Haki na Sheria Initiative v Attorney General & 4 others (Petition 196 of 2023)
[2024] KEHC 10021 (KLR) (Constitutional and Human Rights) (12 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 196 OF 2023

LN MUGAMBI, J

AUGUST 12, 2024

BETWEEN

HAKI NA SHERIA INITIATIVE ..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETAR OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

DIRECTOR GENERAL OF KENYA CITIZENS AND FOREIGN NATIONALS MANAGEMENT SERVICE ..... 3RD RESPONDENT

THE PRINCIPAL REGISTRAR OF BIRTHS AND DEATHS . 4TH RESPONDENT

THE PRINCIPAL REGISTRAR OF PERSONS ..... 5TH RESPONDENT

RULING

1. The 2nd Respondent/Applicant- Cabinet Secretary, Ministry of Interior and Coordination of National Government moved this Court through a Notice of Motion Application dated 1/8/2024. It was brought under a certificate of urgency of even date and a Chamber Summons of similar date that sought to have the matter heard during the Court vacation. The motion was supported by the grounds set out on the face of the application and in the affidavit of Amb. (Prof.) Julius Bitok sworn on the 1/8/2024.

2. The prayers in the Notice of Motion are:

    i. Spent

    ii. The Notice of Motion dated 31st July, 2024 be marked withdrawn

iii. That the Honourable Court be pleased to set aside the conservatory order issued on 25th July, 2024 staying/halting the further and continued implementation of unique personal identifier (Maisha Number), 3rd generation identification card (Maisha Card), digital identification card and Maisha Data Base.

iv. The Honourable Court proceeds to issue further orders and directions to give effect to the foregoing orders

v. The costs of this Application be provided for.

The 2nd Respondent/Applicant

3. The grounds upon which the application is based is replicated in the applicant's affidavit in support hence I would only set out what is deposed in the affidavit.

4. In the affidavit of Prof. Julius K. Bitok sworn on behalf of the 2nd Respondent, the 2nd Respondent recounts on 25th July, 2024 conservatory order issued by this Court staying/halting the further implementation of Maisha Ecosystem was brought to its attention.

5. The 2nd Respondent further stated that that it was equally aware that that the High Court in a previous application, High Judicial Review Number 194 of 2023, the Petitioners had moved to Court using similar facts and had sought and were in fact granted a stay of implementation and/roll out of Maisha ecosystem (per annexure JB 1). The 2nd Respondent further that upon hearing of the application on interpartes, the High Court in the JR 194 of 2023 lifted the stay that had been granted against the roll out as evidence in the ruling- JB2.

6. It was thus the 2nd Respondent position that the application made by the Petitioner/Respondent of 23rd July, 2024 in which the interim conservatory order was granted is res judicata in view of the High Court decision in Judicial Review Application Number 194 of 2023 R v Cabinet Secretary, Ministry of Interior and Coordination of National Government & Others exparte Katiba Institute. That the application was based on the same facts and involved same parties and the orders equally affected the whole of Maisha Ecosystem.

7. Furthermore, the 2nd Respondent/Applicant pointed out that prior to seeking and obtaining the conservatory order of 23rd July, 2024; the Petitioners had filed five different applications seeking conservatory orders which the Court did not grant and/or were vacated as evidenced in annexure JB 4.

8. The 2nd Respondent/Applicant stated that there was no new development or change of circumstance and swore that the press statement that was alluded to by the Petitioner/Respondent to justify the need to issue a conservatory order was merely an update of the progress of the uptake of identity cards by the citizens due to numerous concerns by the citizens about the delays and did not thus denote a commencement of mass roll-out as intimated by the Petitioner/Respondent in its application of 23rd July, 2024 and understood by the Court in issuing the conservatory order. That full disclosure had been made to the Court in Nairobi JR Application No. 194 of 2023 through an affidavit filed by the Attorney General which informed that the 2nd generation identity cards had permanently been retired on 14/11/2023 and that it was impossible to revert to issuance of 2nd generation identity cards and thus the public was completely grounded then.

