



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2020

BETWEEN

MIGUNA MIGUNA.....PETITIONER/APPLICANT

VERSUS

THE LUFTHANSA GROUP

OPERATING AS LUFTHANSA GERMAN AIRLINES.....1ST RESPONDENT

AIR FRANCE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RAYCHELLE OMAMO, THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS.....4TH RESPONDENT

CAPTAIN GILBERT M.KIBE, DIRECTOR GENERAL,

KENYA CIVIL AVIATION AUTHORITY (KCAA).....5TH RESPONDENT

ALEX GITARI, ACTING MANAGING DIRECTOR,

KENYA AIRPORTS AUTHORITY.....6TH RESPONDENT

FRED MATIANG'I, CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....7TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST INTERESTED PARTY

THE LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

RULING

1. By way of a Notice of Motion dated 15th November 2021, the applicant seeks orders that:

i. Spent;

ii. An order be made directing all the respondents herein to lift the red alerts given by the Government of the Republic of Kenya acting through the 3rd, 4th, 5th, 6th and 7th respondents to the 1st and 2nd respondents and/or to any other airline, preventing the said airlines from allowing the petitioner to board their aero planes for purposes of travelling to and entering Kenya;

iii. A mandatory order be issued directing the 2nd respondent herein, Air France, to board the petitioner at Brandenburg Airport in Berlin, Germany on the immediate next available flight to Paris, France enroute Nairobi, Kenya subsequent to the making of his order and disregard any red alert or restriction directed at it by the Government of the Republic of Kenya;

iv. A mandatory order be issued against the Government of the Republic of Kenya to comply with the following orders to ensure the unrestricted re-entry of the petitioner to Kenya:

a. Order made on 15th February 2018 by Justice L. Kimaru in Misc. Criminal Application No.57 of 2018, Miguna Miguna v The Director of Public Prosecutions & 2 others in which the declaration made by the 7th respondent on the 6th February, 2018 that the petitioner was an illegal immigrant was declared null and void and the 7th respondent ordered to surrender the petitioner's Kenyan passport to Court.

b. Order made on 12th February 2018 by the Court of Appeal in Civil Application No.1 of 2017 (UR 1/2018), Dr. Fred Matia'ngi v Miguna Miguna & 4 others declining the 7th respondent's request for stay of execution of the order made on 15th February 2018 by Justice Kimaru.

c. Order made on 29th March, 2018 by Justice Odunga in Petition No.51 of 2018, Miguna Miguna v Dr. Fred Matiang'I & 6 others in which the Court directed that the petitioner should not be removed from Kenya but should be produced in Court and granted access to his lawyers.

d. Order made on 29th March 2018 by Justice Odunga in Petition No.51 of 2018; Miguna Miguna v Dr. Fred Matiang'I & 6 others in which the 7th respondent and officers acting under his command were found guilty of contempt for removing the petitioner from Kenya and refusing to produce him in Court.

e. Judgment made on 14th December 2018 by Justice Odunga in Petition No.52 of 2018 to return to the petitioner his Kenyan passport.

f. Order made on 6th January 2020 by Justice Korir in this petition inter alia restraining the respondents from interfering with the petitioner's entry into Kenya on 7th January 2020 or any other date appointed by the petitioner.

v. The costs of this application be provided for.

2. The application is supported by Dr. John M. Khaminwa's sworn supporting affidavit of similar date. In addition the grounds set out on the face of the application are as follows:

i. The petitioner is a Kenyan citizen by birth and entitled to the rights under Articles 12 to 18 and 39 of the Constitution.

ii. While reiterating the events and determinations referred to under prayer 5, they aver that the petition is as a result challenging the respondent's denial of the petitioner's entry into Kenya through the red alert issued in respect of the petitioner.

iii. The petitioner is entitled to enter Kenya as a matter of constitutional right and further by virtue of the numerous orders that have been issued in this matter.

iv. The petitioner booked an air ticket to travel from Canada via Germany and France and arrive in Kenya on 16th November 2021.

