



**Jabbar v Immigration Officer in Charge Kenyatta International
Airport & 3 others (Petition E452 of 2022) [2023] KEHC 1041 (KLR)
(Constitutional and Human Rights) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1041 (KLR)

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

PETITION E452 OF 2022

M THANDE, J

FEBRUARY 17, 2023

BETWEEN

KHALAF HUSSEIN JABBAR PETITIONER

AND

**IMMIGRATION OFFICER IN CHARGE KENYATTA INTERNATIONAL
AIRPORT 1ST RESPONDENT**

**DIRECTOR IMMIGRATION & REGISTRATION OF PERSON ... 2ND
RESPONDENT**

**CABINET SECRETARY INTERIOR & COORDINATION OF NATIONAL
SECURITY 3RD RESPONDENT**

OFFICE OF THE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Petitioner filed petition dated 19.9.22 seeking the following reliefs:
 - a) A declaration be and is hereby issued that the inclusion of the Petitioner's name in the list or class of prohibited immigrants and the subsequent deportation order is in breach of the Petitioner's constitutional rights and fundamental freedoms under Article 47 of the *Constitution*.
 - b) An order of mandamus is hereby issued compelling the Respondents to remove the 2nd Petitioner's name from the list or class of prohibited immigrants.



- c) A declaration be and hereby issue that the petitioner is not a prohibited immigrant and be allowed to enter and remain in Kenya as per the visa granted.
 - d) Declaration that the Respondents have violated the constitutional rights of the Petitioner and thereby restrained from further contravention and violation of the *Constitution* in prohibiting entry into Kenya by the Petitioner.
 - e) Costs of this Petition.
2. The Petition is founded on Articles 2, 3, 10, 19, 20, 21(1), 35, 47, 49,50(1-8), 153(4) (a), 156(6) and 238 of the *Constitution*. The Petitioner’s case as set out in the Petition and affidavit sworn on even date is that he is an Iraq national who until 21.7.22 was residing and working for gain in Kenya. He held a class ‘G’ work permit issued with effect from 25.3.22 and set to expire on 25.3.24. He has a wife and child in Kenya and another family in Iraq which he visits every month. After visiting his family in Iraq, he arrived in Nairobi on 13.7.22 and was to return there on 21.7.21. On that return date, upon checking in at the Jomo Kenyatta International Airport however, officers of the 1st Respondent informed him that there was a “stop order” against him ordering him to leave the country and never return. No reasons were provided to him in spite of his enquiries. He was also not served with any order declaring him a prohibited immigrant or for deportation.
3. On 16.8.22, the Petitioner’s advocate made enquiries with the Directorate of Criminal Investigation (DCI) who confirmed that there was no criminal complaint or pending investigations against the Petitioner. The DCI was also not aware of any deportation orders. The same information was given by the DCI airport (JKIA) Unit on 1.9.22. After writing and making several visits to 2nd Respondent’s investigation office at Nyayo House, the Petitioner’s advocates were on 9.9.22 furnished with a copy of an order declaring the Petitioner a prohibited immigrant. The deportation order is dated 15.7.22 and signed by the 3rd Respondent. No reasons have to date been given to the Petitioner for the 3rd Respondent’s decision. According to the Petitioner, due process was not followed in making the said decision. He contended that he should be allowed entry into Kenya as he has a valid Class G work permit, issued under the provision of the *Kenya Citizenship and Immigration Act*, 2011. It is the Petitioner’s case that as a holder of a valid Iraqi passport with a Class G work permit, he is not a prohibited immigrant. Further, his deportation without due process was malicious and a violation of Articles 10(2), 28, 47(2), 73 and 129 (1) of the *Constitution*.
4. The Petition is opposed by the Respondents vide a replying affidavit sworn on 20.1.23 by Jimmy Nyikuli, a Principal Immigration Officer, within the Ministry of Interior and Co-ordination of National Government. The Respondents stated that the Petitioner had through his company Al-Imtiaz Al- Mutahida Company Ltd applied for and obtained an investor permit (Class G). In his application for the permit, the Petitioner stated that the company intends to do export of horticultural produce from Kenya to Iraq. Sometime in June 2022, the directorate received a confidential report from the National Intelligence Service that the Petitioner was involved in human trafficking activities. He was not exporting horticultural products as per his permit but was running an illegal recruitment agency facilitating Kenyan girls to travel to the Middle East without proper accreditation from National Employment Authority (NEA). Earlier, the directorate had received a letter from the Petitioner’s co-director on 14.3.22 requesting the watch-listing and replacement of 400 passports that were stolen from the company’s office. The said letter indicated that the company was involved in assisting Kenyan nationals secure employment in Saudi Arabia and Iraq. This was contrary to the information given by the Petitioner in his application for a Class G permit.



5. The Respondents asserted that under Section 40(1)(c) of the Act, the Petitioner's work permit ceased to be valid after it was established that he was not conducting business as per the purview of the permit. Following the recommendations and advice of the National Intelligence Service, the Petitioner was declared a prohibited immigrant under Section 33(1)(h) of the Act and a deportation order issued against him under Section 43(1) and 43(2) of the Act. The Respondents further contend that under Article 39(3) of the Constitution, the right to entry into Kenya is only available to Kenya citizens. To be allowed entry into Kenya, foreigners are required to meet certain conditions in line with safeguarding and promoting national interest. Further that under Section 33(5) of the Act and subject to Section 34, the entry into, transit through or residence in Kenya of a prohibited immigrant, or an inadmissible person shall be unlawful. As such, having violated the terms of his work permit, the Petitioner cannot purport to claim that the Respondents acted illegally.
6. The Petitioner swore a further affidavit on 27.1.23 in rejoinder. He reiterated his earlier averments and further denied all the allegations by the Respondents of human trafficking and termed them false and fabricated. He has never been arrested, summoned or interrogated by either the police or the immigration officials over such allegations or charged before any court of law in Kenya over the same. He contends that he came back to Kenya legally on 13.7.22 a month after the alleged confidential report and was never questioned, summoned, arrested or charged in court. Further that the revocation or invalidation of his work permit, the date of which is not disclosed, contravened Section 40 of the Act and he maintained that the same is still valid.
7. Additionally, the Petitioner averred that the letter in question dated 14.3.22 was authored by Evalyne Achieng Ndalo, a Kenyan and the majority shareholder in the company, and not by him. He contended that the said Evalyne Achieng Ndalo has never been interrogated, summoned, arrested or charged over the matter yet the Respondents chose to use the said letter to discriminate against and deport him without due process. He further alleged that the real objective of the impugned decision by the Respondents was to harass, frustrate and unlawfully force him to close his business and exit Kenya. His position is that unless the Court grants the orders sought herein as urgently sought, he shall suffer irreparable loss and damage.
8. Parties filed their written submissions which I have duly considered. The following issues fall for determination:
 - i) Whether due legal process was followed in declaring the Petitioner a prohibited immigrant and deporting him.
 - ii) Whether the Petitioner's rights under Article 47 of the Constitution were violated by the respondents.
 - iii) Whether the orders sought should be granted.

Whether due legal process was followed in declaring the Petitioner a Prohibited Immigrant and deporting him.

9. It is the Petitioner's contention that due process was not followed in his being declared a prohibited immigrant and his deportation. He should therefore be allowed entry into Kenya given that he holds a valid Iraqi passport and a valid work permit.
10. Article 39 of the Constitution provides for the freedom of movement and residence as follows:
 - (1) Every person has the right to freedom of movement.



- (2) Every person has the right to leave Kenya.
 - (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.
11. Article 39 guarantees to every person the right to freedom of movement and the right to leave Kenya. The right to enter, remain in and reside anywhere in Kenya is however reserved for Kenya citizens. A foreigner may only enter the country, remain and reside anywhere in the country only if authorized by the Act.
12. Section 34 of the Act provides that a person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass. The Section further provides that the presence in Kenya of a foreigner unless authorized by the Act shall be unlawful. A foreigner is however authorized to enter and remain in Kenya by means of a valid work permit, resident permit or valid pass. This permit or pass is issued by the Director under Section 40 of the Act upon the Applicant satisfying the requirements relating to the particular class of permit.
13. In the present case, the Petitioner was permitted to remain in Kenya and conduct business vide a Class G work permit issued on 25.3.22 and due to expire on 25.3.24.
14. Section 33 of the 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 is—
 - (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); and



- (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).
 - (w) a person who has been repatriated and or removed from Kenya under any lawful order.
- (5) Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an undesirable person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or undesirable person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.

15. Section 34 of the Act provides:

Entry and removal of immigrants.

34.

- (1) A person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass.
 - (2) Subject to the provisions of this section, the presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise authorized under this Act, be unlawful, unless that person is in possession of a valid work permit or a valid residence permit or a valid pass.
16. The Petitioner submitted that due process was not followed in his deportation and his being declared a prohibited immigrant. Further that he should be allowed re-entry into the country as he has a valid Iraqi passport and a Class G work permit. It was therefore his case that the actions of the Respondents were unlawful, malicious, unfair and a breach of his rights to fair hearing, fair administrative action, freedom and security of the person, and his rights to freedom of movement and secure protection of law and a violation of Articles 10(2), 28, 47(2), 73 and 129(1) of the Constitution.
17. The Respondents submitted that the Petitioner was in Kenya by virtue of a Class G work permit which permitted him to conduct horticulture export business in Kenya. However, the Petitioner's co-director wrote to the 2nd Respondent reporting the loss of 400 passports that had been mysteriously stolen from their office and requested for watch listing. Prior to this, the National Intelligence Service had furnished the 2nd Respondent with a confidential report to the effect that the Petitioner was not exporting horticultural products as authorized under his permit but was involved in human trafficking activities by operating an illegal recruitment agency facilitating Kenyan girls to travel to the middle east without proper accreditation from NEA. The business that the Petitioner was conducting was deemed to be a threat to national security. This led to the termination of the Petitioner's permit which rendered his stay in the country unlawful.
18. It is not disputed that the Petitioner was issued with a Class G work permit which authorized him to remain in Kenya and engage in the business of export of horticultural produce to Iraq. What is disputed



is the manner in which he was declared a prohibited immigrant, deported and denied re-entry into Kenya.

19. The Respondents have told this Court that the basis for revocation or invalidation of the Petitioner's work permit, was that he was engaging in a business other than that which the permit was obtained. Further that the said business is a threat to national security. They cited Section 41 of the Act and argued that the Petitioner's permit automatically became invalid when he engaged in another business other than that which the permit was obtained for. Their opinion as regards the illegal business was informed by the confidential report from the National Intelligence Service and the letter the letter addressed to them by the Petitioner's co- director on the missing over 400 passports.
20. Notably, the Respondents have not told the Court whether the report by the National Intelligence Service was brought to the attention of the Petitioner before revoking his work permit. Also troubling, is that the Respondents have not told the Court that they summoned the Petitioner's co-director for questioning before making the adverse decision against the Petitioner. As matters stand, the Petitioner has never been questioned by the DCI nor charged in any court of law in Kenya for human trafficking, his records as pleaded in his further affidavit at the DCI headquarters and as confirmed by the DCI airport are clean. So, what would have been the basis for first invalidating and/or revoking his duly issued work permit and secondly declaring him a prohibited immigrant.
21. The Respondents have relied on several provisions of the Act to defend their actions.
22. Section 40 of the Act provides for issuance of permits while Section 41 provides for the Invalidation of a work or residence permit. Section 43 confers powers upon the cabinet secretary to power to remove persons unlawfully present in Kenya as follows:
 - (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, 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.
23. The record shows that the Petitioner entered into the country lawfully with a valid passport and visa. He was then issued with a Class G visa to remain in Kenya and conduct business. was lawfully in the country. As such, the Respondents cannot rely on Section 43 to defend their actions. Section 41(1)(c)



in a summary provides that the permit shall cease to be valid and the presence of the person in Kenya shall be unlawful, unless otherwise authorized by this Act if the holder of the permit engages in any other employment, occupation, trade, business of profession other than that which the permit was obtained for.

24. The question then that follows is did the Petitioner fail to engage in the business for which the permit was obtained or use the permit for another purpose other than that for which the permit was obtained, to render the Petitioner's presence in Kenya unlawful and entitle the 3rd Respondent invoke his powers under section 43(1) and (2) of the *Act*. While the Respondents have made allegations against the Petitioner to this effect, no evidence has been placed before this Court to support the allegations. The Respondents failed to discharge the onus placed upon them under Sections 107 and 109 of the *Evidence Act*.
25. It is also noted that after persisted enquiries, the 3rd Respondent only informed the Petitioner's advocates vide a letter dated 9.9.22 that the Petitioner is a prohibited immigrant. The orders declaring the Petitioner a prohibited immigrant and for his deportation are both dated 15.7.22. The Petitioner was in Kenya when the orders were issued but was not informed of the same. The Respondents instead ambushed him at the airport on 21,7,22 when he had checked in to fly out to Iraq. He was told that there was a stop order against him and that he was not to return to the country. He was however not given any reasons for the decision made against him and he was only be informed through his advocates on 9.9.23. Clearly, due process was not followed.
26. My finding is fortified by the finding in the case of *Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 others* [2020] eKLR, where Makau, J. had this to say:

From the uncontroverted facts of the Petitioner's case, I find that the Deporting of the Petitioner to Niger without any formal process or service on him with the declaration, written allegations, reasons and failure to accord him a hearing and giving him time to appeal against the deportation order or challenge the same, the Respondents violated the Petitioner's constitutional rights as to equal treatment of the law. The 2nd Respondent's action was unfair, unreasonable, irrational, unprocedural and illegal. The declaration thereof deserve to be quashed bearing in mind that the Petitioner has children born of a Kenyan mother and his investments in Kenya where he has been residing for 10 years. This case is similar to the case of *Egal Mohamed Osman v CS Ministry of Interior and Co-ordination of National Government & 2 Others* [2015] eKLR where Hon. Justice I. Lenaola (as he then was) stated:

“This Court will not tire in reminding the 3rd Respondent that the *Constitution of Kenya* is all supreme. It has life and it has teeth. Like Warsame J. in Kana (supra), the earlier the 3rd Respondent realizes that impunity is the biggest danger to the achievement of our constitutional aspirations, the better for those who seek the services of that office. The manner in which the Petitioner has been treated is shameful of a democracy, callous to the extreme and insensitive to a man whose children are born of a Kenyan mother.” (emphasis mine)

Whether the Petitioner's rights under Article 47 of the Constitution were violated

27. Upon issuance to the Petitioner of a Class G permit by the 2nd Respondent, he became authorized to remain in Kenya and engage in the business stated in his application, namely export of horticultural



produce to Iraq. The right to remain in Kenya and conduct the said business thus accrued to him. Any decision that adversely affecting that right must be done in accordance with the law.

28. Article 47 of the of the Constitution guarantees to every person, the right to 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.

29. In 2015, Parliament did enact the Fair Administrative Actions Act (FAAA) to give effect to the rights guaranteed under Article 47(1). Section 2 of the Act defines "administrative action" to include:

- (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;

30. The decision of the 3rd Respondent of declaring the Petitioner a member of the prohibited class and a prohibited immigrant as well as the act of deporting him from Kenya fall within the meaning of "administrative action" under Section 2 of the Act.

31. Section 4 of the Act requires that administrative action shall to be taken expeditiously, efficiently, lawfully, etc and specifically 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.
- (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.

32. The right to fair administrative action cannot be gainsaid. Any administrative action taken by any administrator must conform to the provisions of Article 47 and Section 4 of the *FAAA*. With regard to the decision and action taken against the Petitioner, the Respondents were obligated to inform him in writing the reasons why he was declared a member of the prohibited class and an illegal immigrant and the reason for his deportation. This was his right. Further the Petitioner was entitled to prior and adequate notice of the nature and reasons for the said declaration and deportation, an opportunity to be heard and to legal representation, right to evidence informing the decision and the right of appeal. All these requirements speak to fairness. Anything short of the foregoing denied the Petitioner fairness in the process and was thus illegal and unconstitutional.

33. 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.

34. And in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR, Mwita, J. observed as follows:

The *Constitution* is the Supreme law of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of the Constitution which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies.

35. The manner in which the Petitioner was bundled out of the country and ordered never to return without being given any written or prior reason is a clear demonstration that the Respondents acted without or in excess of their statutory authority and mandate. They violated the Petitioner's right under Article 28 to have his inherent human dignity respected and protected, Additionally, by their actions, the Respondents undermined the rule of law, a national value and principle of governance, thereby contravening the provisions of Article 10 of the *Constitution*. As public officers, the Respondents are required to discharge their mandate in a manner that demonstrates respect for the people and that brings honour to the nation and dignity to the office. They are also required act in a manner that promotes public confidence in the integrity of the office they hold. Further, the Respondents must act within constitutional and statutory limits, being ever mindful that their authority is a public trust to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit. This is the requirement in Articles 73 and 129 of the *Constitution*.

36. There is a long line of authorities where Courts have stated again and again that State agencies 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. They must give due regard to the Bill of Rights which as provided under Article 19, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

37. 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 this 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.

38. The Learned Judge went on to make the following order among others:

A declaration that by denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or order/s and without according him a hearing,



to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK, was a violation of the subject's fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family under Articles 27(1), 45(1) and 47 of the *Constitution*.

39. Article 10 of the *Constitution* sets out the national values and principles of governance. Among those national values and principles are; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. The Respondents' actions as evidence by the Petitioner's case clearly violated the said national values and principles of governance. In a nutshell the Court finds that the Petitioner's rights under Article 47 of the *Constitution* were violated by the decision and actions of the Respondents.

Whether the orders sought should be granted

40. Article 23 of the *Constitution* has conferred upon this Court the jurisdiction to uphold and enforce the Bill of Rights. Clause (2) thereof stipulates the reliefs that this Court may grant in proceedings for upholding the Bill of Rights as follows:

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
41. The Petitioner has sought declaration and order of mandamus and prohibition. Having found as I have that the Petitioner's constitutional rights were violated by the Respondents in that due process was not followed in declaring him a member of the prohibited class and a prohibited immigrant and further in deporting him. It follows therefore that the Petitioner is entitled to the orders sought.
42. The Petitioner has also asked for costs of the Petition. Rule 26 (1) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Clause (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. I have considered the nature of the Petition herein and the fact that award of costs is discretionary. While the guiding principle is that costs follow the event, I do find that it will not be proper to burden tax payers with costs of litigation arising out of the misdeeds of the Respondents.
43. In the end and in view of the foregoing, I find that the Petition has merit and I make the following orders:



- a. A declaration be and is hereby made that the Respondents have violated the constitutional rights and fundamental freedoms of the Petitioner under Article 47 of the *Constitution* by the inclusion of the Petitioner's name in the list or class of prohibited immigrants and the subsequent deportation order against him.
- b. An order of mandamus be and is hereby issued compelling the Respondents to remove the Petitioner's name from the list or class of prohibited immigrants and to allow him to enter and remain in Kenya as per the visa granted.
- c. An order be and is hereby issued prohibiting the 1st, 2nd and 3rd Respondents from preventing the Petitioner from returning to and remaining in the Republic of Kenya without justifiable cause, and contrary to and without following due process.
- d. Each party shall bear own costs.

DATED AND DELIVERED IN NAIROBI THIS 17TH FEBRUARY 2023

.....

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondents

..... Court Assistant