9. The Respondent affirmed that the Maisha Ecosystem is a digital upgrade of the 2nd generation identity card and the data base that already exists pursuant to the provisions of Kenya Citizen and Foreign Nationals Management Service, 2011 hence no mass registration or collection of data will be taking place contrary to the allegation made by the Petitioner/Respondent.

10. The 2nd Respondent deposed that the consequence of the conservatory order of 25th July, 2024 is to completely stop the process of issuing identification/registration documents to any Kenyan who has reached the age of 18 years and the replacement of identity cards the effect of which is the blanket suspension of the right of registration which is guaranteed by Chapter 3 of *the Constitution*.

11. That as at 31st July, 2024; the backlog of registration stood at 1, 215, 095 and that the existence of the Court order will also precipitate crisis of unimaginable proportions.

12. The 2nd Respondent swore that prior to implementing the Maisha Ecosystem, a comprehensive Data Protection Impact Assessment (DPIA) was conducted and submitted to the Data Protection Commissioner who confirmed its compliance with Section 31 of the Data Protection Act and this fact was equally confirmed to the Court in JR 194 of 2023.

13. The 2nd Respondent stated that the conservatory order has had the consequence of stopping the processing and storage of the data wholly to the extent that access to e-Citizen system services is completely disabled yet most government services depend on it. The services affected according to the 2nd Respondent include: e-citizen portal which supports payment of virtually all government services; more than 450 government agencies depend on it to confirm status; the system supports government infrastructure for instance, police service online occurrence book, judiciary information system, health information system and pension information system.

The Response by the Petitioner/Respondent

14. The Petitioner/Respondent in the instant application is Haki Na Sheria Initiative who was the Applicant in the Application of 23rd July, 2024 that the 2nd Respondent now seeks to have reviewed and the orders issued set aside. The Petitioner/Respondent opposes the application by the 2nd Respondent through the Replying Affidavit of Haretha M. Bulle sworn on 6th August, 2024.

15. The Petitioner assaults the Respondents of employing sharp and dilatory tactics in a matter of grave public interest and pointed out that the 2nd Respondent has never even filed a response to the main petition despite various adjournments.

16. The Petitioner disputed that its application of 23rd July, 2024 is res judicata. In opposing the plea of res judicata it contended that it was not a party in the High Court JR No. 194 of 2023 and the only time it became aware of those proceedings was through this consolidation. Further, it stated that there was a change of facts that necessitated the filing of the application for conservatory orders on 23rd July, 2024, and this was after the 2nd Respondent via press release of 22nd July, 2024 confirmed the beginning of mass collection, processing and storage of data for the issuance of unique personal identifier (Maisha Number), third generation identification card (Maisha Identity Card) and enrollment into Maisha Data Base (Maisha Ecosystem).

17. The Petitioner/Respondent also stated that the impugned rules did not provide for the expiry period of the Maisha Card which information came out via the circular of 22nd July, 2024.

18. That Petitioner asserted that issuance of conservatory order is/was necessary to preserve the substratum of the Petition because if the actions of the Respondents are found to be unconstitutional, the process will be irreversible and damages may not adequately give redress to those aggrieved.

19. Further, that no party should be allowed to render litigation nugatory.

20. The Petitioner called into question the Respondents claim that the 2nd generation identity cards cannot be issued any longer which the Petitioner likened to telling the Court that the Respondent does not

intend to comply with the Judgment even if the Court were to find the issuance of Maisha identity cards unconstitutional.

21. On Data Protection Impact Assessment (DPIA), the Petitioner stated that it is still a contested fact which is to be determined by the Court after the parties have been heard including the experts on the risk factors of Maisha Ecosystem.

Parties' Submissions

2nd Respondent's/Applicant submissions

22. The 2nd Respondent submissions were to a large extent a reiteration and amplification of the grounds relied upon in seeking the discharge of the conservatory order. The 2nd emphasized the impact of the order to the general public particularly the youth that are turning 18 years daily and cannot have their identity cards processed hence being shut out of government services such as applying for driving licenses, applying for passports, registering businesses, enrolling to universities and tertiary institutions.

