



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 232 OF 2015

MOHAMED MIRE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

JUDGMENT

Introduction

1. In the Petition filed on 3rd June 2015, the Petitioner seeks various declaratory orders as well as costs of the Petition. In particular, the Petitioner seeks an order that the Petitioner has been discriminated against contrary to Article 27 of the Constitution. The Petitioner also seeks declaratory orders that the Petitioner's fundamental freedoms and rights as outlined under Articles 20, 27, 28, 29, 35, 40, 41, 43, 47, 48 and 57 have been abused. Finally, the Petitioner seeks orders to be registered as a citizen and be duly provided with both an identification card as well as a passport.
2. The Respondents have contested the Petition and filed a Replying Affidavit.

Background Facts

3. The Petitioner is a Kenyan of Somali descent. The Petitioner's parents are both deceased. The Petitioner was born in Nairobi in 1980. He schooled in Nairobi. He applied for his identification card in Nairobi but the Respondents after a brief vetting allegedly directed that he applies for his identification card in the North Eastern part of Kenya. His request to be issued with an identification card was rejected but no reason was advanced.
4. The facts as to application for and denial of an identification card are however doubted and denied by the Respondents.

Petitioner's case

5. The Petitioner's case is that he has been treated with inequality on the basis of his nationality and religion contrary to Article 27 of the Constitution. The Petitioner contends that he is a Kenyan who ascribes to the Muslim faith.
6. Further, the Petitioner contends that the Respondents have violated the Petitioner's right to fair labour practices as guaranteed under Article 41(1) of the Constitution as the Petitioner has been unable to secure any employment without the necessary documents.
7. Finally, it is contended by the Petitioner that the Petitioner's right to property under Article 40 of the Constitution has also been violated as the Respondents have unlawfully withheld the Petitioner's registration documents.

Respondent's case

8. The Respondent's case is contained in the Replying Affidavit of Ochomba Warioba filed on 25th October 2015.
9. The Respondents deny that the Petitioner had previously applied for and been denied a national identification card at a centre known as "Eastlands" and asked to apply for the same in a station in North Eastern Kenya.
10. The Respondents also contend that the Petition is incompetent for want of particulars.

Arguments in court

11. The Petition was heard by way of the written submissions filed by the parties. The Petitioner's submissions were filed on 5th November 2015. Mr. James Makori urged the Petitioner's case whilst Mr. E. Obura appeared for the Respondents. Both counsel wholly adopted their respective submissions.

Petitioner's submissions

12. The Petitioner's counsel submitted that the Petitioner is a citizen by birth and entitled to be issued with an identity card as well as a passport. The Petitioner further submitted that the Respondents failed to furnish the Petitioner with the reasons for the denial of the identification card and this amounted to a violation of Article 47 as to the right to fair administrative action. The Petitioner's counsel asserted that the Respondents were enjoined to hear and deliberate on the Petitioner's application and observe all the rules of natural justice. By reason of such lack of identification card, the Petitioner has been unable to secure any gainful employment, so concluded the Petitioner's counsel.
13. The Petitioner relied on the case of **Hersi Hassan Gutale & another v-Attorney General & Another [2013]eKLR** for the proposition that citizenship of an individual is an important matter and has to be determined on the basis of material presented and the duty is cast upon the Registrar of persons to undertake appropriate inquiries. The Petitioner also relied on the case of **Onyango Oloo v- Attorney General [1986-89] EA 456** for the proposition that there is a presumption that in the application of any power under statute, the rules of natural justice apply and all issues have to be considered by the decision maker before reaching a conclusion.

Respondents' submissions

14. The Respondents foremost, while relying on the case of **Anarita Karimi Njeru v R [1976-80]1KLR 1272** submitted that the Petition was lacking in material particulars and that it failed to meet the laid down test of competency.
15. Further, the Respondents submitted that it was not the role of the court but rather the National Registration Bureau to identify and issue the national identity card to Kenyan citizens who have attained the age of 18 years and above. The requirements, stated the Respondents, are outlined in the Registration of Persons Act (Cap 107) Laws of Kenya.
16. In the case of the Petitioner the Respondents asserted that the Petitioner had simply failed to avail

- the necessary information supported with the necessary documentation. Further the Respondents stated that the Petitioner was also unable to prove that he was a Kenyan citizen.
17. The Respondents finally submitted that the Petitioner had not availed any evidence of discrimination on grounds of his nationality and religion.
 18. For completeness, the Respondents asked for the dismissal of the Petition on the basis that the Respondents as well as the concerned registration officers had acted in public interest.

Discussion and Determinations

19. The core issue in this Petition from the pleadings as well as the submissions by counsel may be easily isolated to be whether the Petitioner is a citizen of Kenya entitled to be registered and issued with a national identification card. It is for that reason that the Petitioner seeks not only a declaration but also an order that the Petitioner be registered as a citizen and provided with an identification card as well as passport of the Republic of Kenya. In my view, resolution of this isolated main issue will see the other corollary and minor issues also resolved.
20. Foremost, it is important to point out that the Petitioner has alleged the violation of certain guaranteed rights and fundamental freedoms.
21. I must hasten to point out that it is for the Petitioner to prove on a balance of probabilities that his fundamental freedoms and rights as protected by or under the Constitution have been violated. The Petitioner must establish this by not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation. The Petitioner has to satisfy an evidential burden to show and establish that a specific right existed and that it has been restricted or violated: see **Githunguri Dairy Farmers Cooperative Society Ltd – v- The Attorney General [2016]eKLR** and also **Catholic Commission for Justice & Peace in Zimbabwe –v- Attorney General [1993] 2 LRC 279**.
22. The Petitioner identified various Articles of the Constitution. The rights pinpointed were; Article 27 (as to equality and freedom from discrimination), Article 28 (as to human dignity), Article 29 (as to freedom and security of person) Article 35 (as to information), Article 40 (as to right to property) , Article 41 (as to fair labour practices), Article 43 (as to right to social security), Article 47 (as to fair administrative action) and Article 48 (as to access to justice). The rights and freedoms guaranteed and protected by these Articles were said to have been abused or violated.
23. Save however for Articles 27, 40 and 47, no attempts were made by the Petitioner to avail any particulars or manner of violation of the rights or fundamental freedoms indexed in the other Articles cited by the Petitioner. To that extent consequently and in so far as even no affidavit evidence was availed, it cannot be said that the Respondents violated the Petitioner's rights or fundamental freedoms under Article 28 (as to human dignity), Article 29 (as to freedom and security of person) Article 35 (as to information), Article 41 (as to fair labour practices), Article 43 (as to right to social security) and Article 48 (as to access to justice).

Of equality under the law

24. With regard to the right to equality before the law as well as equal protection and benefit of the law under Article 27, it was the duty and burden of the Petitioner to evidentially satisfy the court in the manner this protection from discrimination had been violated. Quite apart from the allegation that the Respondents have discriminated against the Petitioner because of his nationality and religion, the Petitioner availed no evidence in support of such allegation. The Petitioner left all to conjecture and expected the court to make the speculative inference that as the Petitioner is of Somali extraction and by the better reason he is a Muslim being discriminated against.
25. In my view, there is need on the part of any person who complains that there is unfair discrimination being meted upon him to show methodically the manner and foundation of such discrimination and further, the unfair impact of such alleged discrimination.
26. In my judgment, the Petitioner's claim herein is too speculative to stand the test. The Petitioner failed to satisfy the requisite onus. There is no evidence, even circumstantial or otherwise, to support the contention that the Respondents unfairly differentiated the Petitioner due to the Petitioner's nationality and or religion.

Of proprietary rights

27. Article 40 of the Constitution provides for the protection of a person's property and the guarantee that private property is not to be arbitrarily expropriated. The Article also guarantees the right to own property anywhere in Kenya.
28. I found no evidence either in the affidavit or the Petition itself showing how the Petitioner has been deprived of his property or denied access to property. There is also no allegation that the Petitioner has been denied the right to acquire property in Kenya. In the result, the Petitioner has failed to prove that his right to property has been violated or is under threat of violation.

Of fair and just administrative action

29. The Petitioner however stands in better stead when he complains that the Respondents or the Respondents' officers have not observed and accorded the Petitioner the right to fair administrative action.
30. The Petitioner claims to have applied for an identification card at a registration station known as 'Eastlands' in Nairobi. The Respondents do not deny that an application was made. However, the Respondents contend that the application must have been considered and the Petitioner advised to apply elsewhere or that the application by the Petitioner must have been considered and declined as the Petitioner did not avail all the necessary documents.
31. Article 12 of the Constitution provides for the entitlement of the Kenyan citizen as far as the recognition as such is concerned. Every citizen is entitled to the rights, privileges and benefits of citizenship as provided by the Constitution. The citizen is also entitled to a Kenyan passport and a document of registration or identification to be issued by the State.
32. Besides the provisions of Article 14 (Citizenship by birth), Parliament has pursuant to Articles 18 of the Constitution enacted legislation to promote and give effect to Articles 12 as well as 15 of the Constitution.
33. The Kenya Citizenship and Immigration Act (Cap 172) as well as the Registration of Persons Act (Cap 107) Laws of Kenya, respectively, provide detailed mechanisms and procedures for the issuance of the Kenyan passport and national identification card by the State. The manner of application is outlined. It has to be formal. The forms are prescribed. The information to be availed is also itemized in the case of both statutes. The process is clearly outlined. In the case of registration of persons and issuance of identification cards a principal registrar appointed under Section 4 of the Registration of Persons Act (Cap 107) is in charge.
34. On the other hand, in the case of issuance of passports under the Kenyan Citizenship and Immigration Act (Cap 172), a Director- General appointed under the Kenya Citizens and Foreign Nationals Management Service Act (Cap 174) is in charge. Both the Principal Registrar and the Director General are appointees of the 2nd Respondent herein to whom they are answerable and accountable. Both have directors, immigration officers and registrars, as the case may be, deputizing for them.
35. A reading of both the Constitution (Articles 12 through 18) as well as the Kenya Citizenship and Immigration Act (Cap 172) and the Registration of Persons Act (Cap 107) would reveal that the law conceives administrative independence on the part of the Director- General as well as the Registrars. It is for any applicant to avail all the necessary information as prescribed and required and for the Director- General or his officers processing the application for a passport or citizenship on the other hand or the Registrar processing an application for identification document, to consider and decide independently whether the application has merit. Indeed, the statutes even provide for instances when the officer may request for additional information to enable him process the application better.
36. In exercise of such powers however and in making the decision or determination, the Director- General as well as the Principal Registrar must afford any applicant fair administrative action as guaranteed by Article 47 of the Constitution and now promoted by the Fair Administrative Action Act, 2015.
37. The court must consequently restrain itself from interfering with a mandate which has been expressly conferred by statute to specific authorities save only to the extent that the tenets of fair administrative action have not been observed.

38. In the instant case, the Petitioner claims to have applied for registration documents but was allegedly denied by the Principal Registrar. The Petitioner further states that the Principal Registrar has consistently insisted that the Petitioner moves to and makes the application before the Registrar of persons stationed in the North Eastern part of Kenya. The Respondents' further view is that if the application was made it was denied for lack of sufficient information. The Respondents also state the application for identification card ought to be made at the Petitioner's place of domicile or at his place of permanent residence.
39. From the Petitioner's affidavit in support of the Petition as well as the Replying Affidavit filed in opposition, it is my finding that the Petitioner did indeed apply for registration as well as an identification card. No application for a passport had however been made by the Petitioner. It was then the 2nd Respondent's duty, acting through the Principal Registrar of Persons, and its officers to expeditiously, reasonably and procedurally consider the application. Ultimately, a decision whether or not to issue the Petitioner with an identification document or card had to be made and this was bound to affect the Petitioner either way.
40. The law enjoins the decision-maker to give written reasons for any action or decision taken (Article 47(2) of the Constitution) or give a statement of reasons for any decision reached (Section 4(3) (d) of the Fair Administrative Action Act 2015. Such written reasons may be given voluntarily or upon request: see **Section 6 of the Fair Administrative Action Act 2015**.
41. I have perused the various demands made by the Petitioner through his advocates. They are in the form of a request to the 2nd Respondent to consider the application. They are also in the form of complaints for the verbal references and advice to the Petitioner to go and apply for the identification card in North Eastern Kenya. There is however no formal or written communication by the 2nd Respondent's officers. This is inexplicable. If the application was lacking some information or the information supplied was not adequate or the authenticity thereof was doubted, then the 2nd Respondent's officers could have invoked Section 8 of the Registration of Persons Act (Cap 107).
42. Section 8 of the Registration of Persons Act states that a registration officer may require any person who has given any information to furnish such documentary or other evidence of the truth of the information given. The Section also mandates the 2nd Respondent's officers to appoint a committee or a person to assist in the authentication of information furnished by an applicant. It is apparent that the 2nd Respondent's officers did not invoke these provisions.
43. I hold the view, in the circumstances of this case, that the Respondents acted contrary to the provisions and spirit of Article 47(2) of the Constitution as to justice, fairness and reasonableness. The Respondents' officers apparently abdicated their statutory duty to receive, consider and determine in an expeditious, fair, lawful and reasonable manner an application made by the Petitioner for a national identification document. In these respects, the Petitioner's right to fair administrative action was violated.
44. Besides, the spirit of the Constitution is that a person should be able to reside and remain anywhere in Kenya, unless proven or shown otherwise. To consider and insist that an applicant must go for registration at particular places to be designated by the Principal Registrar would be to over-stretch and abuse the spirit as to freedom of movement. It would also be unreasonable. The relevant statutes already provide for sufficient details and information to be provided. The anticipation is that an application for an identification document to be issued by the State under Article 12 of the Constitution can be made anywhere within the Republic of Kenya. The inconvenience of directing and shepherding applicants to apply at particular places is baseless. A person should and must be able to apply for an identification card at any registration station within the Republic of Kenya and where the Principal Registrar determines otherwise written reasons for such a decision should be availed.

Conclusion

45. The Petitioner on a preponderance of fact has established that he applied for registration of an identification document. Even if the Petitioner was not qualified to be issued with one, the Respondents' officers were required to follow the due process consistent with Articles 12, 27 and 47(1) of the Constitution. The action of the Respondents' officers of verbally directing the

Petitioner to go and apply elsewhere, I find and hold, was unreasonable and amounted to a violation of the Petitioner's fundamental rights and freedoms.

Reliefs

46. Having partially found for the Petitioner, what relief is available to the Petitioner?
47. Notwithstanding any specific prayers sought by a Petitioner, this court has under Article 23 of the Constitution wide powers to fashion an appropriate remedy depending on the circumstances of each case.
48. The 2nd Respondent has its qualified and appointed officers to consider applications for registration of Kenyan citizen and issuance of identification documents. The power is statutory. This court has no such powers. It may very well turn out that the Petitioner is not entitled to be issued with any identification document. It may also very well turn out that he is entitled to the national identification document. The capacity to make such determination is with the 2nd Respondent's officers and not the court.
49. I conclude that the proper course would be to direct that the Petitioner's application be considered on its merit at the place where it has been lodged. This will help avoid any further anxiety and prejudice to be suffered by the Petitioner. I am however unable to declare that the Petitioner is a citizen of Kenya entitled to a passport and identification card.

Disposition

50. The final orders are as follows

- a. The Petitioner's allegations that his rights and fundamental freedoms under Articles 20, 27, 28, 29, 35, 40, 41, 43, 48 and 57 have been violated fail for want of evidence or insufficient evidence and the prayers to like effect are hereby dismissed.
- b. It is hereby declared that the Respondents violated the Petitioner's rights under Article 47(1) and (2) by not affording the Petitioner a hearing and not giving written reasons for the denial of the identification card.
- c. The 2nd Respondent's officer being the Principal Registrar of Persons is directed that upon receipt of the Petitioner's fresh application for identification card he shall consider it expeditiously on its own facts and relevant provisions of the law.
- d. Notwithstanding the Petitioner's partial success in this petition, I order that each party will bear its own costs of the Petition.

Dated, signed and delivered at Nairobi this 29th day February, 2016

J.L.ONGUTO

JUDGE