



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 352 OF 2016

IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 10, 14 (4), 14 (5), 16 AND 27 OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

E W A..... 1ST PETITIONER

J K A..... 2ND PETITIONER

L M A..... 3RD PETITIONER

VERSUS

THE DIRECTOR OF IMMIGRATION AND REGISTRATION

OF PERSONS..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petitioners' case

1. The uncontested facts of this case are that the Petitioners were born Kenyan citizens. The first and third Petitioners were born at the Kenyatta National Hospital. The third Petitioner was born at the Pumwani Hospital. Their birth certificates attest to this fact.

2. It is admitted that the Petitioners were adopted by British citizens, namely, I D A and J El A in High Court Adoption Causes Nos. 35 of 1998, No.1 of 1996 and No. 52 of 1997. It is common ground that upon being adopted as aforesaid, they became British citizens. Copies of the Adoption orders are annexed to the supporting affidavit.

3. Also uncontested is the fact that at the time of the adoptions, the adoption orders did not include an order that the child be presumed to be a Kenyan citizen. The Petitioners now wish to regain their

citizenship that was lost upon acquiring British citizenship.

4. The point of departure is that the first Respondent has declined to issue the Petitioners with Kenyan Passports unless they produce a court order. The Petitioners contend that the said refusal is an infringement of their constitutional rights guaranteed under Article **14** and **27** of the Constitution and a declaration that they be presumed and declared to be Kenyan citizens. They also urge the Court to compelling the first Respondent to issue them with Pass ports.

5. The Respondents' argument is that Section **10** of the Kenya Citizen and Immigration Act[1] (the Act) provides for procedure to regain citizenship. According to the Respondent, this Petition is premature in that the Petitioners have not demonstrated that they applied for the citizenship and were denied.

6. Alfred Abuya Omangi, a Principal Immigration officer in charge of legal section, in a Replying Affidavit filed on **20th** September 2017 avers that they have no record of the adoption order. He avers that the Petitioners do not qualify under Section **9** of the Act to be presumed as Kenyan Citizens because the section limits the age of presumption of a foundling to **8** years. Further, he avers that unless this court makes a pronouncement, they may not be legally process the citizenship. He deposes that their actions are founded on Sections **9 (1) (5)** and **10 (1) & (2)** of the Act.

7. The second Petitioner filed a further Affidavit on **16th** May 2017 detailing futile attempts they made to obtain the Pssports at the Immigration offices. He adds that the immigration officers declined to accept their applications and advised them to obtain a court order or apply for dual citizenship since they were below 23 years as at the date of the promulgation of the 2010 Constitution.

8. Counsel for the Petitioners submitted that the Petitioners are Kenyan citizens[2]by birth, hence, they are entitled to regain their citizenship, as per Article **14 (5)** and **12 (1)** of the Constitution. Counsel also submitted that the demand that they produce a court order infringes on their rights.

9. Counsel for the Respondents conceded that the Petitioners are Kenyan citizens by birth[3] but were adopted by British nationals, the Constitution then did not allow dual citizen ship unlike the 2010 Constitution. It is his submission that the Petitioners ought to follow the procedure provided under the law.[4] She however clarified that the Respondent was not contesting the order presuming the Petitioners as citizens.

10. It is clear that the argument by the first respondent overlooks the fact that 2010 Constitution created new rights that were not explicitly provided under the retired constitution. The argument also seems oblivious of the fact that any existing law that is inconsistent with the Constitution is invalid to the extent of such inconsistency. Put differently any provision in the Immigration Act (Repealed) that are inconsistent with the provisions of the current Constitution would be invalid to the extent of such inconsistency.

11. It being common ground that the Petitioners were born Kenyan Citizens, hence, by operation of law, they are Kenyan citizens by birth. Such citizenship cannot be revoked or lost by the mere fact that a person had acquired citizenship of another country. Indeed, Article **14 (5)** of the Constitution provides that a person who is a Kenyan Citizen by birth and who, on the effective date, has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

12. The Petitioners case falls squarely under Article **14 (5)** since they were Kenyan citizens by birth, they were born in Kenya to Kenya parents as provided under Article **14 (1)** and they acquired British citizenship upon being legally adopted by British citizens. Now they desire to regain their Kenyan citizenship. Article **14 (5)** clearly provides that they are entitled to regain their citizenship on application.

13. A literal construction of Article **14 (5)** leads to the irresistible conclusion that all that they are required to do is to apply to regain their citizenship. Thus, the Respondents invocation of Article **14 (4)** of the Constitution and Section **9** of the Act is totally inappropriate and an erroneous interpretation of the

law because the said provisions deal with children found in Kenya and who appear to be less than 5 years of age and whose nationality and parents are not known, as opposed to the Petitioners who were born in Kenya, to Kenyan parents.

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 (1)**. 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 satisfies 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 Constitution 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.

16. Section **30** of the Sixth Schedule to the Constitution amplifies this position. It provides that a Kenya citizen is a citizen by birth if that citizen acquired citizen under Section **87** or **88 (1)** of the former constitution. Section **89** of the former Constitution provides that "Every person born in Kenya after **11th** December, 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya..." As admitted by the parties herein, the Petitioners were Kenyan citizens by birth.

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.

18. Citizenship is a fundamental right of individuals for the reason that in some cases it is the basis for enjoying other rights related to citizenship. The vital importance of citizenship is described by the USA Supreme Court Chairman as the right to enjoy rights.^[5] The right to citizenship is reflected in Article 15 of UDHR.

19. Chapter three of the Constitution is dedicated to citizenship. Article 14 (1) of the Constitution provides that a person is a citizen if on the day of the person's birth whether or not born in Kenya, either mother or father of the person is a citizen of Kenya. This constitutional provision shows that Kenya is aligned with those countries where the well-known international principle *jus sanguinis* is applied.

20. The determination of the citizenship is a basic element for obliging a state to protect the citizens of that state and let them enjoy certain constitutional rights related to the juridical fact of citizenship, i.e. the active and passive right to vote or right to be issued with identification documents etc.

21. Even if the court the Court was to accept the first Respondents assertion that the Petitioners lost their Citizenship, then the provisions of Section **10** of the Act on the procedure of regaining citizenship is clear. It 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. The application is required to be accompanied by proof of applicant's previous Kenyan citizenship and proof of citizenship of the other country. The Petitioners provided the above details. Under section **10 (3) & (4)** of the Act, the Cabinet Secretary is required to cause the application to be registered and keep a record of such application, and issue a certificate in a prescribed form to the applicant.

22. In view of the above clear provisions of the Constitution and the law I find that there is absolutely no

legal basis for the first Respondents refusal to issue the Petitioners with Kenyan Passports. Further, by dint of Article 14 (5) of the Constitution, the Petitioners are entitled on application to regain their Kenyan citizenship. It is also clear that under Section 10 (3) & (4) of the Act, the Cabinet Secretary is enjoined to issue the requisite certificate in the prescribed form to the Petitioners.

23. In view of the clear provisions of the Constitution and the Act cited above, the conclusions is irresistible that this Petition is merited.

24. As for the appropriate reliefs, this Court is empowered by Article 23 (3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*[6]thus:-

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

25. Consequently, I find and hold that the following are the appropriate reliefs in this case therefore order as follows:-

a. A declaration be and is hereby issued that the refusal by the first Respondent to grant the Petitioners with Kenyan Passports is an infringement of their Constitutional Rights under Article 14 (5) of the Constitution.

b. That the Petitioners are Kenya citizens by birth as provided under Article 14 (1) of the Constitution and are all entitled to rights of a citizen as provided under Article 12 (1) of the Constitution.

c. An order of mandamus be and is hereby issued directed to the first Respondent compelling the first Respondent to admit and process the Petitioners applications to regain their citizenship under Article 14 (5) of the Constitution and Section 10 (3) & (4) of the Act.

d. An order of mandamus be and is hereby issued compelling the first Respondent to issue the Petitioners with Kenyan passports.

e. No orders as to costs

Orders accordingly

Signed, Dated at Nairobi this 22nd day of February 2018

John M. Mativo

Judge

[1] Act No. 12 of 2011

[2] Counsel cited Hashmukh Devani vs Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 Others {2016}e KLR

[3] Counsel cited Article 14 (1) of the Constitution and Section 30 of the Sixth Schedule to the Constitution

[4] Counsel cited Speaker of the National Assembly vs Njenga Karume {2008} 1 KLR 425

[5] Natalie Klein, Lise Barry, A human rights perspective on diplomatic protection: David Hicks and his dual nationality, Australian Journal of Human Rights, V.13, 2007, p.4

[6] (2002) 5 LRC 216 at page 249