Okoiti v Ministry of Defence & another (Petition 465 of 2019) [2022] KEHC 13172 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 465 OF 2019

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

MINISTRY OF DEFENCE ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1. The petition dated November 19, 2019 was filed under articles 3(1), 22, 23, 48, 50(1), 258 and 259(1) of the *Constitution* for the alleged contravention and violation of articles 1(1),2, 3(1), 4(2),10(1) &(2), 12(1)(a),19, 20, 24, 41, 47, 73, 129, 131(2)(a), 153(4)(a), 232(1)(g, h & i) and 259(1) of the *Constitution*.

2. The petition seeks the following orders: -

    i. A declaration that the decision to impose a blanket ban without exemption on all Kenyans with dual citizenship from joining the Kenya Defence Forces is unconstitutional and therefore null and void.

    ii. An order quashing the 1st respondent's announcement to the public that the Kenya Defence Forces will be recruiting General Service Officer(GSO) Cadets, Specialists Officers, General Duty Recruits, Tradesmen/women and Constables which is scheduled to take place from 27th November to December 16, 2019.

    iii. A permanent injunction prohibiting the respondents from barring any Kenyan citizen who has been made a citizen of another country by operation of that country's law, without ability to opt out, from joining the Kenya Defence Forces.

iv. An order compelling the respondents to bear the costs of this suit.

v. Any other relief the Court may deem just to grant.

The Petitioner's Case

3. The petition is supported by the petitioner's affidavit sworn on November 19, 2019. It is based on the assertion that the 1st respondent published an announcement to the public that the Kenya Defence Forces would be recruiting General Service Officer (GSO) Cadets, Specialists Officers, General Duty Recruits, Tradesmen/women and Constables to the exclusion of Kenyan citizens with dual citizenship.

4. The petitioner deposes that while this requirement is made pursuant to article 78(2) of the *Constitution*, sub-article (3) makes it clear that this does not apply to a person who has been made a citizen of another country by operation of that country's law, without ability to opt out. Moreover he argues that section 129 of the *Kenya Defence Forces Act* does not bar citizens with dual citizenship from joining the military.

5. He deposes that the *Constitution* under article 238(2) (a) and (b) requires that the national security of Kenya be promoted and guaranteed in accordance with the principles that national security is subject to the authority of the *Constitution*. Further that Parliament and national security are to be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. He contends that the respondents' call in the matter is untenable under the law, and they should be held to the highest standard in implementing the *Constitution*.

6. The petitioner additionally filed a supplementary affidavit dated November 12, 2021 deposing that the 1st respondent had yet again barred persons with dual citizenship from the recruitment in their January 2021 advertisement but had however removed any references to dual citizens in their advert released in October 2021.

1st Respondent's case

7. The 1st respondent in opposition to the petition filed its replying affidavit dated August 11, 2020 sworn by Osman Guyo Wako, the 1st respondent's Staff Officer II Career Progression and manpower development.

8. He deposes that the petition as presented is hypothetical since it fails to provide any tangible data, statistics or information of holders of dual citizenship who have previously applied, seek to apply or are prospective candidates with the requisite qualifications laid down by the 1st respondent in the current and previous recruitment exercise. He depones that there has never been any holder of dual citizenship who has presented himself/herself for consideration for enlistment by the 1st respondent. Further that the petition fails to meet the required threshold for a constitutional petition as it is guised as an advisory opinion.

9. He further deposes that there exists no lacuna in the interpretation of the constitutional and statutory provisions which the petitioner seeks to rely upon to arrive at the conclusion that the respondents violated the law. This is since the petition fails to holistically appreciate the functions and operations of the 1st respondent.

10. With reference to the impugned advertisement, he deposes that the immediate need of the military informs the subsequent recruitment cycle requirements which are generally unique to the interest of the 1st respondent. This he asserts is a discretionary administrative function of the 1st respondent as envisaged under article 241(7) of the *Constitution*.

11. He deposes that the fact that the 1st respondent failed to take into account the provisions of article 78 of the *Constitution* is not in itself a ground for impugning an exercise of its discretion since the exclusion of dual citizens is informed by operational, tactical and security needs. He states that under the existing operational needs the decision to exclude these citizens is based on the fight for power and effective military. This is owing to cited considerations including anticipated problems such as the unlikely event of military conflict between the concerned nations' allegiance which may be swayed based on where the family and the dual citizens are domiciled. As such he deposes that service in the military requires allegiance to one sovereign nation.

