



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 253 OF 2016**

**OMAR SHEIK ABDIAZIZ IBRAHIM.....PETITIONER**

**VERSUS**

**PRINCIPAL REGISTRAR OF BIRTHS AND DEATHS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL.....2<sup>ND</sup> RESPONDENT**

**SAHRO HUSSEIN OSOBOW alias SAHRA HASSAN ALI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Through a petition dated 16<sup>th</sup> June 2016, the Petitioner herein, who describes himself as a Somali citizen lawfully residing in Nairobi where he works for gain as a businessman, sued the respondents seeking the following orders:

*a. **AN ORDER OF DECLARATION** declaring that the issuance/existence of a Certificate of Death in the name of OMAR ABDIAZIZ IBRAHIM (Petitioner) is unlawful, cruel, inhuman and degrading treatment, and violates the Petitioner's rights to life and security of the person under Articles 26 (1) and 29 (d) of the Constitution respectively.*

*b. **AN ORDER OF DECLARATION** declaring that the actions of the police of interrogating the Petitioner and demanding information not within the Petitioner's knowledge, constantly visiting the Petitioner's home and searching his properties, and surreptitious surveillance of the Petitioner's private communications/affairs have violated and continue to violate the Petitioner's rights to security of his person, and privacy under Article 29 (a), (d) & (f) and Article 31 (a), (c) & (d) of the Constitution respectively.*

*c. **AN ORDER OF DECLARATION** declaring that the 1<sup>st</sup> Respondent's declaration of the Petitioner as dead subjects the Petitioner to psychological torture; and violates the Petitioner's fundamental freedom from torture under Article 25 (a) of the Constitution.*

*d. **AN ORDER OF DECLARATION** declaring that the actions of the Respondents have threatened and continue to threaten the Petitioner's right to property under Article 40 of the Constitution.*

*e. **AN ORDER OF JUDICIAL REVIEW** bringing before the Honourable court for purposes of its being quashed, the Certificate of Death, Serial No. 0539034 in the name of OMAR SHEIK ABDIAZIZ IBRAHIM (Petitioner) issued by the Principal Registrar of Births and Deaths on the 12<sup>th</sup> November, 2015.*

*f. **AN ORDER OF JUDICIAL REVIEW** compelling the Principal Registrar of Births and Deaths to cancel the Certificate of Death, Serial No. 0539034 in the name of OMAR ABDIAZIZ IBRAHIM (Petitioner) and to rectify the register of deaths.*

*g. **AN ORDER OF JUDICIAL REVIEW** prohibiting the Inspector General either by himself or through any officer[s] acting on his commands, instructions or howsoever otherwise, from harassing, conducting unnecessary surveillance, searches, interrogations/investigations on the Petitioner's person, home/properties and communications.*

*h. **AN ORDER FOR COMPENSATION** for violation of the Petitioner's rights and fundamental freedoms.*

*i. Costs.*

***j. Such other orders that the Honourable court shall deem just to grant.***

2. The Petition is supported by the petitioner's affidavit sworn on 16<sup>th</sup> June 2016 wherein he states that the 3<sup>rd</sup> Respondent is his wife and that even though the 3<sup>rd</sup> Respondent officially resides in Somali, sometime in 2015, she entered the country using a fake Kenyan Passport No. A194625 in which she falsely declared that she is a Kenyan, born in Tana River. He attached copies of his passport, Notification of an Approval for Renewal of an Entry Permit and Certificate of Marriage to the Affidavit in support of the petition.

3. He further states that unknown to him, on 1<sup>st</sup> October, 2015 the 3<sup>rd</sup> Respondent filed NAIROBI KADHI'S COURT CASE NO. 98 OF 2015: SAHRA HASSAN ALI -VERSUS- OMAR SHEIK ABDIAZIZ, seeking orders, *inter alia*, to stop him from accessing/administering his properties/investments in Kenya and enjoying user thereof and that she secretly obtained the said orders which she then registered as caveats against all his properties in Kenya but that on 8<sup>th</sup> December, 2015, the 3<sup>rd</sup> Respondent withdrew the suit before the Kadhi's Court after which the aforesaid caveats were lifted. He attached the Notice of withdrawal of suit dated 08.12.2015, Order of the Kadhi's Court (Hon. A.I. Hussein) given on 17.12.2015 and Applications for removal of Court Order dated 18.01.2016 to the Affidavit in support of the petition.

4. He adds that in a separate scheme to kill/get rid of the Petitioner, and/or deprive him of his properties in Kenya, the 3<sup>rd</sup> Respondent maliciously/falsely made a report to the 1<sup>st</sup> Respondent to the effect that the Petitioner had died on 2<sup>nd</sup> January, 2009 thereby prompting the 1<sup>st</sup> respondent to issue a Certificate of Death in the name of the Petitioner on 12<sup>th</sup> November, 2015 on the basis of falsified information and fraudulent/forged documents including a Kenyan national identification card furnished by the 3<sup>rd</sup> Respondent. A copy of the Certificate of Death was annexed to the Affidavit in support of the petition.

5. The petitioner further claims that the 3<sup>rd</sup> Respondent then resorted to the use/abuse of the police, particularly those drawn from the Criminal Investigation Department, to harass, intimidate and threaten him with dire consequences unless he provides certain information not within his knowledge and gives up his investments/properties to them; and that the 3<sup>rd</sup> Respondent is aided by the fraudulent Kenyan Passport in her custody and the fraudulent certificate of death in respect to the Petitioner.

6. The petitioner adds that besides the Kenyan Passport, the 3<sup>rd</sup> Respondent also has a Somali Passport No. P00406XXX and a Ugandan Passport No. B0500XXX in which she declares to have been born in Somali and Uganda respectively and that the police are aware that the 3<sup>rd</sup> Respondent uses the foregoing passports to conceal her true identity, but are yet to subject the 3<sup>rd</sup> Respondent to due process as they have allowed themselves to be used in the 3<sup>rd</sup> Respondent's schemes to frustrate and eliminate the Petitioner, and take over his properties. He attached a copy of the 3<sup>rd</sup> respondent's Kenyan, Somali and Ugandan Passports to the Affidavit in support of the petition.

7. The petitioner's case is that the 3<sup>rd</sup> respondent has violated his right to privacy and security of person by unnecessarily disclosing his home, properties and telephone contacts to strangers and that the police who are using the irregularly obtained information to undertake surreptitious surveillance of the Petitioner's private communications and home/properties. He adds that police officers drawn from the Criminal Investigation Department have on several occasions made informal demands to the Petitioner regarding his private affairs and properties by constantly subjecting him to unwarranted interrogations with the aim of attaining the 3<sup>rd</sup> Respondent's objective of eliminating him thereby subjecting him to trauma and psychological torture.

8. The petitioner asserts that the aforesaid conduct of the respondents has had the effect of arbitrarily curtailing his freedom without any just cause and that the unlawful declaration of his death is cruel, inhuman and degrading.

9. The Petitioner further states that he is apprehensive that the 3<sup>rd</sup> Respondent, in collusion with the said rogue police officers will harm/kill him anytime, unless the orders sought in the petition are granted.

10. In his oral evidence during the hearing of the petition, the petitioner repeated the contents of the affidavit in support of the petition and maintained that the death certificate issued by the 1<sup>st</sup> respondent has affected him psychologically as it shows that he is deceased and that 2<sup>nd</sup> respondent did not take any action against the 3<sup>rd</sup> respondent despite the damning reports that he had made against her when he recorded his statement on the 3<sup>rd</sup> respondent's fraudulent activities. He produced the statement recorded with the CID at Langata Police Station as Petitioner's exhibit 2.

11. On cross examination, he stated that he did not know the procedure to be followed in the issuance of a death certificate in the case where a deceased person dies at home.

12. In his written submissions in support of the petition, m/s Miyare & Co. advocates for the petitioner highlighted the issues for determination to be as follows:

- a) Whether or not the 1<sup>st</sup> Respondent issued a Certificate of Death with regard to the Petitioner.
- b) Whether or not the 1<sup>st</sup> Respondent negligently issued the Certificate of Death.
- c) Whether or not the Death Certificate violates the Petitioner's constitutional rights.
- d) Whether or not the Petitioner is entitled to an order for compensation.
- e) Who should bear the costs of the suit?

13. On the first issue, counsel submitted that the Petitioner tendered Certificates of Death Nos. 0539034 and 986913 in the name of **Omar Abdiaziz Ibrahim** which was a confirmation that the Certificate of Death was indeed issued in respect to the petitioner. Counsel noted the 1<sup>st</sup> Respondent acknowledged having issued the said Certificate of Death and further tendered an extract of the Register of Death to affirm that the Petitioner's death was reported and registered accordingly.

14. On whether or not the 1<sup>st</sup> Respondent was negligent in issuing the death certificate, counsel submitted that the 1<sup>st</sup> respondent could only issue a written permit authorizing the interment or other disposal of the body of a deceased upon production of a medical certificate as to the cause of the death, a notice in writing by a medical practitioner stating that the medical certificate as aforesaid has been signed by him, or a death report upon which a magistrate or police officer has certified that the death is not one to which section 386 or 387 of the Criminal Procedure Code (cap 75) applies. Counsel referred to the provisions of section 19(1) (a) and (b) of Births and Deaths Registration Act which stipulate that: ***The registrar can only issue a permit for interment or other disposal of the body upon production of a medical certificate and a written notice from a medical practitioner acknowledging having signed the medical report, or, a death report as aforesaid.***

15. It was the Petitioner's case that the 1<sup>st</sup> Respondent did not follow due process and/or conduct due diligence prior to the registration of the Petitioner's purported death and before issuing the impugned Certificate of Death. He added that had the 1<sup>st</sup> Respondent exercised due diligence he would have known that the information on the death was false, malicious and only intended to injure the Petitioner.

16. On whether the issuance of the death certificate amounted to a violation of the petitioner's constitutional rights, counsel submitted the 1<sup>st</sup> Respondent's act of issuing a Certificate of Death in his name while he was alive is tantamount to intentionally depriving him of his right to life, recognition and privileges as a living person. He thus urges the Honourable Court to find that by issuing the challenged Certificate of Death, the 1<sup>st</sup> Respondent violated the Petitioner's right to life, freedom and security as a living person which includes the right not to be subjected to torture in any manner whether physical or psychological or to be treated or punished in a cruel, inhuman or degrading manner as envisaged under Article 29 (d) and (f) of the constitution. Counsel maintained that the Certificate of Death caused the Petitioner severe mental anguish as not only had the 1<sup>st</sup> Respondent declared him dead, but also that the Certificate of Death also subjected him to inability to freely deal with his properties and transact his businesses.

17. On whether or not the petitioner is entitled to compensation for the aforesaid violations, counsel submitted that it is settled law that violations of fundamental human rights must be remedied to vindicate the constitution and to deter further infringement thereof and further, that under Article 23 of the Constitution, the court has the discretion to award compensation in the form of damages where a fundamental right has been violated even where an order for compensation has not been pleaded. For this argument, counsel relied on the decision in the case of **Fredrick Gitau Kimani -versus- Attorney General & 2 others [2012] eKLR.**

#### **The 1st respondent's case**

18. The 1<sup>st</sup> respondent opposed the petition through the replying affidavit of its Principal Civil Registration Officer Shumary Malleon who avers that the Registrar of Births and Deaths is empowered by Section 7 of the Births and Death Registration Act (herein after "**the Act**"), to keep a register of death with the prescribed particulars of every death being notified to the registrar for registration. He states that under Section 17 of the Act, the registrar, in registering and maintaining the records of deaths, relies on information given by the deceased's close relatives, a relative of the deceased dwelling or being in the same registration area as the deceased or any person present at the death or any person finding or taking charge of the body or causing the body of such person to be buried or otherwise disposed of.

19. He further states that from the said provisions of Section 17 of the Act, it is apparent that in discharging his statutory mandate, the registrar relies on diligence and utmost good faith of the person notifying him of the death and that such a person is required to certify the correctness of the information by signing the death register. He further avers that in the instant case, the Assistant Registrar Madogo Sub-location was notified of the petitioner's death by one **Suban Issa Noor** who alleged that he was the petitioner's relative and not the 3<sup>rd</sup> respondent, and that the said **Suban Noor** signed the death register as shown in annexure "**SM1**" to the said replying affidavit.

20. He maintains that the registrar acted in good faith and within the law as there is no requirement for the production of the identification of the deceased person before such death can be registered.

21. The 1<sup>st</sup> respondent's deponent also testified during the hearing of the petition when he repeated the contents of his replying affidavit and confirmed that 27<sup>th</sup> February 2009, death was registered in respect to **Omar Abdul Aziz Ibrahim** and that in registering the death, the registrar relied wholly on the information given to him by the deceased's relative or person reporting the death, in this case, one **Suban Issa Noor**.

22. At the hearing of the petition, Miss Wawira, learned counsel for the 1<sup>st</sup> and 2nd respondents submitted that under the Act, where a person dies at home, the information of death is relayed to the registrar by a relative or any person present at the death place and that upon receiving such information, the registrar is not required, under any law, to conduct further investigations on the death report as he solely relies on due diligence and utmost good faith of the informer.

23. Counsel submitted that the registrar did not contravene any law in issuing the death certificate and that the 3<sup>rd</sup> respondent was not the informant in this case. Counsel further argued that the law does not require the informant to produce any identification of himself or the deceased.

#### **Analysis and determination**

24. I have considered the instant petition, the respondents' response and the parties' submissions. I find that the main issue for determination is whether in issuing death certificate No. 0539034, the 1<sup>st</sup> respondent and by extension the 3<sup>rd</sup> respondent violated the petitioner rights

under Articles 25(a), 26(1), 29(a) (d) and (f), 31(a), ( c ) and (d) and 40 of the Constitution. The said Articles stipulate as follows:

Articles 25(a)

**Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--**

**(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**  
Article 26(1)

**(1) Every person has the right to life.**

Article 29(a) (d) and (f)

**Every person has the right to freedom and security of the person, this includes the right not to be--**

**(a) deprived of freedom arbitrarily or without just cause;**

**(d) subjected to torture in any manner, whether physical or psychological;**

**(f) treated or punished in a cruel, inhuman or degrading manner.**

Article 31(a), (c) and (d)

**“Every person has the right to privacy, which includes the right not to have-**

**(a) Their person, home or property searched;**

**(c) Information relating to their family or private affairs unnecessarily required or revealed; or**

**(d) The privacy of their communications infringed.**

Article 40

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--**

**(a) of any description; and**  
**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person--**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

25. In the instant case, it was not in dispute that on 12<sup>th</sup> December 2015 the 1<sup>st</sup> respondent issued death certificate No. 0539034 in the name of **Omar Abdiaziz Ibrahim**. The main bone of contention, however, was whether the said death certificate was in respect to the petitioner or someone else.

26. The 1<sup>st</sup> respondent outlined the procedure for issuance of a death certificate as contained in Sections 7, 16, 17 and 26 of the Act as follows:

Section 7 of the Births and Deaths Registration Act, Cap 149 it is states:

*It shall be the duty of every registrar to keep... a registrar of deaths and to enter therein, respectively, the prescribed particulars of every ....death notified to him.*

Section 16 of Cap 149 goes to provide for the mode of registration of a death in that,

*Every person notifying a death shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the death shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.*

Section 17 further states:

*Upon the death of any person the registration of whose death is compulsory, it shall be the duty of the nearest relatives of the deceased present at the death or in attendance during the last illness of the deceased, and, in default of such relatives, of every other relative of the deceased dwelling or being in the same registration area as the deceased, and, in default of such other relatives, of each person present at the death and of the occupier of the house in which to his knowledge the death took place, and, in default of the persons herein before in this section mentioned, of each inmate of such house, or of any person finding or taking charge of the body of such person or causing the body of such person to be buried or otherwise disposed of, to give notice within such time as may be prescribed to the registrar of the registration area in which the death took place.*

On provision of certificates, Section 26 of Cap 149 provides that **the Principal registrar shall on payment of prescribed fees; furnish a certified copy of any entry in any register.** It is therefore clear that a death certificate is issued based on the information filed in the death register.

27. It is trite law that he who alleges must prove his allegation and in the instant case, the burden lay squarely on the shoulders of the petitioner to prove firstly, that the impugned death certificate referred to him and no one else and secondly, that it is the 3<sup>rd</sup> respondent who maliciously caused his name to be entered in the death register in order to fulfill an evil scheme to eliminate him.

28. Having considered the totality of the evidence availed before me, I am not satisfied that the petitioner discharged this burden of proof to the required standards so as to warrant the issuance of the orders sought. I say so because firstly; no material was placed before me to show that the name **Omar Abdiaziz Ibrahim** entered in the impugned death certificate referred to the petitioner herein who states that his name is **Omar Sheik Abdiaziz Ibrahim**.

29. Secondly; while the petitioner claimed that it is the 3<sup>rd</sup> respondent who maliciously reported his death to the 1<sup>st</sup> respondent; it came out clearly in evidence that the actual informant of the death was one **Suban Issa Noor**. I am therefore unable to find that the 3<sup>rd</sup> respondent's alleged involvement in the death certificate saga was proved to the required standards or it all. My finding is that while the petitioner may have had suspicion that the 3<sup>rd</sup> respondent could have been involved in a scheme to 'eliminate' him following the marital disputes that may have had, mere suspicion alone is not enough to support a claim of violation of constitutional rights and that the petitioner needed to furnish the court with cogent evidence to prove his claims. It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

*“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

30. This principle was emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

*“...the principle in **Anarita Karimi Njeru** (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru** (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”*

31. My further finding is that the petitioner did not prove that the names **Omar Abdiaziz Ibrahim** and **Omar Sheik Abdiaziz Ibrahim** refer to one and the same person, that is, him so as to justify his claim that the impugned death certificate was in respect to his alleged reported death.

32. For the above reasons, I find that the instant petition is not merited and the order that commends itself to me is to dismiss it with no order as to costs.

33. Before I conclude this judgment, I wish to observe that even though the 1<sup>st</sup> respondent is under the law, only required to rely on the

utmost good faith and prudence/diligence of those who report deaths to him, in light of many reported fraudulent death reports, perhaps it is high time that they relooked into the procedures undertaken in recording death reports by taking down the full particulars of those who make such reports, and the details of the deceased persons so as to leave no room for fraudsters who may want to take advantage of the lack of clarity of the law in this regard. This may also be an opportune moment for the law makers to consider amending the Act with a view to making fraud proof by making clear provisions so as to avoid a scenario such as the one that presented itself before this court where the exact identity of the deceased or the person reporting his death cannot be established with certainty.

**Dated, signed and delivered in open court at Nairobi this 15<sup>th</sup> day of March**

**2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Non appearance of parties

Court Assistant – Ali