



**Gulleid v Registrar of Persons & another (Petition E007 of 2021)
[2021] KEHC 110 (KLR) (27 September 2021) (Judgment)**

Abdul Mohammed Gulleid v Registrar of Persons & another [2021] eKLR

Neutral citation: [2021] KEHC 110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION E007 OF 2021

EKO OGOLA, J

SEPTEMBER 27, 2021

BETWEEN

ABDUL MOHAMMED GULLEID PETITIONER

AND

REGISTRAR OF PERSONS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

Circumstances under which failure to replace a lost identity card violates rights to fair administrative action and amounted to an unlawful constructive revocation of citizenship.

Reported by Beryl Ikamari

Constitutional Law - citizenship - replacement and issuance of identity cards - failure to replace an identity card on grounds of double registration without giving the affected person a chance to be heard - whether the circumstances amounted to constructive revocation of citizenship - whether there was a violation of the right to fair administrative action - Constitution of Kenya, 2010, article 17; Kenya Citizenship and Immigration Act (Act No. 12 of 2011) section 21.

Civil Practice and Procedure - constitutional litigation - responding to a petition - where the respondents filed grounds of opposition without filing a replying affidavit - whether the facts alleged in the petition would remain uncontroverted under those circumstances.

Constitutional Law - fundamental rights and freedoms - right to fair administrative action - whether failure to replace an identity card on grounds of double registration without giving the affected person a chance to be heard constituted a violation of the right to fair administrative action - Constitution of Kenya, 2010, articles 17 and 47.

Brief facts

The petitioner lost his identity card in 1989 and it was replaced within three days after the petitioner's father paid some facilitation fee for the replacement. However, in 1990 the petitioner was arrested and charged for allegedly undertaking double registration for his identity card but he was acquitted. He stated that since 1990



he had applied for a replacement of his identity card and visited the 1st respondent's office to no avail. In the year 2010, the petitioner was informed that he had been blocked in the ID system because of the alleged double entry in 1989.

During the Covid-19 pandemic, the petitioner stated that he was unable to receive donations from the Government because he had no identity card. The petitioner alleged that the respondents had acted irrationally, unreasonably and contrary to his legitimate expectation and in violation of the articles 10, 47, 50 of the Constitution, by refusing to issue him with an identity card when in fact, his citizenship status had been confirmed. The petitioner sought various court orders including the replacement of his identity card.

Issues

- i. What was the effect of filing grounds of opposition without filing a replying affidavit as a response to a petition?
- ii. Whether double registration qualified as a ground for revocation of citizenship under the Constitution.
- iii. Whether a decision not to replace an identity card citing double registration, which was made without affording the affected person a hearing, was a violation of the right to fair administrative action and amounted to constructive revocation of citizenship.

Held

1. The respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioner that he was a Kenyan citizen. The grounds of opposition filed by the respondents were only deemed to address issues of law. They were general averments and could not amount to proper or valid denial of allegations made on oath.
2. The petitioner's citizenship status was supported by his father's identity card, the petitioner's school leaving certificate, a copy of his lost identity card and a letter from the Regional Intelligence Coordinator at the Coast Region who confirmed that the petitioner was a Kenyan citizen. It had been proved on a balance of probabilities that the petitioner was a Kenya citizen.
3. The 1st respondent's act of denying the petitioner a replacement of his lost National Identification Card on account of double registration amounted to a constructive revocation of the petitioner's citizenship which power or discretion was not conferred by article 17 of the Constitution.
4. Even assuming the 1st respondent had the authority to revoke citizenship, it was required to follow the law, specifically section 21 of the Kenya citizenship and immigration Act. The Cabinet Secretary could revoke citizenship earned through registration on the grounds mentioned under article 17 of the Constitution if there was adequate proof and the Citizenship Advisory Committee recommended it. However, before doing so, the Cabinet Secretary was required to give written notice and inform the person whose citizenship was due to be revoked of the intention to revoke his or her citizenship, as well as the reasons for the action. The Cabinet Secretary had to then provide the person who had received such notice with an opportunity to present reasons why his or her citizenship should not be rescinded.
5. The petitioner was condemned unheard by the 1st respondent and therefore, his right to a fair hearing and the right to a fair administrative action guaranteed under articles 47 and 50 of the Constitution were infringed by the 1st respondent.
6. Article 23 (3) of the Constitution empowered the High Court to grant appropriate reliefs in any proceeding seeking to enforce fundamental rights and freedoms. The petitioner's rights were violated, and he was entitled to damages. In terms of the quantum of damages, awarding damages entailed the exercise of judicial discretion, which should be exercised judicially, which meant that it was to be based on reason and principle rather than caprice or personal opinion.
7. Determining compensation for an injury or loss that was neither physical nor financial presents unique challenges for the judicial process, which sought to produce objectively justified results based on



evidence, reason, and precedent. An award of Kshs 500,000 was be reasonable considering violation of the petitioner's right to be heard and the right to a fair administrative action.