12. He concludes by averring that the *Constitution* and statutes should be interpreted holistically not in a self-destroying manner. Further that the petition seeks to have the laws interpreted to suit a current need oblivious of the greater societal and security needs for the country. As such the petition ought to be dismissed in the interest of justice and fairness.

Parties submissions

The petitioner's submissions

13. The petitioner filed written submissions dated November 15, 2021.On whether he has locus standi to file this suit, he submitted that article 3(1) of the *Constitution* places an obligation on every person to respect, uphold and defend the *Constitution*. As such he has the requisite *locus standi* as empowered by articles 3(1), 22, 23 and 258 of the *Constitution* to file the suit since it is in public interest. In support reliance was placed on the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR, *Albert Ruturi, J K Wanywela & Kenya Bankers' Association v The Minister of Finance & Attorney General and Central Bank of Kenya* (Civil Application No.908 of 2001) and *John Harun Mwau and 3 others v . Attorney General and 2 others* [2012] eKLR which affirm this position.

14. Moving on to the issue of this court's jurisdiction, he submitted that a court's jurisdiction flows either from the *Constitution* or legislation. As such this court's jurisdiction to entertain this matter flows from article 165(3)(d) of the *Constitution*, with article 23 vesting this court with the jurisdiction to hear and determine applications for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom. In support of the point of jurisdiction he relied on the cases of *Samuel Kamau Macharia v KCB & 2 others*, Civil Application No 2 of 2011; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*. (1989) and *Adero & another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577.

15. The petitioner argued that contrary to the 1st respondent's argument that the matter is disguised as an advisory opinion, bodies which can approach the Supreme Court for advisories are clearly defined and that he was excluded from that definition. Taking this into consideration, he submits that this is the only Court, where the petitioner could come as a public spirited citizen and plead with the Court to protect and uphold the *Constitution*.

16. Answering the question as to whether the petition is hypothetical, he submitted that the petition is not. This is because it is a fact that the 1st respondent had scheduled the impugned recruitment to take place from 27th November to December 16, 2019. Opposing the 1st respondent's argument that no statistics were given to support the case, the petitioner relied on the case of *Coalition for Reforms and Democracy & others v Attorney General* [2015] eKLR, where it was held that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the *Constitution* to occur, before approaching the Court.

17. According to the petitioner the blanket ban on dual citizens joining the 1st respondent is unconstitutional. The petitioner on this point begun by arguing that every citizen was entitled to their

full rights as provided under article 12(1)(a) of the *Constitution*. Hence the 1st respondent is bound to uphold the *Constitution* under Article 2. As such he contends that the impugned requirement was unconstitutional since neither the *Constitution* nor legislation imposed a blanket ban on Kenyans with dual citizenship from joining the 1st respondent.

18. To expound on this point he stated that article 78(2) of the *Constitution* which restricts dual citizens from being members of the 1st respondent is qualified by article 78(3) in that it exempts any person who has been made a citizen of another country by operation of that country's law, without ability to opt out. Moreover that section 129 of the *Kenya Defence Forces Act* No. 25 of 2012, which deals with offences relating to dual citizenship, does not bar Kenyans with dual citizenship from joining the 1st respondent.

19. To buttress this point reliance was placed on the case of *Bishop Donald Kisaka Mwawasi Attorney General & 2 others* (2014) eKLR where it was noted that the proscription in article 78(2) of the *Constitution* is for a state officer holding dual citizenship, and is not absolute. It is exempted by article 78(3) (b), if the person is made a citizen of another country by operation of that country's law without ability to opt out. That exception is significant, and it implies that if the laws of that other country have no provision for renunciation of citizenship of that country, a State officer can hold dual citizenship.

20. In light of this the petitioner submits that the 1st respondent's impugned actions violate and continue to violate article 47(1) of the *Constitution* by taking an administrative action that is not expeditious, efficient, lawful, reasonable, and procedural. Likewise, article 73(1) (a) (i) of the *Constitution* which proclaims that authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the *Constitution*.

21. Furthermore he submits that the 1st respondent's action violates the provisions of articles 4(2), 10(2), 27, 41(1), 129, 131(2)(a),153(4)(a), 238(2) (a) & (b) and 259(1) of the *Constitution*. Additional reliance was placed on the cases of *S v Acheson*, 1991 (2) SA 805, *Kenya Country Bus Owners Association v Cabinet Secretary for Transport & Infrastructure & 5 others* [2014] eKLR; *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* (2017) eKLR; among others.

22. In view of this he argues that allowing the prayers in the petition will not yield an impracticality as argued by the respondents. To this end he argues that the respondents should bear the costs of this suit. He urged the Court to be guided by the principle set out in the case of *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR and *Erick Okeyo v County Government of Kisumu & 2 others* [2014] eKLR which is award of costs in constitutional litigation between a private party and the State. A private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs. The petitioner further relied on the cases of *John Harun Mwau and three others v Attorney General and two others* [2012] eKLR, *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, among others.

23. Lastly, the petitioner prays that this Court on top of the prayers sought, to grant any other appropriate relief which will protect the *Constitution* and uphold the rule of law as held in the case of *Minister of Health & others v Treatment Action Campaign & others* (2002) 5 LRC 216 and *Fose v Minister of Safety & Security* [1977] ZACC 6.

The Respondents' submissions

24. The respondents' through its special state Counsels A.M. Mate and H.M. Mugiira filed written submissions dated January 17, 2020 and March 14, 2022 respectively. The issues identified for determination as pertains the petition are:

i. Whether the petition has been spent/ overtaken by events.

ii. Whether article 78(3) (b) of the *Constitution* should be interpreted literally.

iii. Whether the petitioner has discharged his burden of proof.

iv. Whether a newspaper advertisement on recruitment is a government decision for the purposes of the petition

v. Whether failure to indicate an exemption Clause (article 78(3) (b)) is a violation of the *Constitution*

vi. Whether the Petitioner is entitled to costs

25. Counsel in the first submissions, submitted that there was no lacuna in the interpretation of articles 78,238(2)(a) and (b) of the *Constitution* and section 129 of the *Kenya Defence Forces Act*. He urged the court to refrain from the improper transformation of normal dispute issues for ordinary litigation into an advisory opinion cause.

26. Counsel proceeded to argue that the petitioner's allegation that there had been violation of rights was hypothetical and merely persuasive as there was absence of demonstration of the allegations in the petition. In support of this point he relied on the case of *Durity v AG* (2002) UKPC 20 where it was held that the inherent jurisdiction of the High Court required it to prevent abuse of its process. Additional reliance was placed on the case of *Booth Irrigation Ltd (No 2)* HC Misc Application No 1052 of 2004.

27. Relying on the stated factors as to why dual citizens are not admitted into the military as espoused in the 1st respondent's replying affidavit, Counsel argued that the consequence of allowing the prayers would yield an impractical result. This is since the court is not charged with the mandate to regulate the conditions of service within the Kenya Defence Forces. As such counsel submitted that the Courts should avoid a construction and interpretation of the law that produces an absurd result as held in the case of *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* (2012) eKLR. Rather the court should interpret the law holistically taking into consideration the greater societal and security needs of the Country. He also relied on the case of *USIU v Attorney General & another* [2012] eKLR, in support of this argument.

28. In the further submissions, Counsel argued that the petition had been overtaken by events. This was since the parties had recorded a consent in Court on November 26, 2019 to the effect that the respondents would consider recruitment of holders of dual citizenship that fall under article 78(3) (b) of the *Constitution*. The recruitment has since taken place. Moreover Counsel submitted that the impugned advertisement was not meant to run perpetually but was designed to accommodate the specific requirement of the time. As such the petition has been overtaken by events and is an academic exercise.

29. Furthermore, he submitted that article 22 of the *Constitution* gives locus standi to individuals to institute proceedings to enforce the Bill of Rights when the same has been denied, violated or threatened while article 23 gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In this case Counsel contended that in light of the above circumstances, there was no denial, violation or threat to the Bill of Rights.

30. On whether article 78(3) (b) of the *Constitution* should be interpreted literally, he submitted that section 8 (7) of the *Kenya Citizen and Immigration Act*, No 12 of 2011, states that a dual citizen shall

owe allegiance to and be subject to the laws of Kenya. Further that article 78(2) of the *Constitution* states that a State Officer or a member of the Defence Forces shall not hold dual citizenship which is given effect by section 129(1) (a) of the *Kenya Defence Forces Act*, No 25 of 2012 making acquisition of dual citizenship while in military service an offence.

