



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 205 OF 2018**

MHS.....1<sup>ST</sup> PETITIONER

MGL.....2<sup>ND</sup> PETITIONER

**AND**

MGA.....1<sup>ST</sup> RESPONDENT

**DIRECTOR OF IMMIGRATION**

**AND REGISTRATION OF PERSONS.....2<sup>ND</sup> RESPONDENT**

**MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF THE NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**ITALIAN EMBASSY.....INTERESTED PARTY**

**JUDGEMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners, Muhidin Hassan Shamsa and Mohamed Ga'al Libaan, through the petition dated 28<sup>th</sup> May, 2019 allege that their constitutional rights to human dignity and security of person, freedom of movement and right to education have been violated by Mohammed Ga'al Ahmed, Director of Immigration and Registration of Persons, and Ministry of Interior and Co-ordination of the National Government the respective 1<sup>st</sup> to 3<sup>rd</sup> respondents. The Italian Embassy is named as an Interested Party.

2. In the petition, the petitioners pray for the following orders:-

**a) A declaration that the forced stay of the 1<sup>st</sup> Petitioner and her children in the country against their will and wish infringes on their freedom and security, human dignity, right to education and freedom of movement.**

**b) The 2<sup>nd</sup> Respondent to repatriate the 1<sup>st</sup> Petitioner and her children back to their home country in Italy and or it facilitates their travel by issuance of Certificate of Identity and Nationality under Section 25 of the Kenya Citizenship and Immigration Act 2015 (sic) to enable them to travel to Italy.**

**c) Any other Order that the court may deem fit and necessary in the interest of justice.**

**d) Costs of this Petition be borne by the 1<sup>st</sup> Respondent.**

3. The petitioners' case is that sometime in June, 2012 the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Petitioner, who was the wife of the 1<sup>st</sup> Respondent at the time, travelled to Kenya for holiday together with their children. Their journey started in Florence, Italy where they are citizens. According to the petitioners it was anticipated that the holiday would last two months but this was not to be because upon the expiry of the two months the 1<sup>st</sup> Respondent confiscated their passports and the travel documents of the minors so as to force them to remain in Kenya.

4. The 1<sup>st</sup> Petitioner who does not have a job or steady means of income was fully reliant on the 1<sup>st</sup> Respondent who she asserts runs various businesses in the Nairobi Central Business District. The petitioners claim that the 1<sup>st</sup> Respondent moved away from home and married

another woman who he is currently living with.

5. The 1<sup>st</sup> Petitioner further alleges that she and her children have suffered physical abuse at the hands of the 1<sup>st</sup> Respondent who has allegedly threatened to kill her and the children which led them to flee their home in Nairobi West in 2018. As a result, the 1<sup>st</sup> Petitioner and her children are being hosted by a well-wisher. The 1<sup>st</sup> Petitioner asserts that she has sought to assistance and protection of the police who have failed to take any action.

6. Additionally, the 1<sup>st</sup> Petitioner alleges that her children had been enrolled at Nairobi South Academy but subsequently dropped out of school in 2018. She avers that her first born son is due to attend college in 2020, and because of the actions of the respondents the education of the children is in a limbo.

7. The 1<sup>st</sup> Petitioner avers that she has on several occasions gone to the Italian Embassy and written emails seeking assistance to go back home but was informed that she would require the consent of her husband to return to Italy. The 1<sup>st</sup> Petitioner avers that her children are better off in Italy as they would benefit from the social programmes and free education as they are Italian citizens. Furthermore, the 1<sup>st</sup> Petitioner states that her Kenya passport was due to expire on 2<sup>nd</sup> July, 2018 and by staying beyond this date she would be violating the criminal laws of Kenya.

8. By way of a further affidavit dated 29<sup>th</sup> May, 2019 the 1<sup>st</sup> Petitioner deposed that she and her children have never applied to be Kenyan citizens and she is unaware of any law which would allow them to stay in Kenya without proper documents given that her passport expired on 2<sup>nd</sup> July, 2018. It is her averment that according to Section 25 of the Kenya Citizenship and Immigration Act, 2011 (“KCIA”) she can however be provided with a certificate of identity and nationality.

9. The 1<sup>st</sup> Petitioner claims that the 1<sup>st</sup> Respondent used his Somalia passport to obtain a Kenyan work permit and has not disclosed that he is also an Italian citizen or used his Italian documents. She alleges that this may be because he is a fugitive in Italy.

10. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by himself on 20<sup>th</sup> February, 2020 and a notice of preliminary objection dated 20<sup>th</sup> February, 2020. His case is that his family had lived in Florence, Italy where they are citizens until 2012 when they decided to move to Kenya. His averment is that after the relocation of the family, he and his wife experienced marital difficulties and they divorced at the Kadhi’s Court in Kenya in accordance with Muslim faith.

11. It is the 1<sup>st</sup> Respondent’s deposition that the 2<sup>nd</sup> Petitioner and one of their other children have attained the age of majority and are currently living in the United Kingdom and did not require a court order or assistance to leave the country.

12. It is further averred that the 1<sup>st</sup> Respondent filed a custody suit in respect of the two minors being **Nairobi Children’s Case No. 647 of 2019, Mohamed Ga’al Ahmed v Muhidin Hassan Shamsa**, which matter was set for hearing on 2<sup>nd</sup> April, 2020. The 1<sup>st</sup> Respondent claims that the issue of custody of the children is therefore *sub judice* and this Court does not have the jurisdiction to hear this matter. It is the 1<sup>st</sup> Respondent’s case that according to Section 80 of the Children Act, 2001 appeals from a decision of the Children’s Court lies to the High Court, and such an appeal is not due as a decision is yet to be rendered.

It is stated that the Petitioner has been informed by the Italian Embassy that the travel of the minors cannot be authorised until and unless the 13. custody issue is determined. The 1<sup>st</sup> Respondent deposes that he has been supporting all his children and providing for their basic needs and education and therefore the allegation that the children’s rights and access to education have been violated is untrue.

14. It is the 1<sup>st</sup> Respondent’s contention that all the children save for the eldest two are in Kenya legally. Furthermore, he claims that nothing is precluding the 1<sup>st</sup> Petitioner from leaving the country and there is no merit in her allegation that he rights under Article 39 of the Constitution have been infringed.

15. The 1<sup>st</sup> Respondent asserts that this Court cannot entertain claims against a foreign sovereign which in this instance would be the Government of Italy unless immunity has been waived. Further, that even where immunity is waived, local courts cannot direct a foreign sovereign on how to deal with its citizens.

16. It is concluded that the petition concerns a family issue which is better suited to the jurisdiction of the family and children courts, and the same is in no way an immigration and or fundamental rights issue. The 1<sup>st</sup> Respondent therefore urges this Court to find that the petition is incompetent for want of jurisdiction and dismiss it.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit sworn on 15<sup>th</sup> October, 2018 by Alfred Omangi, the Principal Immigration Officer in the Investigations and Prosecution Section of the Department of Immigration within the Ministry of Interior and Co-ordination of National Government.

18. The respondents claim that due to the ongoing matters in Court between the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent, the provisions of Section 34 of the KCIA cannot be enforced until these cases are determined. It is further averred that the respondents are alien to the allegation that the 1<sup>st</sup> Petitioner may face criminal charges for remaining in the country without proper documentation because of the expiration of her passport. It is claimed that the Petitioner can have these issues addressed in a court of law and get redress. It is deposed that the Department of Immigration cannot issue a certificate of nationality under Section 25(f) of the KCIA as the same is only issued to non-citizens who cannot obtain a passport from their country of origin.

19. The respondents claim that there is no proof of correspondence between the 1<sup>st</sup> Petitioner and the Interested Party showing that she is unable to obtain Italian passports. Furthermore, it is asserted that even if the Court compels the 2<sup>nd</sup> Respondent to issue the petitioners with a certificate of nationality, they would still require a right of entry from the Interested Party. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents aver that a repatriation order can only issue under Section 26A of the Penal Code in a case where a non-citizen has been convicted of an offence punishable with imprisonment of a term not longer than twelve months.

20. It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' contention that the petitioners have not indicated how they have violated their rights and their inclusion in the proceedings amounts to an abuse of the process of the Court. They consequently assert that the petition is unfounded and premature as the petitioners should have sought redress from the Interested Party regarding the passport issue.

21. The petitioners filed written submissions dated 2<sup>nd</sup> October, 2018. It is the contention of the petitioners that under international human rights laws, non-national residents in a country have the right to return to their countries of origin or citizenship and States shall not place obstacles for foreigners who want to leave their country of residence. The petitioners rely on Article 13(2) of the Universal Declaration of Human Rights (UDHR), Article 12(2) of the International Convention on Civil and Political Rights (ICCPR), Article 5(d)(ii) of the International Convention on Elimination of all Forms of Racial Discrimination (ICEFRD), and Articles 10(2) and 12 of the Convention on the Rights of the Child (CRC).

22. It is the petitioners' case that the 1<sup>st</sup> Petitioner has attempted to have her passport renewed by her State and she was informed that it can only be renewed with the consent of the 1<sup>st</sup> Respondent. As a result the 1<sup>st</sup> Petitioner has remained in the country illegally and her freedom of movement has been curtailed as she runs the risk of being arrested and prosecuted. The lack of lawful status has also impaired her right to dignity as she cannot be afforded the rights and privileges reserved to citizens and persons with lawful authority to reside and or work in Kenya. The 1<sup>st</sup> Petitioner states that if she were allowed to return to Italy she would be allowed to work and benefit from social programmes available there.

23. The 1<sup>st</sup> Petitioner states that her children aged twelve, sixteen, seventeen and nineteen years have expressed their desire to return back to their home country but they have been precluded from doing so as the 1<sup>st</sup> Respondent has confiscated their passports. Furthermore, the petitioners submit that education is free in Italy for citizens but the 1<sup>st</sup> Petitioner's children cannot benefit from the free education hence the violation of their right to education. It is asserted that it is in the best interest of the children that they return to Italy whose education system is alleged to be superior to the Kenyan education system.

24. On the alleged violation of their freedom of movement, the petitioners rely on Article 12(1) of the ICCPR which states that any person can move freely in the State where the person is a lawful resident. It is submitted that the 1<sup>st</sup> Petitioner's freedom of movement has been curtailed as her passport has expired and the Interested Party has refused to renew it on the basis of 'an ongoing domestic dispute.' This, according to the petitioners, is unlawful, discriminatory and exposes the 1<sup>st</sup> Petitioner to security risks including the risk of arrest and prosecution.

25. It is further submitted that the 1<sup>st</sup> Petitioner does not require consent or approval of the 1<sup>st</sup> Respondent to have her passport renewed as the requirement is discriminatory and contrary to Article 27 of the Constitution and Articles 2(d), 5, 9 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In support of this argument the petitioners rely on the case of **Miazdzyk v Poland Application 23592 of 2007, the European Court of Human Rights** where it was decided that the restriction on the freedom of movement of a foreign national must be proportional and a court should weigh the individual rights against the public interest. The petitioners submit that it is disproportionate for the Interested Party not to renew the 1<sup>st</sup> Petitioner's passport on account of an ongoing domestic dispute.

26. On the alleged violation of the right to security of the person, the petitioners rely on Section 34 of the KCIA and submits that her continued stay in the country without lawful status puts her at risk especially from the 1<sup>st</sup> Respondent who has on several occasions allegedly instructed the police to arrest them.

27. On the prayer for an order directing the 2<sup>nd</sup> Respondent to issue a certificate of identity and nationality, the petitioners submit that the 2<sup>nd</sup> Respondent is indeed mandated by Section 25(f) of the KCIA to issue such a certificate to a person who is unable to obtain a passport or travel document from their home country. It is submitted that the 1<sup>st</sup> Petitioner and her children qualify to be granted certificates for purposes of returning back home. It is averred that there is nothing precluding the 1<sup>st</sup> Respondent from pursuing the legal remedies he is pursuing in Kenya in Italy.

28. The 1<sup>st</sup> Respondent filed his written submissions dated 20<sup>th</sup> February, 2020 in which he submits that the preliminary issue to be determined is whether the Court has the requisite jurisdiction to entertain the matter. It is asserted that this being a matter concerning children, the same can only be dealt with by the Children's Court under Section 73 of the Children Act, 2001.

29. Still on the claim that this Court lacks jurisdiction, it is submitted that although Section 80 of the Children Act, 2001 gives a general right of appeal to the High Court from a decision rendered by the Children's Court such jurisdiction cannot be engaged as the Children's Court is yet to determine the custody matter. It is therefore submitted that the issues raised in this petition are *sub judice* and or *res judicata* the **Children's Case No. 647 of 2019, MGA v MHS and Divorce Cause No. 128 of 2018, MGA v MHS**. It is the 1<sup>st</sup> Respondent's contention that by entertaining the instant petition and or granting the orders sought, the Court will be prejudicing the hearing of the main children's case and is likely to embarrass, prejudice or undermine the proceedings and the decision of the Children's Court.

30. The 1<sup>st</sup> Respondent claim that the petitioners are guilty of material non-disclosure and therefore are undeserving of the prayers sought, which prayers are an abuse of the court process as no mandatory orders can be granted against the Interested Party under Article 31 of the Privileges and Immunities Act, Cap. 179 of the Laws of Kenya unless immunity is waived. Even where immunity is waived, it is asserted

that local courts cannot direct a foreign sovereign on how to deal with its citizens. The 1<sup>st</sup> Respondent relies on the case of **Kakuta Maima Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** where the Court deliberated on the importance of jurisdiction.

31. It is contended that there is nothing precluding the 1<sup>st</sup> Petitioner from leaving the country and that there is no merit in the petitioners' allegation that the 1<sup>st</sup> Petitioner's rights under Article 39 have been violated. On the issue of the minors leaving the country, it is asserted that the 1<sup>st</sup> Petitioner has been advised by the relevant government agencies and the Italian Embassy that the same cannot be authorised unless and until the custody issue is determined.

32. According to the 1<sup>st</sup> Respondent the prayer for certificates of nationality fails automatically as the 1<sup>st</sup> Petitioner and her children are not incapable of obtaining passports from the country of citizenship. It is alleged that they all have their passports and the children's passports are all valid, but the only problem is that the 1<sup>st</sup> Petitioner's passport is expired. It is submitted that the question to be answered is the effect of a certificate of nationality on the 1<sup>st</sup> Petitioner's Italian passport or status.

33. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed written submissions dated 20<sup>th</sup> March, 2019 and contend that the petition does not raise a valid dispute in law between them and the petitioners; that the petition does not meet the threshold of a constitutional petition; and that the Court has no jurisdiction to grant the orders sought.

34. On the claim by the 1<sup>st</sup> Petitioner that since her passport has expired she is unlawfully present in Kenya and is entitled to be repatriated under Section 43 of the KCIA, it is submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the legality of a person's presence in the country depends on the validity of their visa under Section 35 of the KCIA. It is their case that a dispute as to the validity of the petitioners' passports falls within the mandate of the Interested Party and has nothing to do with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

35. The respondents further argue that the 1<sup>st</sup> Petitioner submitted inadmissible documentary evidence as the passports are in a foreign language which is not the language of the courts in Kenya. It is therefore urged that no evidence has been adduced that the petitioners are unlawfully present in Kenya. It is further asserted that there is no evidence or any evidence to prove the existence of a dispute between them and the petitioners or that the 1<sup>st</sup> Petitioner even sought their assistance and the same was not accorded to her.

36. It is argued that the Court cannot grant an order to compel the 2<sup>nd</sup> Respondent to issue a repatriation order as this would be contrary to the doctrines of separation of powers and constitutional avoidance. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents support this point by referring to the decisions in **International Centre for Policy and Conflict and 5 others v The Hon. Attorney General & 4 others [2013] eKLR**, and **National Conservation Forum v Minister of State for Provincial Administration and Internal Security & 2 others Nairobi Constitutional Petition No. 31 of 2013**.

37. It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' contention that there is no cause of action against them as evidenced by the allegations. In support of this assertion they rely on the case of **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR**. On the legal principle of constitutional avoidance, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents rely on the holding of the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others, Petition No. 14, 14A, B, C of 2014** where the Court stated that "**the Court will not determine a constitutional issue, when a matter may properly be decided on another basis.**"

38. On whether the petition meets the requirements of an actionable constitutional petition, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that the petitioners have failed to demonstrate how they have violated their rights and the claim against them is therefore an abuse of the court process. It is asserted that the petitioners have failed to meet the threshold in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents contend that the dispute is between the 1<sup>st</sup> Petitioner, the 1<sup>st</sup> Respondent and the Interested Party and there is no real controversy between them and the petitioners. Reference is made to the decisions in **Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion and Constitutional Affairs and another, Petition No. 354 of 2012**, and **Patrick Ouma Onyango & 12 others v The Attorney General & 2 others, Misc Appl No. 667 of 2005** where the Court held that for a claim to be justiciable it must contain a "*real or substantial controversy.*" It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case that taking action as proposed by the petitioners would amount to usurping the sovereignty of Italy as a country.

39. On the issue of whether the Court has jurisdiction to grant the orders sought, it is submitted that there is an ongoing dispute between the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent which raises the same issues as the matter before this Court. It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' contention that the matter is premature and even if a certificate of nationality was to be issued, the Petitioner would still require the Interested Party to grant them entry which they cannot be compelled to do. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents claim that the petitioners have other avenues of pursuing their dispute against the 1<sup>st</sup> Respondent including instituting criminal proceedings against him in respect of any criminal offences. Furthermore, it is asserted that the Petitioner has failed to submit documentary evidence such as an entry in the police occurrence book to support the said allegations.

40. On the issue of costs, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents urge that their costs be met by the 1<sup>st</sup> Respondent. In support of the submission they place reliance on the case of **Mbithi Peter Mutuku v Council of Legal Education & 2 others [2016] eKLR**.

41. In my view, the issue disclosed by the pleadings and submissions is whether the constitutional rights and fundamental freedoms of the petitioners has been infringed by all or any of the respondents and, if so, the appropriate remedies to be granted.

42. The 1<sup>st</sup> Petitioner argues that her rights have been curtailed as she is unable to travel back to Italy because her passport has expired and cannot be renewed unless she acquires consent from her former husband, the 1<sup>st</sup> Respondent. She further argues that because her right to movement has been limited, she also has been denied her right to dignity as she cannot work or participate in any income generating activity due to her alleged illegal status in Kenya. She claims that as a result of this she and the children have been forced to rely on the kindness of a

well-wisher. Finally, she asserts that the expiry of her passport and her lack of proper documentation means that her freedom of security is at risk as she may be arrested if she attempts to move within Kenya.

43. The 1<sup>st</sup> Respondent claims that the 1<sup>st</sup> Petitioner is free to leave the country, and that there is no evidence that her right to movement has been infringed. He asserts that the movement of the children is that which has been limited as the Italian Embassy has advised that their movement cannot be permitted until the custody issue has been determined. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have submitted that there is no evidence to prove that the 1<sup>st</sup> Petitioner is illegally in the country.

44. According to Article 39 of the Constitution:-

**“(1) Every person has the right to freedom of movement.**

**(2) Every person has the right to leave Kenya.**

**(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.”**

45. The right to freedom of movement is also contained in various international human rights instruments including Article 13 of the Universal Declaration of Human Rights (UDHR), Article 12 of the International Covenant on Civil and Political Rights (ICCPR), and Article 12 of the African Charter on Human and People’s Rights (ACHPR). These laws guarantee the freedom of movement within any State and the freedom for individuals to leave and return to their country of origin or citizenship. Furthermore, Article 10(2) of the Convention on the Right of the Child (CRC) calls upon State parties to **“respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country.”**

46. The above mentioned instruments require that the freedom of movement only be restricted by the law and where it is **“necessary to protect national security, public order, public health or morals or the rights and freedom of others, and are consistent with the other rights recognised in the present Covenant.”** See Article 12(3) of ICCPR. It is expressly prohibited under the ICCPR for a person to be arbitrarily deprived of their right to enter their own country.

47. The right to human dignity is provided under Article 28 of the Constitution which states that every person has the right to have their inherent dignity protected and respected. Article 1 of the UDHR also protects this right. The ACHPR goes further to guarantee that every person has the right to have their legal status recognised.

48. Article 29(a) of the Constitution provides for the right to freedom of security. It states that:-

**“Every person has the right to freedom and security of the person, which includes the right not to be— (a) deprived of freedom arbitrarily or without just cause.”**

49. The right to liberty and security of person is also guaranteed under Article 3 of the UDHR, Article 9 of the ICCPR, and Article 6 of the ACHPR. Accordingly, no one shall be deprived of their freedom unless such a restriction is prescribed under the law.

50. From the foregoing it is evident that the rights which the petitioners claim have been infringed are of the utmost significance within the international and regional human rights landscape and as a result of this, any infringement, denial or violation of the same must be dealt with comprehensively.

51. The 1<sup>st</sup> Respondent has established that the 2<sup>nd</sup> Petitioner has reached the age of majority and is currently residing in the United Kingdom, a fact which has not been disputed by the 1<sup>st</sup> Petitioner. Therefore, the issue to be determined herein is whether the restriction of the 1<sup>st</sup> Petitioner’s right to return to Italy is discriminatory.

52. According to the exhibit marked ‘MHS1’ which is the email dated 9<sup>th</sup> January, 2019 from the Consular Office of the Italian Embassy in Nairobi, it is confirmed that the practice of issuing passports requires the consent of the husband who in this case has refused to grant consent. It is not clear as to what the position is in regard to a former spouse considering that the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Petitioner are no longer man and wife.

53. Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women calls upon member States to:-

**“...condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:**

**(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;**

**(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”**

54. Furthermore, Article 15 (4) states as follows:-

**“States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”**

55. The Office of the High Commissioner for Human Rights (OHCHR) in General Comment No. 27 has expounded on the right to freedom and on movement and its implications. Paragraph 6 states that:-

**“The State party must ensure that the rights guaranteed in Article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with Article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.”**

56. It further emphasized that where a State refuses to issue a passport or refuses to prolong the validity of its national's passport who is residing abroad, it has deprived the person of the right to leave the country or travel to another country (paragraph 9). The OHCHR has also criticised the practice of many states in **“preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person”** which is declared to be a violation on the right under Article 12 of the ICCPR (paragraph 18).

57. The OHCHR calls upon States to exercise the principle of proportionality in line with the Article 12 of the ICCPR when restricting the right to movement. The same should be exercised in a manner which is **“appropriate to achieve their protective function”** and must be the least intrusive method to achieve the desired outcome (paragraph 14).

58. The cited provisions clearly show that the restriction of an individual's right to movement is strictly forbidden except in cases where it is done in order to protect the national security of the State, public order, public health or morals, or the rights and freedoms of others. Looking at the facts presented to me in the case herein, there is nothing to show that the 1<sup>st</sup> Petitioner was denied the renewal of her passport in order to protect the national security of Italy or to maintain public order, health, morals, or maintain the rights and freedoms of the Italian citizenry. The evidence provided by the 1<sup>st</sup> Petitioner merely points to the fact that her passport has not been renewed as she has no consent from her husband to do so. There is evidence on record that the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent have indeed divorced. According to the Office of the High Commissioner for Human Rights, the right to freedom of movement is set in stone so that any restriction on a woman's freedom of movement which requires her to seek the consent or accompaniment of a male, whether a family member or husband, amounts to discrimination and infringes her right under Article 12 of the ICCPR.

59. Therefore, it is my conclusion that the restriction of the 1<sup>st</sup> Petitioner's movement out of Kenya and back to Italy based solely on the alleged lack of consent from her husband is a clear and blatant violation of her right to free movement.

60. As to whether the 1<sup>st</sup> Petitioner's freedom of security and dignity has been curtailed, the KCIA states in Section 34(1) that any person who is not a citizen or asylum seeker in Kenya shall not remain in the country unless they have a valid permit or pass. Furthermore, according to Section 34(2) where a non-citizen is not in possession of a valid work permit or a valid residence permit or pass, they are unlawfully present in Kenya.

61. It is therefore evident from the above provisions that the 1<sup>st</sup> Petitioner, who entered into Kenya with an Italian passport as per her evidence, and had intended to only remain for two months, is currently within the country without the required documentation. In a case like this it would be prudent for an individual who cannot obtain a passport from their country of citizenship, to be provided with a certificate of identity and nationality as prescribed under Section 25(1)(f). However, there is no evidence to show that the 1<sup>st</sup> Petitioner has applied for the certificate and the 2<sup>nd</sup> Respondent has denied her such a certificate.

62. On these grounds it is clear that the 1<sup>st</sup> Petitioner is indeed residing in Kenya unlawfully, however, it cannot be said that her rights to freedom of movement and security within Kenya have been deliberately curtailed as she has not produced any proof that she has applied to the 2<sup>nd</sup> Respondent for a work permit or a certificate of nationality for purposes of sustaining herself while in Kenya and ensuring that she is in the country lawfully.

63. The right to education is protected under Article 43(1)(f) of the Constitution which states that every person has the right to an education. The same right is guaranteed in the Convention on the Rights of the Child (CRC), and particularly Article 28(e) which calls upon States to ensure the regular attendance of children in school and put in place measures to reduce drop-out rates.

64. According to Section 7 of the Children Act, 2001, it is the responsibility of the Government and the parents to ensure that children have access to an education. Parental responsibility is further restated in Section 23 of the Act which places a duty on parents to provide for the education and guidance of their children. It is thus understood that as much as the government holds the ultimate responsibility to ensure that all children have access to an education, parents are not exempt from their own responsibility in ensuring that their children are benefiting from the education provided by the State.

65. The 1<sup>st</sup> Respondent in this case has attested to his ability to care for his children and provide them with an education. Furthermore, according to the Consent Order dated 13<sup>th</sup> November, 2019 issued in Nairobi Children's Case No. 647 of 2019 Ahmed Mohamed Gaal v Shamsa Muhudin Hassan and attached to the 1<sup>st</sup> Respondent's replying affidavit, it was ordered by the Hon. F. Terer, Resident Magistrate that the minors resume their studies at Nairobi South Nursery and Primary, Secondary School. Furthermore, the Hon. Resident Magistrate ordered on 28<sup>th</sup> June, 2019 that in the interim of the proceedings before the Children's Court the full custody of the minors be granted to the 1<sup>st</sup> Respondent herein.

66. It is therefore my conclusion upon reviewing the evidence before me that the right to education of the minors herein has not been

infringed as the same has and can be provided by the 1<sup>st</sup> Respondent.

67. The question is whether the petitioners are entitled to the orders sought. The petitioners submit that the 2<sup>nd</sup> Respondent should issue them with a certificate of nationality as the 1<sup>st</sup> Petitioner and her children qualify for the same in order to return back to Italy. The 1<sup>st</sup> Respondent submits that the custody matter before the Children's Court is still pending trial and determination and therefore issues raised in the petition herein are *sub judice* and or otherwise *res judicata*. It is further asserted that by entertaining the instant petition and or granting the order sought, the Court will be prejudicing the hearing of the children's matter and is likely to embarrass, prejudice or undermine the proceedings and the decision of the Children's Court.

68. The 1<sup>st</sup> Respondent further asserts that no mandatory orders can be granted against the Interested Party under Article 31 of the Privileges and Immunities Act, Cap. 179 of the Laws of Kenya unless immunity is waived. Further, that even where immunity is waived, it is asserted that local courts cannot direct a foreign sovereign on how to deal with its citizens.

69. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents contend that there is no cause of action against them as evidenced by the allegations in the petition and that the petitioners have failed to demonstrate how their rights have been infringed by them. It was further submitted that there is an ongoing dispute between the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent which raises the same issues as the matter before this Court and therefore this matter is premature. They further contend that even if a certificate of nationality was to be issued, the petitioners would still require the Interested Party to grant them entry which the Interested Party cannot be compelled to do.

70. On the issue of the case before the Children's Court and whether this matter is *res judicata*, we must first understand what the law says on the same. According to Section 7 of the Civil Procedure Act, Cap. 21 in Section 7:-

**“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.”**

71. In the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** the Court of Appeal held that where the issue of *res judicata* is raised:-

**“The issue is not meant to be related, (whatever that may mean) to issues in a previous suit. The requirement is that the issue be directly and substantially in issue.”**

I do not think it can be said that the issues raised by the petitioners herein are *res judicata* or *sub judice* the divorce and custody proceedings. Nevertheless, the issuance of any orders in this matter will have a direct impact on the custody case which is still pending before the Magistrate's Court.

72. In the case before me, the 1<sup>st</sup> Petitioner is seeking to have travel documents issued to her to enable her travel back to Italy with her children. However, as has been evidenced by the email exchange between her and the Interested Party, in particular the emails dated 3<sup>rd</sup> July, 2018 and 9<sup>th</sup> June 2019 attached to the petitioners' further affidavit, the Italian Embassy officials have informed her that due to the ongoing custody case before the Children's Court, and in the absence of the consent of her husband, the minors cannot be granted passports. The outcome of the case before the Children's Court would therefore be significantly affected by any orders issued by this Court. The 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent are going through a lawful judicial process before a Court with competent jurisdiction and any order that may destabilize the case to the detriment of the parties cannot be issued by this Court. The petitioners are seeking orders that may result in the spiriting away of children who are the subject of the proceedings before the Magistrate's Court. It is, however, incumbent upon the Magistrate's Court knowing the precarious position of the 1<sup>st</sup> Petitioner to hear and determine the matter with utmost urgency. What is keeping the 1<sup>st</sup> Petitioner in this country is the child custody dispute before the Magistrate's Court and the matter ought to be dispensed with on priority basis.

73. On the matter of the orders sought against the Interested Party, or rather the prayer for an order of repatriation, it is necessary to appreciate the place of the local courts in regard to the principle of non-intervention or non-interference with the internal affairs of other States. The United Nations General Assembly adopted its **Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970)** in which it emphasises on several principles including the **“principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter”**. According to this principle,

**“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”**

74. Furthermore, on the **“principle of sovereign equality of States”** it is emphasised that:-

**“(a)States are juridically equal;**

**(b)Each State enjoys the rights inherent in full sovereignty;**

**(c) Each State has the duty to respect the personality of other States;**

**(d) Each State has the duty to respect the personality of other States.”**

75. Furthermore, in its **Resolution 34/101 (1979) on Non-interference in the Internal Affairs of States** the General Assembly reaffirmed that:-

**“A declaration on non-interference in the internal affairs of State would be an important contribution to the further elaboration of the principles for strengthening equitable co-operation and friendly relations among States, based on sovereign equality and mutual respect.”**

76. It is evident from the above that the principle of non-interference is an issue which is at the forefront of international law, particularly in respect to the peaceful coexistence of States. My understanding is that in order for States to effectively co-operate, the sovereignty of individual states must be respected through non-interference.

77. This position has been further strengthened by the International Court of Justice (ICJ) and other international and regional tribunals which have interpreted the sovereignty of a state in respect of its jurisdictional immunity. In the of **Germany v Italy: Greece Intervening (2012)** before the ICJ the Court held as follows:-

**“91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the court of other States...”**

78. From the foregoing it is apparent that every State holds jurisdictional immunity which grants it protection from the jurisdiction of the domestic courts of another State. This immunity extends even where there is a clear infringement of an international human rights law which would typically entitle a court to adjudicate upon in the national context. By upholding the immunity of a State against the jurisdiction of another State’s domestic courts, the ICJ has guaranteed the sovereignty of the State from the interference of its internal affairs.

79. Indeed Article 31 of the Privileges and Immunities Act, Cap. 179 removes foreign nations from the jurisdiction of local courts and tribunals by providing that:-

**“ARTICLE 31**

**1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of—**

**(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;**

**(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;**

**(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.**

**2. A diplomatic agent is not obliged to give evidence as a witness.**

**3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.**

**4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.”**

80. I therefore agree with the respondents that this Court does not have the jurisdiction to grant orders as against the State of Italy which is represented in Kenya by the Interested Party. To do so would be to disparage the sovereignty of Italy as a State and violate its jurisdictional immunity against the Kenyan domestic courts. The petitioners pretend that the order of repatriation they seek is against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. This, however, is a veiled attempt at overturning the Interested Party’s decision not to renew the passport of the 1<sup>st</sup> Petitioner. I suspect counsel for the petitioners would have done justice to his clients had he advised them to try the diplomatic channels or wait out the determination of the matter before the Children’s Court.

81. In light of the above analysis, and having considered the evidence before me I cannot allow this petition as allowing it would not only infringe upon the jurisdiction of the Children’s Court which is yet to adjudicate the dispute over the custody of the children but will also impinge on the jurisdictional immunity of the sovereign State of Italy. The petition is therefore dismissed.

82. Although I have found that this petition was not necessary, I will not burden the petitioners with costs considering that they are still

engaged in another case which was essentially triggered by the divorce between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent. Each party is therefore ordered to meet own costs of the proceedings.

**Dated, signed and delivered through video conferencing/email at Nairobi this 28<sup>th</sup> day of May, 2020.**

**W. Korir,**

**Judge of the High Court**