



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

PETITION NO.5 OF 2018

**IN THE MATTER OF ARTICLE 1(1), (2),(3B) & (4B), 2,3,10,19,20,21,22,23,73,75,159,258,259 AND 260 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 27,28,47 AND 50(1) OF THE
CONSTITUTION OF KENYA 2010 AND SECTION 56(10) OF THE COUNTY GOVERNMENT ACT 2012**

AND

**IN THE MATTER OF THE CONFISCATION/WITHHOLDING OF THE
PETITIONER'S NATIONAL IDENTITY CARD BY SOLOLO POLICE**

BETWEEN

GALMA DUBA GUFU.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER INTERNAL SECURITY AND

NATIONAL CO-ORDINATION.....2ND RESPONDENT

J U D G M E N T

The Petition dated 22nd day of May 2018 seeks the following orders:

- (a) That a declaration be and is hereby issued that the petitioner is holder of a valid Kenya National identity card and remains the legitimate holder of Id/No [xxxx].
- (b) That a declaration be and is hereby issued that the petitioner is a Kenyan citizen by birth and to declare that all decisions, actions by the 2nd respondent, purporting to confiscate or withhold the petitioner's national identity card aforesaid, and/is unconstitutional, null and void.
- (c) That this honourable court be pleased to issue an order compelling and respectively directed at the respondents jointly and severally by themselves their servants, agents officers or whomsoever else is acting on their behalf to surrender to the petitioner his national identity card number [xxxx], forthwith and from preventing or in any other manner whatsoever or howsoever from interfering with the petitioner right of being a Kenyan citizen.

(d) That this honourable court be pleased to make any other orders it deems fit and just to grant.

(e) That cost of this petition be provided for.

The petition is supported by the petitioner's affidavit sworn on the same date. The respondents filed grounds of opposition to the petition. Directions were given by the court to the effect that the petition be determined by way of viva voce evidence. Four witnesses testified for the petitioner's case while two testified against the petition.

PW1 GALMA DUBA GUFU is the petitioner. He testified that he is a businessman in Marsabit. He was born in 1982 at Dirib Gombo in Marsabit County. He can't recall the date and month of birth. In the year 2002 there was vetting of people for registration purposes in his location. He was vetted and three months later issued with a Kenyan identity card number [xxxx]. The vetting took place on 4.3.2002. His parents are alive and also gave out their identity cards during the vetting. He used the identity card for quite some time.

It is his further evidence that he was carrying on business of buying and selling cattle. He went to visit his relatives in Sololo. He was arrested on 8.8.2004 and taken to Sololo Police station. He was kept in the cells for twelve (12) days. He was later taken to Court. His identify card was taken away by the Police. He was charged with the offence of moving around at night and was fined Ksh.3000 in default serve one month imprisonment. He went back to Moyale Police station to collect his identity card. He was directed to go to Sololo Police station but arrested again at the Police station and placed in the cells for about two (2) hours and then released without being given his identity card. The identity card was taken by the Police.

The petitioner maintains that he is a Kenyan and not Ethiopian. He was not charged with the offence of being a foreigner. He could have been repatriated. His father is Dub Gufu Yattan and his mother is Godana Duba Gufu. He has nine (9) brothers from the same parents. He has other seven (7) brothers from his step mother but from the same father. All of them are alive. His children have problems in getting birth certificates. His mobile phone that was registered using his identity card number is now blocked. He was issued with a Police abstract for the lost identity card.

PW1 went on to testify that several other people were arrested on 8.8.2004. He is illiterate. They were arrested at night. He is not aware of the charges of being in Kenya unlawfully. He was 20 years old in 2002 when he was issued with the identity card. There was a vetting committee which included the District Officer. He kept on writing letters seeking the release of his identity card.

PW2 Diba Jarso was the assistant chief of Dirib sub location. He retired in 2017. He became assistant chief in 1988. Before then he was in the Police service. In 2002 he was present during the vetting of the petitioner. The senior Chief George Godana and elders were present. He knows the petitioner's parents. The petitioner's application was approved. He knows the petitioner very well. He come from the sub-location. He has known him since his childhood. He knows his parents who are Kenyans and still alive. The petitioner's parents attended the vetting. At the time of vetting there were no birth certificates. It was the applicant's parents' identity cards that were being checked. He retired after attaining 60 years. The District officer and intelligence officers also attended the vetting. It is PW2's evidence that the petitioner is a Kenyan and obtained his identity card lawfully.

PW2 further testified that the petitioner's father's identity card indicate that he is from North Horr while the mother is from Maikona. The elders who attended the vetting are from Dirib sub location. According to their naming customs, the name Dub means the father was absent when the child was born.

PW3 Godana Duba Gufu is the petitioner's biological mother. She went with the petitioner during the vetting and he was issued with a Kenyan identity card. She is a Kenyan and holder of identity card number [xxxx], serial number 2007 91390 issued on 21.05.1996. She gave birth to the petitioner at Dirib Gombo. She is illiterate and can't remember when PW1 was born. She got her identify card from Maikona as she was moving around with her cattle that time. Maikona is in Marsabit County. She was initially issued with the big identity card when she was about 20 years and the current identity card is a replacement. At one time the petitioner was arrested and his identity card was taken away. She has nine children. They include Roba, the petitioner, Bonaya, Kabale, Jillo, Guyatu Diramu and Dokata. He husband, the petitioner's father, is alive.

PW4 Jaldes Dub Gufu is the petitioner's step brother from the same father. His mother has six sons and one daughter. The petitioner was accompanied by his parents when he went for the vetting. He was issued with an identity card. The petitioner used to deal with the business of buying and selling cattle. He is a Kenyan with identity card number [xxxx] serial number [xxxx] issued on 29.1.2001. Initially he had the old identity card. He is illiterate. The petitioner was born in Dirib Gombo.

DW1 Chief Inspector James Musimi is the current OCS Sololo Police Station. The station records showed that on 8.8.2004 at around 6.00pm an operation of arresting illegal immigrants was conducted under the supervision of inspector Lee Kabiru who was the then OCS. The petitioner was arrested with six others as per OB no.14/8/2004. They were found without valid documents. The petitioner was taken to Moyale Police station. At that time Sololo Police station was under Moyale Police station. He was charged in Court on 9.10.2004 and convicted. The charge was that of being found illegally present in Kenya Contrary to section 13(2) of chapter 172. He was fined Ksh.5000 in default serve six (6) months. He was to be repatriated back to his country. He can't tell whether he pleaded guilty or there was a full hearing. There is no report that the petitioner's identity card was taken away on the station records. The OB record does not indicate that the petitioner and the other six (6) were taken to court. The charge sheet and certified copies of judgement are not part of the records. It is the prisons department which does the repatriation. The registrar of persons can cancel an identity card. The petitioner was issued with a police abstract on 12.8.2015.

DW2 Daniel Karungo is a Registrar of Persons in Marsabit County. He testified that the petitioner's identity card has been invalidated. The identity card was found to have been acquired in an improper manner. Those Kenyans from border district are normally subjected to vetting. The District Commissioner, Registrar, national intelligence, local chief, assistant chief and elders are some of the vetting committee members. The petitioner was subjected to the normal vetting as he was below 25 years old. The petitioner's application was done on 8.3.2002 and he was issued with an identity card on 17.9.2002. There is a letter dated 16.9.2019 indicating that the petitioner is not a

Kenyan. Intelligence report can be obtained after registration. Further vetting of the documents is done in Nairobi by the National vetting committee.

Mr. Biwott, Counsel for the petitioner, maintain that the petitioner has proved that he is a Kenyan and resident of Marsabit. He obtained an identity card after attaining the age of 18 years. He is a citizen by birth. His mother presented her identity card number [xxxx] as proof of being a Kenyan. He was told by the Police that he would be charged with the offence of loitering and advised to plead guilty. He paid the fine and went to collect his identity card. He is surviving on a police abstract. His application for the identity card was approved even at the national level.

Miss Kung'u, deputy chief state counsel, maintain that the petitioner did not prove his case. If indeed he lost his identity card, there is no evidence as to what steps he has taken to follow up with the relevant institutions. It has taken eleven (11) years to lodge the complaint with the Police as per his Police abstract issued on 12.08.2015. It has taken the petitioner fourteen (14) years to move the court with the petition. The petitioner was arrested and charged in criminal case number 269 of 2004. He pleaded guilty for being in Kenya illegally. The Kenyan identity card issued to the petitioner was obtained illegally and was confiscated. All criminal records from 1985-2014 were destroyed on 18th October 2017 as per Rule 3(b) of the Records Disposal Act, Cap.14 Laws of Kenya. Only Kenyan citizens are eligible for issuance of identity cards under section 2 of the Registration of Persons Act, Cap 107 laws of Kenya.

The issues for determination are:

1. Whether the petitioner is a Kenyan citizen
2. Whether the petitioner pleaded guilty to the offence of being in Kenya illegally, and if so, whether the conviction makes the petitioner to be a non citizen of Kenya.

Whether the Petitioner is a Kenyan citizen

The Petitioner was born in 1982. He was issued with a Kenyan identity card in 2002 before the promulgation of the 2010 Constitution. The petitioner 's contention is that his Kenyan identity card was taken away in 2004.

Article 12 of the 2010 Constitution states:

12 (1) Every citizen is entitled to –

(a) The rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution: and

(b) A Kenya passport and any document of registration or identification issued by the State to citizens.

(2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria mentioned in Article 24.

Articles 13 and 14 states as follows:

(1) Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.

(2) Citizenship may be acquired by birth or registration.

(3) Citizenship is not lost through marriage or the dissolution of marriage.

14. Citizenship by birth

(1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya.

(4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

(5) A person who is a Kenyan citizen by birth and who has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

Article 17 of the constitution provides for revocation of citizenship. It states as follows:-

17. Revocation of citizenship

(1) If a person acquired citizenship by registration, the citizenship may be revoked if—

(a) the person acquired the citizenship by fraud, false representation or concealment of any material fact;

(b) the person has, during any war in which Kenya was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in such a manner as to assist an enemy in that war;

(c) the person has, within five years after registration, been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or

(d) the person has, at any time after registration, been convicted of treason, or of an offence for which—

(i) a penalty of at least seven years imprisonment may be imposed; or

(ii) a more severe penalty may be imposed.

(2) The citizenship of a person who was presumed to be a citizen by birth, as contemplated in Article 14(4), may be revoked if —

(a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;

(b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or

(c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.

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

(6) Citizenship By Birth

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

Section 10 of the same Act states:

(10) Regaining citizenship

(1) A person who was a citizen of Kenya by birth and who ceased to be a citizen of Kenya because he or she acquired the citizenship for another country may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship.

(2) The application under subsection (1) shall be accompanied by-

(a) proof of applicant's previous Kenyan citizen;

(b) proof of citizenship of the other county.

(3) Upon receipt of an application made under subsection (1), the Cabinet Secretary shall cause the application to be registered and keep a record of such application.

(4) The Cabinet Secretary shall after registering an application, issue a certificate in a prescribed form to the applicant.

(5) The Cabinet Secretary may issue an extract of the register to the applicant and such further extracts to such third parties as shall be entitled upon application and payment of such fees as may be prescribed.

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

(1) The Cabinet Secretary may, where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, revoke any citizenship, acquired by registration on the grounds specified in Article 17 of the Constitution.

(2) The Cabinet Secretary shall by notice, in writing, inform any person whose citizenship is due for revocation of the intention to revoke his or her citizenship giving reasons for the intended revocation.

(3) The Cabinet Secretary shall give a person who has been given a notice under subsection (2) an opportunity to present the reasons why his or her citizenship should not be revoked.

(4) The Cabinet Secretary may after considering the presentations made under subsection (3) revoke the citizenship and cause the revocations to be entered into the register for revocation of citizenship.

Another relevant legislation is the Registration of Persons Act. The preamble to the Act states that it is “**an Act of Parliament to make provision for the Registration of Persons and for the issue of identity cards, and for purposes connected therewith.**”

Under Section 3 of Chapter 107, an identity card is defined as a card issued under Section 9 of the Act. Section 6(1) of the Act states as follows: -

(1) Every person who attains or has attained the age of eighteen years and is unregistered shall be liable to registration under this Act and shall within ninety days of attaining that age present himself before a registration officer and register himself by giving to the registration officer the particulars specified in subsection (1) of the section 5, and for that purpose shall permit his finger and thumb or toe or palm impressions to be recorded in any manner prescribed.

Section 9 of the Act states: -

(1) Upon the registration of a person under this Act, the registration officer shall issue an identity card in the prescribed form to that person.

(2) Every identity card shall contain –

(a) Photograph, of the prescribed size and type, of the registered person; and

(b) Such of the finger and thumb or palm or toe impressions of the registered person as the registration officer may require,

And for the purpose of obtaining them the registered person shall permit his photograph and his finger and thumb or palm or toe impression to be taken.

Provided that a registered person may elect, or be required by a registration officer, to supply a photograph of himself in duplicate where the registration officer is satisfied that the photographs are of the prescribed size and type and have been taken within the prescribed time.

Section 30 of the 6th Schedule to the Kenyan Constitution states as follows:-

30. A Kenyan citizen is a citizen by birth that citizen –

(1) acquired citizenship under article 87 or 88 (1) of the former Constitution; or

(2) would have acquired citizenship if Article 87 (2) read as follows: -

“Every person who, having been born outside Kenya, is on 11th December, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall, if his father or mother becomes, or would but for his or her death have become, a citizen of Kenya by virtue of subsection (1), become a citizen of Kenya on 12th December, 1963.”

Section 30 of the 6th Schedule is not very relevant to the present case. Article 87 of the Old Constitution related to citizens of United Kingdom and its Colonies who were born in Kenya. The petitioner testified that he was born at Dirib Gombo area in Marsabit County. He was vetted and issued with a Kenyan identity card number 23412154. His parents are Kenyans. His father is the holder of a Kenyan identity card number [xxxx]. serial No. [xxxx] while his mother holds Kenyan identity card number [xxxx] serial number [xxxx]. It is therefore clear that the Petitioner is a Kenyan by birth. There is no evidence that the petitioner’s citizenship was revoked in accordance with the provisions of Section 21(2) of the Kenyan Citizenship and Immigration Act. Under Article 17(2) it has to be established that the person who was presumed to be citizen by birth acquired the citizenship by fraud, false representation or concealment of any material fact or it is established that the person is a nationality of another country or his parentage is not Kenyan.

PW2 is the former assistant chief. He was present during the vetting. PW3 is the petitioner’s biological mother. She too was present during the vetting of the petitioner and presented her identity card. The vetting minutes dated 1.3.2002 were produced. The District officer, Central Division was the chairman, the District Registrar of persons area chief, assistant chief, security officer and elders were present. The petitioner’s application was approved. He presented his parents’ two identity cards whose numbers are stated on the minutes.

The only document which makes reference to the contention that the petitioner is not a Kenyan citizen is a letter dated 16th September, 2019. The letter partly reads as follows:-

Ref. NRB/OPS/2/2/8/VOL.VI/90 16thSeptember, 2019

The Senior Principal State counsel

Office of the Attorney General

Department of Justice

Miriga Mieru Building

2nd Floor

P.O Box 51-60200

MERU

RE: MARSABIT HCPT NO 5 OF 2018

CALMA DUBA DUYU –VS HON ATTORNEY GENERAL & MINISTER FOR INTERNAL SECURITY AND NATIONAL CORDINATION

We refer to your letter Ref AG/MRU/MARS/1CORD/7G/2018 dated 11th July 2019 in regard to the above matter.

The Petitioner, Galma Duba Duyu was registered after he was positively identified as a Kenyan and an ID card was processed and issued on 17th September, 2002. During the process of identification, he produced copies of his parents ID cards number [xxxx] (Godan Duba Gufu-mother) and [xxxx] (Dub Gufu Yattan-father) as proof of his citizenship. On the basis of the supporting documents tendered, the National Government officials authorized his registration and subsequent issuance of an ID card.

In 2005, the registration records of the petitioner were invalidated as he was suspected to be a non Kenyan on the strength of letter Ref SEC/POL.2/1/6/VOL.1/99.

Enclosed herein please find copies of the registration records. (Register 136A/136) pertaining to the petitioner and his parents respectively. We have also enclosed extracts of the register (identification reports) with the details of the petitioner and his parents.

There is reference to letter of Ref SEC/POL 2/1/6/Vol.1/99 which was not produced. Its not clear what are the contents of that letter.

The petitioner contends that his identity card was taken in 2004. That contention is believable because that is the time he was arrested. There is a letter dated 13.12.2012 addressed to the District Registrar of person by the Senior Chief of Dirib Gombo location. The letter states that the petitioner is the resident of the location and was issued with an identity card in 2002. There is a letter dated 20.1.2014 by the petitioner addressed to the National Registration of Persons. The letter indicate that the petitioner re-applied for an identity card in Nairobi and was told that he is an alien. He followed up the issue with the UNHCR and he was confirmed that he is not an alien.

It is therefore clear that the petitioner has persistently been following up the issue of his identity card. The respondents maintain that it has taken too long for the petitioner to complain. This may be the case but the reality is that he has at all times maintained that his identity card was taken by the Police in 2014. Indeed he was issued with an identity card and DW2 confirmed that and identity card was issued to him. The identity card was issued to him in his capacity as a Kenyan by birth. I do find that the petitioner is a Kenyan Citizen by birth and the identity card issued to him in 2002 was not procured through fraud or misrepresentation of facts.

Whether the Petitioner pleaded guilty to the offence of being in Kenya illegally and if so whether his conviction makes him to be a non citizen of Kenya.

The respondent's case is grounded by the witness statement of **DW1 Chief Inspector James Musyimi** dated 17.6.2019. Paragraphs 2,3,4 and 5 of the statement states as follows:

- 1. That the applicant in this civil case one Galma DUBA GUFU a borona male adult was arrested on 8th August 2004 at 1800 hours with other six (6)people within Sololo sub-county vide sololo police station OB No.14/08/08/2004.**
- 2. That after the arrest they were interrogated and the applicant was found without valid document or pass and later the applicant was escorted to Moyale Police station where he was charged with offence of being in Kenya illegally C/Sec 13(2) of the immigration Act Cap 72 laws of Kenya.**
- 3. That on 9.10.2004 at Moyale Senior Resident Magistrate Court the applicant was found guilty to the offence and convicted as charged. He was fined 5000 Kenya shillings in default to serve six months imprisonment and to be repatriated back to Ethiopia vide Sololo Police station petty crime record register (PCR) No.46/2004.**
- 4. That the applicant did not make any formal report about the allegation that his identity card was taken from him by anybody.**

The grounds of opposition indicate that the petitioner was not a Kenyan citizen at all. He pleaded guilty to being in Kenya illegally and was fined Ksh.5000 or six months imprisonment. He was to be repatriated to his home country Ethiopia.

The petitioner admit that he was arrested on 8.8.2004. The respondents produced a copy of the sololo Police station occurrence book (OB) for that period. The entry for OB No.14/8/8/2004 indicate that Galma Duba Gufu was arrested on that date. The particulars or reasons for the arrest are not given. The other part of the OB indicate as follows: "IMM of Person Act". I presume this refers to Immigration of Persons Act or something involving people who are immigrants. There is a record indicating as follows:

"fined 5000 ID 6 MNTH IMP to be repatriated by SRMS Court Moyale 9/10/04"

The above information applied to all the other six people who were arrested on the same day. On his part the petitioner contends that he was arrested for loitering at night and was told to plead guilty. He is illiterate and pleaded guilty. He was fined Ksh.3000, paid the fine and went back to Sololo Police station to pick his identity card. The identity card was not released to him from the date he took plea in Moyale.

The respondents categorically maintain that the records at Sololo Police station does not show that the petitioner reported the loss or confiscation of his identity care. The arrest was done in April 2004. The petitioner had been issued with an identity card in 2002. It cannot be true that the petitioner had no valid document in 2004. If he didn't have his identity card with him he could have easily sent message to his relatives for the identity card to be brought.

Despite the petitioner's denial, on a balance of probabilities it is established that the petitioner was charged under the Immigration Act for being in Kenya illegally and was fined Ksh.5000. The issue which follows is, why was he not repatriated? Was he repatriated and he returned to Kenya. Is there any evidence that he is an Ethiopian. He is a Borana and there are Boranas in Ethiopia. He had been issued with a Kenyan identity card. His parents are Kenyan. There is no single document indicating that he is from Ethiopia or has ever lived in that county. In 2004 the old constitution did not allow dual citizenship. The letter dated 16.6.2019 does not state the reason for the invalidation of the petitioner's records. It does not make reference to the court case as the reason as to why his records were invalidated. The petitioners original registration records have the following handwritten remarks.

"Reported to be a non citizen Kenyan vide letter ref. SEC/POL/41/6/vol.1?99 – 9.5.2005.

The registration details for the petitioner's parents were also enclosed in the letter dated 16.09.2019. For the parents the identity cards were issued in 1996 and they are indicated to be **"TYPE 2 – REPLACEMENT."**

The petitioner's parents are Kenyans. They live in Kenya. The petitioner lives in Kenya. There is no evidence that he renounced his Kenyan citizenship and became an Ethiopian. In my view, even if the petitioner pleaded guilty to the charges of being in Kenya illegally or was convicted that does not make him a non Kenyan. He is a Kenyan by birth and cannot be stripped off his citizenship. The entry from the Court was done on 9.10.2004. It is not clear what happened between 8.8.2004 to 9.10.2004. The petitioner maintains that he went to Court and paid the fine on the same day. DW1's affidavit states at paragraph 4 that the petitioner was found guilty. No judgment or proceedings are available.

Section 47A of the Evidence Act states as follows:-

47.A A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

There is no judgment or proceedings other than the OB entries. The question which the respondents have to grapple with is proof that the petitioner is an Ethiopian. The respondents could all along have even ordered for DNA test to confirm the petitioner's parentage. His parents are available and have readily stated that they are his parents. The area chief and assistant chief have confirmed that they know the petitioner since childhood. The position taken by the respondents that the petitioner pleaded guilty to being in Kenya illegally is not a good reason for taking away the petitioner's Kenyan citizenship by birth. Citizenship comes with several advantages. The petitioner's children have been denied birth certificates since their father's ID card was invalidated. The petitioner's mobile registration was also cancelled and cannot enjoy the privileges which come with the possession of an identity card.

In the case of **MIGUNA MIGUNA –v- DR. FRED OKENO MATIANGI, CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT & 6 OTHERS, Nairobi Constitution PetitionNo.51 of 2018, (2019)eKLR**, Justice Mwita noted as follows at paragraphs 79 and 80 of his judgement:-

79. Other than citizenship falling in the above categories, citizenship by birth cannot be revoked and for that reason, the 1st and 2nd respondents did not have power or discretion to exercise in so far as the petitioner's citizenship was concerned. He was not one whose citizenship could be revoked as contemplated by article 17 of the constitution or whose passport could be suspended or revoked in terms of Section 33(1) of the act.

80. Even if the 1st respondent had power to revoke citizenship, he had to comply with the law namely, Section 21 of the act. The section is clear that where there is sufficient proof and on recommendation of the Citizenship Advisory Committee, the Cabinet Secretary may revoke citizenship acquired by "registration" on the grounds specified in Article 17 of the Constitution. However before doing so, the Cabinet Secretary is required to give written notice and inform the person whose citizenship is due for revocation, of the intention to revoke his or her citizenship, giving reasons for the action. The Cabinet Secretary is then required to give the person who has been given such notice an opportunity to present reasons why his or her citizenship should not be revoked.

In the case of **MAHAMUD MUHUMED SIRAT –V- ALI HASSAN ABDIRAHMAN & 2 OTHERS, Nairobi Election Petition No.15**

of 2008 (2010) eKLR, Justice Luka Kimaru observed as follows: -

My evaluation of the evidence availed to the court by the 1st respondent in support of his assertion that the petitioner is an Australian citizen and the response thereto by the petitioner reiterating that he is a Kenyan citizen leads me to the conclusion that the petitioner has indeed established that he is a Kenyan citizen. The evidence adduced by the 1st respondent does not stand up to legal scrutiny. The 1st respondent's reliance on documents which in a normal court proceedings cannot be admitted in evidence doomed his case. The passport alledged to be the Australian passport of the petitioner is just but a piece of paper which could have been generated or downloaded in any cyber café. The 1st respondent did not produce the alledged Australian passport of the petitioner to prove or establish that indeed the petitioner is a citizen of Australia. The Australia High Commission was in fact unable to give conclusive information regarding whether or not the petitioner possesses an Australia passport. I therefore hold that the petitioner is a citizen of Kenya as prima facie evidence by his possession of a Kenya identity card and a Kenyan passport.

Similarly, in the case of *EWA & 2 OTHERS V- THE DIRECTOR OF IMMIGRATION AND REGISTRATION OF PERSONS & THE A.G., Nairobi Constitutional Petition number 352 of 2016*, Justice John Mativo stated as follows at paragraphs 14, 15 and 17 of his judgment:

14. It is a constitutional imperative that a person was born in Kenya and at the time of birth at least one of his parents is a Kenya citizen, the person enjoys citizenship by birth in terms of Article 14(4). Such citizenship cannot be revoked or lost under any circumstances. Article 12(1) of the Constitution provides that every citizen is entitled to the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by the Constitution, and a Kenya passport and any other document of registration or identification issued by the state to citizens. A passport or other documents referred to in clause (1) (b) of Article 14 may only be denied, suspended or confiscated in accordance with an Act of Parliament that satisfied the criteria mentioned in Article 24.

15. The above provision is echoed by section 6 of the Act which provides that a citizen by birth will carry the same meaning as provided in Article 14 as read together with clause 30 of the Sixth Schedule of the Constitution. Also relevant is Article 16 of the Constitution which provides that a citizen by birth does not lose citizenship by acquiring the citizenship of another country. Even if the petitioners were to be deemed to have lost their citizenship by virtue of the prevailing law then, it should be recalled that Section 7 of the fourth Schedule to the Constitutions provides that all law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

17. Nationality or citizenship by birth means nationality that an individual is automatically attributed by law from the moment of birth rather than acquired as an adult or following any administrative process.

The end result is that the petitioner is a Kenyan citizen by birth. I cannot hold that he makes a fresh application for purposes of regaining his citizenship because he will have to prove the citizenship of his current county. Currently he lives in Kenya and the evidence shows that he has all along lived in Kenya. He cannot prove that he is an Ethiopian citizen and proof of citizenship of another country is a requirement when one makes an application to regain Kenyan citizenship.

Further, the petitioner's parents are Kenyans. His mother testified that she obtained her first identity card when she was 20 years old. Therefore as long as the petitioner's parents are Kenyans the petitioner will remain a Kenyan by birth unless the contrary is proved. Citizenship by birth cannot be lost unless one renounces it. I am aware that the petitioner's identity card was invalidated maybe in the year 2005 before the promulgation of the New Constitution. Some legal provisions were not in force then. However, now that the petitioner has been pursuing his identity card all along, why is it that there was no communication to him. No reasons for the alledged invalidation were given. Between 2004 to 2019 there has been no communication to the petitioner. He has all along been expecting to be issued with his identity card.

I do find that the petition is merited and is hereby allowed. Orders are granted as follows:

(a) A declaration is hereby issued that the Petitioner is holder of a valid Kenya National identity card and remains the legitimate holder of Id/No.[xxxx].

(b) A declaration is hereby issued that the Petitioner is a Kenyan citizen by birth and declare that all decisions, actions by the 2nd respondent, purporting to confiscate or withhold the petitioner's national identity card aforesaid, are/is unconstitutional, null and void.

(c) An order is hereby issued compelling and directing the respondents jointly and severally by themselves their servants, agents officers or whomsoever else is acting on their behalf to surrender to the petitioner his national identity card number [xxxx], forthwith and from preventing or in any other manner whatsoever or howsoever from interfering with the petitioner's right of being a Kenyan citizen.

(d) Costs to the Petitioner.

Dated, Signed and Delivered this 27th day of November, 2019

S. CHITEMBWE

JUDGE