



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.176 OF 2014

BETWEEN

EGAL MOHAMED OSMAN.....PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF IMMIGRATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Amended Petition dated 17th June was filed by Egal Mohamed Osman challenging the alleged refusal, neglect and or failure by the 3rd Respondent to consider his Application for Kenyan citizenship. He has also alleged that he is apprehensive that although he has a valid Entry Permit into Kenya, he stands the risk of being deported from Kenya upon expiry of the said permit.
2. In the said Amended Petition, he sought the following orders;

“(1) A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 12(1) (a) and (b) 15(1) and (2), 27(1) and (2), 39(1), (2) and (3) and 47(1) and (2) of the Constitution of Kenya 2010, have been and continue to be contravened and infringed upon by the 1st and 3rd Respondents.

(2) A declaration that the Petitioner is entitled to a grant of Kenyan citizenship pursuant to the provisions of inter alia Article 15(1) of the Constitution.

(3) Order of Mandamus directed to the 3rd Respondent, compelling the 3rd Respondent to consider the Petitioner’s Application for Citizenship and in the absence of any stated justifiable legal reason to grant and/or approve the Petitioner’s application for citizenship.

(4) Prohibitory order issued against the 1st and 3rd Respondents and all its agents, servants, officials or offices under his docket prohibiting them from arresting, harassing and/or deporting the Petitioner or in any manner whatsoever curtailing the Petitioner's freedom of movement.

(5) A mandatory order issued against the 1st Respondent compelling the 3rd Respondent to order for the immediate and unconditional release of the Petitioner's Kenyan passport.

(6) General, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 for the unconstitutional conduct of the 1st and 3rd Respondents.

(7) Any other orders and directions as this Honourable Court may consider appropriate.

(8) Costs of this Petition.

(9) Interest.”

Petitioner's Case

3. In his Amended Petition, Supporting Affidavit thereof sworn on 17th June 2014, the annexures to it Supplementary Affidavit sworn on 8th August 2014 and in Submissions filed on 30th September 2014, it is the Petitioner's case that he is a British Citizen and holder of British Passport No.508268718 and also holds an Entry Permit No.904685 issued by the 3rd Respondent on 29th September 2012. He has also stated that he is a Lecturer at the RAF International University and is married to one, Sainab Mohamed Yussuf, a Kenyan Citizen and holder of Kenyan Passport No.C024986 and together they have five children.
4. He further stated that on 19th March 2012 he applied for Kenyan citizenship under the provisions of **Section 11** of the **Kenya Citizenship and Immigration Act** and invoking the rights conferred by **Article 15(1)** of the **Constitution**. That despite many visits to the 3rd Respondent's offices, he never received any communication as to why his Application had not been considered. However, on 12th May 2014, he received verbal communication that his Application for renewal of his Entry and Work Permits had been denied without reasons being proffered for such drastic action.
5. The Petitioner has also claimed that he has been continuously harassed, threatened and intimidated by persons calling themselves National Intelligence Service (NIS) officers with the sole intention of frustrating his continued stay in Kenya.
6. In submissions, Counsel for the Petitioner added that the following rights that the Petitioner is entitled to, have been violated by the Respondents by their actions aforesaid;
 - i. **Article 15(1)** – the entitlement to apply for citizenship by fact of at least seven years of marriage to a Kenyan spouse.
 - ii. **Article 27** – equality before the law.
 - iii. **Article 39(1)** and **(2)** – freedom of movement and residence.
 - iv. **Article 47** – right to fair administrative action.
7. The Submissions made in the above regard are that as he has been married to a Kenyan citizen, Seinab Mohamed Yusuf, since 8th March 1997, he was entitled to apply for Kenyan citizenship and the delay in considering his Application in line with the provisions of **Section 11** of the **Kenya Citizenship and Immigration Act** (hereinafter “the Act”) was unreasonable and

unlawful. In that regard he placed reliance on the decisions in **Republic vs Cabinet Secretary, Ministry of Interior and National Co-ordination & Anor Ex-parte Patricia Olga Howson, Misc. Civil Application No.324 of 2013** where Odunga J. faulted a six month's delay in processing an application for citizenship.

8. Another issue raised was that the 3rd Respondent declined to renew the Petitioner's Entry and Work permits without giving any reason whatsoever and an allegation was later made that he had been declared a prohibited immigrant when he had no notice of such a declaration.
9. The Petitioner's submission in regard to the above issue was that at no time was he declared a prohibited immigrant nor were any reasons for such a decision ever given to him and that is why he was issued with an Entry Permit and a certificate of good conduct (No.398830). He relied on the decisions in **R vs Minister for State for Immigration and Registration of Persons, J.R Misc. No.361/2012, [2013] eKLR** and **R vs Minister of State for Immigration and Registration of Persons Ex-Parte C.O, J.R Misc. Appl. No.5/2013, [2013]eKLR** all which upheld the proposition that where a decision is made that affects a person, reasons for such a decision must be given and at the very least such reasons should be given to the court at the hearing. The decision of Ojwang J. (*as he then was*) in **Sitamze vs The Minister for Home Affairs & 2 Others H.C. Misc. Appl. No.430/2004** was also cited in support of that submission.
10. On freedom of movement and residence, the Petitioner's case was that he had been subjected to "enhanced security" and was harassed, intimidated and threatened by Security officers without any cause and therefore his rights had been violated. In the same breathe he claimed that his right to equality before the law had been violated because although he had met all qualifications for grant of citizenship, he was instead declared a prohibited immigrant without due process of the law. He relied on the case of **Karua vs Radio Africa Ltd & Others [2006] 2EA 117** in that regard.

I should note that although alleged violation of **Article 47** was pleaded, no specific submission was made in that regard but the issue was also not responded to by the Respondents.

11. For the above reasons, the Petitioner prays for orders as elsewhere set out above.

Respondents' Case

12. All Respondents relied on the Affidavit of Alfred Abuya Omangi sworn on 22nd April 2014 in answer to the Petition. Mr. Kuria, learned Litigation Counsel also filed written submissions on 13th October 2014.
13. Their case is simply that;
 - i. The reason why the Petitioner's Application for Kenyan Citizenship has never been considered is because **"there was a freeze on all applications and his application have never (sic) been considered due to the foregoing."**
 - ii. The Petitioner had never been issued with any Work Permit but was indeed issued with an Entry Permit **"No.904685 for a period of 2 years from 29th September 2012"**
 - iii. The Petitioner had been **"declared a prohibited immigrant on 22nd July 2007 and the immigration laws prohibit issuance of citizenship to such persons."**
 - iv. The Petitioner has not been harassed as alleged but was subjected to routine checks to verify his entry documents as is routinely done for **"persons who have [a] history of [having] been declared prohibited immigrants with enhanced scrutiny"**.
 - v. The Petitioner has failed to show how his rights were violated when there is clear demonstration

that the Respondents facilitated his ingress and egress into Kenya as demonstrated by the issuance of an entry permit to him.

14. In addition, Mr. Kuria in his submissions stated that following the decision in **Khatija Ramtula Nur Mohamed vs Director of Immigration & Anor [2013] eKLR**, it is a fact that the status of permanent residence is a new phenomenon in Kenya and that registration of a person as a citizen by fact of being married to a Kenyan citizen is not absolute but is subject to the conditions under **Section 11** of the **Act**.
15. Further, that exclusion of undesirable aliens is a fundamental act of sovereignty and therefore exclusion of the Petitioner from Kenya cannot be an act of discrimination contrary to **Article 27** of the **Constitution** as alleged.
16. Finally, that the Petition is without merit and ought to be dismissed with costs.

Determination

17. From the above facts and submissions, it is clear that the Petitioner's principal complaint is that his Application for citizenship although allegedly clothed with merit has never been considered. Alongside that issue is his claim that his rights under **Articles 15, 27, 39** and **47** of the **Constitution** have been violated. I shall determine those issues separately and conclude by determining whether the Petitioner is entitled to the relief he has sought in the Petition.

Application for citizenship by fact of marriage to a Kenyan citizen

18. This issue is provided for under **Section 11** of the **Kenya Citizenship and Immigration Act, No.12 of 2011** which provides as follows;

“A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if-

- a. ***The marriage was solemnized under a system of law recognized in Kenya;***
- b. ***The applicant has not been declared a prohibited immigrant under this Act or any other law;***
- c. ***The applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;***
- d. ***The marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and***
- e. ***The marriage was subsisting at the time of the application.”***

19. The above Section requires no more than a literal interpretation; that one can only be granted citizenship on account of marriage to a Kenyan Citizen if he/she meets the conditions inherent in the said Section. The body (or bodies) and offices and officers that are authorized to scrutinize such an application are well set out in the Act and they include the 3rd Respondent.

20. It has not been denied that the Petitioner has made an application under the said Section and in the Affidavit of Mr. Abuya, the said application has not been considered since the year 2012 because there has been a general “freeze” on such applications. I will say something about that response later but on whether this Court can intervene and declare the Applicant as entitled to Kenyan citizenship because his spouse is a Kenyan, my firm finding is that in the circumstances, that cannot be the proper and lawful action to be undertaken by this Court. I say so because in **Kulraj Singh Bhangra vs Director General, Kenya Citizens and Foreign Nationals Management Service Petition No.137 of 2014**, this Court cited with approval the decision in **Speaker of the**

National Assembly vs Njenga Karume (2000) I KLR 425 where the Court stated as follows;

“In our view there is considerable merit that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.

21. I reiterate that holding and would only add that in the Act, the fact of making an application presupposes that the application would be considered on its merits and a decision made one way or the other. If the decision is grossly unfair or perverse and if the decision is not equitable, then the same can be challenged either by way of judicial review (see - Narok County Council vs Trans Mara County Council (2000) I.EA1) or by way of a Petition similar to this one but in different circumstances.

22. In a nutshell, this Court cannot and has no mandate to usurp the statutory authority of other agencies and purport to make decisions on their behalf, however merited the case of an applicant may *prima facie* be. In the same vein, however strongly the Applicant has urged his alleged right to Kenyan citizenship under **Section 11** of the **Act**, this is the wrong forum to ventilate that point in the circumstances. He has also and in addition to that fact, approached this Court prematurely as regards the merits of his application and again I make that finding guardedly in view of what I shall say later in the judgment.

Whether the Petitioner’s Rights under Articles 15, 27, 39 and 47 of the Constitution have been violated

(i) Article 15

23. In addressing the issue of citizenship, I also partly addressed the provisions of **Article 15(1)** of the **Constitution** which provides as follows;

“(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

(2) ...

(3) ...

(4) ...

(5) ...”

24. I reiterate my findings above that until the Petitioner’s Application is considered and a decision made one way or the other, it would be premature for this Court to delve into the issue and either declare that he is entitled to citizenship or that he is not so entitled.

25. With that finding it is difficult to reach a conclusion that his right to be registered as a citizen has been violated. Suppose for example his Application is granted? Of what purpose would this Court’s finding be?

26. I decline to make any orders under **Article 15** of the **Constitution** for the reasons above.

(ii) Articles 27 and 47

27. On the rights conferred by **Article 27** of the **Constitution** which are generally the rights to equality and freedom from discrimination, if I heard the Petitioner well, his claim was limited to **Article 27(1)** which provides as follows;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...”

28. In invoking the above Article, the Petitioner raised a number of issues including delay in processing his application and the frustrations he has been subjected to while pursuing that Application.

29. I have elsewhere above summarized the response in that regard by the Respondents. The substantive defence made is that there was a general “freeze” on such applications for an unclear period.

30. On my part, the Applicant has made a powerful case that his right to an expeditious, reasonable and lawful consideration of his Application has been violated. Similarly, he has made out a strong case that he has not been afforded the protection of the law because it is obvious that the response given by the Respondents is so casual as to amount to a non-answer at all.

31. I say so, with respect, because applications for citizenship are serious constitutional matters under **Article 15** of the **Constitution** as well as relevant parts of the Act including **Section 11** thereof. When consideration of such applications are therefore “frozen”, does it mean that the constitutional right to make the Application and to receive fair administrative action under **Article 47** of the **Constitution** are also “frozen”? Does “freezing” mean that the Constitution and Statute are thereby suspended *ad infinitum* without reasons being given to Applicants?

32. Is this Court, seized with a Petition such as the other one before me, entitled to the reasons for the alleged freezing? The answers to all the above questions are obvious and this Court has previously deprecated the manner in which the Immigration and related departments treat litigation where violations of fundamental rights are alleged – see **Sitamze (supra), Bhangra (Supra)** and **Kana vs AG, Pet. No.544/2010** (per Warsame J. as he then was).

33. In addition to the above, the apparent ambiguities and contradictions in Mr. Abuya’s Affidavit cannot go without my pointing them out. They include the following;

- i. If the Petitioner was declared a prohibited immigrant (and the reasons and evidence of such a declaration have not been given), why was he granted an entry permit No.904685 on 29th September 2012, five years after the alleged declaration?
- ii. If he was indeed a prohibited immigrant, how can Mr. Abuya also claim that the Respondents have always “facilitated his ingress and egress” into Kenya? Which prohibited immigrant walks in and out of Kenya work and live with his family as the Petitioner has done for more than a decade?

34. I pose the above questions because **Section 33** of the **Act** has elaborate grounds for declaring a person to be a prohibited immigrant and **Section 33(5)** specifically provides that the entry and

residence of a prohibited immigrant in Kenya is unlawful. It has also not been shown that there were reasons under **Section 33(6)** why the Petitioner was allowed into Kenya and on what conditions he was so allowed and there are also no reasons to presuppose that **Section 34** of the **Act** applies to him. (see also **Mohochi vs A.G of Uganda, EACJ Reference No.5 of 2011**). All the above questions would point me to the fact that the Petitioner has not been afforded the full protection of the law.

35. The other issue arising is the obvious delay in processing the Petitioner's Application for registration as a citizen. The Respondents have not denied that the Application was received neither have they denied that they have not acted upon it for the reasons that I have already dismissed as casual and unreasonable. What of the delay?

36. The Application for registration as a citizen was made on 19th March 2012 close to 3 years of the date of delivery of this judgment. To-date I have seen no explanation for the delay save the "freezing of applications" excuse.

37. In all the decisions cited above on the subject, including **Bhangra, Kana and Bashir Mohamed Jama Abdi vs Minister for Immigration and Registration of Persons [2014]eKLR**, the High Court stated that an unreasonable delay in processing applications for registration etc is an affront to the right to fair administrative action under **Article 47** of the **Constitution**.

38. In some of those cases, the delay was only for six months compared to the three years' delay that the Petitioner has been subjected to.

39. It is obvious that such a delay is reasonable and I so find despite the fact that in submissions little was said of this crucial aspect of the case but a Court seized with facts can properly apply them to the laws and so I have.

(iii) Article 39

40. It is also the Petitioner's complaint that he has been intimidated, threatened and harassed by persons claiming to be members of the National Intelligence Service and he has also been specifically threatened with deportation contrary to **Article 39** of the **Constitution**. That Article provides as follows;

"(1) Every person has the right to freedom of movement.

(2) Every person has the right to leave Kenya.

(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

41. It is clear from the evidence before me that the Petitioner was allowed entry into Kenya vide Entry Permit No.904685 and he is therefore lawfully in Kenya.

42. If that be so, how can he be threatened with deportation without due process? His Application for citizenship is also pending and unconsidered because of the indolence of the 3rd Respondent. How can he be lawfully deported before an answer is given to his request for registration? Since the threats, intimidations and harassments have not been denied, it follows that his rights under **Article 39** of the **Constitution** have been proved and I so hold.

Conclusion and Final Orders

43. This Court will not tire in reminding the 3rd Respondent that the Constitution of Kenya is all supreme. It has life and it has teeth. Like Warsame J. in **Kana (supra)**, the earlier the 3rd Respondent realizes that impunity is the biggest danger to the achievement of our constitutional

aspirations, the better for those who seek the services of that office. The manner in which the Petitioner has been treated is shameful of a democracy, callous to the extreme and insensitive to a man whose children are born of a Kenyan mother.

44. In the end, and noting the nature of the matter, the Petition is allowed in the following terms;

1. ***A declaration that the Petitioner's fundamental rights and freedoms as enshrined under 27(1) and (2), 39(1), (2) and (3) and 47(1) and (2) of the Constitution of Kenya 2010, have been and continue to be contravened and infringed upon by the 1st and 3rd Respondents.***
2. ***Order of Mandamus directed to the 3rd Respondent, compelling the 3rd Respondent to consider the Petitioner's Application for Citizenship within 45 days and file a Report in that regard before this Court.***
3. ***Prohibitory order issued against the 1st and 3rd Respondents and all its agents, servants, officials or offices under his docket prohibiting them from arresting, harassing and/or deporting the Petitioner or in any manner whatsoever curtailing the Petitioner's freedom of movement until his application for registration as a citizen has been duly considered.***
4. ***Let each Party bear its own costs.***
5. ***Prayers 2, 5, 6, 7 and 9 of the Petition are dismissed.***

45. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Muchoki for Petitioner

Mr. Kuria for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

Further order

Mention or directions on 27/3/2015.

ISAAC LENAOLA

JUDGE