



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 139 OF 2015

BETWEEN

EGAL MOHAMED OSMAN.....PETITIONER

AND

- 1. CABINET SECRETARY, MINISTRY OF
INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT**
- 2. HON. ATTORNEY GENERAL**
- 3. DIRECTOR OF IMMIGRATION.RESPONDENTS**

JUDGMENT

1. *Egal Mohamed Osman*, the Petitioner herein, is a British national. He holds a British Passport No. [...].
2. The Petitioner is married to a Kenyan citizen, *Sainab Mohamed Yusuf*. Their marriage was solemnized on 8th March, 1987. The couple is blessed with five children all born and resident in Kenya. At one time, the Petitioner was a lecturer at RAF International University-Kenya for two years.
3. The Petitioner has, so far, filed three Constitutional Petitions in the High Court relating to his quest to acquire Kenyan citizenship by marriage. They are **Petition No. 176 of 2014** *Egal Mohamed Osman vs. Cabinet Secretary Ministry of Interior & Co-ordination of National Government and 2 Others*; **Petition No. 152 of 2015** *Egal Mohamed Osman vs. Cabinet Secretary Ministry of Interior & Co-ordination of National Government and 2 Others* and **Petition No. 139 of 2015** *Egal Mohamed Osman vs. Cabinet Secretary Ministry of Interior & Co-ordination of National Government and 2 Others*.
4. In order to understand the background of the current Petition subject of this judgment, I will attempt a brief background to the three Petitions mentioned above.
5. **Petition No. 176 of 2014** was filed after the Petitioner had lodged his application for citizenship with the Director of Immigration Services and had not received any response for two years. The Petitioner sought for, *inter alia*, an Order of *Mandamus* compelling the Director of Immigration Services to consider his application. The Petition was fully heard and in a judgment rendered on 13th February, 2015 the Court, among other orders, directed the Director of Immigration Services to consider the Petitioner's application for citizenship within 45 days and to file a Report in Court.
6. The Director of Immigration Services complied with the order of the Court. The application for citizenship was duly considered and rejected. A Report was filed in Court.
7. The Report indicated that the Petitioner was among such persons considered to be a threat to national security.
8. In a Gazette Notice No. 2326 dated 4th April, 2015 contained in a Special Issue of the Kenya Gazette Vol. CXVII – No. 36 under the Prevention of Terrorism Act, No. 30 of 2012, the Inspector General of Police issued a Notice of Intention to recommend to the Cabinet Secretary for Interior and Co-ordination of National Government that an order be made declaring those named therein as a '*specified*

entities'. The Petitioner was named as one of the entities intended to be recommended to be declared as a 'specified entity' under the Prevention of Terrorism Act. The Petitioner challenged the Gazette Notice. That was in **Petition No. 152 of 2015**.

9. Petition No. 152 of 2015 was also fully heard. A judgment was rendered on 10th July, 2015. The Petition was dismissed.

10. According to a Replying Affidavit sworn by a Chief Immigration Officer one *Alfred Abuya Omangi* in the current Petition No. 139 of 2015, it is deponed that as a result of the dismissal of Petition No. 152 of 2015, *'the provisions of Sections 33 and 34 of the Kenya Citizenship and Immigration Act, 2011 as read with the provisions of Article 39 of the Constitution of Kenya simply applied to the Petitioner, and it is therefore wrong for the deponent to state that the Petitioner was deported'*.

11. All in all, the Petitioner is no longer in Kenya having been declared a prohibited immigrant.

12. The Petitioner also filed **Petition No. 139 of 2015**. Initially, the Petitioner mainly sought for a declaration that he is entitled to a grant of Kenyan Citizenship and an Order of *Mandamus* that the Director of Immigration Services do issue him with citizenship documents.

13. The Petitioner later amended the Petition and sought two further orders. That was on 24th January, 2020, a period of five years after the dismissal of Petition No. 152 of 2015. The further orders sought are as follows: -

vii. Any other orders and directions as this Honourable Court may consider appropriate. An order directing at the 3rd Respondent to remove the petitioner as a Prohibited Immigrant from the Immigration system.

viii. An order directing the respondent to grant and or reinstate the petitioner's residence permit.

14. The Petitioner now seeks the following orders in Petition No. 139 of 2015 (hereinafter referred to as '**the current Petition**'): -

i. An order of Certiorari to quash the decision of the Cabinet Secretary Responsible for Citizenship, communicated by the 3rd Respondent vide the letter of 23rd march, 2015 essentially declining to grant citizen to the petitioner.

ii. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 15(1) and (2), 27(1) and 92), 39(1) and (2) , 45(1) and (3) and 47(1) and (2) of the Constitution of Kenya, 2010, have been and continue to be contravened and infringed upon by the 1st and 3rd Respondents.

iii. A declaration that the petitioner is entitled to a grant of Kenyan citizenship pursuant to both the provisions of Article 15(1) and (2) of the Constitution.

iv. ORDER OF MANDAMUS directed to the 3rd Respondents, compelling the 3rd Respondent to forthwith issue the Petitioner with Citizenship documents.

v. Prohibitory order issued against the 1st and 3rd Respondents and all its agents, servants, officials or offices under his docket prohibiting them from arresting, harassing and/or deporting the petitioner or in any manner whatsoever curtailing the Petitioner's freedom of movement.

vi. General, exemplary and aggravated damages under Article 23 (3) of the Constitution of Kenya, 2010 for the unconstitutional conduct of the 1st and 3rd Respondents.

vii. Any other orders and directions as this Honourable Court may consider appropriate. An order directing at the 3rd Respondent to remove the petitioner as a Prohibited Immigrant from the Immigration system.

viii. An order directing the respondent to grant and or reinstate the petitioner's residence permit.

ix. Any other orders and directions as this Honourable Court may consider appropriate.

x. Costs of this Petition.

15. The Petitioner has pleaded at length in the current Petition. He has also sworn dispositions to that end. The Petitioner filed written submissions and made reference to several decisions in support of the current Petition.

16. The current Petition is opposed by the Respondents. As well, the Respondents filed their dispositions in opposition. The Respondents also filed written submissions.

17. I have carefully considered the pleadings, submissions and the decisions in the current Petition. I have also considered the pleadings, submissions and the judgments in Petition No. 152 of 2015 and Petition No. 176 of 2015.

18. Resulting from the said considerations, there is an issue which this Court ought to deal with first. It is the effect of the judgment in Petition No. 152 of 2015 on the current Petition.

19. The effect of the judgment in Petition No. 152 of 2015 on the current Petition is alluded to by the Respondents through the Replying Affidavit sworn by a Chief Immigration Officer one *Alfred Abuya Omani* in the current Petition No. 139 of 2015, wherein, it is deponed that as a result of the dismissal of Petition No. 152 of 2015, *'the provisions of Sections 33 and 34 of the Kenya Citizenship and Immigration Act, 2011 as read with the provisions of Article 39 of the Constitution of Kenya simply applied to the Petitioner, and it is therefore wrong for the deponent to state that the petitioner was deported'*.

20. There is no doubt that the Petitioner is not a Kenyan citizen by virtue of Article 14 of the Constitution. The provision is on citizenship by birth.

21. Article 15 of the Constitution provides for citizenship by registration. The provision states as follows: -

(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.

(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.

(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.

(5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.

22. The legislation contemplated under Article 15(4) of the Constitution is the *Kenya Citizenship and Immigration Act, No. 12 of 2011* (hereinafter referred to as **'the Citizenship Act'**).

23. The Petitioner seeks to be registered as a Kenyan citizen by virtue of his marriage to a Kenyan citizen for over 30 years. That is in line with Article 15(1) of the Constitution.

24. Section 11 of the Citizenship Act provides for citizenship by marriage. The provision states as follows: -

A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if –

(a) the marriage was solemnized under a system of law recognized in Kenya, whether solemnized in Kenya or outside Kenya;

(b) the applicant has not been declared a prohibited immigrant under this Act or any other law;

(c) the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;

(d) the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and

(e) the marriage was subsisting at the time of the application.

25. A person who believes to qualify to be accorded citizenship by registration in the above circumstances usually applies to the Director for Immigration Services for consideration. The Petitioner herein made such an application.

26. Apart from seeking to be registered as a Kenyan citizen by virtue of marriage, the Petitioner (as a foreigner) and any other person has the right to freedom of movement in entering, remaining and residing anywhere in Kenya. That is under Article 39 of the Constitution.

27. Sections 33 and 34 of the Citizenship Act provide as follows: -

Section 33

(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, cybercrimes 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; 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).

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who-

- (a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;

(b) the family and dependants of a prohibited immigrant;

(c) incapable of supporting himself and his dependants (if any) in Kenya;

(d) is adjudged insolvent;

(e) anyone who has been judicially declared incompetent;

(f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006;

(3) The Cabinet Secretary may make regulations on admission of regulatory officer's right to deny entry a person other than an asylum seeker who, upon entering or seeking to enter Kenya, fails to produce a valid and acceptable passport or travel document recognized in Kenya to an immigration officer on demand or within such time as that officer may allow;

(4) Any other person who is declared an inadmissible person by the order of Cabinet Secretary in line with an objective and written criteria or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed), including matters legislated in the public health.

(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.

(6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.

(7) The Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons.

(8) The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.

Section 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.

(3) This section shall not apply to-

(a) the accredited representative to Kenya of the government of any Commonwealth country, and the spouse and any child of that representative;

(b) the accredited envoy to Kenya of a foreign sovereign state, and the spouse and any child of that envoy;

(c) a person upon whom the immunities and privileges set in the laws relating to Privileges and Immunities have been conferred under these laws, and the spouses and any children or other dependants of that person;

(d) the accredited diplomatic or consular staff of the persons referred to in paragraphs (a) and (b), and the spouses and any children of the accredited diplomatic or consular staff;

(e) the official staff of the persons referred to in paragraphs (a) and (b), and the spouses and any children of the official staff;

(f) the domestic staff of the persons referred to in paragraph (a), (b) and (c), and the spouses and any children of the domestic staff;

(g) any person, or class or description of persons, exempted by the Cabinet Secretary from the provisions of this section by notice in the Gazette.

(4) Where any person ceases to be a person to whom subsection (3) applies, the person shall, after the expiration of such period of time not exceeding six months following the cessation as an immigration officer may allow for the departure of that person from Kenya, his presence in Kenya shall, unless otherwise authorized under this act, be unlawful.

28. It is a fact that the Petitioner was declared a *specified entity* under the Prevention of Terrorism Act. The Petitioner unsuccessfully challenged the declaration in Petition No. 152 of 2015. As such, the Petitioner is and remains a *specified entity* under the Prevention of Terrorism Act.

29. It is also a fact that the Petitioner is married to a Kenyan citizen. The couple has five children who were all born and are resident in Kenya. Their marriage has lasted for 34 years as at now.

30. Section 11(b) of the Citizenship Act prohibits registration of a person as a citizen of Kenya who has been declared as a prohibited immigrant under the Citizenship Act or any other law.

31. The Petitioner having been declared as a specified entity under the Prevention of Terrorism Act falls under the category of prohibited immigrants under Section 33(1)(i) of the Citizenship Act.

32. Being a prohibited immigrant, the Petitioner is, therefore, not eligible under Section 11 of the Citizenship Act to be accorded Kenyan citizenship by virtue of marriage. Section 11 of the Citizenship Act is still law in Kenya. It has neither been nor is it sought, in the current Petition, to be declared unconstitutional.

33. With such a position in law, this Court is at a loss as to how the amended Petition can possibly succeed. I say so because the current Petition, as presented, did not take into account the fact that the Petitioner is a prohibited immigrant.

34. Having been declared a prohibited immigrant, the rights and fundamental freedoms as well as any privileges guaranteed to lawful immigrants under Article 39 of the Constitution and the Citizenship Act, cannot accrue to the Petitioner.

35. The current Petition, hence, suffers a false start. It is premised on an illegality.

36. Having said so, I do not think that this Court ought to expense the limited judicial time in dealing with the matter further.

37. In the end, the Amended Petition dated 24th January, 2021 be and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 28th day of April, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Odongo, Counsel for the Petitioner.

Mr. Thande Kuria, Counsel instructed by the Hon. Attorney General for the Respondents.

Elizabeth Wambui – Court Assistant.