



Mohamed v Director of Immigration Services & 2 others (Constitutional Petition E015 of 2022) [2022] KEHC 15867 (KLR) (Constitutional and Human Rights) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E015 OF 2022**

M THANDE, J

NOVEMBER 25, 2022

BETWEEN

AISHA HASSAN MOALIM MOHAMED PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

No protection by the law where lawful summons issued by authorized agencies had been disregarded

The petitioner sought for among others findings and declarations; that continuous detention of the petitioner's essential documents without justifiable cause was contrary to article 47 of the Constitution as read together with Fair Administrative Action Act thus null and void; and that the petitioner was a Kenyan citizen. The court held that new issues could not be raised in submissions and any issues so raised, were best ignored. The court also highlighted the scope of powers of the Director of Immigration Services where a person claiming to be a Kenyan citizen was suspected to have obtained his/her documents fraudulently. The court further held that having disregarded the lawful summons issued by the respondents, the petitioner could not come to court seeking protection by the law.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - enforcement of the right to fair administrative action - claim that the Director of Immigration Services (DIS) and the Director of Criminal Investigations (DCI) confiscated and withheld essential documents belonging to a person suspected to have obtained the documents fraudulently without disclosing the reasons for doing so - whether a party could seek the protection of the law having disregarded and failed to comply with lawful summons issued pursuant to investigations by authorized agencies - what was the scope of the powers of the DIS where a person



claiming to be a Kenyan citizen was suspected to have obtained their documents fraudulently - of Kenya, 2010, article 47; , No 12 of 2011, sections 31, 48 and 54.

Civil Practice and Procedure - pleadings - matters to be pleaded - raising of new issues in submissions where the same had not been pleaded - whether new issues could be raised in submissions where the same had not been pleaded.

Brief facts

The petitioner claimed that she was a Kenyan citizen and holder of a Kenyan national identity card and passport. She further claimed that her parents, both deceased, were Kenyan citizens. She stated that she spent a good time of her study time in Mogadishu, Somalia. The petitioner further claimed that in March 2021, the 1st and 3rd respondents, without justifiable cause, confiscated her identity card and passport. She also claimed that on December 1, 2021, the 1st and 3rd respondents took away her academic certificates which were yet to be returned to her. The petitioner argued that withholding of the documents without disclosing the reasons amounted to a breach of the constitutional provision on fair administrative action under article 47 of the (Constitution).

The petitioner prayed for among others a declaration and a finding that continuous detention of the petitioner's essential documents without justifiable cause was contrary to article 47 of the as read together with the thus null and void; and a finding and declaration that the petitioner was a Kenyan Citizen and that the utter interference by the 1st respondent were unwarranted and/or unjustifiable.

The 1st respondent argued that following investigations it was established that the petitioner was not a Kenyan but a Somali national. The 1st respondent further claimed that when the petitioner appeared before it on December 1, 2021, upon being summoned, she was represented by a Ugandan advocate who was found to be working without a valid work permit. Further the petitioner was given time to appoint another advocate but instead filed the instant petition in an attempt to circumvent the law and avoid facing the full force of the law for her illegal actions.

Issues

- i. Whether a party could seek the protection of the law having disregarded and failed to comply with lawful summons issued pursuant to investigations by authorized agencies.
- ii. What was the scope of the powers of the Director of Immigration Services where a person claiming to be a Kenyan citizen was suspected to have obtained his/her documents fraudulently.
- iii. Whether new issues could be raised in submissions where the same had not been pleaded.

Held

1. From a perusal of the amended petition, the contention that the respondents had violated the petitioner's right of access to information under article 35 of the and the ct (AIA) was not pleaded. That was a new issue raised in submissions and was not supported by evidence. New issues could not be raised in submissions and any issues so raised, were best ignored.
2. The had very specific provisions for the procedure to be followed by a party seeking information held by a public officer. The outlined the steps to be followed by such party should the application for information be rejected. The petitioner had not demonstrated that she had complied with those provisions.
3. Article 47 of the guaranteed to every person fair administrative action. Parliament enacted the to give effect to article 47. The right to fair administrative action could not be gainsaid. That right encompassed action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, where a person's right or fundamental freedom had been or was likely to be adversely affected by administrative action, such person must be given reason in writing for such action. That requirement ensured that administrative bodies discharged their mandate within constitutional and statutory confines.



4. Sections 31 of the stipulated the circumstances under which the 1st respondent may confiscate or suspend a passport or travel document. They included *inter alia* where the holder was involved in passport or document fraud, passport or document forgery or transnational crimes. The powers of the 1st respondent were set out in section 48 of the , which included *inter alia* the power to require any person seeking to enter Kenya to answer any question or to produce any document in his possession for the purpose of ascertaining whether that person was or was not a citizen of Kenya and, in the case of any person who was not a citizen of Kenya, for the purpose of determining whether that person should be permitted to enter Kenya under the . Section 54 of the made provision for offences relating to documents.
5. From their averments, the respondents suspected that an offence may have been committed by the petitioner in obtaining the documents in their possession and were investigating the matter. To that end, they had summoned the petitioner to shed light on the matter of her documents for the purpose of their investigations but she had failed to honour the summons. That contention had not been rebutted by the petitioner and remained uncontroverted.
6. Having disregarded the lawful summons issued by the respondents, the petitioner could not come to court seeking protection by the law. Contrary to the allegations by the petitioner that her rights had been violated, it was the petitioner who had violated the Kenyan immigration laws by failing to present herself pursuant to answer summons issued under the law. Therefore, acting as they did, the respondents had not violated the petitioners right to fair administrative action guaranteed under article 47 of the and their actions were warranted.
7. Article 14 of the stipulated who a Kenyan citizen by birth was. The petitioner did not state who her parents were nor did she place before the court any documents relating to her parents, including their identity cards and death certificates. Further, she had stated that the persons indicated in her documents as her mothers, were in fact her guardians. The scanty material placed before the court was inadequate to support her assertions. As such, the court was unable to make any finding or declaration in her favour.
8. The petitioner must first present herself before the respondents for the purpose of furnishing such information, documents and other particulars as were necessary for the purposes of the required investigations and for a determination as to her citizenship and whether the documents in question were obtained lawfully.
9. Under section 49(8) of the , the 1st respondent had power to summon a person of interest. In her affidavit sworn on January 12, 2021, the petitioner claimed that her mother died on January 1, 2010 and annexed a copy of her death certificate, also exhibited was a copy of the petitioner's birth certificate indicating her mother and father respectively. However, in her further affidavit sworn on March 18, 2022, the petitioner stated that her mother was her foster mother. That placed questions in the mind of the court, as to the legitimacy of the documents in question.
10. The respondents acted within the confines of the law in confiscating and withholding the petitioner's documents, pending investigations. The petitioner had not told the court why she had failed to comply with the respondents' lawful summons or indeed any difficulties she may have had in doing so. Rather than coming to court, the petitioner ought to comply with the summons by the respondents to explain the discrepancies in her documents and for a determination to be made as to whether the said documents were genuine and ought to be returned to her. Without her presenting herself to the respondents to shed light on the acquisition of the documents as required, the court was unable to grant the orders sought therein.

Petition dismissed with costs.

Citations

Cases



1. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
2. Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board (Petition 495 of 2015; [2016] KEHC 5405 (KLR)) — Explained
3. Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another (Jr Misc. Civil Application 1 of 2014; [2014] eKLR) — Explained
4. Wainana, Diana Waceke v Director of Immigration Services; Serge Louodom (Interested Party) (Petition 99 of 2018; [2022] KEHC 2134 (KLR))

Statutes

1. Access to Information Act (Act No 31 of 2016) — Section 4, 9, 21 — Interpreted
2. Constitution of Kenya, 2010 — Article 10, 14, 33, 35, 47 — Interpreted
3. Fair Administrative Action Act (Act No 4 of 2015) — Section 4 — Interpreted
4. Kenya Citizenship And Immigration Act (Act No 12 of 2011) — Section 31, 48, 53, 54 — Interpreted

Advocates

None mentioned

JUDGMENT

1. The petitioner, Aisha Hassan Moalim Mohamed, claims that she is a Kenyan citizen and holder of national identity card number 37XXX and Kenyan passport number AKXXX. Her parents Hassan Moalim Gabey and Nuno Abikar, both now deceased, were also Kenyan citizens. Her mother lived in Wajir and died on January 1, 2010. The petitioner spent a good time of her study time in Mogadishu, Somalia, where her studies were sponsored by well wishers. She now resides in South C, Nairobi. She is a medical doctor and her practicing licence was issued to her by the Kenya Medical Practitioners and Dentists Council on October 20, 2021 and is valid up to December 31, 2022.
2. In her petition dated January 12, 2022 and amended on 10.6.2022, the petitioner claims that in March 2021, the 1st and 3rd respondents, without justifiable cause, confiscated her identity card and passport. Again on December 1, 2021, the 1st and 3rd Respondents took away the petitioner's academic certificates, namely University of Somalia (UNISO) Bachelor of Medicine & Surgery (MBBS) certificate, Secondary School Leaving Certificate Roll No 46XXX, and Recognition and Equation of Qualification (CUE/10/91/Vol 465). To date, the documents are yet to be returned to her. The withholding of the Petitioner's identification and academic documents is curtailing the enjoyment of her rights and fundamental freedoms. Further the withholding of the said documents without disclosing the reasons amounts to a breach of the constitutional provision of fair administrative action under article 47 of the *Constitution of Kenya, 2010*.
3. The petitioner thus prayed for the following reliefs:
 - a. A declaration and a finding that continuous detention of the Petitioner's essential documents namely National Identity Card No 37XXX and Kenyan Passport No AKXXX without justifiable cause is contrary to article 47 of the *Constitution of Kenya, 2010* as read together with Fair Administrative Act (No 4 of 2015) thus null and void.
 - b. A declaration and a finding that continuous detention of the petitioner's essential educational documents namely University of Somalia (UNISO)



Bachelor of Medicine & Surgery (MBBS) Degree Certificate, Secondary School Leaving Certificate Roll No 46252 and Recognition and Equation of Qualification (CUE/10/91/Vol. 465) without justifiable cause is contrary to article 47 of the *Constitution of Kenya, 2010* as read together with *Fair Administrative Act* (No 4 of 2015) thus null and void.

- c. An order do issue directing the 1st and 3rd respondents to forthwith release petitioner's original identification documents namely National Identity Card No 37XXX and Kenyan Passport No AKXXX.
 - d. A finding and declaration that the petitioner is a Kenyan Citizen and that the utter interference by the 1st respondent are (sic) unwarranted and/or unjustifiable.
 - e. An order do issue restraining the 1st and 3rd respondents from interfering with petitioner's enjoyment of rights and/or professional practice by virtue of being a Kenyan citizen with valid essential documents.
 - f. Costs of this petition be provided for.
 - g. Any other order that the honourable court may deem fit in the circumstances.
4. The petition is opposed by the respondents vide a replying affidavit sworn on March 2, 2022 by Christine Kinyua, a Senior Immigration Officer with the 1st Respondent. She averred that the petitioner was arrested by the security agency at the Jomo Kenyatta International Airport (JKIA) on February 18, 2021 upon her return from Somalia on suspicion of using Kenyan passport No AKXXX (the passport) and Kenyan identity card No 37XXX (the ID card) which were fraudulently acquired. The passport and the ID card were confiscated and handed over to the 1st respondent and the Director of Criminal Investigations (DCI). Following investigations, it was established that the petitioner is not a Kenyan but a Somali national who first arrived in Kenya on January 20, 2018 using Somali passport no P00680241. She later came back to Kenya on the same passport on September 17, 2018 and initiated the process of acquiring the ID card.
5. Investigations further revealed that the petitioner applied for and obtained a birth certificate for herself and death certificates for her parents on 16.11.18 and 21.11.19 respectively. Thereafter the petitioner applied for and obtained internship license from the Medical Practitioners and Dentists Board (the Board) and later, permanent registration as a medical or dental practitioner. It was further averred that Wajir Girls Secondary School has denied authenticity of the Petitioner's documents from the school. To get her registration as a medical practitioner, the petitioner used her school leaving certificate from Imam Shafie Secondary in Mogadishu which indicated her mother's name as Halima Mohamud while the birth certificate she used to get the passport indicated her mother's name as Gabey Nuno Abikar.
6. When the petitioner appeared before the 1st respondent on December 1, 2021, upon being summoned, she was represented by a Ugandan advocate who was found to be working without a valid work permit. She was given time to appoint another advocate but instead filed the petition herein in an attempt to circumvent the law and avoid facing the full force of the law for her illegal actions. The 1st respondent contended that it acted in accordance with sections 31, 48, 53 and 54 of the *Kenya Citizenship and Immigration Act* and the confiscated documents cannot be released during the pendency of the ongoing investigations. The 1st respondent stated that the petition was premature, deceptive, sensational mala fides, vexatious and unmerited and urged the court to dismiss the same with costs.



7. In a rejoinder vide a further affidavit sworn on March 21, 2022, the petitioner reiterated her averments that she is a Kenyan citizen. She went to Somalia in 2000 and upon her return to Kenya in 2018 and having attained the age of majority, she obtained an identity card and passport after the relevant officers did due diligence. She stated that she and Gabey Nuno Abikar who is her foster mother have lived in Kenya since birth save for the time she went to Somalia to advance her studies. In Somalia, Halima Mohamed took her in as a guardian and that is why she appears in some documents. She contended that article 47 and the *Fair Administrative Actions Act* were not followed and she has not been informed why her documents were confiscated and the withholding of her documents with no indication as to the timelines of the purported investigation is an infringement of her constitutional rights.
8. Abdi Mohamed Ahmed in an affidavit sworn on March 18, 2022 stated that he was born in Wanjir and is a member of Peace Eastleigh Community Association and Eastleigh Nyumba Kumi; that he has known the petitioner, her foster parents and other family members for over 20 years and that they are Kenyan citizens; that the petitioner was raised by Gaby Nuno Abikar for over 15 years; that as a Kenyan citizen, the petitioner ought to enjoy all rights and freedoms as a Kenyan citizen. Another affidavit in support of the petition was sworn by Abdihakim Salat Ali who was born in Mandera but resides and works in Eastleigh, Nairobi. He stated that he has known the petitioner for over 3 years and that to the best of his knowledge she is a truthful and honest person; that he allowed her to stay with his family when the Sheikh at their mosque told him about her story and that they were convinced that it was not safe for the Petitioner to stay alone; that she told him that her parents died a long time ago and she had been surviving on people's goodwill; that as a Kenyan citizen, the Petitioner ought to enjoy all rights and freedoms as a Kenyan citizen.
9. Parties filed their written submissions which I have duly considered together with the authorities cited. The issues that arise for determination are as follows:
 - i. Whether the respondent violated the rights of the petitioner.
 - ii. Whether the court can make a declaration that the petitioner is a Kenya Citizen.
 - iii. Whether the respondents should be compelled to give information and/or forthwith return the petitioner's documents.

Whether the Respondent violated the Petitioner's rights

10. For the petitioner, it was submitted that the respondents have violated articles 10, 33 and 35 of the *Constitution of Kenya, 2010* and sections 4, 9 and 21 of the *Access to Information Act* (AIA). She contended that her letter dated January 7, 2022 seeking information from the respondents, elicited no response no response thereby forcing her to file the present petition.
11. I have carefully perused the amended petition and note that the contention that the respondents have violated the petitioner's right of access to information under article 35 and the *AIA* was not pleaded. This is a new issue raised in submissions and is not supported by evidence. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. This was well articulated by Korir, J. in *Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another* [2014] eKLR where he stated:

The applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.



12. In any event, the *AIA* has very specific provisions for the procedure to be followed by a party seeking information held by a public officer. The *AIA* outlines the steps to be followed by such party should the application for information be rejected. The petitioner has not demonstrated that she has complied with the said provisions.
13. On the other violations, the petitioner submitted that the respondents' actions of indefinitely withholding her vital documents are contrary to article 47 of the *Constitution* as read with the *Fair Administrative Action Act*, 2015 (FAAA). Further that the respondents' actions are contrary to the national values and principles of governance in article 10(2) of the *Constitution*.
14. The respondents submitted that the petitioner has not adduced any evidence in support of the allegations of the violation of the right to fair administrative action. The respondents maintain that the petitioner obtained the documents in question fraudulently. The documents are being held following the Petitioner's failure to honour summons to shed light on the matter of the documents. She has not demonstrated any steps to clear the discrepancy in the documents. Further that what she seeks is not a legal remedy as the same arises from an illegality.
15. Article 47 of the *Constitution* guarantees to every person fair administrative action as follows:
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
16. Parliament did enact the *FAAA* to give effect to article 47. Section 4 of the *Act* provides:
 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. ...
17. The right to fair administrative action cannot be gainsaid. This right encompasses action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, where a person's right or fundamental freedom has been or is likely to be adversely affected by administrative action, such person must be given reason in writing for such action. This requirement ensures that administrative bodies discharge their mandate within constitutional and statutory confines.



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

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

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

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

20. The learned judgement on to state:

37. The fact that the right to Fair Administrative Action is a constitutional right was stated by the Constitutional Court of South Africa in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and others* (CCT16/98) 2000 (1) SA 1, that;
“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

21. In the present case, the citizenship of the petitioner is in question. The respondents contended that the petitioner initially came into the country using a Somali passport in 2018 and shortly thereafter, obtained the documents in question. Their summons to the petitioner to shed light on the matter has not been complied with. Instead, the petitioner has moved to this court seeking reliefs against the respondents.

22. Sections 31 of the *Kenya Citizenship and Immigration Act* stipulates the circumstances under which the 1st respondent may confiscate or suspend a passport or travel document. These include *inter*



alia where the holder is involved in passport or document fraud, passport or document forgery or transnational crimes. The powers of the 1st respondent are set out in section 48 of the Act, which include *inter alia* the power to require any person seeking to enter Kenya to answer any question or to produce any document in his possession for the purpose of ascertaining whether that person is or is not a citizen of Kenya and, in the case of any person who is not a citizen of Kenya, for the purpose of determining whether that person should be permitted to enter Kenya under this Act.

23. Section 54 of the Act makes provision for offences relating to documents. The section provides in part as follows:

1. A person who—
 - a. makes, whether within or outside Kenya, a false declaration or statement, which he knows or has reasonable cause to believe to be false or misleading, for the purpose of obtaining or assisting another person to obtain a passport, travel document, citizen registration, visa, work permit, residence permit, pass, written authority, consent or approval under this Act;
 - b. knowingly has in his possession a passport, travel document, certificate of registration, visa, work permit, residence permit, pass, written authority, consent or approval and who cannot reasonably give a proper account of its possession;
 - c. knowingly uses or has in his possession a forged passport, certificate of registration, visa, foreign person certificate work permit, residence permit, pass, written authority, consent or approval, or a passport, work permit, residence permit, pass, written authority, consent or approval which has been altered or issued without lawful authority, or a passport or travel document or similar document in which a visa, or endorsement has been forged, or altered or issued without lawful service;
 - d. knowingly has in his possession a passport, travel document, certificate of registration, visa, work permit, residence permit, pass, written authority, consent or approval and who cannot reasonably give a proper account of its possession;
 - e. ...
 - f. presents a forged, altered or false documents for the purposes of obtaining a passport, travel document, certificate of registration, visa, work permit, residence permit, pass, written authority;
 - g. commits an offence.

24. it is clear from their averments, that the respondents suspect that an offence may have been committed by the petitioner in obtaining the documents now in the respondents' possession and are investigating the matter. To this end, they have summoned the petitioner to shed light on the matter of her documents for the purpose of their investigations but she has failed to honour the summons. This contention has not been rebutted by the petitioner and remains uncontroverted.

25. The question this court must ask is, whether a party can seek the protection of the law having disregarded and failed to comply with lawful summons.



26. In the case of *Diana Waceke Wainana v Director of Immigration Services; Serge Louodom (Interested Party)* [2022] eKLR, Makau, J. considered a similar matter and stated:

34. From the pleadings it is clear that the interested party has been residing in Kenya and as clearly admitted by the petitioner, he has been engaging in employment despite not having a valid work or resident permit. Further if indeed the interested party has been residing in Kenya for 14 years as it is alleged by the petitioner, this means he first arrived in Kenya in 2004, in that case, the Interested Party had resided in Kenya for 6 years without a valid work or resident permit until 2010 when he first applied for a work permit. This admission therefore is a clear and blatant disregard by the interested party of the Kenyan Laws which he ironically is seeking to protect him.

27. I fully concur with the learned Judge. Having disregarded the lawful summons issued by the respondents, the petitioner cannot come to court seeking protection by the law.

28. The learned Judge went on to say:

41. I find as clearly submitted a foreign national has no independent or inherent right to remain in Kenya. The right to reside, work and or engage in any economic activity in Kenya is restricted and can only be exercised by non-citizens in compliance with the statutes regulating the same. The International Principle of Sovereignty of states presupposes that the right to entry into the Kenya is a preserve of Kenya Citizens only and the State through its authorized agents (the respondents) reserves the right of entry to foreigners. The petitioner has not demonstrated otherwise to persuade this court to decide in her favour.

42. I find to the contrary that it is the interested party who has violated the Kenyan immigration laws and based on those illegalities as clearly captures herein above, it follows that the respondents' actions were warranted and there was no violation of his rights.

43. In arriving at the aforesaid I am guided by the decision in the case of *Simon Kiprotich & 2 others v Principal Secretary, Ministry of Devolution and Planning & 4 others* [2018] eKLR, where the court held that a party cannot benefit from an illegality. The court stated that:-

“The benefit sought by the petitioners is not a legal benefit because they were occupying the forest illegally and that no person should benefit from an illegality... Ultimately, the petition is found without substance as the Petitioners have realized non-justiciable issues and have not even demonstrated that they were in the occupation of the forest albeit illegally and therefore no evidence of violation of rights.”

29. I am in full agreement with the learned Judge and find that contrary to the allegations by the petitioner that her rights have been violated, it is the petitioner who has violated the Kenyan immigration laws by failing to present herself pursuant to summons issued under the law. There is therefore no doubt in my mind, that acting as they did, the respondents have not violated the petitioners right to fair administrative action guaranteed under article 47 of the *Constitution* and their actions were warranted.



Whether the Court can make a Declaration that the Petitioner is a Kenya Citizen

30. It is the petitioner's prayer that the court makes a finding and declaration that the petitioner is a Kenyan Citizen. The respondents contest the citizenship of the petitioner and insist that she is Somali. Their case is that the petitioner used her school leaving certificate from Imam Shafie Secondary in Mogadishu to get registration as a medical practitioner. That certificate indicated her mother's name as Halima Mohamud. The birth certificate the petitioner used to get the passport, indicates her mother's name as Gabey Nuno Abikar. This was not controverted by the petitioner. She however stated that Gabey Nuno Abikar is her foster mother with whom she lived in Kenya since birth, save for the time she went to Somalia to advance her studies. She further stated that when she went to Somalia, Halima Mohamed took her in as a guardian and that is why she appears in some documents.
31. Article 14 of the *Constitution* stipulates who a Kenyan citizen by birth is, as follows:
1. A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.
 2. Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.
 3. ...
32. The petitioner does not state who her parents are nor did she place before the court any documents relating to her parents, including their identity cards and death certificates. Further, she has stated that the persons indicated in her documents as her mothers, are in fact her guardians. The scanty material placed before the court is inadequate to support her assertions. As such, this court is unable to make any finding or declaration in her favour. In any event the Petitioner must first present herself before the respondents for the purpose of furnishing such information, documents and other particulars as are necessary for the purposes of the required investigations and for a determination as to her citizenship and whether the documents in question were obtained lawfully.

Whether the Respondents should be compelled to forthwith return the Petitioner's documents

33. It is the respondents' case that in confiscating and withholding the petitioner's documents, they acted within the law. They hold the documents in question which upon preliminary investigations disclose the possibility of having been obtained fraudulently. The petitioner's refusal to honour summons to shed light on the matter have resulted in delay in the respondents making a final determination in relation to the documents. They further submitted that the Petition is intended to stop the respondents from executing their constitutional and statutory mandate and is an abuse of the court process.
34. Under section 49(8) of the *Act*, the 1st respondent has power to summon a person of interest as follows:
- (8) An immigration officer may, by summons in writing, require any person other than a citizen of Kenya to attend at his office and to furnish to that officer such information, documents and other particulars as are necessary for the purposes of determining whether that person should be permitted to remain in Kenya.
35. The court notes that in her affidavit sworn on January 12, 2021, the petitioner claimed that her mother Gabey Nuno Abikar died on 1.1.10 and annexed a copy of her death certificate. Also exhibited is a copy of the petitioner's birth certificate indicating that Gabey Nuno Abikar and Hassan Moalim Mohamed



as her mother and father respectively. However, in her further affidavit sworn on March 18, 2022, the petitioner stated that Gabey Nuno Abikar is her foster mother.

36. The foregoing places questions in the mind of the court, as to the legitimacy of the documents in question. How was the petitioner issued with a birth certificate indicating that her foster mother is her biological mother? Further, how did she travel to Kenya in 2018 using a Somali passport and shortly after in 2019 and 2020 obtain a Kenyan identity card and passport respectively. These no doubt are the answers the respondents seek from the petitioner.
37. As indicated herein, the respondents acted within the confines of the law in confiscating and withholding the petitioner's documents, pending investigations. The petitioner has not told the court why she has failed to comply with the respondents' lawful summons or indeed any difficulties she may have had in doing so. Rather than coming to court, the petitioner ought to comply with the summons by the respondents to explain the discrepancies in her documents and for a determination to be made as to whether the said documents are genuine and ought to be returned to her. Without her presenting herself to the respondents to shed light on the acquisition of the documents as required, the court is unable to grant the orders sought herein.
38. The upshot is that after considering the facts and the law herein, I find no merit in the petition dated January 12, 2022 and amended on June 10, 2022 and the same is hereby dismissed with costs.

DATED and DELIVERED in NAIROBI this 25th day of November 2022

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**