31. Counsel noted that the only exemption given in this situation is article 78(3)(b) of the *Constitution* which provides that the provision of the article does not apply to any person who has been made a citizen of another country by the operation of that country's law, without ability to opt out. In view of this, he argued that the *Constitution* generally intended not to allow persons with dual citizenship to serve in the Kenya Defence Forces.

32. In the circumstances Counsel contended that if article 78(3)(b) of the *Constitution* is interpreted literally, it would not give a pragmatic meaning to the *Constitution* because it would allow a dual citizen in this category to be a member of the Kenya Defence Forces. This would pose a practical dilemma if Kenya was to be at war with a country with which such a dual citizen is a member or if Kenya was to be at war with a country which is an ally of a country which the member is a dual citizen posing a great risk to the dual citizen's allegiance to Kenya.

33. Moving on to the next issue, Counsel argued that a newspaper advertisement which the petitioner has relied on heavily cannot be taken to be a policy decision that warrants the declarations nor can the same be the subject for Judicial Review orders. This is because Government's official communication is done through the Kenya Gazette. Despite his submission above he argued that the 1st respondent and government had not made any decision to bar dual citizens under the exclusion in article 78(3) (b) of the *Constitution* from applying to join the Kenya Defence Forces.

34. Finally counsel submitted that the advertisement only stated the general position of the law and nothing more as argued by the petitioner. As such he concluded by stating that the petitioner was not entitled to costs as the matter was in public interest.

Analysis and determination

35. I have carefully considered the pleadings and submissions of the parties herein and the cited authorities and in my view the issues for determination are:

    a. Whether this Court has jurisdiction to entertain the instant petition;

    b. Whether the 1st respondent's decision to impose a prohibition on all Kenyans with dual citizenship from joining the Kenya Defence forces is unconstitutional; and

    c. Whether the petitioner is entitled to the reliefs sought.

Issue No. (a). Whether this Court has jurisdiction to entertain the instant petition

36. This issue was raised by the respondents who argued that the petition raises issues in the form of an advisory opinion. Further that the matter had been overtaken by events owing to the consent entered into by the parties on November 26, 2019and the impugned newspaper advertisement published in 2019 rendering the matter an academic exercise. Likewise the respondents argued that the controversy as framed was not a policy issue as framed by the petitioner since the government had not given a definitive position on the eligibility of Kenyan citizens with dual citizenship joining the Kenya Defence Forces.

37. The petitioner opposed this argument stating that the other reliefs sought were still alive and needed this Court's determination. Evidently these issues challenge the justiciability of the matter before this

Court which must be determined before answering the questions raised in the petition. It is clear that the petitioner in the interest of the public approached this Court to defend the right of Kenyan citizens with dual citizenship owing to the alleged breach of their constitutional right to enlist in the Kenya Defence Forces.

38. It is has been held that a constitutional right compared to other rights cannot be overtaken by events as argued by the respondents. This was seen in the case of *Kitale Shuttle Ltd & 5 others v County Government of Trans Nzoia* [2015] eKLR where it was held that:

> " To begin with, the contention that the petition has been overtaken by events is farfetched for reasons that a matter touching on fundamental rights, in the opinion of this court, cannot and will never be overtaken by events as that would curtail the Constitutional right to access to justice provided under article 48 of the *Constitution* and also encourage public organs to flout the constitutional provisions with impunity knowing too well that by the time the matter reaches court the action complained of would have come to pass and be given legal justification by the phase "Overtaken by Events."
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> 17. Such occurrence would be tantamount to overthrowing the *Constitution* on the basis of time factor, a technical mechanism which is frowned upon by the same Constitution by dint of article 159 (2) (a) and under the same article, the courts in exercising judicial authority shall be guided by other principles such as protecting and promoting the purpose and principles of the *Constitution* (see, article 159 (2) (e)).
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> 18. Constitutional matters are special and of great importance to be tied down to procedures and principles applicable in ordinary civil suits where the phase " Overtaken by events" readily applies in certain circumstances and the concept of time, is of essence.
>
> Let it be remembered that the *Constitution* is a living legal document supreme over all other legal documents and binds all persons and state organs whose duty it is to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights (see, chapter four (4) of the *Constitution*) which is the framework for Social, Economic and Cultural Policies. Thus, the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. For such reason alone, it is difficult to fathom how a constitutional right can be overtaken by events.
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> 19. Under article 20 of the *Constitution*, the court in applying the Bill of Rights is required to adopt the interpretation that most favour the enforcement of a right or fundamental freedom and in interpreting the Bill of Rights, the court is required to promote the values that underlie an open and democratic Society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.
>
> In sum, the argument that this petition is overtaken by events is hollow and unsustainable."

39. Palpably, this Court under article 165 (3)(d) of the *Constitution* is vested with the requisite jurisdiction to entertain constitutional questions such as those raised by the petitioner. While prayer (ii) in the petition was determined it is certain that the other constitutional questions have not been determined.

What becomes the main issue for determination at this juncture is whether the circumstances of this case invoke or deter this Court from assuming this jurisdiction owing to the doctrine of justiciability.

40. This concept is described by the Legal Information Institute *Wex Dictionary* as follows:

> "Justiciability refers to the types of matters that a court can adjudicate. If a case is "nonjusticiable," then the court cannot hear it. Typically to be justiciable, the court must not be offering an advisory opinion, the plaintiff must have standing, and the issues must be ripe but neither moot nor violative of the political question doctrine. Typically, these issues are all up to the discretion of the court which is adjudicating the issue."

41. The Court in the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR while expounding on this issue opined as follows:

> "The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favour in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.
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> By justiciability it is meant a matter "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision": see *Black's Law Dictionary* 9th Ed,pp 943-944.In other words, courts should only decide matters that require to be decided. Thus in *Ashwander v Tennessee Valley Authority* [1936] 297 US 288, the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy".
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> Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
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> Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is article 163(6) of the *Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments.
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> The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in *John Harun Mwau & 3 others v AG & 2 others* HCCP No 65 of 2011 (unreported) stated as follows:
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> > "We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the *Constitution* conferred under article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

Later in Hon *Martin Nyaga Wambora v Speaker of County Assembly of Embu and 5 others* HCCP No 3 of 2014, the court observed as follows:

> " "It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.'

42. A three Judge bench in the case of *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR discussed this issue. Also see *William Odhiambo Ramogi & 2 others v Attorney General & 6 others* [2020] eKLR:

43. In *Ndora Stephen v Minister for Education & 2 others*, Nairobi High Court Petition No 464 of 2012, Mumbi Ngugi, J. (as then was) correctly observed that:

> "the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to article 43 (1) of the *Constitution*, the provisions of article 20 (5) (c) of the *Constitution* must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts."

44. A consideration of the matters raised in this petition reveals that the main issue in contention is the 1st respondent's recruitment process which precludes Kenyan citizens with dual citizenship from making applications to join the Kenya Deference Forces. the *Constitution*'s objective on this issue is unmistakably determined under Article 78 as follows:

(1) A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.

(2) A State officer or a member of the defence forces shall not hold dual citizenship.

(3) Clauses (1) and (2) do not apply to--

(a) judges and members of commissions; or

(b) any person who has been made a citizen of another country by operation of that country's law, without ability to opt out.

45. The petitioner seeks to have this court declare that the 1st respondent's exclusion of dual citizens is unconstitutional and thus issue a permanent injunction preventing such an action in the future. The issue as can be discerned revolves around this Country's national security which is a policy issue best determined by Parliament.

46. It is my considered view that the petition invokes the political question doctrine. I say so because the issue raised will require this court to delve into the government's political arena of national security which is not the province of the courts. Moreover, the government is best placed to make such policy determinations on the grant or lack thereof of such a privilege on the dual citizens based on the needs of national security in the interest of the whole Republic.

47. I find it not prudent for this court to assume such jurisdiction and render a prospective order without being informed of all the relevant matters at stake in the future. Guided by the principles of law fashioned in the cited cases, I find that the nature of the instant petition presents a situation where the political question doctrine is alive and in effect affecting this Court's jurisdiction to entertain the petition. Taking this into consideration, I find no justifiable ground for this court to proceed to make a determination on this petition based on its merits.

48. The upshot of the foregoing and for the reasons set out above. I find the petition dated November 19, 2019 to be without legal basis and I dismiss it in its entirety. There shall be no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT