safety of the data collected by NIIMS and the security of the system, including the encryption of the data and restricted access. However, there was no specific regulatory framework that governed the operations and security of NIIMS. The legal framework on the operations of NIIMS was inadequate, and posed a risk to the security of data that would be collected in NIIMS.
- On the effects of the amendments to media, the court held that the legality of the amendments to Previously, the appointment of members of the CAK Board was to be conducted through a process provided for under section 6B, then repealed by the impugned Act. The impugned amendments had done away with the elaborate process under section 6B and vested the powers of appointment in the President and the Cabinet Secretary. Those changes in the law did not accord with article 34(5) of the Constitution. The input of civil society and of the media was essentially removed from the process of appointment of the chairperson and members of the Board of the regulator established under legislation intended by the Constitution to set and regulate and monitor compliance with media standards. The body established, under the amendments made under the impugned Act, would then comprise of appointees of the Executive. A body whose Chair was appointed by the President, whose Board was made up of Principal Secretaries in government, and the rest of whose members were appointed by the Cabinet Secretary, Ministry of Information, Communication and Technology, himself a presidential appointee, could not be considered an independent body contemplated under article 34(5). A media regulator that was controlled by government, as would be the case should the appointment of the Board of CAK be left to the process set out in section 6 of KICA as amended by the impugned Act, would pose a serious threat of violation of the right to freedom of expression and of the media guaranteed under article 34, and would be in conflict with article 34(5). The impact of such a situation on democracy could not be contemplated. Section 6 of KICA as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was unconstitutional, null and void.
- The petitioners had not demonstrated how the amendments to the Children Act by the impugned law violated the Constitution. The petitioners instead challenged the constitutionality of the Child Welfare Society Order (Legal Notice No. 58 of May 21, 2014). However, the challenge was not one of the matters raised in the petition. Parties were bound by their pleadings, and a matter that was not in the pleadings could not be introduced at the submission stage and the court be called upon to make a determination thereon. Accordingly, the issues raised could not be addressed.

Petition partly allowed with each party to bear their own costs. A declaration that section 6 of the

Kenya Information and Communication Act 1998 as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was unconstitutional, null and void. A declaration that the amendments to section 24 of the Public Finance Management Act introducing sub-section 2A made by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was unconstitutional, null and void. A declaration that the collection of DNA and GPS co-ordinates for purposes of identification was intrusive and unnecessary, and to the extent that it was not authorised and specifically anchored in empowering legislation, it was unconstitutional and a violation of article 31 of the Constitution. Consequently, in so far as section 5(1) (g) and 5(1)(ha) of the Registration of Persons Act required the collection of Global Positioning Systems coordinates and DNA, the subsections were in conflict with article 31 of the Constitution and were to that extent unconstitutional, null and void. The respondents were at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS, that was compliant with the applicable constitutional requirements identified in the judgment, was first enacted.

27. The implementation of National Integrated Identity Management System (NIIMS) should not be undertaken without the enactment of an appropriate and comprehensive regulatory framework.

Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)
Constitutional Petitions No 56, 58 & 59 of 2019
High Court at Nairobi
P Nyamweya, M Ngugi & W Korir, JJ
January 30, 2020

Summary of Facts

The Statute Law (Miscellaneous Amendment) Act No. 18 of 2018, made amendments to various statutes. It introduced section 9A to the Registration of Persons Act which established the National Integrated Identity Management System (NIIMS) which was intended to be a single source of personal information of all Kenyans as well as foreigners that resided in Kenya. The petitioners challenged the amendment on grounds that it violated the Constitution and was made in bad faith. They said that the amendments posed various security risks arising from the collection of personal data and violated rights to privacy, children's rights and equality and non-discrimination. They also said that they

were enacted unprocedurally without adequate public participation and the Senate having played its role.

Key Issues for Determination

The main issues that the court had to determine was whether the amendments made to the Registration of Persons Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 were unconstitutional on grounds that public participation requirements were not fulfilled; whether the amendments made to the Registration of Persons Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 were constitutional given that they were substantive as opposed to minor and they related to the establishment of the National Integrated Identity Management System (NIIMS); whether the amendments which related to the establishment of the National Integrated Identity Management System (NIIMS,) were unconstitutional on grounds that they were not passed by the Senate; whether the legal provisions related to National Integrated Identity Management System (NIIMS) as introduced under the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 were unconstitutional on grounds that they violated rights to privacy and children's rights as there were security risks posed by the collection of personal data and whether the legal provisions related to National Integrated Identity Management System (NIIMS) as introduced under the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 were unconstitutional on grounds that rights to equality and non-discrimination of marginalized groups such as the Nubian Community would be violated because of the potential exclusion risks arising from difficulties in obtaining identification documents from the government.

Summary of Judgment

- On public participation, the court held that the doctrine of public participation encompassed the right to directly participate in political affairs and also indirect participation through elected representatives. The fulfilment of public participation would include allowing the public to engage in public debate and dialogue with elected representatives at public hearings and ensuring that citizens had necessary information and an effective opportunity to exercise the right to political participation. That entailed two aspects- providing meaningful opportunities for public participation in the law-making process and taking measures to ensure that people had the ability to take advantage of the opportunities provided. The obligation to facilitate public participation ranged from providing information and building awareness to partnering in decision-making. Public participation in the legislative process was a legal requirement. However, the manner and means of achieving public participation should be left to the legislature. The duty of the legislature in ensuring public participation was to inform the public of its business and provide an environment and opportunity

The respondents had demonstrated that the purpose of the impugned legislation was to setup an identification system and to the extent that it was necessary, it was constitutional.

for those who wished to have a say on the issue to do so. The legislature would then be required to take into considerations the views expressed by the public but it was not bound to implement the views. The legislature was not required to conduct a census-like exercise of knocking on the door of every citizen in its jurisdiction in order to extract an opinion. Time available for public participation had to be considered in light of all the stages of the legislative process. The public was aware of the Bill, from April 10, 2018, when it was published and could have participated from that date. The purpose of publishing a Bill was to notify the public and invite representation through elected representatives or direct submission of memoranda or petitions. Even though the newspaper advertisement inviting members of the public to make representations on the Bill was made on May 7, 2018, it was not correct to say that the public only had seven days to participate in the legislative process as the impugned amendment was to be discussed before the Administration and National Security Committee of the National Assembly. The public could participate in the committee hearing even after the expiry of the period advertised. In introducing the Statute Law (Miscellaneous Amendments) Bill 2018, the legislature intended to undertake amendments on certain statutes without referring to them as minor amendments. There was sufficient time availed to the public to give views about the amendments and therefore there was sufficient public participation.

- On the omnibus bill, the court held that the use of omnibus bills to effect substantive amendments had its shortcomings and such a process generally limited the right of the people to participate in the passing of laws. Several proposed amendments to assorted statutes relating to different activities, when introduced together would not receive the kind of attention that they should if they were placed in stand-alone bills. The risk of excluding the public from participating in the legislative process was exacerbated if a short period for submitting views was provided. If there was evidence demonstrating that public participation requirements were complied with in the adoption of the amendments, the court should not be quick to invalidate the amendments simply because an omnibus Bill was used to make the amendments. It was not the place of the courts to dictate the procedures to be used by the two houses of Parliament in executing their legislative mandate. The court was confined to determining whether legislative bodies had complied with the Constitution and the law in delivering on their mandates.There was evidence of sufficient time given for public participation. The stakeholder engagement on the omnibus Bill before various committees facilitated public participation. The use of the omnibus Bill to enact the impugned legislation was not unconstitutional.
- On legislative process and the role of the Senate, the court held that the jurisdiction of the Senate did not extend to all legislation passed by the National Assembly. It was difficult to think of any legislation that did not touch on counties. The Fourth Schedule to the Constitution gave a wide array of functions to the counties. The functions, however, did not include a national population register. The impugned

amendments did not require the participation of Senate in their enactment.

- On the right to privacy, the court held that information privacy included rights of control a person had over personal information. That information would concern information which closely related to the person and was regarded as intimate and which a person would want to restrict collection, use and circulation thereof. Biometric data in digital form would be collected in NIIMS. It was defined in section 3 of the Registration of Persons Act as unique identifiers or attributes, including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves and Deoxyribonucleic Acid (DNA) in digital form. Biometric data by its nature provided information about a given person and it was personal information that was subject to the protection of privacy under article 31 of the Constitution. The personal data collected in the NIIMS Data Capture Form invited a risk of violation of the right to privacy in the event of inadequate protection measures. Personal data was intrusive if collected without a person's knowledge or consent. When NIIMS data was collected, there was no legal requirement for consent by the subject. The rights of a data subject under sections 26 and 30(1) of the Data Protection Act included the right to object to the processing of his or her personal data and the right to give consent before his or her personal data could be processed. The data collection exercise undertaken pursuant to the impugned amendments was done with the consent of the data subjects.
- The biometric data and GPS coordinates required by the impugned amendments were personal, sensitive and intrusive data that required protection. The impugned amendments imposed an obligation on the respondents to put in place measures to protect the personal data. Under article 31 (c) of the Constitution, a violation of the right to informational privacy would occur when personal information was unnecessarily required or revealed. Therefore, the question to be answered was whether the collection of biometric data was necessary. Biometric data's main utility was the identification of a natural purpose and it was necessary for identification purposes. The multi-modal nature of NIIMS was relevant to the extent that the system entailed the collection of different types of biometric data to improve its deterministic nature. The respondent demonstrated why the collection of different types of biometric characteristics was necessary. With the exception of DNA and GPS coordinates, information collected pursuant to the impugned amendments to the Registration of Persons Act was necessary and therefore not unconstitutional. The collection of DNA and GPS coordinates for purposes of identification was intrusive and unnecessary and it was unconstitutional and a violation of article 31 of the Constitution.
- Some of the stated purposes of NIIMS under section 9A were the creation of a national population register, the assigning of a unique identification number to every person registered in the register, and the verification and authentication of information on the identity of persons. It was thus principally an identification and verification system. To that extent, the biometric data collected was necessary to the stated purposes of NIIMS as it was clear that the system could only provide trustworthy information

about the identity of the person if the characteristics of that person were stored in its database. The purpose and effect of legislation were necessary in determining the constitutionality of legislation. The respondents had demonstrated that the purpose of the impugned legislation was to setup an identification system and to the extent that it was necessary, it was constitutional.

- On whether NIIMS violated the rights of the Child, the court held that the reasons for registration of children in NIIMS were reasonable and laudable. They included national security concerns such as the need to combat terrorism, to enable the state to fulfil its obligations towards children under article 53 of the Constitution and to deal with the inadequacies presented by the birth certificate as an identifier for children in light of the fact that it only had a serial number and did not have children's biometric data and was therefore not suitable as a means to combat child trafficking and child labour. The impugned amendments did not provide criminal sanctions for parents who were mandatorily required to register children. They only required the registration of children. Biometric data collected under NIIMS would apply to children as much as it would apply to adults. There was need for particular conditions that would apply to a child's consent to the processing of data including provisions relating to the appropriate age for giving consent and informing the child in an appropriate manner of the implications of such consent. Where a child was incapable of giving consent, provision should be made for a person with parental responsibility over the child to give consent. Additionally, provision should be made for the status of the data given by the child upon attaining the age of majority and rights to that data also need to be addressed by legislation.
- No special protection was provided with respect to the biometric data collected from children under the impugned amendments, and there was clearly a risk of violation to children's right as a result of that inadequacy. The Data Protection Act provided for the processing of personal data relating to a child. However, even the provisions of the Data Protection Act had gaps. There were no provisions relating to rights arising with respect to the data upon attaining the age of majority and the Act did not define who a child was. The impugned amendments did not include regulations on how data relation to children would be collected, processed and stored in NIIMS. Therefore, the legislative framework on the protection of children's biometric data collected in NIIMS was inadequate and it needed to be provided for specifically.
- On whether NIIMS complied with data protection laws, the court held that the protection of personal data depended largely on a legal, regulatory and institutional framework that provided for adequate safeguards, including effective oversight mechanisms. NIIMS entailed a situation wherein vast amounts of personal data was accessible to the state and data subjects had limited insight into and control over how information about them and their lives was used. There were a number of areas in the Data Protection Act that required operationalization by way of regulations and they included circumstances when the data commissioner could exempt the operation of the Act, and could issue data sharing codes on the exchange of personal data between

government departments. While a legal framework on the collection and processing of personal data existed, adequate protection of the data required the operationalization of that legal framework. Risks could arise in relation to biometric identity systems. There was a risk of exclusion which could mean that certain individuals would not access goods and services that they were entitled to. Exclusion could arise in two ways. One was individuals who were unable to get an identification card or number despite being entitled to the identity card. The second type was individuals who were enrolled on to the biometric system but suffered from exclusion due to biometric failure in their authentication.

- Centralized storage of biometric data involved risks of attacks or unauthorized access and also risks of misuse which could be irreversible. That misuse could result in discrimination, profiling, surveillance of data subjects and identity theft. With centralized storage, in most cases, the data subject had no information or control over the use of his or her biometric data. Risks could also arise where the storage of biometric data was distributed between a central and federated or decentralized database. In such cases, there were increased risks of unauthorized access, use and tracking of personal data and the possibilities for re-use for unintended purposes. All biometric systems, whether centralised or decentralised, and whether using closed or open source technology, required a strong security policy and detailed procedures on its protection and security which complied with international standards.
- While the respondents explained the measures put in place to ensure the safety of data collected by NIIMS, they did not dispute the fact that there was no specific regulatory framework that governed the operations and security of NIIMS. They did not provide a cogent reason for the obvious gap in regulation. To that extent the legal framework on the operations of NIIMS was inadequate and posed a risk to the security of the data to be collected.
- On the right to privacy, the court held that the right to privacy was not a non-derogable right under article 25(c) of the Constitution. A limitation of the right to privacy was therefore permissible if it met the test set out under article 24(1) of the Constitution. Article 24(1) of the Constitution provided that a right or fundamental freedom in the Bill of Rights would not be limited except by law, and only to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right or fundamental freedom. Due to the specificity of the information that DNA could disclose and the harm that the disclosure could cause not just to the data subject but other family members both in terms of identification and genetic information, DNA information required and justified particular and specific legal protection. GPS coordinates involved privacy risks wherein they could be used to track and identify a person's location. Therefore, the collection of DNA and GPS coordinates in the impugned amendments without specific legislation detailing appropriate safeguards and procedures in the collection and the manner and extent that the right to privacy would be limited was not

justifiable. As long as DNA and GPS coordinates remained a provision in the impugned amendments, there was a possibility that they could be abused and misused and there was a risk of violating privacy rights without justification.

- On discrimination, the court held that the impugned amendments were applicable to all persons resident in Kenya including foreigners. The enacted law did not differentiate between nationals and foreigners and everyone including the Nubian community and the Shona community were entitled to register. The petitioners did not establish a violation of their rights to equality and non-discrimination. The law that established NIIMS did not provide for a vetting process. It required a person to provide an identity document issued under a different piece of legislation in order to be registered under NIIMS. The requirement for the vetting of persons from border communities was introduced to section 8(1A) of the Registration of Persons Act by the Security Laws (Amendment) Act, No 19 of 2014. That provision was not challenged before the court by the petitioners. It was apparent that the issue of alleged violation of the rights of members of the Nubian community was under consideration by a court of concurrent jurisdiction. There was no evidence showing whether or not the suit was determined and what the outcome was. Therefore, the court declined to find that the petition was *res judicata*.
- In conclusion, the court held that all the parties agreed that the use of digital data was the way of the future. The challenge was to ensure among other things, that no one was excluded from the NIIMS and the attendant services could occur due to lack of identity documents, or lack of or poor biometric data, such as fingerprints. There could be a segment of the population who ran the risk of exclusion. There was thus a need for a clear regulatory framework that addressed the possibility of exclusion in NIIMS. Such a framework would need to regulate the manner in which those without access to identity documents or with poor biometrics would be enrolled in NIIMS. While the court recognized the possibility of that exclusion, however, the court did not find that it was in itself a sufficient reason to find NIIMS unconstitutional.

Petition partly allowed. A declaration was issued that the collection of DNA and GPS co-ordinates for purposes of identification was intrusive and unnecessary, and to the extent that it was not authorised and specifically anchored in empowering legislation, it was unconstitutional and a violation of article 31 of the Constitution. In so far as section 5(1)(g) and 5(1)(ha) of the Registration of Persons Act required the collection of GPS coordinates and DNA, the said subsections were in conflict with article 31 of the Constitution and were to that extent unconstitutional, null and void. The respondents were at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS that was compliant with the applicable constitutional requirements identified in the judgment was enacted first. Each party was to bear its own costs.

International Case Law

28. The Republic of Kenya's Treatment of the Nubian Community was Discriminatory.

The Nubian Community in Kenya vs The Republic of Kenya
Communication 317/2006
African Commission on Human and Peoples' Rights
17th Extraordinary Session held at Banjul, The Gambia
February 19 – 28, 2015

Withholding of Identification Documents and the actions by the Republic of Kenya that in effect made the Nubian Community Stateless were discriminatory.

The complainants' submissions

The complaint was submitted by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of the Nubian community of Kenya (the Complainants), against the Republic of Kenya (State Party to the African Charter and hereinafter referred to as Kenya). According to the Complainants, the present Nubian community in Kenya, over one hundred thousand (100,000), comprised descendants of ex-Sudanese forcefully enlisted compulsorily into the colonial British King's African Rifles Regiment in the early 1900s. The complainants alleged that as a result of the compulsory enlistment, the Nubian soldiers were taken to various parts of British East Africa, including present- day Kenya, to assist the British in their military expeditions. The colonial authorities did not grant British citizenship to the Nubians as they did to the Indian Railway workers they had brought from India to Kenya for labour in the late 19th Century. As such, the Nubians remained simply as British subjects under colonial rule and were not granted British citizenship. As subjects, they were considered British protected persons.

After the British expeditions, it was alleged that the Nubians demanded to be returned to Sudan but their demands were not met. They were left without any resettlement scheme in Kenya, neither were they granted British citizenship. Members of the Nubian community in Kenya had lived in the Kibera slums in Nairobi, and in Bondo, Kisumu, Kibos, Mumias, Meru, Isiolo, and Mazeras in Mombasa as well as the Eldama Ravine, Tange-Kibigori, Sondu, Kapsabet, Migori and Kisii areas since they moved into Kenya in the early 1900s and knew no other home. There were many Nubians in present day Kenya whose grandparents knew no other home but Kenya, because they were born there.

At Kenyan independence, in 1963, the citizenship status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government as "aliens." The complainants alleged that even though they qualified for Kenyan citizenship

under the Kenyan Constitution and consequently qualified for registration as Kenyan citizens, they had been denied their right to nationality. They had also been denied Kenyan passports and National Identity Cards, and thus the benefits that accrued from the possession of these documents. The lack of those documents and other citizenship rights had, for example, led to the denial of the right to vote and exclusion of the Nubian community from both the political process and social development. The complainants alleged that the deliberate, systematic and sustained denial of identity papers to the Nubian community and their non-recognition as Kenyan citizens had also denied them basic services and led them to extreme poverty.

The complainants claimed that as *de facto* stateless people they were without legal protection. They remained uneducated and were denied access to other civil, political, economic and cultural rights provided for under the Kenyan Constitution and other regional and international human rights instruments that Kenya was a signatory to. They remained landless and were exposed to arbitrary and uncompensated displacements from their dwelling places throughout Kenya, and continued to be threatened with further displacements.

The complainant put forward the argument because local remedies to their predicament were unavailable, ineffective and had been unduly prolonged. They claimed that the Kenyan state violated their rights to equality, prohibition from cruel, inhuman and degrading treatment, their freedom of movement, their right to property, to work, to education, to protection of the family and vulnerable groups, to economic, social and cultural development and their right to a general satisfactory environment under the African Charter of Human and Peoples' Rights.

The respondent's submission

The respondent state submitted that the communication should not be admitted because the applicants had not exhausted local remedies in the Kenyan judicial and administrative systems. The respondent State denied the allegation that the Nubians were discriminated against in the acquisition of citizenship rights on the basis of their affiliation to the Nubian Community. It stated that the Kenyan Constitution did not provide for acquisition of Kenyan citizenship to communities, tribes, clans or groups of people but only to individuals. Any claim to citizenship had to be examined on a case by case basis. It pointed out that that position was legally sound considering that a majority of Communities in Kenya, including the Nubian Community, had their counterparts in the neighbouring countries such as Uganda and Sudan and a blanket qualification would lead to the entry of large numbers of the community into the country.

Issues for determination

The main issues for determination were whether the Republic of Kenya's treatment of the Nubian community was discriminatory and whether such treatment violated their rights to equality, prohibition from cruel, inhuman and degrading treatment, their freedom

of movement, their right to property, to work, to education, to protection of the family and vulnerable groups, to economic, social and cultural development and their right to a general satisfactory environment under the African Charter of Human and Peoples' Rights

Summary of judgment

- On whether the complainant had exhausted local remedies, the African Commission agreed with the complainants that local remedies were unavailable. A remedy was considered available if the petitioner could pursue it without impediment. After more than four years, there did not seem to be any realistic prospect of the complainants' case being heard.
- The African Commission noted that the Kenyan Government had been sufficiently aware of the plight of the Nubians to the extent that it could be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.
- The Nubian community were treated differently from other Kenyans in the acquisition of ID documents which constituted proof of their nationality. It was also not in dispute that the only reason for that differential treatment was their ethnic and religious affiliations. Differential treatment without objective justification and which had the effect of imposing burdens on a particular segment of society and impairing their dignity was unfair and discriminatory.
- The complainants had demonstrated that in order to acquire ID documents, significant burdens were placed on them merely on account of their ethnic and religious background. As a result of those burdens many individuals from the Nubian community faced many challenges in acquiring IDs. Without IDs, they were unable to enjoy a broad range of rights guaranteed in the Charter, such as the right to free movement, the right to education, the right to work under equitable and satisfactory conditions. The lack of IDs cards also effectively rendered many Nubians stateless and liable at any point in time to expulsion or arrest. This certainly was an insult to their dignity as human beings deserving of equality with other Kenyans and equal protection of the laws governing Kenyan citizenship.

The Commission considered that the property rights of the Nubians in Kibera had been encroached on, in violation of article 14 of the Charter.

- Adopting an arbitrary measure, such as the vetting process, which had no basis in Kenyan law, was prone to abuse, and which placed significant burdens on a minority ethnic group and makes them vulnerable to further marginalization was irrational and consequently unjustifiable Kenyan Nubians were unfairly discriminated against in the acquisition of identity documents solely on account of their ethnic and religious affiliations, which assailed their dignity as human beings who were inherently equal in dignity.
- By failing to take measures to prevent members of the Nubian Community from becoming stateless and by failing to put in place fair processes, devoid of discrimination

and arbitrariness for the acquisition of identity documents, the Commission considered that Kenya had failed to recognize the legal status of Nubians, in violation of article 5 of the Charter.

- Nubians had severally been evicted from Kibera with no provision made for alternative housing; no compensation provided to the displaced and no notice of such evictions given to the occupants. The respondent State had not refuted any of those allegations. It had not also shown the public interest that necessitated these evictions nor had the legal framework within which the evictions were carried out been advanced. Evictions were carried out without due process of law and in total disregard of the respondent State's international human rights obligations. The Commission considered that the property rights of the Nubians in Kibera had been encroached on, in violation of article 14 of the Charter. If a State Party failed to respect, protect, promote or fulfil any of the rights guaranteed in the Charter, that constituted a violation of article 1 of African Charter. In the present Communication, the Commission had reached the conclusion that the respondent State's conduct was in violation of articles 2, 3, 5, 12, 15, 16, 17 (1) and 18 of the Charter. The Commission therefore found as a consequence a violation of article 1 of the Charter.

Complaints allowed.

Orders:

i. The Republic of Kenya violated articles 1, 2, 3, 5, 12, 13, 14, 15, 16, 17 (1) and 18 of the African Charter on Human and Peoples' Rights;

ii. The Commission requested the Republic of Kenya to

a. Establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan Citizenship;

b. Recognize Nubian land rights over Kibera by taking measures to grant them security of tenure;

c. Take measures to ensure that any evictions from Kibera were carried out in accordance with international human rights standards.

d. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure, within one hundred and eighty days (180) of the notification of the instant decision of the measures taken to implement the present decision.

29. Children of Nubian descent in Kenya have a right to acquire nationality in a non-discriminatory manner.

Institute for Human Rights and Development Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya
Application 002/09
African Committee of Experts on the Rights and Welfare of the Child (African Committee)
March 22, 2011

The obligation of the State Party under the African Children's Charter in relation to making sure that all children were registered immediately after birth was not only limited to passing laws (and policies), but also extended to addressing all limitations and obstacles to birth registration.

Summary of facts

Applicants' case

Nubians in Kenya were from the Nuba mountains in central Sudan. They were forcibly recruited to the colonial British army in the early 1900s when Sudan was under British rule. Upon the official dissolution of the army, they requested to be returned to Sudan but the colonial Government refused and forced them to remain in Kenya. The colonial Government allocated them land within Kibera but did not grant them citizenship. When Kenya attained independence in 1963, the citizenship status of the Nubians was not addressed, they were treated as aliens and were not granted Kenyan nationality.

The parents of Nubian children born in Kenya lacked identity documents and for that reason, they had difficulty registering the birth of their children. Further the birth registration certificate issued in Kenya explicitly stated that it was not proof of citizenship. Therefore, the complainants alleged that the registered children were left in an uncertain position contrary to article 6 of the African Children's Charter.

The complainants alleged that since many persons of Nubian descent were not granted Identity Cards (ID cards) that were necessary to prove nationality, or only got them after a long delay, that uncertainty meant that the future prospects of children of Nubian descent were severely limited and they were often left stateless. The complainants further alleged that the vetting process for obtaining the ID cards for persons of Nubian descent was extremely difficult, unreasonable, and unfair.

The complainants stated that under the circumstances there had been violations of articles 6, 3, 11(3) and 14 of the African Children's Charter. The violations were on the right to have a birth registration and to acquire a nationality at birth, prohibition on unfair/unlawful discrimination, right to equal access to education and right to equal access to health care.

Respondent's case

The respondent claimed that the petitioners had not exhausted the avenues for redress in Kenya's court system. They asked the court to put the matter aside until such a time that the avenues for redress had been exhausted.

Summary of judgment

- On the issue of admissibility, the African Committee had to decide on whether local remedies had been exhausted and whether the complaint had been filed within a reasonable period of time. The established rule in international human rights law was that only available, effective and adequate remedies needed exhaustion. A remedy was effective if the complainant could pursue it without an obstacle, it was effective if it showed a hint of success and it was sufficient if it was capable of redressing the complaint. Remedies that were extra-judicial such as administrative procedures with the local Government were not in the category of local remedies that had to be exhausted for purposes of admissibility.
- The complainants had indicated that they had engaged the judicial system in Kenya without success. Procedural technicalities meant that a High Court case was still pending. The complainants could be exempted from exhausting local remedies if their attempt was unreasonably prolonged. An unreasonably prolonged domestic remedy could not be said to be available, effective or sufficient. The African Committee held that the six years that had lapsed without the High Court case being determined on its merits meant that the local remedy was unduly prolonged and the complainants qualified for an exception to the requirement that they should exhaust local remedies. It also held that the communication was brought within a reasonable time, after waiting for a sufficient period to see if local remedies would be forthcoming.
- The practice of making children wait until they were 18 years of age to apply to acquire nationality could not be seen as an effort on the part of the State Party to comply with its children's rights obligations. It added that the fact that the Kenyan State left children of Nubian descent without a nationality for a very long period of 18 years was not in line with the spirit and purpose of article 6 and it did not promote the children's best interests.
- A stateless child was a child who was not considered as a national by any State under the operation of its laws. A stateless child faced an uncertain future and could find difficulty in benefiting from protection and constitutional guarantees offered by the State. Under Kenyan domestic law, citizenship could be acquired in four ways; birth, descent, registration and naturalisation. Nubians in Kenyan had acquired citizenship through those four ways. The African Committee therefore made the finding that children of Nubian descent had not been left stateless.
- The African Committee did not suggest that the State Parties to the African Children's Charter should introduce citizenship by birth approach but it explained that the intent of that Charter in article 6(4) was that if a child was born on the territory of a State Party and was not granted nationality by another State, the State in whose territory

the child was born, should allow the child to acquire its nationality. The Kenyan State could have argued that children of Nubian descent in Kenya could be entitled to the nationality of Sudan. However, nothing indicated that the Kenyan Government had undertaken efforts to ensure that those children acquired the nationality of any other State. The obligation under article 6(4) of the African Children's Charter was for the State to make sure that all necessary measures were taken to prevent a child from having no nationality.

- The provisions of article 14(4) of the Constitution of Kenya 2010 were to the effect that a child of less than eight years of age whose parents and nationality were unknown had the right to acquire nationality. The provision was commendable but it did not address the plight of children born in Kenya to stateless persons or who would otherwise be stateless.
- The African Committee held that the facts on acquisition of Kenyan nationality by children of Nubian descent indicated a case in which the evidence produced was sufficient to enable a decision to be made unless proved false of unfair treatment and the Kenyan State had the burden of challenging the claims of unfair treatment. The Kenyan State was not present in the proceedings and such an engagement was not possible. The African Committee was not convinced that the practice that allowed children of Nubian descent to be stateless for long periods of time and the unfair treatment that included a vetting process was strictly proportional to and absolutely necessary for the legitimate State interest to be obtained. It held that there had been violation of the article 3 of the African Children's Charter which prohibited unfair discrimination.
- Article 14 of the African Children's Charter provided that children had the right to enjoy the highest attainable standard of health. That right included the right to facilities and access to goods and services to be guaranteed to all without discrimination. The underlying conditions for achieving a healthy life were protected by the right to health. The African Committee held that there was in fact inequality in the access to available health care resources, for Nubian children and it could be attributed to their lack of confirmed status as nationals. The health needs of the Nubian children had not been effectively recognised and adequately provided for in the context of the resources available to fulfil the right to health.
- Article 11(3) of the African Children's Charter provided for the right to education. State Parties were obligated to undertake measures to achieve full realisation of that right. Article 11(3)(a) of the African Children's Charter required the provision of free and compulsory basic education which necessitated the provision of schools, qualified teachers, equipment and the recognised corollaries of the fulfilment of the right. Nubian children had less access to educational facilities compared to other communities. Their inequality in accessing available educational services and resources could be attributed to their problems in acquiring nationality in Kenya. The Nubian community had been provided with fewer schools

Nubians in Kenyan had acquired citizenship through those four ways. The African Committee therefore made the finding that children of Nubian descent had not been left stateless.

and an unreasonably lower share of available resources in the sphere of education. That, according to the African Committee was unfair.

- The African Committee found multiple violations of articles 6(2), 6(3) and 6(4), article 3, article 14(2), 14(2)(b), 14(2)(c) and 14(2)(g) and article 11(3) of the African Children's Charter by the Government of Kenya. It made the following recommendations: -
    i) That the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian decent in Kenya, that were otherwise stateless, could acquire a Kenyan nationality and the proof of such a nationality at birth.
    ii) That the Government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality was not recognised were systematically afforded the benefit of those new measures as a matter of priority.
    iii) That the Government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent were registered immediately after birth.
    iv) That the Government of Kenya should adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.
    v) That the Government of Kenya should report on the implementation of the recommendations within six months from the date of notification of the decision herein. In accordance with its Rules of Procedure, the Committee would appoint one of its members to follow up on the implementation of the decision herein.

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