



Kahia v Inspector-General of Police & 5 others; Chief Licensing Officer, Firearm Licensing Board & another (Interested Parties) (Constitutional Petition E413 of 2021) [2023] KEHC 1089 (KLR) (Constitutional and Human Rights) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E413 OF 2021**

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

OSMAN AHMED KAHIA PETITIONER

AND

INSPECTOR-GENERAL OF POLICE 1ST RESPONDENT

DCI 2ND RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES 3RD RESPONDENT

CS, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

DPP 6TH RESPONDENT

AND

CHIEF LICENSING OFFICER, FIREARM LICENSING BOARD .. INTERESTED PARTY

PRINCIPAL REGISTRAR, NATIONAL REGISTRATION BUREAU INTERESTED PARTY

There is a need for law reform on the aspect of revocation of citizenship by birth.

Reported by Kakai Toili

Constitutional Law – citizenship – citizenship by birth – revocation of citizenship by birth – procedure – applicable procedure in the absence of express statutory provisions – whether citizenship by birth could be revoked,



and under what circumstances – whether, in the absence of an express statutory framework for revoking citizenship by birth, the procedure prescribed in section 21 of the Kenya Citizenship and Immigration Act (for revocation of citizenship by registration), or the procedural safeguards under article 47 of the Constitution and the Fair Administrative Action Act, could be applied with necessary modifications – Constitution of Kenya, articles 10, 27, 39, 43, and 47; Kenya Citizenship and Immigration Act (cap 170) sections 2 and 43.

Constitutional Law – *fundamental rights and freedoms – right to human dignity – freedom of movement – right to fair administrative action – attempted revocation of citizenship by birth and deportation – whether the attempted revocation of the petitioner’s citizenship, confiscation of identification documents and firearm, and attempted deportation amounted to violations of the petitioner’s rights to human dignity, freedom of movement, equality and freedom from discrimination, and fair administrative action – Constitution of Kenya, articles 10, 27(1), 28, 39, and 47; Kenya Citizenship and Immigration Act (cap 172) sections 21 and 43; Fair Administrative Action Act (cap 7L) section 4.*

Constitutional Law – *immigration law – removal from Kenya – whether persons unlawfully present in Kenya could be removed without being afforded an opportunity to be heard – application of constitutional due process guarantees in removal proceedings—Constitution of Kenya, articles 27, 39, and 47.*

Brief facts

The petitioner averred that he was a Kenyan citizen by birth. In June 2021, he was summoned by officers from the 2nd respondent, the Directorate of Criminal Investigations (DCI), to report to their offices on July 22, 2021. However, on July 21, 2021, he was arrested by agents of the 1st respondent (Inspector General of Police), the DCI, the 3rd respondent (Director of Immigration Services), and the 4th respondent (Cabinet Secretary for Interior and Coordination of National Government).

While in custody, the petitioner alleged that he was denied access to his family and legal counsel, was not informed of the reasons for his arrest, and had his national identity card, mobile phone, and lawfully licensed firearm with its certificate confiscated. He subsequently filed a constitutional petition alleging violations of various fundamental rights and freedoms, alongside an interlocutory application seeking conservatory orders. The court granted interim orders directing the return of his identity card and restraining the respondents from removing him from the court’s jurisdiction pending the determination of the application and the petition. Despite these orders, the respondents failed to return his identity card, prompting the petitioner to file an application for contempt of court against them.

Issues

- i. What were the circumstances in which citizenship by birth could be revoked?
- ii. What was the applicable procedure for revoking citizenship by birth?
- iii. Whether persons unlawfully present in Kenya could be removed without being afforded an opportunity to be heard.
- iv. Whether, in the absence of express statutory procedures for revoking citizenship by birth, the procedure under section 21 of the Kenya Citizenship and Immigration Act (for revocation of citizenship by registration) or the safeguards in article 47 of the Constitution and the Fair Administrative Action Act could be applied with necessary modifications.
- v. Whether the attempted revocation of the petitioner’s citizenship, confiscation of his identification documents and firearm, and attempted deportation violated his rights to human dignity, freedom of movement, equality, and freedom from discrimination, and fair administrative action.

Held

1. The respondents were constitutionally empowered and statutorily mandated to investigate the manner in which persons acquired citizenship. The Constitution expressly recognized one instance under article 17(2) where citizenship by birth could be revoked. Apart from that instance, article 17 and the Kenya Citizenship and Immigration Act only expressly provided for the revocation of citizenship acquired by registration.



2. A purposive and holistic reading of the Constitution supported the conclusion that citizenship by birth could also be revoked if, *inter alia*, it was proved that at the time of birth neither parent was a Kenyan citizen, or if the parents' citizenship had been unlawfully obtained, or if the citizenship was procured through fraud, misrepresentation, or where the person held another nationality.
3. The absence of clear statutory provisions in the Kenya Citizenship and Immigration Act created a legislative lacuna that required law reform to expressly provide for the circumstances and procedure under which citizenship by birth could be revoked.
4. In the present case, the respondents questioned the petitioner's citizenship by birth on grounds including fraud and misrepresentation. However, there was no specific statutory procedure governing the revocation of citizenship by birth. The only procedure provided in law, section 21 of the Kenya Citizenship and Immigration Act, applied to citizenship acquired by registration.
5. In the absence of a defined statutory procedure, the procedure under section 21 (with necessary modifications) was applicable by analogy, pending legislative reform. Alternatively, the procedural safeguards under article 47 of the Constitution applied.
6. Article 47(3) was operationalized by the Fair Administrative Action Act. Article 47 elevated administrative fairness beyond common law, imposing constitutional obligations on public administration to act transparently, lawfully, and procedurally whenever individual rights or legitimate expectations were affected.
7. The constitutional entrenchment of article 47 reflected a deliberate public demand for fairness, transparency, and accountability in administrative decision-making. Public officers were obliged to comply with these standards when exercising statutory powers.
8. The respondents had lawful authority to investigate, arrest, and remove from Kenya persons found to be in contravention of the law. However, the manner in which they handled the petitioner raised unanswered questions, casting doubt on the bona fides of their actions.
9. Whether or not investigations had been concluded before the petitioner's arrest, the respondents failed to demonstrate that they had complied with the elaborate legal processes required to revoke citizenship and effect removal from Kenya.
10. Even assuming the petitioner's presence in Kenya was unlawful, section 43 of the Kenya Citizenship and Immigration Act required the Cabinet Secretary to follow due process, including giving the affected person an opportunity to be heard, before issuing a removal order. No evidence was provided of compliance with this requirement.
11. The handling of the petitioner demonstrated non-compliance with article 27(1) of the Constitution, sections 21 and 43 of the Kenya Citizenship and Immigration Act, article 47 of the Constitution, and section 4 of the Fair Administrative Action Act. The alleged revocation of citizenship, attempted deportation, and confiscation of the petitioner's identity card, passport, and firearm were procedurally and substantively flawed.
12. The respondents were constitutionally and statutorily bound to act transparently and accountably. Compliance with article 10 of the Constitution would have ensured that the petitioner's fate was lawfully determined, either through a valid deportation process or criminal prosecution.
13. By failing to follow due process, the respondents infringed article 27(1) by denying the petitioner the procedural safeguards under sections 21 and 43 of the Act; infringed article 47 and section 4 of the Fair Administrative Action Act by failing to accord fair administrative procedures; violated article 39 on freedom of movement; and undermined article 28 on human dignity.
14. There was no evidence of wrongdoing by the Director of Public Prosecutions. No charges had been authorized against the petitioner, and therefore no constitutional breach was attributable to the DPP.
15. The petitioner's arrest was not unlawful per se, as the respondents had the power to investigate offences. However, procedural lapses in the subsequent handling of the matter meant that allegations of discrimination under article 27(4) were unproven.



16. Although the petitioner invoked article 43 on economic and social rights, no evidence was provided to demonstrate any violation of rights under that provision.
17. While there was some delay in complying with the court's interim orders, the respondents ultimately complied and explained the delay. In the circumstances, the threshold for contempt of court was not met.

Petition partly allowed.

Orders

- i. *The petitioner's case against the DPP was dismissed.*
- ii. *The notice of motion dated November 15, 2021 was dismissed.*
- iii. *A declaration was issued that the attempted revocation of the petitioner's citizenship by birth and the subsequent deportation attempt of the petitioner were in violation of article 27(1) of the Constitution and sections 21 and 43 of the Citizenship and Immigration Act for infringing on the petitioner's right to equal protection and benefit of the law. Alternatively, the attempted revocation of the petitioner's citizenship and the attempted deportation were contrary to article 47 of the Constitution and section 4 of the Fair Administrative Actions Act for want of fair administrative procedures.*
- iv. *A declaration was issued that the confiscation of the petitioner's national identity card, passport and the civilian firearm, make CZ P-07 ceska, three ceska magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm certificate and a corresponding firearm card were in violation of article 47 of the Constitution and section 4 of the Fair Administrative Actions Act for want of fair administrative procedures.*
- v. *An order of certiorari was issued bringing the decisions to revoke the petitioner's citizenship and to subsequently deport him from Kenya and the decisions to confiscate the petitioner's national identity card, passport and the civilian firearm, make CZ P-07 ceska, three ceska magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm certificate and a corresponding firearm card before the court for quashing. The said decisions were declared unconstitutional, null and void ab initio and of no legal effect. The decisions were thereby quashed.*
- vi. *For clarity, the respondents were at liberty to carry out investigations on the citizenship of the petitioner and take appropriate action, as the case may be, as long as they keep within the confines of the Constitution and the law.*
- vii. *An order of mandamus was issued directing the 1st, 2nd, 3rd and 4th respondents to forthwith release to the petitioner the petitioner's passport and the civilian firearm, make CZ P-07 ceska, three ceska magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm certificate and the corresponding firearm card.*
- viii. *The Attorney General shall take up the issue of law reform on the revocation of citizenship acquired by birth.*
- ix. *No order as to costs.*

Citations

Cases

Kenya

1. *Attorney General v David Ndii & 73 others* Petition 12 (E016) of 2020; [2021] KESC 17 (KLR) - (Mentioned)
2. *Imanyara, Gitobu & 3 others v Attorney General* Petitions 78, 79, 80 & 81 of 2010 (Consolidated); [2012] KEHC 845 (KLR) - (Mentioned)
3. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 3 (KLR) - (Mentioned)
4. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Mentioned)



5. *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR - (Explained)
6. *Kiboi, Stephen Njoroge v Daniel Nguli Kyalo* Civil Case 104 of 1999; [2003] KEHC 741 (KLR) - (Mentioned)
7. *Kitheka, Simeon Kioko & 2 others v County Government of Machakos & 3 others* Petition 3 of 2016; [2016] KEHC 373 (KLR) - (Mentioned)
8. *Kitbinji, Dickson v Peter Munya Gatirau & 2 others* Election Petition 1 of 2013; [2013] KEHC 2723 (KLR) - (Mentioned)
9. *Matiang'i, Fred the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* Civil Application 1 of 2017; [2018] KECA 789 (KLR) - (Mentioned)
10. *Muema v OCS, Langata Police Station & 4 others* Constitutional Petition E089 of 2021; [2022] KEHC 13194 (KLR) - (Mentioned)
11. *Naz, Mohammed Ibrahim v Cabinet Secretary Responsible for Matters relating to Citizenship and the Management of Foreign National & another* Petition 333 of 2013; [2013] eKLR - (Followed)
12. *Njuguna, Fredrick v Republic* Criminal Application 44 of 2002; [2002] KECA 69 (KLR) - (Mentioned)
13. *Omukanda, Florence Amunga & another v Attorney General & 2 others* Petition 132 of 2011; [2016] KEHC 3667 (KLR) - (Explained)
14. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Civil Application Nai 307 of 2003; [2007] KECA 21 (KLR) - (Mentioned)
15. *Republic v Chief Magistrate, Resident Magistrate's Court at Nairobi - Milimani Commercial Courts ex-parte Safaricom Limited & 2 others* Miscellaneous Civil Application 299 of 2012; [2014] KEHC 6511 (KLR) - (Mentioned)
16. *Republic v Attorney General & 3 others* Miscellaneous Application 499 of 2009; [2010] KEHC 1693 (KLR) - (Mentioned)
17. *Total Kenya Limited v Kenya Revenue Authority* Civil Application 135 of 2012; [2013] KECA 437 (KLR) - (Mentioned)

South Africa

1. *Fose v Minister of Safety and Security* (CCT 14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Mentioned)
2. *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT 16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 - (Explained)
3. *South African Social Security Agency v Minister of Social Development and others* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) SASSA) - (Explained)

United Kingdom

1. *Gaily v Attorney-General* [2001] 2 RC 671; [2001] UKPC 30 - (Mentioned)
2. *O'hara v Chief Constable of the Royal Ulster Constabulary* [1997] All ER 129 - (Mentioned)

Trinidad and Tobago

Ramanoop v Attorney General TT 2003 CA 19 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 10, 12- 18, 20; 21, 27, 28, 43, 47, 49(2); 50; Chapter 3; schedule sixth; clause 30 - (Interpreted)
2. Contempt of Court Act (cap 8F) section 38 - (Interpreted)
3. Criminal Procedure Code (cap 75) section 29 - (Interpreted)
4. Fair Administrative Actions Act (cap 7L) section 47(3) - (Interpreted)
5. Firearms Act (cap 114) In general - (Cited)
6. Judicature Act (cap 8) section 5 - (Interpreted)



7. Kenya Citizenship and Immigration Act (cap 170) sections 43, 49(2) - (Interpreted)
8. National Police Service Act (cap 84) section 58 - (Interpreted)
9. Penal Code (cap 63) section 26A - (Interpreted)
10. Registration of Persons Act (cap 107) section 6(1) - (Interpreted)
11. Supreme Court Act (cap 9B) In general - (Cited)

Advocates

Mr. Otiende for the petitioner

Miss. Chibole for the 1st - 5th respondents and the interested parties

JUDGMENT

Background:

1. The petitioner herein, Osman Ahmed Kahia, averred that he was a Kenyan Citizen by birth. It is his case that he is the holder of National Identity Card No 24xxxxxx and Passport Number BK 0xxxxx.
2. Sometimes in June 2021, the petitioner was summoned by officers of The Directorate of Criminal Investigations, ('2nd respondent' herein or 'the DCI') to report to their offices on July 22, 2021.
3. However, on July 21, 2021, a day before the appointed date, the petitioner was arrested whilst coming from Jamia Mosque in Nairobi by agents of the Inspector General (the 1st respondent'), the DCI, the Director of Immigration Services (the 3rd respondent') and the Cabinet Secretary, Ministry of Interior and National Coordination ('the 4th respondent').
4. While in custody of the 1st, 2nd, 3rd and 4th respondents' agents at Nairobi Central Police Station, it is the petitioner's case that he was kept at the parking area for four hours without being booked at the said station.
5. It is his case further that he was neither allowed to communicate with family members, his legal counsel nor informed of the reason for the arrest.
6. The petitioner claimed further that his identity card, mobile phone and lawfully possessed firearm (Serial No C332319 CZ P-07 Ceska) and corresponding card were confiscated.
7. He claimed that he was later taken to an open field in Pangani Police Station where he was detained in a car until 2200hrs and later, was taken to Jomo Kenyatta International Airport (JKIA) where he was detained overnight in a cell.
8. On July 23, 2021, the petitioner claimed that he was instructed to see the agent of the 3rd respondent, but declined for reason that he had not been in travel, had been denied the right to counsel, was sickly and hungry and exhausted and physically exhausted.
9. The petitioner claimed that that he was later handed back his phone and was taken to the 3rd respondent's at Nyayo House for interrogation. At the place, he was kept waiting until 1630hrs when the Investigating Officer, Mr Baya interrogated him and admitted him to free bond with instructions that he returns on July 26, 2021.
10. The petitioner claimed that on July 26, 2021, he returned to Nyayo House, recorded a statement, and was directed to proceed to Nairobi Central Police Station where he was admitted to cash bail of Kshs 50,000.



11. The petitioner was subsequently arraigned in court on July 28, 2021 where he was informed that his file was not ready. His cash bail was extended to August 3, 2021 and then to 12th, 19th and August 25, 2021 on the basis that the file was not ready.
12. It is his case that he was subsequently arranged on September 1, 2021 and eventually on September 15, 2021 when he was informed that he would be summoned to court whenever the respondents required.

The Petition:

13. Through the petition dated October 8, 2021, supported by the petitioner's affidavit deposed to on a similar date and two other affidavits deposed to on 7th and 15th January, 2022 respectively, the petitioner approached this court claiming violation of various constitutionally-guaranteed rights and fundamental freedoms by the respondents.
14. Contemporaneously filed with the petition was an application by way of notice of motion supported by the affidavit of the petitioner. The application sought for interlocutory conservatory orders.
15. On October 26, 2021 this court directed that the application be subsumed in and be heard together with the petition.
16. In the main, the petitioner pleaded that the respondents were being weaponized as a result of ongoing land disputes in Mombasa ELC Petition No 9 of 2018, Mombasa ELC CC No 273 of 2017, Mombasa ELC CC No 405 of 2017, Mombasa ELC CC No 92 of 2020, Mombasa ELC CC No 39 of 2020, Mombasa ELC Petition No 64 of 2017 and Mombasa ELC Petition No 202 of 2018 (now No 4 of 2020) between him and third parties.
17. It was his case that with the intention of the arrest was to get him deported, an act that would render him stateless without due process on account of false accusations fabricated by the respondents.
18. He pleaded that the respondents' actions are meant to coerce him into dropping the cases in Mombasa which some high-ranking government officials have interests on due to the pending compensation for sections that have been compulsorily acquired for development of Standard Gauge Railway.
19. It was his case that the confiscation of his National Identity Card had resulted in his inability to travel, seek and transact banking and mobile money services, pay his workers and participate in entrepreneurial dealings, a source of his livelihood.
20. With respect to his firearm, he posited that despite being in lawful possession and never using it, he now feels exposed and insecure especially considering the ongoing land disputes.
21. He pleaded that the letter by the 2nd respondent to the Chief Licensing Officer, 1st interested party herein, stating that his firearm had been seized from him during deportation was false and misleading on grounds including, the fact that he had never been the subject of deportation order neither had he been the subject of legal inquiry leading to the finding that he is a stateless person.
22. He further pleaded that being the sole breadwinner, his inability to access his funds has had negative impact on his family.
23. The petitioner pleaded that deprivation of personal liberty, by the respondents was not in conformity with the Constitution and internationally recognized standards.
24. It was further his case that the scheme to have him deported was without justification in law and an extra-judicial deprivation of his liberties and right to property.



25. With respect to detention, the petitioner pleaded that being held in a car at a parking yard at Nairobi Central Police Station, at Pangani and at the holding cell at JKIA was illegal since the said places are not gazetted as police stations and there was no basis for sidestepping formal institutions authorized by law for purposes of taking custody.
26. The petitioner was aggrieved that the totality of the respondents' action was a derogation of National Values and Principles expected of State Officers and Public Officers provided for under article 10 as read with article 20 of the Constitution which binds state organs and persons to uphold the Bill of Rights.
27. It was his case that he was not accorded equal protection of the law a right guaranteed under article 27 of the Constitution and that the respondents conduct was not in line with limitation of rights provided for under article 24 of the Constitution.
28. He further pleaded that the conduct of the respondents violated his right to dignity and right to freedom of security of the person otherwise guaranteed under articles 28 and 29 of the Constitution respectively.
29. Based on the foregoing, the petitioner sought interim reliefs in the application in the following terms: -
 1. Spent
 2. That pending the hearing of the application and the petition, this honourable court be pleased to issue and order respectively directed at the respondents jointly and severally by themselves their agents, officers or whomsoever else is acting on their behalf restraining them from deporting or removing the applicant from the territory of Kenya.
 3. That pending the hearing of the application and the petition, this honourable court be pleased to issue and order respectively directed at the respondents jointly and severally by themselves their agents, officers or whomsoever else is acting on their behalf to surrender to the applicant his national Identity Card Number 24xxxxx, forthwith and from preventing or in any other manner whatsoever or howsoever from interfering with the petitioner's right of being a Kenyan Citizen.
 4. That pending the hearing of the application and the petition, this honourable court be pleased to issue and order respectively directed at the respondents jointly and severally by themselves their agents, officers or whomsoever else is acting on their behalf to surrender to the applicant his lawfully acquired civilian firearm Serial No C332319, make CZ P-07 Ceska, three Ceska Magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm Certificate Number 003xxx and a corresponding firearm card.
 5. Pending hearing and determination of this application, the honourable court be pleased to issue a restraining order against the respondent whether by themselves agents and servants and whosoever acting under their authority or instruction from charging, prosecution, arrest, continued harassment, questioning, intimidation, apprehension on any matter concerning the applicant's registration status as a citizen of Kenya.
 6. Pending hearing and determination of this petition, an order of injunction be and is hereby granted restraining the respondents whether by themselves by agents, privies and servants, acting for and on their behalf whether jointly or severally from harassing in any manner whatsoever intimidating, causing the arrest/prosecuting, threatening to arrest or to prefer criminal charges and/or interfering with the applicant's fundamental rights and freedoms in respect to any matters under investigations by the National Registration Bureau and the



Firearms Licensing an the Directorate of criminal Investigations or further interfering in the petitioners enjoyment of the fundamental rights as guaranteed by the Constitution.

7. That the costs of this application be provided for;
 8. For any other relief that the honourable court may deem just and expedient to grant in the circumstances.
30. In the main, the petitioner prayed for the following reliefs: -
- a. A declaration be and is hereby issued that the seizure and confiscation of the petitioner's National Identity Card Number 24xxxxxx and lawfully acquired civilian firearm Serial Number C332319, make CZ P-07 CESKA, three CESKA magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition) a firearm Certificate number 003xxx and a corresponding firearm card are violations against the petitioner's fundamental right against deprivation of private property of whatever description guaranteed by article 40(3) of the Constitution.
 - b. A declaration be and is hereby issued that the manner in which the respondents conducted themselves resulting in his detention, the confiscation of his National Identity card and lawfully acquired firearm and related documents and attempted removal from Kenya were done in violation of the rule of law and in direct contravention of provisions of the Constitution that guide each of the named respondents and was therefore an abuse of office.
 - c. A declaration be and is hereby issued that detaining the petitioner without justification and without informing him of the reasons of detention, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death and physical harm, denying him food and basic sanitation services, was a violation of the petitioner's rights protected in article 29 of the Constitution on freedom and security of the person
 - d. A declaration be and is hereby issued that the actions of the Respondents effectively infringes on the petitioner's rights on dignity (article 28), property (article 40), family (article 45) rights of a detained person, arrested and persons held in custody (article 51) and all other rights that flow with the right to citizenship.
 - e. A mandatory injunction directed against the respondents and the interested parties compelling them to forthwith return the petitioner's National Identity Card Number 24xxxxxx and lawfully acquired civilian firearm Serial Number C332319, make CZ P-07 ceska, three ceska magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition) a Firearm Certificate number 003xxx and a corresponding firearm card, and forthwith from preventing or in any other manner whatsoever or howsoever from interfering with the petitioner's right of being a Kenyan citizen.
 - f. An order for general, exemplary/vindictory and/or punitive damages against the respondents consequential to declaration of violations of the fundamental rights and freedoms of the petitioner in the prayers above
 - g. Cost of the petition.
 - h. Interests on all monetary awards.
 - i. That this court be pleased to grant such further order or orders as may be just and appropriate.



31. In the interim, this court made interim orders; prayer 2 (returning to the petitioner his National Identity Card) and 5 (restraining the respondents from removing the petitioner from the court's jurisdiction) the pending the hearing of the application and the petition.
32. Despite the foregoing orders, the respondents failed to avail to the petitioner his National Identity Card.
33. The respondents' conduct subsequently yielded the petitioner's yet another application by way of notice of motion dated November 15, 2021 where he sought orders on contempt of court, (hereinafter referred to as 'the contempt application'). The application was supported by the petitioner's affidavit deposed to on even date.
34. The contempt application sought the following prayers: -
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to issue summons to the following persons to appear in person before the honourable court to show cause why they should not be punished for contempt;
 - i. Director-General, Department of Immigration Services.
 - ii. James Githinji, In Charge, Directorate of Criminal Investigations, Department of Immigration.
 - iii. Fredrick M Baya Director of Immigration Services based on the 7th Floor, Nyayo House; and
 - iv. Jimmy Edwin Nyikuli, a legal officer in the Investigations and prosecution section of the Department of Immigration Services.
 4. That persons whose name appear in (3) above be committed to civil jail for a period of six months for contempt of Court and each to be condemned to pay a fine of Kshs 200,000.
 5. That in view of the conduct of persons named in (3) above and for reasons to be recorded, pending the hearing of the petition, this honourable court be pleased to issue an order compelling and respectively directed at the respondents jointly and severally by themselves their servants, agents officers whomsoever else is acting on their behalf to forthwith conduct the necessary ballistic tests on the firearm and surrender to the applicant his lawfully acquired civilian firearm Serial Number C332319, make CZ P-07 CESKA, three CESKA magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition) a Firearm Certificate number 003xxx and a corresponding firearm card,
35. The contempt application was also heard alongside with the Petition.

The Submissions

36. The petitioner filed written submissions dated February 14, 2022.
37. It isolated seven issues for determination as follows; whether his arrest and detention violated his constitutional rights; whether there was factual basis for investigations and possible prosecution; whether there was justification for confiscation of his identity card, firearm, ammunition and



corresponding card; whether it was legally justified to attempt to remove him from Kenya; whether he is entitled to punitive damages and who should bear the costs.

38. On the issue of arrest and detention, it was submitted that the respondents acted outside the confines of the law.
39. Reference was made to section 36 of the Criminal Procedure Code which allows a person to challenge the power to arrest without warrant by court when it is exercised in violation of human rights.
40. It was submitted further that his arrest was in violation of section 29 of the *Criminal Procedure Code* which allows for arrest without warrant on reasonable suspicion of having committed a cognizable offence or when a person breaches peace in the presence of a police officer.
41. It was further submitted that his arrest was in violation of section 58 of the *National Police Service Act* which provides for power to arrest without warrant as read with article 49(2) of the *Constitution* which forbids remanding of a person for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.
42. To fortify the foregoing illegality by the respondents, the petitioner relied on the decision in Civil Appeal No 89 of 2010, *Daniel Waweru Njoroge & 17 others v Attorney General* [2015] eKLR, where the learned judge adopted the decision in *O'hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC where it was observed: -
- ... The reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention.
- ...the court agrees with the commission and government that having a reasonable suspicion presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed an offence. What may be regarded as 'reasonable' will however depend upon all the circumstances...
43. The petitioner summed up the issue of unlawful arrest by submitting that the conduct of the respondents violated his right to dignity as it was devoid of reasonableness and rationality.
44. It was the petitioner's position the unlawful deprivation of his liberty and can only be vindicated by exemplary damages.
45. He submitted that the onus of proof of lawfulness resides with the respondents. To that end, he relied on the decision in *Akusala Boniface v OCS Lang'ata Police Station & 4 others* [2018] eKLR.
46. On the issue of equal benefit of the law and non-discrimination, it was submitted that he was unfairly and arbitrarily profiled and discriminated against for having Cushitic attributes and held out to be a Somali.
47. In claiming that there was no basis for his investigation and prosecution, the petitioner urged the court to find guidance from the decision in *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 where it was observed;
- ... it is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform...
48. On the foregoing, it was the petitioner's case that under article 157 of the *Constitution*, the Director of Public Prosecutions, is not a conveyor belt for every allegation and investigation placed before him.



49. In rebutting propriety of confiscation of his firearm, ammunition and corresponding certificates and permits, the petitioner submitted that he had been lawful firearm holder having acquired it in strict compliance with *Firearms Act* and the regulations thereon.
50. It was his position that he renewed his firearm certificate on April 26, 2021 and has never used the firearm or accused of using it in a manner inconsistent with the law.
51. In respect to his National Identity Card, it was his case that its confiscation was not in tandem with article 12(c) of the *Constitution* as read with section 6(1) of *Registration of Person's Act*.
52. The petitioner relied on the case of *Miguna Miguna v Fred Okeng'o Matiang'i* where it was observed *inter-alia*: -

Even if the 1st Respondent had the power to revoke citizenship, he had to comply with the law namely section 21 of the Act. The section is clear that where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, the Cabinet Secretary may revoke citizenship acquired by registration on the grounds specified in article 17 of the *Constitution*.

53. In submitting on illegality of the attempt to remove him from Kenya, the petitioner referred to section 43 of *Kenya Citizenship and Immigration Act* on the powers to remove persons unlawfully in Kenya and the decision in *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters relating to Citizenship and the Management of Foreign National & another* [2013] eKLR where it was observed: -

... The requirement in removing an alien from a state's territory, as provided under the above convention and in accordance with the constitutional provisions contained in article 47, is such that such removal should be in accordance with the law, that due process should be followed.

54. Based on the foregoing, the petitioner submitted that this court has supervisory jurisdiction under article 165(6) to review the decision of the respondents.
55. In conclusion the petitioner urged the court to award him exemplary damages of Kshs 5,000,000 for violation of his rights and fundamental freedoms. The decision in *Florence Amunga Omukhanda & another v Attorney General & 2 others* [2016] eKLR was relied upon.
56. On the issue of costs, it was submitted that since the respondents are public officers who acted in flagrant disregard of the law, they should be held personally liable to costs.
57. The petitioner relied on the South African Court decision in *South African Social Security Agency v Minister of Social Development* (Corruption Watch (NPC) RF Amicus Curiae) [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) SASSA where it was observed: -

...it is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation.

58. By and large, the petitioner prayed that the Petition and the applications be allowed as prayed.



The Responses:

The 1st to 5th respondents' & interested parties' cases:

59. The 1st to 5th respondents & interested parties were all represented by the Hon Attorney General. They opposed the petition and the applications through grounds of opposition dated December 16, 2021 and the replying affidavit of Jimmy Nyikuli, a Principal Immigration Officer in the Investigations and Prosecution Section of the State Department of Immigration deposed to on March 9, 2022.
60. In the grounds of opposition, it was the respondents' and the interested parties' cases that the petition is an abuse of the due process this court and in forum shopping since the petitioner had previously moved this same court in Nairobi High Court Petition No E285 of 2021: *Osman Ahmed Kahia v Inspector-General & 7 others*.
61. It was stated that in the said case, the petitioner was being investigated on allegation *inter-alia*; having obtained Kenyan identification documents through fraud and false pretences; making false declaration for a passport and for giving false information to a person employed in the public service.
62. On the foregoing, it was stated that allowing the application would hamper the constitutional and statutory mandate of the respondents.
63. In defending the move to arrest the petitioner, it was the respondents and interested parties' case that the petitioner was lawfully arrested for questioning in accordance with the statutory mandate of the respondents under *inter alia* section 49(2) of the *Kenya Citizenship and Immigration Act* which gives power to an immigration officer or a police officer to arrest any person, if he has reasonable cause to believe that a person has committed an offence.
64. It was further its case that they were not aware of any land disputes in Mombasa and to that end, the petitioner had not discharged the evidentiary burden of proof showing involvement of high-ranking Government officials.
65. The respondents and interested parties further challenged the petition for failure to identify with reasonable specificity constitutional violations.
66. With respect to the claim of violation of article 27, 28, 36, 39, 40, 43, and 47 of the *Constitution*, it was stated that the said rights are not non-derogable rights since they are subject to limitation set under article 24 of the *Constitution*.
67. In urging the court to dismiss the petition, the respondents and the interested parties stated that the petitioner's rights under article 25 continue to be protected and is only using the instant petition to delay and shield him from investigations regarding his true identity.
68. In the replying affidavit, Mr Nyikuli largely reiterated the position as asserted in the grounds of opposition.
69. He, however, hastened to add that the petitioner had withdrawn Nairobi High Court Petition No E285 of 2021: *Osman Ahmed Kahia v Inspector-General & 7 Others* since no conservatory orders had been obtained in the said petition.
70. He deposed further that they received information on or about July 2021 that the petitioner was a foreign national living in Kenya using illegally acquired registration documents.
71. It was his case that upon conducting investigations, it was established that the petitioner obtained his passport by giving false information concerning his date of birth and details of his parents.



72. To that end it was his deposition that according to their records and information provided by the petitioner, while applying for his new generation passport, the petitioner indicated that he was born on January 1, 1974 and his mother was one Khadija Isa Hassan whereas the initial information indicated that he was born to Ahmed Kahia and Halima Ibrahim in the year 1984.
73. It was its case that the petitioner gave false information to a person employed in the Public Service contrary to section 129 of the Penal Code and section 53(1)(a) of [Kenya Citizenship and Immigration Act](#) in order to obtain his National Identification Card and Passport.
74. He deposed that the petitioner was, therefore, lawfully arrested for questioning as to his real identity pursuant to section 49(2) of [Kenya Citizenship and Immigration Act](#).

Response to the contempt application:

75. The 1st to 5th respondents & interested parties opposed the contempt application through grounds of opposition dated November 29, 2021.
76. They sought to strike out the said application on the following grounds: -
1. The instant contempt application is not hinged on any lawful law in that;
 - a. Section 5 of the [Judicature Act](#), cap 8 that is relied upon by the applicant was repealed by section 38 of the [Contempt of Court Act](#), 2015;
 - b. There is no law creating an offence known as “contempt of court”;
 - c. There is no penalty prescribed in law for contempt of court;
 - d. [Contempt of Court Act](#) was declared to be unconstitutional by the Hon EC 7 of 2017 vide a judgment delivered on November 9, 2018.
 - e. Therefore, by dint of sections 20 to 23 of the Interpretations and General Provisions Act, cap 2 of the laws of Kenya, there is no law on contempt of court.
 2. The alleged contemnors are yet to be personally served with the notice to show cause contrary to judicially set principles.
 3. Based on the constitutional principles of the right to a fair hearing and the bill of rights, the applicant is to comply with the known principles of law for the reasons that:
 - i. Contempt of court is quasi criminal in nature hence the notion of penal consequences that are likely to take away and/or limit the liberty of the alleged contemnors should they be found to be in contempt;
 - ii. The limitation of the rights as a result of the alleged contempt of court ought to be prescribed by law pursuant to article 24 of the [Constitution](#);
 - iii. The alleged contemnors ought to be charged with a charge sheet being read to them;
 - iv. The alleged contemnors reserve all the rights of an accused person as guaranteed under the [Constitution](#);
 - v. Under what law will the charges be drawn, if at all?
 - vi. What is the minimum and maximum penalty for contempt of court?



- vii. On what basis does the applicant prescribe that the alleged contemnors be jailed for six months? What is the law on which that penal period is prescribed?
4. The instant notice of motion application is bad in law and devoid of any merits. The same forms a classical description of an abuse of the due process of this honourable court as the had also filed a similar suit against the same parties before this division vide Petition No 285 of 2021 [*Osman Ahmed Kabia v Inspector-General of Police & 7 others*].
5. Based on the constitutional principles of the right to a fair hearing and the bill of rights, a notice to show cause is unconstitutional.

The Submissions:

77. The, 1st - 5th respondents and interested parties further urged their case through written submissions dated May 16, 2022.
78. On denying that the respondents conduct constituted violation of the petitioner's rights, it was submitted that the instant petition was a bid by the petitioner to amend the previous petition in Nairobi High Court Petition No 285 of 2021; *Osman Ahmed Kahia v Inspector General & 7 others* for having failed to get the prayers sought.
79. It was submitted that this court ought to outrightly dismiss the petition. To buttress the position the decision in *Fortis Tower Management Ltd & another v Trend mark Computers Limited* [2018] eKLR was relied upon where it was observed inter-alia: -
- ...In cases where the court in which the case was filed is a seriously inappropriate forum, and the filing smirks of bad faith, the court should even dismiss the suit outright.
80. On the foregoing, the respondents and the interested parties submitted that the petitioner was not entitled to costs. Support to that end was drawn from the Court of Appeal decision in *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR where it was observed;
- ...in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...
81. In the end, it was submitted that the petitioner was interfering with institutional independence of the Police as provided for under the *National Police Service Act*. It was urged that the petition ought to be dismissed for lack of merit.

The 6th Respondent:

82. The Director of Public Prosecutions, 6th respondent herein, did not participate in these proceedings.

Analysis:

83. From the reading of the pleadings and parties' submissions, there is no doubt that the respondents are not only constitutionally-obligated, but also enabled by law to discharge their respective duties which involve investigations into the manner in which persons acquire citizenship.



84. What stands out in this case is the question of whether in discharging the said duties, the respondents kept within the Constitution and the law. This court will, therefore, interrogate the processes as undertaken by the Respondents with a view to ascertain if the Constitution and the law were upheld.
85. As the petition revolves around the issue of due process, articles 27(1) and 47 of the Constitution are outrightly triggered. Article 27(1) deals with whether a law in place was complied with whereas article 47 is on whether a party was accorded a fair administrative process.
86. In this case, on one hand article 27(1) of the Constitution will interrogate if the procedure laid down in the law on the revocation of the petitioner's citizenship, if any, and the subsequent deportation were complied with. On the other hand, article 47 will deal with whether in the processes of revocation of the petitioner's citizenship, the subsequent deportation attempt, the confiscation of the petitioner's National identity card, Passport and the firearm were in line with the fair administrative procedures' requirements of lawfulness, reasonability and procedural fairness.
87. Article 27(1) of the Constitution provides as follows: -
- Every person is equal before the law and has the right to equal protection and equal benefit of the law.
88. In the instant case, the petitioner contended that he is a Kenyan by birth. Chapter 3 of the Constitution (articles 12 to 18 inclusive), as read together with clause 30 of the sixth schedule of the Constitution provides for citizenship by birth.
89. The Constitution expressly recognises one instance where citizenship by birth may be revoked. That is under article 17(2) of the Constitution which states as follows: -
- (2) The citizenship of a person who was presumed to be a citizen by birth, as contemplated in article 14(4), may be revoked if—
- (a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;
- (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or
- (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.
90. Article 14(4) provides as follows: -
- A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.
91. Apart from the above single instance where revocation of citizenship by birth is provided for, the Constitution under article 17 as well as the Citizenship Act provide for instances where citizenship acquired by registration may be revoked.
92. Whereas it may appear that citizenship acquired by way of birth (save under article 17(2) of the Constitution) cannot be revoked since there is no such provision in the Constitution and the Citizenship Act, there is need to interpret the Constitution in line with article 259 of the Constitution alongside settled legal principles as discussed by the Supreme Court in various decisions and aptly captured by the High Court in David Ndiu & others v Attorney General & others [2021] eKLR (famous referred to as 'the BBI case').



93. In the *BBJ* case, the court captured with precision the manner in which our transformative Constitution ought to be interpreted. The learned judges presented themselves thus: -

399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

a) First, the *Constitution* must be interpreted holistically; only a structural holistic approach breathes life into *the Constitution* in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle in *Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The *Constitution* has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

c) Third, the *Constitution* has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In Re the Speaker of the Senate & Another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):

[155] In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the *Constitution*, 2010 and the *Supreme*



Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the *Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the *Constitution*. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the *Constitution* has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, in interpreting *Constitution of Kenya, 2010*, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya case. It stated thus:

[356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the *Constitution* that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.



[357] We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

[232] ...References to *Black's Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

[233] It is possible to set out the ingredients of the theory of the interpretation of the *Constitution*: the theory is derived from the *Constitution* through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the *Supreme Court Act*, that introduce non-legal phenomena into the interpretation of the *Constitution*, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the *Constitution* has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the *Supreme Court Act*, is to “facilitate the social, economic and political growth” of Kenya.

400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions.....

94. By applying the above approach, a holistic reading of the *Constitution* favours an interpretation to the effect even citizenship by birth can also be revoked if it is proved inter alia that on the day the person was born none of the parents were Kenyan citizens or if they were, the parents had obtained their citizenship by otherwise unlawful means or the instant person obtained the citizenship by unlawful means like fraud or misrepresentation or may be it is proved that the person was of another nationality.
95. Given the lacuna in the *Kenya Citizenship and Immigration Act*, No 12 of 2011 (hereinafter referred to as ‘the *Citizenship Act*’), and in line with article 18 of the *Constitution*, there is, therefore, need for law reform to ensure that the instances where citizenship by birth may be revoked are expressly provided for.
96. Having said so, it appears in this case that the respondents were faced with a situation where they impugned the petitioner’s alleged citizenship by birth on, among others, grounds of fraud and misrepresentation.
97. Faced with such a scenario, the respondents were not able to apply a specific provision of the *Constitution* and the *Citizenship Act* on the procedure in revoking the petitioner’s citizenship by birth. The only revocation procedure provided in law is in section 21 of the *Citizenship Act* which relates to cases where citizenship was acquired by way of registration and not by birth.



98. Section 21 of the [Citizenship Act](#) provides as follows: -

21. 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.

99. Since the [Constitution](#) and the Citizenship Act are silent on the applicable procedure in cases of revocation of citizenship by birth, then the procedure in section 21 of the [Citizenship Act](#) (with



necessary modifications) becomes applicable pending appropriate law reform. Alternatively, the provisions of article 47 of the Constitution will set in place in the absence of a defined procedure.

100. Article 47(1), (2) and (3) states that: -

- (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.

101. The legislation that was contemplated under article 47(3) is the Fair Administrative Actions Act. Section 4 thereof provides that: -

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

- (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.
- (4) 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.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in article 47 of the Constitution, the administrator may act in accordance with that different procedure.

102. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’, an ‘administrator’ and a ‘decision’ as follows: -

‘administrative action’ includes –

- (i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

"decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;

103. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission v Mbalu Mutava & another [2015] eKLR addressed itself to article 47 of the Constitution as follows: -

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.

104. In South Africa, the Constitutional Court in President of the Republic of South Africa and others v South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The court referred to section 33 of the South African Constitution which is similar to article 47 of the Kenyan Constitution. The Court expressed itself as under: -

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...

105. Article 47 of the Constitution, therefore, goes beyond being a mere codification of the common law principles on administrative action. Its main purpose 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...’. The entrenchment of article 47 in the Constitution was a deliberate move by Kenyans in demanding inter alia fairness, transparency and accountability in public administration. Public officers must, therefore, embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and execute administrative decisions complies with article 47 of the Constitution and the Fair Administrative Actions Act.
106. This court will now apply the foregoing to the facts in this case. The petitioner contended that he had been summoned to the DCI on a scheduled date. One day before the said date, he was arrested, taken round various police stations and ended up being held at the Jomo Kenyatta International Airport as he was in the process of being deported. It is this court that stopped the deportation of the petitioner pending further orders.
107. As stated earlier by this court, there is no doubt that the respondents have collective powers to investigate, interrogate, arrest and even deport persons who are in contravention of the Constitution and the law. In the instant case, if investigations reveal that the petitioner acted contrary to the law in obtaining the impugned documents then, as long as the respondents stay within the Constitution and the law, they are empowered to not only arrest and arraign the petitioner before court, but to also deport him accordingly.
108. However, the manner in which the respondents dealt with the petitioner left a chain of unanswered questions and the processes tainted the *bona fides*. The petitioner was never made aware of the alleged investigations before his arrest. As the allegations were serious in nature for they impacted on the integrity of the country, it behoved upon the respondents to call upon the petitioner, lay the allegations before him and get to the root of it all. This court believes that the respondents intended to accord the petitioner such an opportunity when they summoned him, but surprisingly he was arrested a day before the scheduled appearance.
109. From the respondents’ position in the matter, it may be that investigations were undertaken and concluded before the arrest of the petitioner. Unfortunately, the Respondents did not state as much in their responses. What they indicated was that they were still carrying out the investigations.
110. Be that as it may, even if the investigations were conducted and concluded and revealed culpability on the part of the petitioner, still it was incumbent upon the respondents to ensure that the elaborate due processes in law for revoking the petitioner’s citizenship and the subsequent deportation were properly so invoked. Again, there is no evidence of such compliance. More surprisingly, the petitioner was bonded to attend court on several times, but he was not charged and, unless otherwise stated, that position remains so to date.



111. To say the least, even in the event the petitioner's presence in Kenya was confirmed to be unlawful, still the provisions of section 43 of the *Citizenship Act* which gives powers to the Cabinet Secretary to remove persons unlawfully present in Kenya ought to have been complied with.

112. Section 43 elaborately provides as follows: -

Power to remove persons unlawfully present in Kenya:

(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 Tribunals 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) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.

(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.

(7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.

113. Whereas section 43 of the *Citizenship Act* gives the power to the Cabinet Secretary to make an order for the removal of such persons from Kenya, sub-section 3 calls upon the Cabinet Secretary to discharge such duties subject to the *Constitution* and the related laws. In that case, it goes without say that, at the



- very bare minimum, the person intended to be removed from Kenya must be accorded an opportunity to be heard before the order is finally made.
114. There seems to be no evidence pointing to the fact that the process under section 43 of the *Citizenship Act* was undertaken in this case.
 115. From the above discussion, it is apparent that the manner in which the Petitioner was handled in this matter is an affirmation that the respondents did not heed to the calling in article 27(1) of the *Constitution* as well as sections 21 and 43 of the *Citizenship Act*. Likewise, article 47 of *the Constitution* and the *Fair Administrative Actions Act* which called for want of compliance with due processes were not complied with.
 116. In such instances, the alleged revocation of the petitioner's citizenship, the subsequent deportation attempt, the confiscation of the petitioner's national identity card, passport and the firearm could not have been proper. For instance, the firearm was withdrawn on the basis that the petitioner was being deported. However, the alleged deportation has already been faulted above. Therefore, unless for other reasons to be tendered to the petitioner, the continued confiscation of the petitioner's firearm cannot legally stand. Likewise, the Passport was held on the basis of having been obtained fraudulently. Be that as it may, one wonders why the petitioner has not been charged since 2021 or alternatively why no deportation proceedings have since been initiated.
 117. The respondents are under a constitutional and statutory obligation to not only act transparently, but are also accountable. They cannot deal as it pleases and in opaque ways. Had the respondents handled the matter as per the dictates of article 10 of the *Constitution*, the petitioner would by now have known his fate. The petitioner would either have been legally deported or charged in a court of law.
 118. The respondents cannot, therefore, eat their cake and remain with it. In such instances, the *Constitution* and the law comes to the aid of the petitioner. Unless the Respondents comply with the procedural dictates of the *Constitution* and the law, the state of affairs can only revert to how they were before the impugned actions of the respondents.
 119. It is, therefore, the finding of this court that article 27(1) of the *Constitution* as read with sections 21 and 43 of the *Citizenship Act* and article 47 of *the Constitution* in conjunction with section 4 of the Fair Administrative Actions Act were variously infringed by the respondents. Article 27(1) of the *Constitution* was infringed to the extent that the respondents did not accord the petitioner the benefit of the procedures in sections 21 and 43 of the *Citizenship Act*. Article 47 of the *Constitution* as well as section 4 of the Fair Administrative Actions Act were flouted by the respondents' failure to accord the petitioner fair administrative procedures.
 120. Resulting from the foregoing, the petitioner's freedom of movement and residence guaranteed under article 39 of the *Constitution* was equally infringed. The state of affairs no doubt negatively impacted on the dignity of the petitioner. That was a violation of article 28 of the *Constitution*.
 121. As I come to the end of this issue, suffice to state that none of the allegations by the petitioner pointed to any wrong doing by the DPP. It is on record that the DPP is yet to authorize any charges against the petitioner and as such cannot be held to have acted contrary to the *Constitution*.
 122. Having so found, this court will now deal with the allegations of infringement of the other articles of the *Constitution*.
 123. As to whether the petitioner was unlawfully arrested, this court finds in the negative. The *Constitution* and the law accord the respondents powers to detect and investigate offences. What the respondents did could be summed up as carrying out investigations on the petitioner. The investigations are lawful



- and if they are yet to be completed, the respondents are under an obligation to either proceed on or drop the same.
124. The petitioner did not allege that he was arrested and confined contrary to article 50 of the Constitution. He was readily released on bond pending court appearance. The allegations that the petitioner was held in police cells which were of deplorable conditions remain unproved. There is no evidence in support of such allegations.
 125. The same trend follows the allegations that the petitioner was targeted for being of a Cushitic descent or a Somali. There is no evidence or at all in support of such serious allegations. That is the position in respect of the allegation that the investigations were targeted on deporting the petitioner as to defeat the land cases filed in court in Mombasa or to defeat the compensation due to the petitioner arising from land that was compulsorily acquired by the State for purposes of constructing the Standard Gauge Railway line.
 126. In sum, the contention that the petitioner was discriminated against contrary article 27(4) of the Constitution cannot hold.
 127. Article 43 of the Constitution is on economic and social rights. Apart from just mentioning the said provision, the petitioner failed to demonstrate, by way of evidence, how any of the rights in article 43 were flouted. The contention, therefore, also fails.
 128. Lastly is the contempt application. Whereas the Petitioners took some time to comply with the order of the court, they nevertheless did comply with it. The respondents explained why there was delay and the court intervened accordingly. And, with the intervention of the learned state counsel as directed by the court, the orders of the court were complied with.
 129. In the prevailing circumstances, this court, therefore, finds it a tall order to cite any of the respondents for contempt of court.
 130. On remedies, the petitioner sought for declarations and damages. In deciding on the nature of the relief to issue, this court must consider the most appropriate relief. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief.
 131. Courts have severally rendered on reliefs. The Court of Appeal in Total Kenya Limited v Kenya Revenue Authority (2013) eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in Simeon Kioko Kitbeka & 18 others v County Government of Machakos & 2 others (2018) eKLR held that article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.
 132. In Republic ex parte Chudasama v The Chief Magistrate's Court Nairobi and another, Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See Gaily v Attorney-General [2001] 2 RC 671; Ramanoop v Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago);



Wanjuguna v Republic [2004] KLR 520... The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See The Judicial Review Handbook (3rd Edn) by Michael Fordham at 361.

133. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

134. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR while dealing with the issue of damages as a relief in constitutional violations emphasized the need for appropriate and just remedies. On the power of declarations, the Learned Judges stated as follows: -

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. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy....

135. Given the nature of the allegations facing the petitioner, this is a case where declarations will suffice as appropriate remedies.

136. And, since the petition has partly succeeded and the respondents are still open to carrying out any further investigations against the petitioner, the most suitable order on costs is that each party do bear its own costs.

Conclusion:

137. As stated, the petition has, therefore, partly succeeded. Apart from sustaining the claim on the contravention of articles 27(1) and 47 of the *Constitution* and section 4 of the *Fair Administrative Actions Act*, the rest of the prayers sought in the Petition were unsuccessful.

138. In essence, the following conclusions come to the fore: -



- (a) Whereas the Constitution and the Citizenship Act are largely silent on the procedure to be undertaken in cases of revocation of citizenship acquired by birth, the procedure in section 21 of the Citizenship Act will, with appropriate modifications, be applicable pending law reform.
- (b) In instances where a person's citizenship by birth is impugned and the procedure in section 21 of the Citizenship Act is, for any reason, not applicable, then such a person must be accorded fair administrative procedures pursuant to article 47 of the Constitution.
- (c) There is need for law reform on the aspect of revocation of citizenship by way of birth.
- (d) The petitioner in this case was not accorded due process and was, alternatively, not accorded the protection and benefit of the law in the manner he was treated by the respondents.

Disposition:

- 139. Drawing from the foregoing, it is this court position that the petition and the applications can be safely determined.
- 140. Coming to the end, this court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
- 141. In the end, the petition and the applications are determined as follows: -
 - (a) The petitioner's case against the Director of Public Prosecutions is hereby dismissed.
 - (b) The notice of motion dated November 15, 2021 is equally dismissed.
 - (c) A declaration hereby issue that the attempted revocation of the petitioner's citizenship by birth and the subsequent deportation attempt of the petitioner were in violation of article 27(1) of the Constitution and sections 21 and 43 of the Kenya Citizenship and Immigration Act for infringing on the petitioner's right to equal protection and benefit of the law. Alternatively, the attempted revocation of the petitioner's citizenship and the attempted deportation were contrary to article 47 of the Constitution and section 4 of the Fair Administrative Actions Act for want of fair administrative procedures.
 - (d) A declaration hereby issues that the confiscation of the petitioner's National Identity Card No 24xxxxxx, Passport Number BK 01xxxx and the civilian firearm Serial No C332319, make CZ P-07 Ceska, three Ceska Magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm Certificate Number 003076 and a corresponding firearm card were in violation of article 47of the Constitution and section 4 of the Fair Administrative Actions Act for want of fair administrative procedures.
 - (e) An order of certiorari hereby issues bringing the decisions to revoke the petitioner's citizenship and to subsequently deport him from kenya and the decisions to confiscate the petitioner's National Identity Card No 24xxxxxx, Passport Number BK 01xxxx and the civilian firearm Serial No C332319, make CZ P-07 Ceska, three Ceska Magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm Certificate Number 003076 and a corresponding firearm card before this court for quashing. The said decisions are



hereby declared unconstitutional, null and void ab initio and of no legal effect. The decisions are hereby quashed.

- (f) For clarity, the respondents are at liberty to carry out investigations on the citizenship of the petitioner and take appropriate action, as the case may be, as long as they keep within the confines of the Constitution and the law.
- (g) An order of *mandamus* hereby issue directing the 1st, 2nd, 3rd and 4th respondents to forthwith release to the petitioner the petitioner's Passport Number BK 01xxxx and the civilian firearm Serial No C332319, make CZ P-07 Ceska, three Ceska Magazines each loaded with fourteen (14) rounds of ammunition (in total, 42 rounds of ammunition), a firearm Certificate Number 003xxx and the corresponding firearm card.
- (h) The Honourable Attorney General shall take up the issue of law reform on the revocation of citizenship acquired by birth.
- (i) There shall be no order as to costs as the petition has partially succeeded.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD DAY OF FEBRUARY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Otiende, Learned Counsels for the Petitioner.

Miss. Chibole, Learned Counsel for the 1st, 2nd, 3rd, 4th and 5th Respondents and the Interested Parties.

