



**Bobali v Director of National Registration Bureau (Miscellaneous Application E013 of 2023)
[2024] KEHC 16271 (KLR) (Constitutional and Human Rights) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E013 OF 2023
LN MUGAMBI, J
DECEMBER 20, 2024**

BETWEEN

MANGUBU BOBALI PETITIONER

AND

DIRECTOR OF NATIONAL REGISTRATION BUREAU RESPONDENT

RULING

Introduction

1. By a Notice of Motion Application dated 11th April 2023, the Petitioner seeks orders that:
 - i. Spent.
 - ii. The Director of National Registration Bureau do strike the name and records of Kemunto Kangwana Jennifer Civilian Identity Card Number xxxxxxxx Serial number 2408891021 from the Kenya Civil Registration data and the Civilian Identity card issued pursuant to the aforesaid Registration be revoked and or cancelled.
 - iii. The Applicant refugee status that was previously in the Kenyan system be restored.
 - iv. Costs of this application be in the cause.

Petitioner's Case

2. The Application is sustained by the Petitioner's supporting affidavit of even date and the grounds on the face of the Application.



3. The Petitioner states that she is a refugee and who sought asylum in Kenya with GOK/UNHCR under registration number 823-1200027. She avers that this has been her status throughout and has never acquired or applied for Kenyan citizenship.
4. She explains that in 2014 she got into in a relationship with one, John Orina Kangwana. She depones that without her knowledge, John Orina Kangwana fraudulently registered her as a Kenyan citizen under the name Kemunto Kangwana Jennifer and issued with an identity card. She avers that when their relationship ended, John Orina Kangwana departed with the said identity card.
5. The Petitioner asserts that she only became aware of this situation when she visited the UNHCR office and was informed that her fingerprints appear in Kenyan records as Kemunto Kangwana Jennifer.
6. She contends that at the time of the impugned registration, she was only 15 years old and could not have acquired Kenyan citizenship nor had she applied for the same. Accordingly, she points out that the said registration was procured by misrepresentation and concealment of material facts without her knowledge.
7. The Petitioner is aggrieved since she requires authentic records of her birth and citizenship status and is however unable to acquire the same due to this issue. She depones that when she approached the Respondent to strike out her name and record in the Kenyan system, she was informed that this can only be done by way of a court order thus the purpose of filing this suit.

Respondent's Case

8. Although the Respondent indicated that it had filed a preliminary objection in this matter as a response, the P.O was not in the Court file or Court Online Platform (CTS) but submissions by the Respondent were available.

Parties Submissions

Petitioner's Submissions

9. The Petitioner in support of her Application filed submissions dated 7th July 2023 through Kwengu and Company Advocates.
10. Recounting the Petitioner's case, Counsel submitted that the Petitioner in her affidavit had proved that she is a refugee in Kenya. Counsel pointed out that the merits of the application were unopposed save for the Respondent's objection on procedural technicalities.
11. Counsel argued in this regard that despite the Respondent's contention, the law does not provide a procedure for removal of a person from Kenyan records. As such Counsel filed the instant matter under Article 17 of the *Constitution*. Considering this, Counsel urged the Court to be guided by Article 159(d) of the *Constitution* in determining this matter. Counsel also highlighted the case of *David Bundi v Timothy Mwenda Muthee* [2022] eKLR where Court overlooked procedural technicalities.

Respondent's Submissions

12. Senior State Counsel, Dan Weche filed submissions for the Respondent dated 23rd May 2023. Counsel stated that the issues for determination were whether the suit is fatally defective and whether failing to cite the challenged provisions of the *Constitution* renders the matter defective.



13. On the first issue, Counsel submitted that the application is offensive to Rule 10(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 that provides a constitutional petition should be filed by way of a petition.
14. In this matter, Counsel noted that the Petitioner's case had been commenced vide an Application not a Petition and so final orders cannot issue in this matter. As such Counsel argued that the Petitioner's application was void ab initio on this ground.
15. Reliance was placed in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR where the Supreme Court pointed out that failure to adhere to the procedure set out in the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 renders such an application null and void.

Analysis and Determination

16. It is my considered view that the issues that arises for determination is:
 1. Whether instant proceeding is fatally defective
 2. Whether or not this Court should allow the Petitioner's application dated 11th April 2023.

Whether the instant Proceeding is fatally defective

17. The Respondent herein opposed this Application based on the Petitioner's failure to institute this suit by way of a Petition. Rule 10 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 provides that:

An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
18. For context Rule 4(1) of these *Rules* provides as follows:

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”
19. The law on procedural technicalities finds its origin in the *Constitution* under Article 159 (2)(d). It provides as follows:

“Justice shall be administered without undue regard to procedural technicalities.”
20. Discussing this principle in *Methodist Church in Kenya (Supra)*, the Supreme Court observed as follows:

“73. article 159(2)(d) and (e) of the *Constitution* of Kenya, 2010 thus stipulates:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

...

justice shall be administered without undue regard to procedural technicalities; and



the purpose and principles of this Constitution shall be protected and promoted”.

74. The said article 159(e) requires the courts of justice to uphold “the purpose and principles of this Constitution”. The abode of such “purposes and principles” is article 10, clause (b) of which calls upon us to uphold:

human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized”.

75. A regular scheme for thus discharging the judicial mandate is embodied in a number of statutes. A typical such statute is the *Civil Procedure Act* (cap 21, Laws of Kenya), section 1A(1) of which thus provides:

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

21. In the matter the Superior Court went on to determine as follows:

- “ 86. What is the import of such detailed statements emanating from the trial Judge? It is quite evident that the petitioner was accorded a substantial hearing, on the “cross-petition” – regardless of the technicality attending the formal judgment of the “cross-petition”. It is of no legal consequence, in my perception, that the replying affidavit was inellegant in para 34, with 1st respondent herein averring that he was “cross-petitioning”. (To recall, the constitutional charter [article 159 (2) (d)] declares that “justice shall be administered without undue regard to procedural technicalities”; and article 22(3)(b) declares that “[any] formalities relating to proceedings ... are [to be] kept to the minimum”). (Emphasis added).

22. Correspondingly, in *Gitau v Kenya Methodist University* (Kemu) [2021] KEHC 322 (KLR) the Court discoursed as follows:

- “ 12. Talking about the overriding objective of the Rules and the requirement for courts to determine cases without undue regard to procedural technicalities, it is important at this stage to attempt to define the term a “legal technicality.” This phrase has been defined as follows:16

“Legal technicality” is a casual or colloquial phrase referring to a technical aspect of law and that it is not a term of art in the law, has no exact meaning and doesn't have a legal definition. That notwithstanding, the term implies that strict adherence to the letter of the law prevents the spirit of the law from being enforced and is often simply used to denote any portion of the law that interferes with the outcome desired by the user of the term.”



13. The court in *James Mangeli Musoo v Ezeetec Limited* 17 preferred the following definition:

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

14. The House of Lords in *Henry JB Kendall & Others v Peter Hamilton* 18 had this to say: -

“Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve”

15. In *Anchor Limited v Sports Kenya* 19 the court while searching for a fitting definition of procedural technicalities had this to say: -

- “10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwangi, in *Kenya Ports Authority V Kenya Power & Lighting Co. Limited* (2012) eKLR and another one supplied by the Learned Hon. Justice C.W Githua in *James Muriithi Ngotho & 4 Others V Judicial Service Commission* (2012) eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwangi defined a technicality thus:

Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”



16. Whatever definition we adopt, courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically examine the meaning of the “on the merits,” how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure of the procedural rules, we should prefer the “determination on the merits” principle.”
23. Furthermore, the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 informs that its overall objective is as follows under Rule 3:
- Scope and objectives.
- 3.
- (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.
 - (2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.
 - (3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realizing the—
 - a. rights and fundamental freedoms enshrined in the Bill of Rights; and
 - b. values and principles in the Constitution.
 - (4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.
 - (5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the—
 - a. just determination of the proceedings;
 - b. efficient use of the available and administrative resources;
 - c. timely disposal of proceedings at a cost affordable by the respective parties; and
 - d. use of appropriate technology.
 - (6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—
 - a. participate in the processes of the Court; and
 - b. comply with the directions and orders of the Court.
 - (7) The Court shall pursue access to justice for all persons including the—
 - a. poor;
 - b. illiterate;
 - c. uninformed;



- d. unrepresented; and
- e. persons with disabilities

(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

24. The jurisdiction of this Court under Article 22 is invoked when there are allegations that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened with violation. That is when the intervention of the Court can be sought.

25. A party approaching the Court must be able to demonstrate the particular provisions of the Constitution that have therefore been violated and the manner in which the violation occurred. This was the holding in the celebrated case of *Anarita Karimi Njeru* (1979) KLR which was later affirmed by the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR by holding as follows:

“(349) Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

26. That is what essentially defines the character of a Constitutional proceeding. Looking at the Miscellaneous Application, it is manifest that the Petitioner’s primary claim is not violation of her fundamental rights. Instead, she seeks to have the name Kemunto Kangwana Jennifer that bears her fingerprint impression revoked from Kenyan records. She does not accuse the Respondent whom she has sued of any wrong-doing.

27. The Applicant is not alleging that the Respondent has infringed any of her constitutional rights. No accusations of any infringement of the provisions of the Bill of rights has been alleged against the Respondent herein. If anything, the person whom the Applicant alleges is the mastermind of the alleged false registration is not even a party in the proceeding.

28. Filing a Petition would have exposed the fallacy of instituting this proceeding early enough for a Petition must satisfy certain set benchmarks. Rule 10 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 which requires proceedings in Constitutional matters to be commenced by way of Petition provides guidance on the essentials to be captured in a Petition and is meant ensure material facts are pleaded for substantive justice to be done to all the parties hence compliance with this rule is not a mere technicality as alleged by the Applicant. An application such as the present one is limiting and does not provide a sufficient mechanism of achieving the overriding objective of doing substantive justice to the parties. To say that the Respondent advised the Applicant to file a case in Court is not enough to invoke this Court’s Constitutional jurisdiction. I would therefore find the Applicant choice of invoking the jurisdiction of this Court by instituting a miscellaneous application instead of a Petition as provided for in Rule 10 (1) hinders this Court from



making a full and proper inquiry and prevents it from deciding based on substantive merits of the matter. The omission is fatal and goes to the substance of the case.

Whether or not this Court should allow the Petitioner's application dated 11th April 2023.

29. The process of being registered to become a Kenyan citizen is governed by *Kenya Citizenship and Immigration Act*. The effect of such registration is said to be as follows under Section 18:

A person who qualifies to be registered as a citizen of Kenya under this Act, shall upon taking the oath or affirmation or allegiance, in the prescribed manner, be issued with a certificate of registration as a citizen of Kenya.

30. Article 17(1) of the *Constitution* provides for revocation of citizenship as follows:

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.

31. This Article is further amplified under Section 21 of the *Kenya Citizenship and Immigration Act* as follows:

Revocation of citizenship

1. The Cabinet Secretary may, where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, revoke any citizenship acquired by registration on the grounds specified in Article 17 of the Constitution.
2. The Cabinet Secretary shall by notice, in writing, inform any person whose citizenship is due for revocation of the intention to revoke his or her citizenship giving reasons for the intended revocation.
3. The Cabinet Secretary shall give a person who has been given a notice under subsection (2) an opportunity to present the reasons why his or her citizenship should not be revoked.
4. The Cabinet Secretary may after considering the presentations made under subsection (3) revoke the citizenship and cause the revocation to be entered into the register for revocation of citizenship.



5. The Cabinet Secretary shall within fourteen days of revocation notify the person of the decision to revoke his or her citizenship giving the reasons for the revocation.
 6. A person who is aggrieved by the decision of the Cabinet Secretary's to revoke his citizenship may within thirty days after receipt of communication on the revocation appeal to the High Court.
 7. Where an appeal has been filed under subsection (6), the person who has appealed shall be deemed to be lawfully present in Kenya until the appeal is determined.
 8. Where an appeal to the High Court is not allowed, the person may appeal to the Court of Appeal and the Supreme Court and such person may not be removed from Kenya until he has exhausted all the avenues of appeal.
 9. A person whose citizenship is revoked by the Cabinet Secretary shall cease to be a citizen of Kenya on the date of the revocation or in any case upon exhaustion of appeal.
 10. The documents of identification that had been previously issued to a person whose citizenship has been revoked shall become invalid on the date of revocation and the holder shall surrender them immediately after the revocation of citizenship is communicated.
 11. A person who does not surrender the documents of identification commits an offence.
 12. The renunciation by any person of his or her Kenyan citizenship or the revocation of citizenship shall not relieve that person from his personal obligations or any liability that had accrued before such renunciation or revocation of his or her citizenship.
32. It is vital to note that based on the dictates of the above provisions although relied upon, the Petitioner's Identity Card alleged fraudulent registration does not qualify her as a validly registered citizen of Kenya.
33. In this regard, I turn to the [Registration of Persons Act](#) which provides for registration under Section 6(1). It states as follows:
- Registration
- Every person who attains or has attained the age of eighteen years and is unregistered shall be liable to registration under this Act and shall, within ninety days of attaining that age, present himself before a registration officer and register himself by giving to the registration officer the particulars specified in subsection (1) of section 5, and for that purpose shall permit his finger and thumb or toe or palm impressions to be recorded in any manner prescribed.
34. On revocation of the issued identity card, the Act under Section 18A provides as follows:
1. The Director shall cancel the registration and revoke the identity card of any person issued under this Act if the card was obtained through—
 - a. misrepresentation of material facts;



- b. concealment of material facts;
 - c. fraudulently;
 - d. forgery;
 - e. multiple registration; or
 - f. any other justifiable cause.
2. Before cancellation of the registration and revocation of the identity card as provided in sub section (1), the Director shall notify the card holder in writing of the intention to cancel the registration and revoke the card unless the holder can show cause within fifteen days why the cancellation should not be done.
 3. The cancellation of a registration and the revocation of a card under subsection (2) shall not take effect until after the expiry of fifteen days from the date of cancellation and revocation to allow the card holder to appeal to a court of competent jurisdiction.
 4. Any person whose registration has been cancelled and identity card revoked or whose citizenship has been otherwise revoked under an existing law shall be under obligation to surrender the identity card to the registrar.
 5. The Director shall by notice in the Gazette publish the names and identity card number of the person whose registration is cancelled and the identity cards revoked.
35. It is obvious that the Petitioner's existence in Kenyan records is not predicated on genuine registration as stipulated under the [Kenya Citizenship and Immigration Act](#). Accordingly, the Petitioner is not a validly registered citizen of Kenya.
 36. That said, the [Registration of Persons Act](#) provides for the registration and revocation of identity cards in Kenya. The Act under Section 18 A provides an elaborate and detailed procedure on how an identity card can be cancelled.
 37. In view of the foregoing, I find the Petitioner's averment that the Respondent instructed that the record of the impugned identity card can only be cancelled by way of a Court Order to be misguided. I observe so because the Act is clear on the procedure that is to be adopted in cases of registration by misrepresentation of material facts; concealment of material facts; fraudulently; forgery; multiple registration; or any other justifiable cause. Equally the Counsel's submission that such procedure does not exist in law is erroneous.
 38. Consequently, it is my take that the Petitioner should utilize the procedure set out in the [Registration of Persons Act](#) to have the name Kemunto Kangwana Jennifer cancelled from the Kenyan records.
 39. The matter is purely administrative and the appropriate procedures have not been put in motion. I am thus barred by the doctrine of exhaustion from entertaining this miscellaneous application.
 40. In the overall analysis, I find no merit in this application and strike out the same. I would however order that each Party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2024.

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L N MUGAMBI

JUDGE