23. That the 2nd Respondent complied with the legal requirement and conducted a Data Protection Impact Assessment which was accepted by Data Protection Commissioner; that in event that the Court finds there was a breach, the aggrieved persons can still get remedies prescribed under Part VIII of Data Protection Act or as may be directed by the Court.

1st Respondent submissions

24. The 1st Respondent supported the application by the 2nd Respondent to review and set aside the conservatory order issued on 25th July, 2024. The 1st Respondent submitted that it was misleading for the Petitioner/Respondent to allege that Maisha Ecosystem was commencing pursuant to the circular of 22nd July, 2024 when the issue was the subject of the application in JR 194 of 2023 where through various affidavits filed, the Respondents had indicated and explained how the system will be rolled out.

25. Further, that there was no mass collection of data contrary to the Petitioner's allegation as individual information would only be obtained upon application for registration as used to under the previous registration hence the orders were issued without the Court having been properly appraised with a clear explanation about the situation on the ground.

Petitioner/Respondent Submissions

26. The Petitioner Respondent seized the opportunity to submit on the appropriateness for the Court to sustain conservatory order which it issued on 25th May, 2024 insisting the met the threshold had been met. The Petitioner relied on the principles for grant of conservatory order enunciated in the following cases: Board of Management of Uhuru Secondary School v City Council County Director of Education [2015] eKLR; Centre for Human Rights & Awareness (CREAW) & 7 Others v Attorney General (2011) eKLR; Kevin K. Mwiti v Kenya School of Law & Others; and Gatirau Peter Munya v Dickson Mwenda Kithinji [2014] eKLR.

27. In particular, the Petitioner/Respondent laid emphasis on the following principles as emanating the above cited authorities and which it argued the application of 23rd July, 2024 satisfied:

    i. <u>That its Petition presents an arguable case, which raises, not debatable issues, but serious if not fundamental issues that ought to be given reasonable or fair chance to be heard or articulated in a Court of law.</u>

ii. That there was a demonstration that there is a real danger that the applicant will suffer prejudice from violation or threatened violation unless the conservatory is issued.

iii. That the Petition will be rendered nugatory and its substratum extinguished.

iv. That it is in public interest that a conservatory order be granted.

28. The Petitioner submitted it was through the circular of 22nd July that the Respondent was informing the public about the introduction of the 10-year expiry identity cards. Further, that it is now that the Respondent were confirming that they had discontinued the issuance of the 2nd generation identity cards.

29. The Petitioner further argued that it is in public interest that the Constitutional values and principles especially meeting the public expectation that in implementing the policies, the Respondents would do so in accordance with *the Constitution*.

30. On the contention that the matter is res judicata for reasons that a similar application had been filed in JR 194 of 2023; the Petitioner/Respondent argued that it was not privy to the previous JR application. The Petitioner applicant relied on the Supreme Court case of Communication Commission of Kenya & 5 Others v Royal Media Service [2014] in which the principles pertaining to res-judicata were expounded by the Court. The Petitioner/Respondent denied that the facts for conservatory order in this case are similar to ones that were the basis for the stay order in the JR 194 of 2023.

Katiba Institute Submissions

31. In brief submissions, Katiba Institute opposed the application to review and set aside the conservatory order by submitting that the Court has a duty to guard against any action or inaction whose effect would remove the pith of litigation and it a shell as was held in Dr. *Alfred Mutua v Ethics & Anti-Corruption Commission & Others Civil App Nai. No. 31 of 2016*.

32. In addition, Katiba Institute urged the Court to consider the public interest factor which it argued does not favour the Respondents continuing with the project that the Court might impeach later.

Analysis and Determination

33. From the pleadings, the Parties' submissions and the Parties' brief oral highlights in Court, it is my considered view that there are four (4) issues for determination, namely:

a. Whether the Court was misled regarding the intention of the press statement released by the 2nd Respondent on 22nd July, 2024 to issue the interim conservatory order of 25th July, 2024.

b. Whether the Petitioner/Respondent's application dated 23rd July, 2024 is res-judicata in view of JR Application Number 194 of 2023 that had been previously been determined on merits.

c. Whether public interest will best be served by sustaining the conservatory or by setting aside the conservatory order.

d. In view of the findings in a, b & c above, whether the Court should allow or decline this application.

34. Before I address the identified issues, I deal with the preliminary issue concerning my jurisdiction to an application of this nature that calls upon the Court to review and set aside its own orders such as the order made on 25th July, 2024, particularly and in reference to constitutional disputes.

35. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 do not expressly provide for such a circumstance. Nevertheless, Rule 3(8) proclaims the inherent jurisdiction of the Court which powerfully captures the immense discretionary power of the Court. It states thus:

> " Nothing in these rules shall limit or otherwise affect the inherent jurisdiction of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the Court process"

36. The phrase "as may be necessary to meet the ends of justice" gives the Court wide-ranging discretionary power to be exercised on the basis of facts of a particular case to prevent injustice or mischief, or rather as the justice of the case demands. In that regard, the Court may reexamine and vary its own orders in certain special circumstances as will be shortly demonstrated.

37. The Supreme Court in the case of *Outa vs Okello & 3 others (Petition 6 of 2014)* [2017] KESC (KLR) 24 Feb. 2017) (RULING) considered the basis of the jurisdiction to review and set aside its own orders without any express provision of law that authorized it. Not only did the Supreme Court find that it had the power to review and set aside its decision in certain exceptional circumstances under the 'inherent jurisdiction principle' but also discussed the instances when such power can be exercised. The Supreme Court stated:

> " We hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, other than in the manner already stated in paragraph 90 above. However, in exercise of its inherent powers this Court may upon application by a Party, review, or on its own motion, review, any of its judgments, rulings or orders in exceptional circumstances so as to meet the ends of justice. Such circumstances shall be limited to situations where:
>
> i. the judgment, ruling or order is obtained by fraud or deceit;
>
> ii. the judgement, ruling or order, is a nullity, such as when the Court itself was not competent;
>
> iii. the Court was misled into giving judgment ruling or order, under a mistaken belief that the parties had consented
>
> iv. the judgement or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision..."

38. I will be shall be guided by the principles set by the Supreme Court in determining the instant application. I thus turn now to determine the issues identified.

Whether the Court was misled regarding the intention of the press statement released by the 2nd Respondent on 22nd July, 2024 to issue the interim conservatory order of 25th July, 2024.

39. The conservatory order of 25th July, 2024 was issued after the Petitioner/Respondent, in a notice of motion filed under certificate urgency moved this Court on the basis that the Respondents had by circular dated 22nd July, 2024 announced an intention to commence the mass roll out for collection, processing and storage of data in respect of Maisha Identification Card, Maisha Unique Personal Identification Number (UPI) and Maisha Data Base (Maisha Ecosystem).

40. In issuing the conservatory order of 25th July, 2024, the fact that the Court gave immense weight to the Petitioner's assertion of fact in its affidavit that there was an imminent mass roll out exercise for Maisha

Data Base and associated products by the Respondents following the press release 22nd July, 2024 is discernible even from the framing of the order in the introductory paragraph. The order reads:

> "The Petitioner/Applicant - Haki Na Sheria Initiative discloses that on 22/07/2024, the Respondents via press release confirmed beginning of mass collection, processing and storage of data for issuance of personal identifier (Maisha number), 3rd generation identification card, Maisha digital ID and enrolment into Maisha Data Base which this consolidated Petition is challenging on Constitutional grounds. The Court has a duty to preserve the substratum of the Petition, for if mass roll out goes on, if eventually the Court finds there was violation, that may not be easily redressable. The Court is satisfied that based on the latest disclosure, an order staying any further and/or continued implementation pending the hearing and determination of this application ought to issue"

41. The Respondent now contends that information was misleading as factually, there was no mass roll out but an update of the implementation of Maisha ecosystem which was already an ongoing matter. The 2nd Respondent disclosed that the 2nd generation Identity card had effectively been retired on 14th November, 2023 and production of Maisha card began; a fact which was well known to the Petitioners as this fact had been disclosed in a previous application JR 194 of 2023 where the roll out had been stayed but later the stay order was vacated.

42. It is on this basis that the 2nd Respondent sought to review and set aside the conservatory order which it argued was based on misinformation that there was an impeding mass roll out Maisha Ecosystem and associated products yet this was not the case as it was already being implemented.

43. Looking at the affidavit and annexures by the Respondents, one cannot avoid reaching the conclusion that the alleged commencement of mass roll out of Maisha ecosystem products alleged by the Petitioner was indeed not the correct position. From the affidavit evidence presented and through the JR Application Number 194 of 2023, I am able establish that what the JR Application Number 194 of 2023 intended to stay was the roll out of Maisha cards. In fact, the exact wording of the order number 2 of the Chamber Summons Application of 30th November, 2023 in JR 194/2023 reads as follows:

> "Prohibition restraining the Respondents, their agents, and servants from executing the 1st November 2023 decision to roll out the Maisha Namba Cards before conducting a data protection impact assessment per section 31 of the Data Protection Act."

44. The object of the order was to stay the roll out of Maisha Cards which is a common denominator in both applications. If then as at 30th November, there was an application to stop the roll out Maisha Card, how can the press statement of 22nd July have been about the commencement of roll out of the same product? In this, I agree with the 2nd Respondent affirmation of the fact that this process was an ongoing experience contrary to what the Petitioner/Respondent had presented in seeking the conservatory order; a fact which this Court heavily relied on in issuing the conservatory as is apparent on face of that order.

Whether the Petitioner/Respondent's application dated 23rd July, 2024 is res-judicata in view of JR Application Number 194 of 2023 that had been previously been determined on merits.

45. Res-judicata bars the Court from tying a suit if there exists another decision of a competent court on the same issue. Blacks Law defines res judicata as:

> " An affirmative defence barring parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction and that could have been but was not raised in the first suit. The three essential elements are:
>
> i. An earlier decision on the issue
>
> ii. A formal judgment on merits
>
> iii. Involvement of the same parties, or in privy with original parties"

46. The principle that underlies res judicata is that no man should be vexed twice over the same cause. The *Civil Procedure Act*, Section 7 encapsulates the principle of res judicata as follows:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the parties, under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"

47. A total of six explanations are provided under Section 7 to simplify the principle of res-judicata. Explanation 4 and 6 are what I opine to be relevant for purposes of this application. Explanation 4 states "Any matter which might have been made ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit". Explanation 6 says that "where persons litigate bonafide in respect of a public right claimed in common for themselves and others, all persons interested in the right shall, for purposes of this section, be deemed to claim under persons so litigating"

48. I now refer to the Chamber Summons Application of 30th November 2023 once more. The main order that was sought in the JR application Number 194 of 2023 by Katiba Institute was to stop the implementation of the roll out Maisha cards. In the Application of 23rd July, 2024; the Petitioner/ Respondent- Haki Na Sheria Initiative, the conservatory order that was sought was directed at staying or halting the implementation of unique personal identifier (Maisha number), 3rd generation identification card (Maisha Card) and Maisha Data Base. The order for conservatory is slightly expanded but these are species of a genus known as Maisha Data Base. The Judge in JR 194 of 2023 listened to the reasons for and against the roll out of Maisha Cards and at the end of the day, he was persuaded to lift the interim stay orders that he had issued against the implementation then. This Court has already found that information that the roll out was about to be commence based on the July 22, 2024 press release was an inaccurate representation of facts. There was factually no new development meaning that the issues against the roll-out are the same ones that were canvassed earlier before the Court or should have been before that Judicial Review Court then (per explanation number 4) when it determined the former application and declined it. This court cannot thus relitigate the same issue of roll out of Maisha Card or any of the associated species/products which ought to have been part of the former application- JR 194 of 2023 where the application was heard on merits.

49. Concerning the Petitioner/Respondent stance that it was not privy to the previous application- JR 194 of 2023; this argument is untenable considering both the Petitioner/Respondent, Katiba which

had filed the application filed the Petition in public interest just as Haki Na Sheria Initiative hence their interests converge. They are all before the Court not for themselves but the general public. In that case; by dint of explanation 6, the Petitioner/Respondent cannot disengage itself from an application filed by Katiba as that explanation states that "Where a person litigates in respect of a public right.... all persons interested in such right shall, for purposes of the section, be deemed to claim under persons so litigating"

50. It will be prejudicial that in matters of public interest to require the respondents to defend themselves over the same claim just because it is a different public spirited person that has filed the application that had been settled earlier on, even it was before the consolidation was allowed.

51. My finding is that res judicata has been established considering that the application of 23rd July, 2024 is seeking a conservatory order against the roll out of Maisha Card and related products which was an issue dealt with in the ruling of the Court in JR 194 of 2023 and, noting there was no new development that the Circular of 22nd July, 2024 brought about as had been alleged by Petitioner/Respondent but was oust an apprise of what was already an continuing process.

Whether public interest will best be served by sustaining the conservatory order or by setting it aside

52. The question of public interest, is which side does public interest tilt? Is it in stopping the processing of Maisha cards and the associated products pending the hearing and determination of the Petition or not stopping?

53. The Respondents swore that the issuance of the 2nd generation identity card system ceased completely with effect from 14th November, 2023. The Data Protection Commissioner confirmed on oath (affidavit evidence) that Data Protection Impact Assessment was conducted and a report submitted to the Data Protection Commissioner as required by the law who approved it before the commencement of processing of data relating to Maisha cards and related products. That particular confirmation is relevant as it signifies prima facie proof of compliance with the Data Protection Law particularly at the preliminary level even though this may change with a full hearing where experts' testimony and cross-examination take place that could expose weaknesses that may have been overlooked.

54. Another aspect that one must look into are the practical considerations. The 2nd Respondent swore that there were over 1,215,095 backlog identity cards for Kenyans that were pending processing as at 31st July 2024. Without those Kenyans getting these identity cards, it could mean loss of job opportunity. They may not access other crucial documents like driving licences, registration of companies and businesses and so on. These are matters that the 2nd Respondent urged this Court to reflect on. The 2nd Respondent further swore that the situation continues to escalate and the backlog is increasing at the rate of 10,000 every day (as depicted in paragraph 16 of affidavit in support of Amb. (Prof.) Julius K. Bitok) which claim is supported by annexure JB-7.

55. There was thus clear demonstration that suspension of registration of Kenyans has very direct immediate adverse consequences on very large population of people and the 2nd Respondent is able to track and account for such members every day. On the other hand, the Petitioners allegations of violation are subject to proof, and the Petition could go either way. The doctrine of presumption of Constitutionality is thus applicable, that the validity of the impugned rules is presumed until the time the Court has had the opportunity of listening fully to all the rival arguments and arrives at determination on the constitutionality or otherwise of impugned legislation. Having regard to the foregoing reasons, I am persuaded that is not in public interest to maintain the interim conservatory order.

Whether the Court should allow or decline this application.

56. In view of the foregoing findings, I allow the 2nd Respondent/Applicant's Application to review and set aside the conservatory order of 25th July 2024.

57. Further, in view of the findings, I find no juridical significance that is left in the Petitioner/ Respondent's application of 23rd July, 2024 hence it is struck out together with the ensuant directions issued thereto.

58. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 12TH DAY OF AUGUST, 2024.

L N MUGAMBI

JUDGE