**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 51 OF 2018**

**IN THE MATTER OF ARTICLES 2, 3, 10, 12, 14(1)-(3), 16, 19, 20(1)-(4), 21, 22, 23, 24, 28, 29, 47, 159, 165(3), 238, 244, 245, 258 AND 259 OF THE CONSTITUTION**

**IN THE MATTER OF VIOLATION OF RIGHT TO CITIZENSHIP AND ALL OTHER ATTENDANT RIGHTS AND DENIAL OF RIGHT TO FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**MIGUNA MIGUNA............................................................................PETITIONER**

**VERSUS**

**DR. FRED OKENGO MATIANG'I CABINET SECRETARY,**

**MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.........1ST RESPONDENT**

**RTD MAJOR GORDON KIHALANGWA,**

**DIRECTOR OF IMMIGRATION.........................................2ND RESPONDENT**

**JOSEPH BOINNET, THE INSPECTOR GENERAL OF**

**POLICE THE NATIONAL POLICE SERVICE................3RD RESPONDENT**

**GEORGE KINOTI, DIRECTOR OF CRIMINAL**

**INVESTIGATIONS..............................................................4TH RESPONDENT**

**SAID KIPROTICH, OFFICER IN-CHARGE, THE FLYING**

**SQUAD OF KENYA POLICE SERVICE...........................5TH RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION**

**JOMO KENYATTA INTERNATIONAL AIRPORT.........6TH RESPONDENT**

**ATTORNEY GENERAL.....................................................7TH RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION ON**

**HUMAN RIGHTS....................................................1ST INTERESTED PARTY**

**RULING**

1. Before Court is a very unusual application. Unusual because it is the first time the court is faced with an application where a person said to be a citizen, has been deported to another country and declared a prohibited immigrant thus unwelcome in a country he calls his birth place. The application is also unusual because it has been filed on his behalf by his advocates on grounds that they could not have access to him.

2. On 6th February 2018, Cabinet Secretary for Interior and Coordination of National Government, ***Dr. Fred Matiang'i***, the 1st respondent herein, declared ***Miguna Miguna*** the petitioner, a prohibited immigrant, a declaration made pursuant to section 33(1) of the ***Kenya Citizenship and Immigration Act 2011. (The*** Act). He further declared that the petitioner was not a citizen of Kenya under section 43 of the Act.

3. Following that declarations, ***Major (Rtd) Gordon Kihalangwa***, Director of Immigration and the 2nd respondent herein, deported the petitioner to Canada with the help of police officers under the watch of ***Joseph Boinnet Inspector General of Police*** and ***George Kinoti, Director of Criminal Investigations,*** the 3rd and 4th respondents respectively. Also sued is the Officer Commanding Jomo Kenyatta International Airport Police Station where the petitioner was held before he was put on a flight out of the country. The Attorney General represents the national government in civil proceedings.

4. The application sought several conservatory orders ranging from suspension of the declarations made under Sections 33(1) and 43 of the Act, suspension of the declaration made through Gazette Notice VOL CXX No. 15 of 30th January 2018 declaring National Resistance Movement (NRM) a criminal organization, reinstatement of the petitioner's Kenyan passport and facilitation of the petitioner's re-entry into the country, and an order directing that the Chairperson of Kenya National Human Rights Commission or her representative be allowed access to the Immigration and Customs Clearance areas at the Airport of entry of the petitioner's choice, to observe the extent of observance by the respondents of relevant constitutional, human rights and immigration laws applicable to the petitioners right to re-enter Kenya.

5. The application is supported by an affidavit sworn by one of the petitioner's advocates, ***Mr Nelson Havi*** and grounds on the face of the motion. The facts of the petition and motion as can be gleaned from the face of the motion and the affidavits are that on 2nd February 2018, security officers broke into the petitioner's home in ***Runda Estate,*** Nairobi using all manner of force, ransacked the house, dragged the petitioner out of the house and drove with him to various police stations including ***Kiambu, Githunguri*** and ***Lari*** in Kiambu County.

6. Following this arrest, the petitioner's advocates applied for and obtained orders from Criminal Division of this Court for his release on a cash bail of Kshs. 50,000. The orders were made on 2nd February 2018. The court ordered that the petitioner attend Court on 5th February 2018 for inter parties hearing. The 3rd and 4th respondents did not comply with that order for they neither released the petitioner nor produced him in Court on 5th February 2018.

7. On 6th February 2018, the respondents' agents took the petitioner to ***Kajiado Law Courts*** intending to charge him before a resident magistrate. The learned magistrate declined to take plea on being informed that the petitioner was a subject of an application before the High Court. He directed that the petitioner be produced before the High Court before 3 p.m. on the same day. The petitioner was to be returned to the Magistrate's Court for plea on 14th February 2018.

8. As it would turn out, the petitioner was not produced before the High Court as ordered by both the High Court and the Magistrate. Meanwhile, the petitioner was declared a non-citizen, and his passport withdrawn. He was also declared a prohibited immigrant, driven to Jomo Kenyatta International Airport on the same day 6th February 2018 and forced onto ***KLM flight No KL360*** and deported to Canada. Based on the declaration by the 1st respondent revoking the petitioner's citizenship and declaring him a prohibited immigrant, the motion and petition dated and filed in Court on 12th February 2018 contend that those actions were unconstitutional and illegal thus the request for their suspension pending the hearing and determination of the petition.

9. The respondents filed replying affidavits to the petition and motion. For the motion the affidavit of the 2nd respondent sworn on 15th February 2018 and filed on the same day was material. He deposed that he is responsible to advice the Cabinet Secretary responsible relating "***to grant and loss of citizenship"*** and issuance of passports. He also deposed that the petitioner, ***Miguna Miguna***, was born on 31st December 1962 in ***Nyando Kisumu County,*** that in 1987, the petitioner applied to the High Commission in Canada for a Kenyan Passport where he was a Political refugee. That the High Commission was directed to issue him with a one way travel document to Kenya but the petitioner never travelled. That the petitioner applied for a passport in 2009 which was granted on approval by the Minister then in Charge. It was deposed that the petitioner is a Canadian citizen having acquired that Country's passport in 1986 a time when the repealed Constitution did not allow dual citizenship.

10. The 2nd respondent deposed that under section 97 of the repealed Constitution a citizen of Kenya lost Citizenship on acquiring another Country's citizenship unless he renounced citizenship of the other country which the petitioner did not do. He deposed that the petitioner's Kenyan passport was illegally issued, that the petitioner did not follow the law (section 10 of the Citizen and Immigration Act) to regain his citizenship and that the petitioner has never made an application to regain his citizenship. Section 10 (1) provides that ***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 of another country may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship***

11. The 2nd respondent deposed therefore, that he informed the petitioner by letter of 5th February 2018 that his ***Kenyan passport No A 116842*** had been suspended and was required to surrender it within 21 days otherwise it would be rendered null and void. He also deposed

that he informed the 1st respondent regarding the petitioner's post-election political activities which were detrimental to national security, and that acting on that information, the 1st respondent issued the declarations under sections 33(1) and 43 of the Act declaring the petitioner a prohibited immigrant, issued the deportation ordered of 6th February 2018 and on the same day he (the 2nd respondent) instructed his officers to ensure the orders were executed. He deposed that this was done in accordance with the Constitution and the law.

***Submissions***

***12. Dr. Khaminwa,*** senior counsel, leading a team of Advocates for the petitioner, submitted that the petition raises weighty legal and constitutional issues given that the petitioner was deported to Canada despite the fact that he was born Kenyan Citizen, and that as advocates, one of them had to swear an affidavit in support of the petition and motion because they had no access to him. Learned Counsel submitted that the petitioner's deportation was done in violation of the Constitution and the law, that the petitioner was declared a prohibited immigrant without giving him an opportunity to be heard as required by both the Constitution and the Law, and that he was deported in violation of valid Court orders. He urged the Court to uphold the Constitution and the rule of and grant the motion to enable the petitioner to come back and not only prosecute his petition but also face his accusers.

***13. Mr Waikwa Wanyoike,*** teaming up with ***Dr, Khaminwa,*** added that the question before Court is whether the petitioner was accorded fair administrative action as required by both the Constitution and the law (***Articles 47*** and ***50(1)*** of the Constitution and the Fair Administrative Act). Article 47 (1) provides that ***every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair,*** while ***Article 50 (1)*** provides that ***every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*** Learned counsel submitted that there is a tribunal under Section 23 of Kenya Citizenship and Foreign nationals Management Act that should review administrative decisions and that the decision to take away the petitioner's citizenship should have been done in accordance with the law which is subject to fair administrative action. Counsel contended that when the petitioner was taken to ***Kajiado Law Courts***, he was charged as a Kenyan citizen. He submitted that if there was suspicion of violation of the law, the petitioner was entitled to be informed and that the Director of Immigration could make a decision but only after giving the petitioner a hearing.

14. Learned counsel argued that the same process would still apply to a foreigner before he was declared a prohibited immigrant. Learned counsel concluded that the 1st respondent, as Cabinet Secretary, has no power to take away one's citizenship.

***15. Mr Bitta,*** learned counsel for the respondents, opposed the application arguing that the petitioner is a ***Canadian citizen,*** having acquired that country's citizenship prior to the 2010 Constitution. He contended that after the 2010 Constitution, the petitioner did not rescind his Canadian citizenship before acquiring a Kenyan passport. He also submitted that even after the 2010 Constitution, the petitioner did not apply to regain his citizenship. He relied on some decisions to submit that one who lost citizenship prior to the 2010 Constitution had to re-apply. According to counsel, the passport was acquired contrary to law.

16. Learned counsel contended that the petitioner has no ***prima facie*** case, that the petitioner's activities are detrimental to national security and that the orders sought are in relation to matters that have already been carried out since the 1st respondent's order has already been executed. In counsel's view, the conservatory orders sought will not sustain the status quo. He further contended that the petitioner did not authorise the filing of this petition and that the facts averred thereto and deposed in the affidavit are hearsay.

17. In a brief rejoinder, ***Dr. Khaminwa (SC)*** and ***Hon. Orengo (SC)*** submitted that although the respondents had been given time to file a response, they did not do so as directed by the Court, that the applicant was born in Kenya and that under the 2010 Constitution, no one can take away his citizenship, that the petitioner never renounced his citizenship, and that he was deported in disobedience of Court orders.

18. Both counsel argued that in the circumstances, Courts must stand up in defence of the Constitution and added that it was on that basis that the Court, (***Kimaru J)*** had made a ruling finding that the respondents acted in contempt of Court. They urged the Court to uphold the rule of law and order the petitioner's return to Kenya to face the law if necessary. They added that the petitioner's identity card was issued in 2012 and that the Registrar of persons has not denied or controverted the fact that the petitioner is a citizen holding a Kenyan identity card. They contended that a passport does not confer citizenship and that neither the Director of Immigration nor the Cabinet secretary can take away one's citizenship.

***Determination***

19. This motion seeks conservatory orders to suspend declarations made by the 1st and 2nd respondents declaring the petitioner a non-citizen, a prohibited immigrant, issuing a deportation order and suspension of his passport. The basic facts relating to this petition and motion are not in dispute. The petitioner was born a citizen of Kenyan parents. He attended local schools in the country and lived in the country up to late 1980, when he left as a political refugee. He obtained a Canada Passport on which he travelled and still travels. As at 2nd February 2018, he held dual citizenship having obtained Kenyan passport in 2009. He had also worked as a state officer up until after the 2013 elections.

20. The petitioner even contested for an elective post in the 2017 general elections, exercising a political right reserved for citizens under Article 38(1) of the Constitution. Further still, he is holder of Kenyan ***identification card No 270598*** issued on 18th November 2012 at Westlands in Nairobi. The copy confirms that he was born on 31st December 1962 in Nyando Kisumu County. A copy of the Kenyan Passport also contains the same details.

21. It is also not in dispute that the petitioner was arrested on 2nd February, 2018 and detained by Police officers until he was declared a prohibited immigrant on 6th February 2018 and deported. His passport was also suspended and confiscated.

22. The petitioner has challenged these actions contending that they were taken in contravention of the Constitution and the law and in violation of his rights and fundamental freedoms. The petitioner and his counsel argue that citizenship by birth cannot be taken away through

some administrative action. Reliance has been placed on Article 14 of the Constitution which states that a person is a citizen by birth if on the date of his birth whether born in Kenya so long as either of his/her parents was a citizen.

23. They also rely on Article 16 which states that a citizen by birth does not lose citizenship by acquiring citizenship of another country. This Article allows dual citizenship in this country. Article 17 deals with loss of citizenship by registration and gives instances when one may lose his/her citizenship.

24. In suspending the petitioner's passport and declaring him a non-citizen, a prohibited immigrant and one whose presence was against the interests of the country, the 1st and 2nd respondents relied on sections 33(1) and 43 (1) of the Citizens and Immigrations Act. Section 33 (1) stipulates instances when an immigration officer or any other law enforcement officer may suspend or confiscate a passport or other travel document, while section 43 (1) gives the Cabinet Secretary authority to make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under the Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code, to be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

25. Although the petitioner wants these actions eventually nullified, he wants their immediate suspension pending the hearing and determination of the main petition. At this stage, therefore, the Court is not supposed to make a definitive determination on the petition. Its duty is to consider whether there are sufficient grounds to persuade it to grant the conservatory orders sought in the application.

26. The law regarding grant of conservatory orders is now settled in this country. Decisions ranging from this Court, the Court of Appeal and the Supreme Court are clear on the issue. That is, a party who moves the Court seeking conservatory order(s) must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation or threatened violation is likely to continue unless conservatory orders are granted. In such a case, the purpose of granting conservatory order(s) is to prevent breach of the Constitution, violation of rights and fundamental freedoms or to preserve the subject matter pending the hearing and determination of a pending cause or petition.

27. The Supreme Court in its decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR***, stated;

> ***"Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as „the prospects of irreparable harm? occurring during the pendency of a case; or „high probability of success? in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes"***

28. In the case of ***Rights Education and Awareness (CREW) and 7 others v Attorney General [2011] eKLR***, the court observed that at the stage of applying for conservatory orders, a party is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless a conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

29. Whether or not to grant conservatory orders, the court would have to consider whether there is real or impending danger to violation or continuing violation of the Constitution or rights and fundamental freedoms with a consequence that a petitioner would suffer or continue to suffer prejudice were the Court to decline the request to grant Conservatory orders. In such a case, the Court would issue conservatory orders for purposes of protecting the Constitution or rights and fundamental freedoms pending the hearing of the main petition.

30. In the case of ***Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others [2012]eKLR*** the Court stated;

> ***"Where a legal wrong or legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has power to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission"***

31. And In ***Judicial Service Commission V Speaker of the National Assembly Another [2013]eKLR*** the Court again stated that;

> ***"Conservatory orders… are not ordinary civil law remedies but are remedies provided for under the constitution, the supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person" (Emphasis)***

32. The petitioner was deported after he was declared anon-citizen and a prohibited immigrant on 6th February 2018. This Court has therefore been called upon to suspend the declarations and allow his return to the country to fight for his rights. The grounds relied on are based on breach of the Constitution and the law. It is alleged that the Constitution and more so the Bill of Rights was violated and continues to be violated. The petitioner's counsel argue that the petitioner being a Kenyan citizen by birth, could not lose his citizenship as the 1st respondent purported to do and that he could not be deported by the 2nd respondent as he did. The other ground advanced is that the petitioner's rights under Articles 47(1) and 50(1) of the Constitution on fair Administrative action and fair hearing were violated.

33. The petition raises constitutional and legal questions that the petitioner seeks resolution on. It is not disputed that the alleged breaches and violations occurred on 6th February 2018 or thereabout, that revocation of citizenship, declaration of the petitioner as a prohibited immigrant and his deportation, raise the question whether the petitioner was subjected to the constitutional requirements in Articles 47(1), 50 (1) and the Fair Administrative Act.

34. I have also seen deposition by the 2nd respondent that he issued a letter to the petitioner on 5th February 2018, suspending his passport and requiring him to surrender it within 21 day. The letter, ***annexture "GK 1"*** to the 2nd respondent's affidavit, is addressed to ***Joshua Miguna Miguna*** of ***Runda Meadows, Nairobi.*** It is not clear where and when, if at all, the letter was delivered to the petitioner given that by that date the petitioner was in the hands of the Police and not at the address in the letter.

35. A keen reading of our Constitution reveals the following key highlights. First, that the Constitution is the supreme law of the Republic and ***binds all persons and state organs. (***Article 2(1)). Second, that the ***Republic of Kenya is a multiparty state founded on the national values and principles of governance in Article 10***. (Article 4(2)). Third, that national values and principles of governance ***bind all state organs, state officers, public officers, and all persons whenever any of them*** – (a) ***applies or interprets the constitution,*** (b) ***enacts, applies or interprets any law or makes or implements public policy decisions.*** The national values and principles of governance include; ***the rule of law, democracy, human dignity, equality, social justice and human rights.*** (Article 10)

36. Fourth, that the Bill of Rights as an integral part of our democratic state is the framework for social, economic and cultural policies and that ***the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.*** Further that the rights and fundamental freedoms in the Bill of Rights ***belong to each individual, are not granted by the State and are subject only to the limitations contemplated in the Constitution.*** (Article 19)

37. Fifth, that the Bill of Rights applies to all law and binds all state organs and persons and that ***every person is to enjoy the rights and fundamental freedoms in our Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*** (Article 20), that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms.

38. Applying the above principles to the questions that arise for determination in the petition, and bearing in mind the architectural design of our Constitution as highlighted above, it is not lost that they relate to alleged breaches of the Constitution and violation of rights and fundamental freedoms. The Court will thus be exercising its jurisdiction under Article 165(3) (b) and (d) (ii) of the Constitution to determine whether indeed rights or fundamental freedom in the Bill of Rights were denied have been denied, violated, infringed or threatened; and whether actions of the respondents were done under the authority of the Constitution or of the law or was inconsistent with, or in contravention of, the Constitution and the law. I am aware that at this stage the Court is not required to pronounce itself on the petition. Its duty is to weigh the grounds raised by the applicant and determine whether grant of conservatory orders is deserved based on the material before it.

39. Having applied my mind to the application and considered the response thereto, it cannot be denied that this petition raises serious constitutional and legal issues. The petitioner has been declared a prohibited immigrant, stripped of citizenship and deported from the country in a manner he says was contrary to the Constitution and the law. What would be the effect if the Court declined to grant conservatory orders sought? It is obvious that the declarations will continue in force and the petitioner remains deported while his citizenship is unresolved.

40. Allegations of breach of the Constitution and violations of the Bill of Rights such as revocation of citizenship are grave acts that affect one's right of movement. Declaration of the petitioner as a prohibited immigrant also limits his movement to enter the country and exposes him to penal sanctions should he re-enter the country. It is not denied that the petitioner was born in this country and that his kin and kith are citizens. The declaration and deportation have the cumulative effect of limiting his right to enter the country, or visit them while the Court waits to determine the legal and constitutional issues surrounding his citizenship and his rights under the Bill of Rights.

41. The respondents have on their part argued that the petitioner's presence was prejudicial to national security and therefore, he had to be deported. When the Court has to balance between the Constitution and the Bill of Rights ***visa vies*** national security, the Constitution and the Bill of Rights must prevail. There should hardly be any justification for the state to claim immunity on grounds of national security in the current constitutional dispensation when one of the principles of national security in Article 238 (2) (b) is that ***national security should be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.***

42. In the case of ***The Attorney General & another v Coalition for Reform and Democracy (CORD) & others*** (Civil Application No. NAI 2 of 2015) the Court of Appeal observed that Constitutional supremacy as articulated by **Article 2** of the Constitution has a higher place than public interest. And in the case of ***Attorney General & another v Randu Nzai Ruwa & 2 others*** [2016] eKLR ***Musinga JA,*** responding to a submission that certain actions taken on the basis of state security should not be questioned by Courts, opined that ***in the present constitutional dispensation, any suggestion that Courts ought not question or interfere with any decision by the Executive, as long as such decision is based on national security, is completely unacceptable and has no place in our progressive Constitution.*** That in my view, would also be the case where national security like in this case, is raised to justify the respondents' actions which, ***prima facie,*** appear to compromise the Constitution and the Bill of Rights.

43. In determining whether or not to grant conservatory orders, the Court may consider if any breaches or violations could easily be compensated. However, in a case like this, compensation may not be appropriate or a justification for constitutional breaches and violations of the Bill of Rights. This is because there can be no sufficient compensation for breach of the Constitution or violation of rights and fundamental freedoms. It must therefore be everyone's obligation to uphold the Constitution, respect, enhance and protect human rights and fundamental freedoms because they are the foundation of the rule of law and good governance.

44. There should never be willingness to compensate as justification for violation of rights or breach of the Constitution. It must also be the

constant endeavour of every Court to make fundamental rights in our Constitution more meaningful and expansive. This is so because the right to compensation for any suspected unlawful acts of violation of rights and fundamental freedoms, were the Court to eventually determine that there were such violations, would only be palliative than restorative of already violated rights and fundamental freedoms. In the circumstances of this case refusal to grant the conservatory orders sought would be to pay lip service to the values and principles in our Constitution.

45. The Court was informed from the bar, that ***Kimaru J*** had issued orders that are to a large extent similar to those sought in this application. I have had advantage of looking at the ruling by ***Kimaru, J*** dated 15th February 2018, two days after this Court had partly heard and adjourned the application to enable the respondents respond to it. What I gather from that ruling is that the only reason why the learned Judge granted the orders was because they were made in contempt of Court and not because of reason of any Constitutional challenge. The petition and motion before me raise constitutional issues that the Constitution and the Bill of Rights have been breached and violated. The application therefore seeks their suspension pending the hearing and determination of the petition. I also note that the application seeks other orders that were no before ***Kimaru J***.

46. From the respondents' replies, their motivation for taking the actions against the petitioner was first, that he is a non-citizen and second, that his presence in the country was incompatible with national security. I must state here that our Courts are sufficiently endowed with both human and intellectual resource to resolve the matrix web surrounding the petitioner's citizenship and any alleged acts of omission or commission said to be prejudicial to national security. If a person present in Kenya commits acts that violate the law, such a person should first be subjected to the laws of the land and thereafter the Court may order his/her deportation upon determining his/her guilt or otherwise rather than deny the Courts an opportunity to determine the person's guilt or innocence or any other unresolved issues, yet that is why courts exist.

47. Having given due consideration to the application and the issues raised in the application and petition,. I am satisfied, ***prima facie***, that the petitioner has raised substantial constitutional and legal questions regarding the actions taken against him by the respondents to justify this Court's intervention.

48. The respondents have argued that there is no status quo to maintain since the orders by the 1st respondent have been executed. Well, that cannot be a ground for declining the application. Once the petitioner succeeds to demonstrate that there is a strong possibility that the Constitution and the Bill of Right were violated, the Court in exercising its discretion can grant orders to reverse those actions and restore the position ante in defence of the Constitution and the Bill of Rights.

49. Moreover, the issues in this petition are also such that they cannot be fully and fairly adjudicated through affidavit evidence. For example, whether or not the petitioner renounced his Kenya citizenship, was subjected to fair administrative action or given a fair hearing require oral testimony followed by cross examination to enable the Court make an informed decision. They are factual issues that only the Petitioner can speak to. In the circumstances, I am satisfied that there is a strong case for granting the application.

50. Consequently, the application dated 12th February 2018 is allowed and I make the following orders;

> 1. A conservatory ***ORDER*** be and is ***HEREBY GRANTED*** suspending the declaration by the 1st respondent, ***DR. FRED OKENG'O MATIANGI,*** made on 6th February, 2018 under Section 43(1) of the Kenya Citizenship and Immigration Act 2011 declaring ***MIGUNA MIGUNA***, the Petitioner, not being citizen of Kenya and whose presence was contrary to national interests, be removed from Kenya, pending the hearing and determination of this petition.
>
> 2. A conservatory ***ORDER*** be and is ***HEREBY GRANTED*** suspending the decision by the 2nd respondent, ***MAJOR (RTD) GORDON KIHALANGWA*** made on 5th February suspending ***JOSHUA MIGUNA MIGUNA's*** Kenyan passport No. A116842, pending the hearing and determination of this petition.
>
> 3. A conservatory ***ORDER*** be and is ***HEREBY GRANTED*** suspending the order by ***DR. FRED OKENG'O MATIANG1,*** the 1st respondent, made and published in ***Gazette Notice No. 932*** of 30th January, 2018 declaring ***National Resistance Movement*** (NRM) a criminal organization, pending the hearing and determination of this petition.
>
> 4. An order be and is ***HEREBY ISSUED*** directing the ***DIRECTOR OF IMMIGRATION***, and in his absence, the most senior officer in the ***Directorate of Immigration*** to issue ***JOSHUA MIGUNA MIGUNA,*** the petitioner, with travel Documents to enable the petitioner re-enter and to remain in Kenya pending the hearing and determination of this petition. In default, ***JOSHUA MIGUNA MIGUNA,*** the petitioner, shall be at liberty to use the Canadian passport to re-enter and remain in Kenya pending the hearing determination of this Petition.
>
> 5. An ***ORDER*** be and is ***HEREBY ISSUED*** directing the Respondents to facilitate the petitioner's re-entry into Kenya on a date and time notified to the respondents by the Petitioner.
>
> 6. An ***ORDER*** be and is ***HEREBY ISSUED*** that during the petitioner's first re-entry to Kenya, the ***CHAIRPERSON*** of ***KENYA NATIONAL COMMISSION ON HUMAN RIGHTS,*** the 1st Interested Party, or her representative, be allowed access to the Immigration and Customs Clearance Areas at the Port of the petitioner's re- entry, in order to observe the extent of the respondents' observance of the relevant constitutional, human rights and immigration laws applicable to the Petitioner's right to re-enter Kenya.
>
> 7. Parties to fast track the petition for hearing as a matter of urgency.
>
> 8. Costs of the application to the petitioner

9. This order may be served by publishing it once either in ***THE STANDARD*** or ***DAILY NATION*** newspapers at the petitioner's expense.

**Dated Signed and Delivered at Nairobi this 26th Day of February 2018**

**E C MWITA**

**JUDGE**