Petition allowed.

Orders

- i. *Declaration issued that the petitioner was a citizen of Kenya and that he was entitled to all the rights and privileges provided for under Chapter three of the Constitution of Kenya, 2010.*
- ii. *Declaration issued that the respondents were in violation of articles 10, and 47 of the Constitution by failing to issue the petitioner with a duplicate of his lost identity card.*
- iii. *Order issued compelling and directing the 1st respondent to replace the petitioner's lost identify card .*
- iv. *The petitioner was awarded Kshs. 500,000 for the violation of his right to fair administrative action.*
- v. *Costs to the petitioner.*

Citations

Cases

Kenya

1. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
2. *Kitur, Phillip Tirop v Attorney General* Constitutional Petition 159 of 2015; [2018] KEHC 7492 (KLR) - (Applied)
3. *Mbogo & another v Shah* [1968] EA 93 - (Applied)
4. *Miano, Jamlik Muchangi v Attorney General* Constitutional Petition No 300 of 2015; [2017] eKLR - (Mentioned)
5. *Nyakundi, Peter O & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & Attorney General* Petition 24 of 2015; [2016] KEHC 467 (KLR) - (Explained)

South Africa

Minister of Health & others v Treatment Action Campaign (TAC) & others (2002) 5 SA 721; (2002) 5 LRC 216 - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 10; 12; 13; 14; 15; 17; 18; 23(3); 47; 50; Chapter 3; Schedule 6 clause 30 - (Interpreted)
2. Fair Administrative Action Act, 2015 (Act No 4 of 2015) In general - (Cited)
3. Kenya Citizenship and Immigration Act, 2011 (Act No 12 of 2011) sections 6, 21 - (Interpreted)

Advocates

Mr Gikandi for petitioner

Ms Opio for Attorney General

JUDGMENT

PARTIES

1. The petitioner is an adult male of sound mind residing in Mombasa County and was a holder of Identity Card number xxxxx which got lost sometime in 1989 and was replaced sometime in 1990. The 1st respondent is the Registrar of Persons, an office created under the *Kenya Citizenship and Migration Act* No 12 of 2011, while the 2nd respondent is the Attorney General who is the principal legal advisor to the Government.



The Petition

2. *Vide* the amended petition herein dated 6/04/2021, the petitioner Abdul Mohammed Gulleid claims that he was born on 7/07/1967 at Tudor Estate within the County of Mombasa to a Kenya Father who was the holder of Identity Card No xxxx. Upon attaining the age of majority, the Petitioner states that he applied and was issued with an identity card number xxxx which unfortunately got lost sometime in 1989 and replaced within three (3) days after the petitioner's father paid a man some facilitation fee to undertake the said replacement. However, sometime in 1990, the petitioner avers that he was arrested, charged, and later on acquitted for having allegedly undertaken a double registration of his identity card.
3. The petitioner avers that since 1990, he has continuously applied for replacement of his National Identity Card and even visited the 1st respondent's office in Nairobi to no avail. However, sometime in the year 2010, the petitioner avers that he was informed by the 1st respondent's office that he had been blocked in the ID System because of the alleged double entry in 1989. Consequently, during the Covid -19 Pandemic, he was unable to receive donations from the Government since he did not have a National Identity card, yet as a Kenyan Citizen he was entitled to all the rights and privileges accorded to citizens of Kenya under articles 13, 14, 15, 47 and 50 of the [Constitution of Kenya, 2010](#).
4. It is the petitioner's case that the respondents have acted irrationally, unreasonably and contrary to the petitioner's legitimate expectation and in violation of the articles 10, 47, 50 of the [Constitution](#), by refusing to issue him with an identity card when in fact, his citizenship status was confirmed by the Regional Intelligence Coordinator at the Coast Province One Mr Ochieng, who noted that he was born in Kenya at Tudor Estate in Mombasa; he attended school at Ziwani Boys Primary School, where he left in the year 1979 and was issued with a Kenya Primary School leaving certificate by the said school.
5. Being aggrieved by the actions of the respondents, the petitioner filed this Petition seeking the following orders:
 - a. A declaration that the petitioner is a Kenya citizen and is entitled to all the rights and privileges provided for under Chapter three of the [Constitution of Kenya, 2010](#).
 - b. A declaration that the respondents are in violation of articles 10,12,13,14,15 and 47 of the [Constitution of Kenya, 2010](#) and the provisions of the [Fair Administrative Action Act](#).
 - c. An Order directing the 1st respondent to forthwith replace the petitioner's lost identity card number xxxx.
 - d. General damages for violation of the petitioner's fundamental rights.
 - e. Costs of the Petition be awarded to the petitioner herein.
6. The petition is supported by the affidavit of the petitioner sworn on 8/12/2020.

The Response

7. The respondents through the Principal Litigation Counsel from the Attorney General office in Mombasa opposed the amended Petition *vide* grounds of opposition dated and filed on 4/06/2021, on the grounds that:
 1. The petition is misconceived, frivolous, vexatious and an abuse of the Court process.
 2. The application is unmerited as he reliefs sought are improper and incapable of being granted.



3. The petition is incurably defective and unconstitutional since by granting the prayers sought, the court would be usurping the statutory powers vested in the 1st respondent.
4. The petition is not supported by any evidence in proof of the injustice and/or breach of constitutional rights.

Submissions

8. The petition was disposed off by way of written submissions. I have considered the submissions filed on behalf of the petitioners as well as the grounds of opposition filed by the respondent and all other relevant material.
9. Mr Gikandi Learned counsel for the petitioner submitted that despite service of the petition, the respondents have not filed any replying affidavit, hence the factual matters in the petition have not been rebutted, and therefore, they are deemed to be admitted by the respondents. Ms Kiti learned counsel for the respondent did not respond to the issue of failure by the respondent to file a replying affidavit to the Petition.
10. This court finds and holds that the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioner that he is a Kenyan citizen born on 7/06/1967 at Tudor Estate within Mombasa County and upon attaining the age of majority, he applied for and was issued with a National Identity Card which got lost sometime in the year 1989 and the same was replaced after payment of a facilitation fees. However, the petitioner was arrested, charged, and acquitted for the offence of Double Registration of a National Identity card and since then the petitioner's efforts to get a national Identity Card have not bore any fruit.
11. In the court's view, the grounds of opposition filed by the respondents are only deemed to address issues of law. They are general averments and cannot amount to proper or valid denial of allegations made on oath. (see *Peter O. Nyakundi & 68 others vs Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR Odero, J addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated:

“As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See *Mereka & Co Advocates v Unesco Co Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 others v Hon Attorney General* Constitution Petition No 8 OF 2014 and *Eliud Nyauma Omwoyo & 2 others v Kenyatta University*). . The respondents have failed to refute specifically the allegations in the petitioner's sworn affidavit in support. Failure to file a replying affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”
12. Similarly, in *Phillip Tirop Kitur v Attorney General* [2018] eKLR, the court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner's evidence stood unchallenged. In addition, the High Court rejected the Attorney General's contention that the delay in filing the petition had caused it prejudice, ruling that in the absence of a replying affidavit or oral evidence, the court had no facts upon which it could make such a finding.



13. From the foregoing, and having established that the petitioner's citizenship status is supported by his father's identity card, the petitioner's school leaving certificate, a copy of his lost identity card and a letter from the Regional Intelligence Coordinator at the Coast Region who confirms that the petitioner is a Kenyan citizen, I find and hold that from the petitioner's single story and the failure to file a replying affidavit to controvert the factual issues raised by the petitioner, it has been proved on a balance of probabilities that the petitioner is a Kenya citizen. The remaining issues for determination are:
1. Whether the petitioner can lose his citizenship due to the issue of double registration.
 2. Whether the petitioner's rights and Fundamental Freedoms were violated.

1. Whether the petitioner can lose his citizenship due to the issue of double registration.

14. The petitioner has averred that he was arrested, charged, and acquitted for the offence of double registration. The petitioner's efforts to apply for the replacement of his documents have been in vain, rendering him helpless since he is not able to enjoy the benefit and rights that come with being a Kenyan Citizen.

Article 12 of the [2010 Constitution](#) states

- (1) Every citizen is entitled to –
 - (a) The rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution: and
 - (b) A Kenya passport and any document of registration or identification issued by the State to citizens.
- (2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria mentioned in article 24.

15. Article 17 of the [Constitution](#) provides for revocation of citizenship. It states as follows: -

17. Revocation of citizenship

- (1) If a person acquired citizenship by registration, the citizenship may be revoked if—
 - (a) the person acquired the citizenship by fraud, false representation or concealment of any material fact;
 - (b) the person has, during any war in which Kenya was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in such a manner as to assist an enemy in that war;
 - (c) the person has, within five years after registration, been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or
 - (d) the person has, at any time after registration, been convicted of treason, or of an offence for which—
 - (i) a penalty of at least seven years imprisonment may be imposed; or
 - (ii) a more severe penalty may be imposed.



- (2) The citizenship of a person who was presumed to be a citizen by birth, as contemplated in article 14(4), may be revoked if—
 - (a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;
 - (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or
 - (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.

16. From the foregoing, I find and hold that the 1st respondent's act of denying the petitioner a replacement of his lost National Identification Card on account of double registration amounted to a constructive revocation of the petitioner's citizenship which power or discretion is not conferred by article 17 of the Constitution.

17. Article 18 of the Constitution empowered parliament to enact legislation on citizenship. This led to the enactment of the Kenya Citizenship and Immigration Act, Chapter 172, Laws of Kenya in August 2011. Section 6 of the Act states as follows: -

(6) Citizenship by Birth

A citizen by birth will carry the same meaning as provided in article 14 as read together with clause 30 of the Sixth Schedule of the Constitution.

18. Section 21 of the Kenya Citizenship and Immigration Act provides for revocation of citizenship and states as follows: -

- (1) The Cabinet Secretary may, where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, revoke any citizenship, acquired by registration on the grounds specified in article 17 of the Constitution.
- (2) The Cabinet Secretary shall by notice, in writing, inform any person whose citizenship is due for revocation of the intention to revoke his or her citizenship giving reasons for the intended revocation.
- (3) The Cabinet Secretary shall give a person who has been given a notice under subsection (2) an opportunity to present the reasons why his or her citizenship should not be revoked.
- (4) The Cabinet Secretary may after considering the presentations made under subsection (3) revoke the citizenship and cause the revocations to be entered into the register for revocation of citizenship.

19. Even assuming the 1st respondent had the authority to revoke citizenship, it was required to follow the law, specifically section 21 of the Kenya citizenship and immigration Act. The Cabinet Secretary may revoke citizenship earned through "registration" on the grounds mentioned under article 17 of the Constitution if there is adequate proof and the Citizenship Advisory Committee recommends it. However, before doing so, there are a few things to consider. The Cabinet Secretary is required to give written notice and inform the person whose citizenship is due to be revoked of the intention to revoke his or her citizenship, as well as the reasons for the action. The Cabinet Secretary must then provide the person who has received such notice with an opportunity to present reasons why his or her citizenship should not be rescinded.



2. Whether the petitioner's rights and Fundamental Freedoms were violated.

20. . The petitioner claims that his rights and fundamental freedoms have been violated since he was condemned unheard. A complaint against him was never served upon him before his name was blocked in the 1st respondent's system for double registration. Therefore, the 1st respondent's actions are null and void
21. In the case of *Judicial Service Commission v Mbalu Mutava Musyimi* [2015] eKLR the Court of Appeal stated that;
- “ 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.”
22. From the foregoing, and the failure by the respondents to rebut the factual matters in the amended petition, this court finds that the petitioner has proved on a balance of probability that he was condemned unheard by the 1st respondent and therefore, his right to a fair hearing and the right to a fair administrative action guaranteed under articles 47 and 50 of the Constitution were infringed by the 1st respondent.
23. In terms of appropriate reliefs, article 23 (3) of the Constitution empowers this Court to grant appropriate reliefs in any proceeding seeking to enforce fundamental rights and freedoms, such as this one. The South African Constitutional Court in *Minister of Health & others v Treatment Action Campaign & others* (2002) 5 LRC 216 at page 249 held as follows:
- “...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.”
24. This court has considered the petitioner's case and the applicable law, and it has concluded that the petitioner's rights were violated, and he is entitled to damages. In terms of the quantum of damages, awarding damages entails the exercise of judicial discretion, which should be exercised judicially, which means that it should be based on reason and principle rather than caprice or personal opinion. See *Mbogo & another v Shah* [1968] EA 93.
25. It is undeniable that determining compensation for an injury or loss that is neither physical nor financial presents unique challenges for the judicial process, which seeks to produce objectively justified results based on evidence, reason, and precedent. See *Jamlik Muchangi Miano v Attorney General* [2017] eKLR.



26. Doing the best I can, I find that an award of Kshs 500,000 would be reasonable in the circumstances considering violation of the petitioner's right to be heard and the right to a fair administrative action. Accordingly, I enter judgement in favour of the petitioner as follows: -

- (a) A declaration is hereby issued that the petitioner is a Citizen of Kenya and that he is entitled to all the rights and privileges provided for under Chapter three of the *Constitution of Kenya, 2010*.
- (b) A declaration is hereby issued that the respondents are in violation of article 10, 47 of *Constitution* by failing to issue the petitioner with a duplicate of his lost identity card.
- (c) An order is hereby issued compelling and directing the 1st respondent to forthwith replace the petitioner's lost identify card number xxxxxxxx.
- (d) The petitioner is awarded Kshs 500,000 for the damage for violation of his right to a fair administrative action.
- (e) Costs to the petitioner.

Orders accordingly.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr Gikandi for Petitioner

Ms Opio for Hon. Attorney General

Ms Peris Court Assistant