v. That the petitioner left Canada for Germany on 13th November 2021 due to the court's decision dated 12th November 2021 and the 3rd, 6th and 7th respondents assurance that there existed no red alerts. He was however denied entry aboard Air France AF1835 from Berlin to Paris as he was informed that the government had issued a red alert against him.

vi. The petitioner is stranded in Berlin, Germany hence the need for the issuance of the order sought by the petitioner on 4th November 2021 as it is no longer a matter of speculation and accordingly needs to be removed to allow his travel to Kenya.

vii. The orders sought are consequential for the purposes of enforcement and implementation of previous orders made with respect to the petitioner.

viii. The Court owing to its power ought to consider the prayer in light of the evidence availed to the Court.

3. Mr. Havi for the petitioner in his submissions gave a background on how this matter started and where it has reached. He referred to Pet.No.51/2018 which held the government's action to be unconstitutional. Counsel submitted that the applicant has made attempts to return to Kenya in vain. It is claimed that on both occasions there were "red alerts" issued against him by the government of Kenya.

4. That on 6th February, 2020 Justice Korir ordered that the petitioner should use his identity card or Kenyan passport to travel to Kenya. He could however not travel because of the “red alerts”, issued by the government of Kenya to the 2nd respondent. Further counsel admitted to not having seen the “red alert” but argues that it is a real thing since the applicant was on 15th November, 2021 barred from boarding Air France to Kenya. The applicant’s Kenyan passport is said to have been perforated and he does not in any way require a visa to travel to Kenya. Responding to the grounds of opposition by the 1st and 2nd respondents learned counsel submits that the petitioner does not need to file another suit. It is his contention that one or all the respondents are lying in this matter.

5. Mr. Havi referred to three authorities namely:

i. Esso Petroleum Ltd [1973] ALL E.R. 1075. On this he submitted that the court has the power to prevent a respondent from a status illegally obtained. In this case the government has destroyed the petitioner’s passport yet wants him to get a visa. He already has a ticket paid for.

ii. The Despina Pontikos [1975] E.A. 38 where a mandatory injunction was issued at interlocutory stage. He argued that the respondents in this case have been evasive.

iii. Ripples Ltd v Kamau Mucuha [1992] eKLR where Justice Mwera (rtd) issued a mandatory injunction.

6. Finally he submits that both respondents insinuated that this application is res judicata. He opposed that saying the circumstances had changed and the petitioner is stranded in Berlin, Germany.

7. Dr. Khaminwa fully associated himself with Mr. Havi’s submissions. He reiterated that there was abuse of the law and the constitution in this matter following the disobedience of court orders. He also stressed that the applicant is a Kenya citizen having been born in Kenya and has an Identity card. He referred to various Articles of the Constitution and what they stand for e.g. Articles 2(5), 12, 13, 14, 16 and 39.

8. Mr. Abdikadir Osman for the 1st interested party submitted that the circumstances were now different as there was evidence of “red alerts”. That the 1st and 2nd respondents have breached their contractual duty.

9. The 1st and 2nd respondents in response in opposition to the notice of motion filed their grounds of opposition dated 17th November 2021 stating that:

i. Its relations with the petitioner are purely contractual and hence the matter should be heard by way of a civil or commercial suit. Adding that it invokes the doctrine of avoidance as seen in the case of Anthony Miano 7 other v Attorney General & others(2021)eKLR.

ii. No order should be issued against it because it is not involved in the dispute between the petitioner and the 3rd to 7th respondent. Secondly, there is no evidence adduced that it has violated the petitioner’s constitutional rights and freedoms.

iii. The 2nd respondent is required to comply with requirements and restrictions imposed by states with regard to entry into and out of their territories being an international carrier. As a result the decision should not prejudice its landing rights in Kenya due to boarding a person contrary to the requirements for gaining entry into Kenya.

iv. An order directing setting aside of the restriction should accordingly be directed to the 3rd to 7th respondents and not it.

v. The petition dated 14th February 2020 does not seek any order against the 2nd respondent to carry the petitioner to Kenya.

10. Mr. Lawson Ondieki for the 1st and 2nd respondents in his submissions relied on their grounds of opposition. It is his submission that there are no “red alerts” and what has been produced are tweets. He contends that the issue here is documentation to enable the petitioner to travel. This to him is an issue which does not involve the 1st and 2nd respondents.

11. Counsel further submits that the issue between the petitioner and 1st and 2nd respondents is a contractual and not a constitutional issue. He referred to the case of **Anthony Miano and others [2021] eKLR** and submitted that the petitioner could file a civil suit and choose another flight. He contends that any injury suffered can be compensated by way of damages. It is his submission that the 2nd respondent is an international air carrier and is bound to comply by the travel requirements by every other state and in this case documents are key. Any such requirements seeking to be set aside ought to be directed at the government of Kenya and not the 2nd respondent.

12. Counsel finally submits that a mandatory injunction cannot issue since the petition itself does not seek any injunction against the 2nd respondent. He relied on the case of **Morris & Co. Ltd v KCB Ltd [2003] 2 E.A. 606**

13. The 3rd, 4th and 7th respondents filed a replying affidavit dated 17th November, 2021 sworn by Dr. (ENG.) Karanja Kibicho, CBS Principal Secretary of the 7th respondent. They assert that the petitioner’s application is based on hearsay as no government agency has issued any “red alert” to the 1st and 2nd respondents in relation to the petitioner’s travel to Kenya.

14. It is averred that the petitioner is travelling on a Canadian passport as a Canadian citizen and hence requires a visa to be allowed to board the aircraft to Kenya. According to them the petitioner was advised through the 1st interested party to visit the Kenya High Commission in

Ottawa and obtain an Emergency certificate to enable him to travel to Kenya. In addition, it is contended that the application is res judicata as the matters are similar to those litigated upon on 12th November 2021. The respondents state that they will not comment on the matters pending before the Court of Appeal and High Court with relation to the petitioner as the same are sub judice.

15. Mr. Marwa for the 3rd, 4th and 7th respondents in his submissions relied on their replying affidavit and earlier affidavit and the ruling of 12th November, 2021. He urged that the petitioner does not possess travelling documents and that he has not been denied entry into Kenya. That he has no visa for the Canadian passport he intends to use.

16. Counsel referred to the request for travel documents dated 5th November, 2021, plus the response to the request, through which he was advised. The applicant did not heed the advice. He submits that there are no “red alerts” issued and the last annexure in the Notice of Motion does not say anything about “red alerts” and no reason was given for the denial.

17. In a rejoinder Mr. Havi reiterated that the dispute is not contractual but constitutional and of an international nature. He argued that the 2nd respondent could not demand for a visa from the applicant and the conditions set for him are unnecessary.

18. Dr. Khaminwa added that an Identity card was sufficient, to allow the petitioner to travel back to Kenya. He reiterated the contents of the application and further adopted the substance of his supporting affidavit sworn on 4th November, 2021.

Analysis and determination

19. I have duly considered the Notice of Motion, affidavits, grounds of opposition, annexures, cited cases and submissions, the law, and in my view the issues for determination are:

i. Whether this application is res judicata;

ii. Whether the suit invokes the doctrine of constitutional avoidance; and

iii. Whether the petitioner/applicant is entitled to the orders sought

i. Whether this suit is res judicata

20. The jurisdiction of this Court to entertain this application is challenged by the respondents. The 3rd, 4th and 7th respondents argue that the matter is res judicata by virtue of the determination made on 12th November 2021.

21. The guiding law upon which courts make findings on the doctrine of res judicata is Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Court of Appeal in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** while discussing the doctrine of res judicata opined as follows:

“Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....”

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”

The Court went further to state that:

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata

based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue of *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

22. A look at the facts of this case on the face of it seemingly reveals that the elements of the doctrine are present owing to it being the same parties and same issues before a court of competent jurisdiction. A closer look however reveals that the issue before this court is on a different set of facts. While the orders desired are the same, the emerging issue is that the petitioner was actually barred from boarding the 2nd respondent’s flight to Kenya on 15th November, 2021 as opposed to the hypothetical assertions in the previous application where a ruling was delivered on 12th November, 2021.

23. At the heart of this court is a need to safeguard and ensure that a person’s rights are upheld and respected. In view of that it is clear that this application is not *res judicata* as argued by the 3rd, 4th and 7th respondents. In the present scenario the claim is that the applicant’s rights have been constantly violated. He is at liberty to file a suit and or application each time his fundamental right is violated until the action is stopped to qualify the matter as *res judicata* in that final determination.

24. In the Court of Appeal in the case of **John Florence Maritime Services Limited** (*supra*) the court makes known in its conclusion that:

i. The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

In this case the facts presenting themselves are different from what was dealt with in the ruling of 12th November, 2021.

ii. Whether this suit invokes the doctrine of constitutional avoidance

25. In this issue, the 2nd respondent contends that the matter invokes the doctrine of constitutional avoidance as it is founded on the contractual relationship between it and the petitioner. Counsel argues that the Petitioner if aggrieved should file a civil suit. The High Court in the case of **Council of County Governors v Attorney General & 12 others [2018] eKLR** held:

“59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (*supra*) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of *S v Mhlungu*, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.”(Emphasis added).

26. In deciphering what a constitutional issue is Mativo J. in the case of **C N M v W M G [2018] eKLR** opined as follows:

“18. It is important to address the question whether or not this Petition raises constitutional issues at all. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

He went further to state that:

“20.....When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.”

27. The question before this court is primarily based on the 3rd to 7th respondents’ mandate concerning entry of the petitioner into the country. While it is certain there exists a contract between the petitioner and 2nd respondent, this matter involves multiple parties. The actualization of the petitioner’s travel is not only dependent on the 2nd respondent but also state organs being the 3rd, 4th and 7th respondents. This is much more than the 2nd respondent’s action of admitting the petitioner on board its flight in the contractual relationship.

28. The matter before hand in the words of Mativo J. forces this court to consider constitutional rights and values as actioned by state organs. This is fundamentally this court’s jurisdiction as envisaged under Article 165(3) (d) of the Constitution. In essence its resolution cannot escape reliance on the Constitution. In light of the above, I am inclined not to agree with the 2nd respondent’s argument. This is because the doctrine would only have been invoked if the suit was only between the petitioner and the 1st and 2nd respondents’ which is not the case here.

iii. Whether the petitioner/applicant is entitled to the orders sought

29. The applicant through the attached documents shows that he was denied a boarding certificate aboard flight AF1835 from Berlin to Paris and then to Nairobi. The reason is not stated just the wordings '*other reason*'. The respondents maintain that there is nothing like a 'red alert' as claimed by the petitioner. What is emphasized however is that the applicant is obliged to comply with the laws set for any citizen prior to entering the Kenyan territory. The right of entry in Kenya is accorded to both citizens and foreigners within our territory. It has since been determined that the petitioner is a Kenyan citizen by virtue of birth. This was in the case of **Miguna Miguna v Fred Okengo Matiang'I Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 Others; Kenya National Commission on Human Rights(Interested Party) (2018)eKLR**.

30. As such Article 12 of the Constitution provides that:

(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 Kenyan 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 referred to in Article 24.

31. A citizen's rights are further echoed under the Section 22 of the Kenya Citizenship and Immigration Act Cap 172 (The Act) which provides in the relevant sections as follows:

1. Every citizen is entitled to the rights, privileges and benefits and is subject to the limitations provided for or permitted by the Constitution or any other written law including—

- (a) the right to enter, exit, remain in and reside anywhere in Kenya;
- (g) the entitlement to any document of registration or identification issued by the State to citizens including—
 - (i) a birth certificate;
 - (ii) a certificate of registration
 - (iii) a passport;
 - (iv) a national identification card; and
 - (v) a voter's card, where applicable.

32. The Act also places a number of duties on citizens under Section 23 as follows:

Every citizen of Kenya shall -

- (a) owe full allegiance to the State and the Constitution of Kenya;
- (b) obey the laws of Kenya;
- (e) cooperate with State organs and other Citizen of Kenya to ensure enforcement of the law;
- (f) respect and promote the dignity and rights of other persons;
- (g) respect and promote national integration and unity, peaceful coexistence; and
- (h) promote the values and principles prescribed in the Constitution.

Likewise Section 24 of the Act provides that:

Persons entitled to passports and other travel documents :

- (1) Every citizen is, subject to this Act, entitled upon application, in the prescribed manner, to be issued with a passport or other travel documents to facilitate international travel.

33. My interpretation of the cited provisions is that a Kenyan citizen is entitled to all the rights and privileges accorded by the Constitution and with no exception, have a right to acquire documents of identification such as a national identity card and passport or other travel documents to facilitate international travel which identifies a citizen internationally. In essence a Kenyan citizen does not require a visa to enter the country. Successively each citizen of the country is obliged to obey the law set out under Section 23 of the Act as they enjoy these rights. This law applies equally to all Kenyan citizens, with no exception.

34. The circumstances of this case as pleaded by the parties are that the applicant does not at the moment possess a Kenyan passport to gain entry into the country. This is because the passport as asserted was submitted to the Deputy Registrar in the **Miscellaneous Application No.57 of 2018** of the Criminal Division as ordered by Justice Kimaru. The applicant further argues that a national identity card is sufficient for him to enter the Kenya territory as a citizen. This is misguided as Section 24 of the Act requires **all** citizens to possess a passport before engaging in international travel. It is accordingly not accurate to state that a national identity card is sufficient to gain entry into Kenya as a citizen.

35. Besides, the 7th respondent in their response dated 10th November 2021 to the 1st interested party's communication on the applicant's intent to travel, notified them that the applicant had not applied for issuance of a new passport or its replacement. Nevertheless he was at liberty to apply to be issued with an Emergency Certificate from the Kenya High Commission at Ottawa, Canada. The applicant does not adduce any evidence to demonstrate whether he sought this certificate, as advised, or what may have happened.

36. The Act at Section 48 grants the immigration Officer powers with regard to immigration to take out the following actions:

(1) Subject to and for the purposes of this Act an immigration officer shall have the power to—

(a) board, or enter, and search any carrier or premises in Kenya;

(b) 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;

(c) require any person seeking to enter or leave Kenya other than a refugee or any asylum seeker, to produce to him a valid passport or a valid travel document and any form of declaration that may be prescribed;

(d) require any person seeking to enter Kenya to submit to examination by a medical practitioner; or

(e) arrest, restrain, stop or deny departure to any person against whom a warrant of arrest has been issued by a competent Kenyan court and hand over the person for custody to the nearest police officer.

37. The application of the above law is uniform to all persons both of Kenyan origin and foreign nationality contrary to what is asserted by the applicant. This court is obligated under Article 10 to uphold the national values and principles one of which is the rule of law in the application of the laws of the land.

What is more is that Article 259 of the Constitution as observed in the case of **Apollo Mboya v Attorney General & 2 others [2018] eKLR** obliges this court to:

“20. It is useful to bear in mind that Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. It obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance, an approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The Article imposes a mandatory duty upon everyone to adopt an interpretation that conforms to Article 259.

21. It is also an established principle of interpretation that Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be “unduly strained.”[7] It should avoid “excessive peering at the language to be interpreted.[8]”

The Court further opined as follows:

“24. In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. We are obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the purposes and principles of the Constitution.”

38. The requirement to have a passport as a Kenyan traveling internationally is uniform to all citizens not only the petitioner. Where the relevant authorities find the same is absent the immigration officer is accordingly empowered to act as permitted under Section 48 of the Act.

39. In this case, the applicant has dual citizenship in Kenya and Canada. For the purposes of this travel he is using his Canadian passport.

Section 8(6) and (7) of the Act provides as follows, on dual citizenship:

(6) A dual citizen who holds a Kenyan passport or other travel document and the passport or other travel document of another country shall use any of the passports or travel documents in the manner prescribed in the Regulations

(7) A dual citizen shall owe allegiance and be subject to the laws of Kenya.

40. The practice is that foreign citizens possessing their countries passports are required under section 35 of the Act to obtain a visa, unless otherwise exempted by the Cabinet Secretary.

Rule 8 of the *Kenya Citizenship and Immigration Regulations, 2012* on the requirement of visa for a dual citizen provides as follows:

Endorsement of passport of other countries:

(1) The passport of any other country that is held by a dual citizen may, upon application by the holder, be endorsed to indicate that the holder is a citizen of Kenya.

(2) A dual citizen may apply for endorsement under paragraph (1) in Form 4 set out in the First Schedule.

(3) A dual citizen whose passport of another country has been endorsed under paragraph (1) may use the passport to enter into or exit out of Kenya and shall be exempted from visa, pass or permit requirements.

(4) An endorsement made under this regulation shall be in Form 5 set out in the First Schedule and be valid for the period that the dual citizen remains a citizen Kenya.

(5) An immigration officer may, after the holder of a passport that has been endorsed in accordance with this section has ceased to be a citizen of Kenya, cancel the endorsement.

41. Turning back to the facts of this case it is clear that the petitioner is entitled to gain entry into the country even with his Canadian passport as long as Rule 8(1) of the Kenya Citizenship and Immigration Regulations, 2012 has been satisfied. In light of this the 3rd to 7th respondents would be required to allow the applicant to gain access into the country unconditionally as a citizen of Kenya. Unfortunately the applicant has not revealed to the court whether this requirement has been satisfied, by him. In any event had it been complied with he would not be held up in Berlin, as claimed.

42. Both counsel for the applicant have insisted that Justice Korir issued orders on 6th January, 2020 vide Petition No. 51 of 2018 to the effect that the applicant should be allowed re-entry into Kenya on an Identity card or passport. It is not in dispute that the applicant is not in possession of a passport. I have called for the said file which is now before me. From the record this is what Justice Korir stated on 6th January, 2020 when the Notice of Motion was placed before him under certificate of urgency:

“The Notice of Motion dated 31.12.2019 is therefore certified urgent. Considering the nature of the orders sought and the orders sought and the urgency of the application I grant prayers No.2, 3, 4, 6 and 8 of the application pending interpartes hearing of the same. The application to be served before the close of business on 7.1.2020 for mention for directions on 8.1.2020”

It means those orders were only in the interim.

43. The said orders were extended on 8th January, 2020 to 10th January, 2020 when the matter was to be heard. Other issues came up including the filing of a brief by the Hon. Attorney General which was done on 21st January, 2020. The matter was to be mentioned on 23rd March, 2020 to give the court time to read the Hon. Attorney General’s brief and give further directions. The interim orders extended on 8th January, 2020 were never extended after the 10th January, 2020. As per the record the Notice of Motion dated 31st December, 2019 has not been heard interpartes for issuance of substantive orders. That is what should be done instead of filing a multiplicity of cases. It follows that the orders issued on the 6th January, 2020 have lapsed. Interim orders cannot be in force for close to two years if no extension has been made.

44. The order that the applicant has been relying on is in prayer No.3 of the said Notice of Motion in Petition No. 51/2018 and it states as follows:

“That an order be and is hereby issued, that pending and following the interpartes hearing of the application, compelling the respondents to facilitate entry of the petitioner into Kenya on January, 2020 or on another date appointed by the petitioner on the basis of his identification through the use of his National Identity card or his Kenya passport in the form and state it was delivered by the respondents to High Court registry pursuant to this court’s order”.

45. The above order does not in any way state that the applicant should use his National Identity card as his Travel document. It was to be used upon entry for purposes of **identification**. The Identity card cannot therefore be said to be a travel document. See section 25 of the Act.

46. The 1st interested party being aware of the need for the applicant to be in possession of a passport/Travel documents for his return to Kenya on 16th November, 2021 did a letter to the Principal Secretary State Department – Immigration, Border Control and Registration of persons and (ii) Director of Immigration dated 5th November, 2021 (annexture KK1). The letter requested the Director to issue the applicant with a valid Kenyan passport. Alternatively it requested for a temporary travel document pending the issuance of his valid Kenyan passport. Such a letter would never have been written if the 1st interested party was not aware of the requirements under the Act.

47. This letter was promptly responded to on 10th November, 2021 by the Director General, (annexture KK1) who explained that a new passport could not be issued since the applicant had not applied for one. He further explained that such an application is made online through the e-citizen platform but the applicant had not made one. He went further to advise that the applicant was at liberty to visit the Kenya High Commission in Ottawa, Canada where he would be issued with a one way Emergency Travel Certificate to enable him to travel to Kenya. This information must have been relayed to the petitioner as it is not denied.

48. From the record, there is no evidence to show that the applicant has ever applied for a new passport or renewal of the old one. Secondly, he never visited the Kenya High Commission in Ottawa – Canada to obtain Emergency Travel Document as guided. Thirdly, there is no evidence that his Canadian passport has been endorsed as required under Regulation 8 of the Kenya Citizenship and Immigration Regulations, 2012.

49. As pointed out earlier the Kenya Constitution, Kenya Citizenship and Immigration Act, 2012 plus its Regulations apply to all Kenyan Citizen and must be adhered to by both the government and its citizens.

50. As the applicant stands in Germany Berlin, or wherever he is, he is not in possession of any Travel documents besides his Canadian passport and air ticket. His Kenyan Identity card is not a Travel document to allow him travel from Canada through other countries before finally landing in Kenya. It is only upon entering Kenya that he would use his identity card for purposes of identification as per the order since he does not have a Kenyan passport

The orders issued by Justice Korir on 6th January, 2020 were for purposes of use of the Identity card for identification of the applicant only and not travels prior to entry into Kenya. It is not an excuse for the applicant to ignore travel requirements as per the law.

51. The applicant being a Kenyan citizen is bound by the laws of this land as every other Kenyan. Nobody has stopped him from entering the country. Let him obtain the travel documents either from the Kenya High Commission Ottawa (Canada) or the Kenya Embassy Berlin (Germany). These should be obtained within 72 hours and once he obtains them the 2nd respondent should allow him to board the next available flight to Kenya with no further excuses. As for prayer No.3 all the orders cited there were issued in various files which are separate from this one. The procedure would be for any applications to be made in the relevant files for execution of those orders.

52. After considering all the material before me and in addressing the issues at hand, I hereby issue the following orders:

- i. The petitioner/applicant to obtain his Emergency Travel Document from the Kenya High Commission Ottawa (Canada) or the Kenya High Commission Berlin (Germany) or from wherever he is within 72 hours. The 4th respondent MUST ensure this order is complied with.
- ii. Once in possession of the Emergency Travel Document and upon presentation of the same to the 2nd respondent, the latter should allow the petitioner/Applicant to board the available flight to Kenya with immediate effect.
- iii. Upon landing in Kenya, the petitioner/applicant to be allowed by the immigration officer to use his Kenyan Identity card for purposes of identification.
- iv. The petitioner/applicant upon entry in Kenya should immediately apply for a Kenyan passport. The same to be issued to him within seven (7) days of such application provided there is compliance with all the requirements. The 7th respondent to ensure this order is complied with.
- v. Save for the above orders any other prayers sought in the Notice of Motion dated 15th November 2021 are declined. There shall be no order as to costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 22ND DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT