



**Bilal v Director of Criminal Investigations & 4 others (Constitutional Petition E164 of 2022)
[2023] KEHC 493 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E164 OF 2022**

M THANDE, J

JANUARY 27, 2023

BETWEEN

MUEIZ AHMED OSMAN BILAL PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES 3RD RESPONDENT

**CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT 4TH RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. In his Petition dated April 13, 2022, the Petitioner, states that he is a Tanzanian national who is resident in Kenya. He is married with 5 children, 2 of whom live and study in Canada. His family resides on LR No xxxx/xx in South C, Nairobi County, which he purchased. He is involved in the business of facilitating travel and acquisition of employment and business opportunities around the world. He renewed his work permit on July 31, 2020 which was valid until July 31, 2022. In the years he has been in business he has remained compliant by ensuring that all licences are renewed and that collected revenues are submitted to the Kenya Revenue authority. In the course of his business he has acquired recognition and accolades from Kenya Airways and other airlines. The Petitioner has been operating his business from Uganda House since July 1, 2011. He is also a respected elder within the Muslim and business community in Nairobi.



2. The Petitioner claims that on April 12, 2022, at about 2.30 pm, as he was preparing for prayer during the Ramadhan season, he was inhumanely whisked away by officers of the 1st Respondent, into a waiting vehicle. He was taken to Jomo Kenyatta International Airport and shuffled into a waiting flight to Tanzania. He was informed that orders had been issued for him to be taken to Tanzania as he had been listed as a prohibited immigrant for being involved in organized crime. The Petitioner laments that he has neither been charged in any court nor summoned by the Respondents. He claims that as a result of his illegal removal from Kenya without due process, his rights have been violated by the Respondents, and his wife and 3 children have been left destitute.
3. The Petitioner thus seeks the following reliefs:
 - a. A declaration that the decision to tag the petitioner as a prohibited immigrant without any lawful cause and due process is unconstitutional/unlawful.
 - b. A declaration that the petitioner is by law entitled to due process if a decision is to be made declaring him a prohibited immigrant.
 - c. A declaration that the Petitioner is by law entitled to due process if a decision is to be made removing him from the jurisdiction of the court.
 - d. A declaration that the failure by the 1st, 2nd and 3rd Respondents to issue the Interested Party/Petitioner with a written explanation for removing him from the jurisdiction of the court is illegal, unlawful and amounts to a denial, breach and violation of the Petitioner's fundamental right and freedom under Article 47(1) and (2) of the [Constitution of Kenya](#).
 - e. A declaration that under and by virtue of the provisions of Article 27(1) of the [Constitution](#) of Kenya the petitioner is entitled to equal protection of the law.
 - f. A declaration that the absence of the Petitioner from his family in Kenya by virtue of the actions/decision of the Respondents, is in breach and violation of the Interested Party's fundamental rights and freedoms under Article 45(1) and 53(1)(e) of the [Constitution of Kenya](#).
 - g. A declaration that the Respondents are in breach of the Petitioner's fundamental rights and freedoms under Article 39(1) of the [Constitution of Kenya](#).
 - h. The Honorable Court be pleased to issue an order of permanent injunction prohibiting the 1st 2nd and 3rd Respondents, jointly and severally and through their agents or officers claiming authority under them from prohibiting the Interested Party from entering back into Kenya upon exit therefrom using his Tanzanian Passport No. ABxxxxx.
 - i. That an order for exemplary and punitive damages issued against the 1st to 5th Respondents jointly and severally, on account of their gross violation of the subject's fundamental freedoms and rights as enshrined in the petition.
 - j. Costs of this Petition to be awarded to the Petitioners.
 - k. Such other or further relief as this Honourable Court may deem just and fit to grant.



4. It is noted that the Petitioner is in the prayers above variously described as the Interested Party/ Petitioner, Interested Party and Petitioner. This however is a matter of poor drafting and perhaps copy pasting.
5. The Petition is supported by the grounds therein and the affidavit sworn on even date.
6. The Respondents though served and in spite of being given ample opportunity to do so, did not file any response. The Petition thus proceeded as undefended and the claims by the Petitioner remain uncontroverted.
7. In his submissions, the Petitioner listed the following issues for determination which the Court hereby adopts:
 - i. Whether declaration of the Petitioner as a prohibited immigrant contravened Articles 27(1), 39(1), 45(1), 47(1) and (2) and 53(1)(e) of the Constitution.
 - ii. Whether the Petitioner is entitled to the reliefs sought.
Whether declaration of the Petitioner as a prohibited immigrant contravened Articles 27(1), 39(1), 45(1), 47(1) and (2) and 53(1)(e) of the Constitution.
8. The Petitioner's complaint is that he was declared a prohibited immigrant, yet he does not fall under any of the categories listed in Section 33(1) of the Kenya Citizenship and Immigration Act. As such, his removal from Kenya without due process contravened his constitutional rights and fundamental freedoms. The Petitioner further contended that he was not made aware of any illegal activity that would have caused him to be listed as a prohibited immigrant. Relying on Article 47(1) and (2) of the Constitution and Section 4 of the Fair Administrative Actions Act FAAA, the Petitioner contended that he is entitled to equal protection under the law and to be informed in writing, the reasons for adversely affecting his rights and fundamental freedoms and opportunity to defend himself. Additionally, the Petitioner submitted that the Respondents' actions adversely affected him as he left behind his family who now depended on well-wishers for upkeep. Further that his business is on the verge of collapse as he is unable to attend to his clients due to his absence from Kenya.
9. Section 33 of the Kenya Citizenship and Immigration Act stipulates who a prohibited immigrant is as follows:
 1. For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who—
 - a. not having received a pardon—
 - i. has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;
 - ii. has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;
 - iii. has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;
 - b. a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;



- c. a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;
- d. a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;
- e. a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;
- f. a person whose presence in or entry into Kenya is unlawful under any written law;
- g. a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;
- h. a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;
- i. a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;
- j. a person involved in or is reasonably suspected to be engaged in money laundering;
- k. a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- l. a person engaged in or suspected to be engaged in illicit arms trade;
- m. a person engaged in or suspected to be engaged in illegal human body organs trade;
- n. a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber- crimes and related crimes;
- o. a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- p. a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- q. a person whose conduct offends public morality;
- r. a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;
- s. a person who is seeking to enter Kenya illegally;



- t. a person who is a fugitive from justice;
- u. a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006);
- v. any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed); and
- w. a person who has been repatriated and or removed from Kenya under any lawful order.

10. The Petitioner states that he is a law-abiding individual. The exhibited work/resident permits show that he has been obtaining work permits consistently over the years. The latest resident/work permit was issued on July 31, 2020 which authorized the Petitioner to enter and remain in Kenya for a period of 2 years for the purpose of employment/business/profession or residence. The permit is expressed to be in accordance with the provisions of Section 40 of the Act. It is noted that Section 40(3) provides as follows:

The Director shall issue a permit of the required class to a person who is not a prohibited immigrant or inadmissible person, who has—

- a. made an application in the prescribed manner before entry into Kenya; and
- b. satisfied the Committee that he has met the requirements relating to the particular class of permit.

11. At the time the Petitioner was issued with his permit, he was clearly not a prohibited immigrant or inadmissible person as Section 40(3) is clear that a permit may not be issued to such persons. As indicated herein, the Respondents did not file any response to the Petition. There is therefore nothing herein to persuade the Court that subsequent to the issuance of the permit to the Petitioner on July 31, 2020, he became a prohibited immigrant.

12. The Act gives powers to the Director appointed under Section 16 of the [Kenya Citizens and Foreign Nationals Management Service Act](#), to make an order for the removal from Kenya of any person found to be in the country unlawfully. Section 43 provides:

- 1. The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.
- 2. A person against whom an order has been made under this section shall—
 - (a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or



- (b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunal's decision until the suit is finally disposed of.
 3. Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.
 4. ...
13. Upon issuance of an order under the foregoing provision, the person in respect of whom such order has been issued shall be returned to the place he originated from or with the approval of the Cabinet Secretary, to his country of residence or citizenship or place of his choice with approval of the authorities of such place. The law requires that the order of the Director for the removal of a person from Kenya must be in writing. The law further requires that the order shall be executed as the Cabinet Secretary shall direct but subject to the Constitution and related laws.
14. In the present case, the Petitioner has stated that he was not served with any order for his removal from Kenya. Further that he was bundled out of his office by officers of the 1st Respondent as he was preparing to go for prayers. This was done in the presence of his employees and customers. He was ferried to Jomo Kenyatta International Airport and shuffled into a waiting flight to Tanzania. All he was told is that orders have been issued for his deportation to Tanzania.
15. Article 47 of the Constitution provides for Fair administrative action as follows:
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
16. In compliance with Article 47(3) Parliament did enact the FAAA to give effect to the rights stipulated in Article 47(1). Section 4 of the Act provides:
 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.



3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

1. The administrator shall accord the person against whom administrative action is taken an opportunity to–
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

17. The right to fair administrative action cannot be gainsaid. This right encompasses action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, where a person’s right or fundamental freedom has been, or is likely to be adversely affected by administrative action, such person must be given reason in writing, for such action. This requirement ensures that administrative bodies discharge their mandate within constitutional and statutory limits. The actions of such bodies must conform to the statutory provisions and must pass the Constitutional muster.

18. In the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal had this to say about the right to fair administrative action:

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



19. A similar position was adopted in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR, where Mwita, J. stated:

33. Article 47(1) of the Constitution is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub Article 2 makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action.

20. The learned Judge went on to state:

37. The fact that the right to Fair Administrative Action is a constitutional right was stated by the Constitutional Court of South Africa in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

21. In the case of *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatab Okoiti* [2018] eKLR, cited by the Petitioner, Mativo, J (as he then was) stated:

In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others v The County Government of Nyeri & Ano* [39] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

- a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.
- b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.



- c. Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [40]:-

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

22. And in the case of *Republic v Commission For Higher Education Ex-Parte Peter Shoita Shitanda* [2013] eKLR, Odunga, J. (as he then was) considered an application for judicial review orders and had this to say:

As already stated hereinabove judicial review jurisdiction is merely concerned with the decision making process and not the merits thereof. In Uganda case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, the Court citing *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

23. In the present case, when the actions of the Respondents are considered in light of the provisions of Article 47 of the Constitution, Section 43 of the Act and Section 4 of the *FAAA*, it is quite clear that the same are tainted with illegality as they are contrary to the provisions of the cited law. Further, by hounding the Petitioner out of his office in the presence of his employees and customers and further ferrying him to the airport and shuffled into a waiting flight to Tanzania, the Respondents actions were clearly unreasonable. No reasonable authority addressing itself to the facts and the law before it, would have made such a decision or acted in such a manner. The actions of the Respondents lacked procedural propriety and fairness as there was failure to observe the rules of natural justice. The Petitioner was not served with any deportation order nor informed of the reasons for his deportation in writing. Clearly, he was not accorded any fairness by the Respondents.

24. Further, the Petitioner has stated that he is a family man, married with 5 young children 3 of whom are minors. He is the breadwinner of the family and they all depended on him for upkeep. He has



been away from his family since April 12, 2022 when he was forcefully removed from Kenya. By being deported, he has been denied his right to family as guaranteed under Article 45 of the Constitution.

25. Although the Petitioner is a foreigner, he is entitled to equal protection of the law. The rights to fair administrative action under Article 47, to family under Article 45(1) and of equality before the law and to equal protection and equal benefit of the law under Article 27(1) are available to every person, regardless of citizenship. By being hounded out of Kenya by the Respondents, as he was, without a written order or written reason, the Petitioner though a foreigner, was denied due process of the law. I do therefore find and hold that the Petitioner's rights as set out herein were violated by the Respondents through their actions.

Whether the Petitioner is entitled to the reliefs sought

26. The Petitioner seeks declarations that his rights have been violated by the Respondents. These are prayers that this Court has no difficulty granting given the findings herein.
27. I now turn to the remaining prayers. The Petitioner seeks an order prohibiting the 1st, 2nd and 3rd Respondents, jointly and severally and through their agents or officers claiming authority under them from prohibiting him from re-entering Kenya upon exit therefrom using his Tanzanian Passport No. ABxxxxx. Although the deportation of the Petitioner has been found to be unlawful, the Court cannot dictate to the 3rd Respondent the travel documents to accept. This falls within the realm of the 3rd Respondent's mandate. Under Section 48 of the Act, it is the officers of the 3rd Respondent who determine whether a person may enter Kenya on the strength of the travel documents presented. An order specifying the travel document to be used by the Petitioner in re-entering Kenya would be tantamount to interfering with the 3rd Respondent's constitutional and statutory mandate. In this regard, I am guided by the holding in the case of Tom Dola & 2 others v Chairman, National Land Commission & 5 others [2020] eKLR where the Court of Appeal stated:

In Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR, this Court emphasised, and we reiterate, that where the Constitution has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of the Constitution or the law.

28. The Petitioner has also prayed that an order for exemplary and punitive damages issued against the 1st -5th Respondents jointly and severally, on account of their gross violation of his fundamental freedoms and rights as enshrined in the petition.
29. Article 23 (3) of the Constitution provides the following remedies:

In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation; and



(f) an order of judicial review.

30. This is a case of constitutional violation, which does not call for an award of compensatory damages in the traditional sense. Further, the award of damages is a secondary remedy, as was stated by the Constitutional Court of South Africa in the case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 as follows:

[T]he primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

31. I also derive guidance in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR in which the Court of Appeal addressed the issue of award of damages for infringement of constitutional rights and stated:

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004*. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. (emphasis ours). All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (emphasis ours).

32. The Court of Appeal went on to state:

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not



compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.

33. Duly guided by the dictum in the cited cases and having regard to the circumstances herein, I find that the justice of this case does not favour the grant of an award of damages for the breach of the Petitioner's constitutional rights. My view is that a declaration of violation of rights would be the appropriate remedy. In any event, no submissions were made to support the claim for damages.
34. I now turn to the issue of costs. Rule 26(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, provides that the award of costs is at the discretion of the Court. Given that this is not a public interest litigation, the circumstances herein call for an award of costs to the successful party.
35. Before I conclude, I wish to state that agencies of the State must at all times act in accordance with the constitution and the law. They must, in the discharge of their mandate accord due process to all persons. In the case of *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others* [2014] eKLR, Lenaola, J (as he then was) was of a similar view. He stated:
- This Judgment should serve as a wake up to all security agencies and those charged with issues of Immigration. Due process under the Constitution 2010 is not illusory. It lives and thrives whatever the status of the person who demands it. The casual response to the present Petition is worrying and the trend, if it continues, may lead to decisions that would in the end compromise national security.
36. Similarly, I associate with the sentiments of Aburili, J. who in the case of *Republic v Director of Immigration Services Ex-Parte Planet Motors Company Limited & another* [2016] eKLR stated:
- Furthermore, this court finds that if the applicants were such a threat to the security of this nation, then the court wonders why the respondent did not appear in these proceedings to furnish the court with relevant information that would assist in arriving at a different decision from the one I am about to make. Courts of law are under a duty to do justice and to protect the sovereignty of the nation of Kenya and its inhabitants. If there was evidence of the applicants being involved in any of the acts set out in section 33(1) of (2) of the relevant Act, this court would be happy to direct that the respondent, nonetheless, follows the legal procedures for deporting such persons. High handedness is abhorred by the law.
37. As demonstrate herein, the Respondents did not follow due process in dealing with the Petitioner. Worse still, they did not even bother to respond to the Petition. As stated by Lenaola, J. (as he then was) the constitutional requirement for due process is not illusory but obligatory. The Court abhors the practice of State agencies of treating suits against them casually. Due to default on the part of the Respondents, the Court did not have the benefit of the hearing the State's side of the story and may have arrived at a decision that may in the end compromise national security.
38. The upshot is that after considering the facts and the law herein, I find that the Petition dated April 13, 2022 is merited and I make the following orders:
- i. A declaration be and is hereby made that the decision to tag the Petitioner as a prohibited immigrant without any lawful cause and due process is unconstitutional/unlawful.



- ii. A declaration be and is hereby made that the Petitioner is by law entitled to due process if a decision is to be made declaring him a prohibited immigrant.
- iii. A declaration be and is hereby made that the Petitioner is by law entitled to due process if a decision is to be made removing him from the jurisdiction of the Court.
- iv. A declaration be and is hereby made that the failure by the 1st, 2nd and 3rd Respondents to issue the Petitioner with a written explanation for removing him from the jurisdiction of the Court is illegal, unlawful and amounts to a denial, breach and violation of the Petitioner's fundamental rights and freedom under Article 47(1) and (2) of the Constitution of Kenya.
- v. A declaration be and is hereby made that under and by virtue of the provisions of Article 27(1) of the Constitution of Kenya the Petitioner is entitled to equal protection of the law.
- vi. A declaration be and is hereby made that the absence of the Petitioner from his family in Kenya by virtue of the actions/decision of the Respondents, is in breach and violation of his fundamental rights and freedoms under Article 45(1) and 53(1)(e) of the Constitution of Kenya.
- vii. A declaration be and is hereby made that the Respondents are in breach of the Petitioner's fundamental rights and freedoms under Article 39(1) of the Constitution of Kenya.
- viii. An order is hereby issued to the 1st Respondent to permit the Petitioner to enter into and remain in Kenya and should a decision be made to remove him from Kenya, then due process shall be followed.
- ix. The Petitioner shall have costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY 2023

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondents**

..... **Court Assistant**

