



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.251 OF 2014

BETWEEN

JISVIN CHANDRA NAROTTAM HEMRAJ PREMJI PATJNI.....PETITIONER

AND

THE DIRECTOR OF IMMIGRATION..... 1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Jisvin Chandra Narottam Heremji Premji Pattni, was born on 22nd March 1952 and in his Petition dated 30th May 2014, he claims that his parents, Narottam Hemraj Premji Pattni and Ramaben Narottam Hemraj Premji Pattni and are citizens of Kenya and holders of Kenyan Passports No.A.1234337 and A128080, respectively.
2. The Petitioner also claims that having been born in Kenya, he was issued with a Kenyan birth certificate and was also issued with a certificate of registration as a Kenyan Citizen vide Certificate of Registration Number 11675 dated 19th August 1968.
3. In his Petition, he also averred that he **“had a British passport which was renewed from time to time”** but that he has lived in Kenya for 62 years and **“has established businesses and investments and employed fellow citizens, contributed to the national building just like any other Kenyan citizen and has lived in Kenya enjoying every right and entitlement just like any other citizen.”**
4. What then triggered the filing of the preset Petition is that on 24th November 2011, he **“applied for a Kenyan identity card vide serial No.2320195701 and on 1st March 2012, he was issued with a Kenyan identity card number 30202752”**. On 31st January 2013, he applied for a Kenyan passport, was issued with a receipt No.0878133 and was allocated tracking No.11545022. His application for the said passport was subsequently rejected on the grounds that he had ceased to be a Kenyan citizen by dint of **Section 97 of the Repealed Constitution** having not renewed his British Citizenship by 21st March 1975.

5. That thereafter, all his efforts to get a clarification from the 1st Respondent has borne no fruit and instead he had been threatened with deportation and also warned that he would be barred from entering Kenya should he dare move to Court to challenge the refusal to issue him with a Kenyan Passport hence the filing of this Petition.

Petitioner's case

6. The Petitioner by his Petition, Supporting Affidavit and its annexures, a further Affidavit as well as in Mr. Okemwa's submission, has made the point that the 1st Respondent's actions aforesaid were unconstitutional, illegal, null and void and were also a contravention of his constitutional rights. That by dint of **Articles 13(1) (2) and 14(5) of the Constitution**, he is entitled to a Kenyan passport as a matter of right because he is a citizen of Kenya.

7. In addition, it is his case that the 1st Respondent has misinterpreted **Section 97 of the Repealed Constitution** and has irrationally and unreasonably applied it retrospectively to deny him his entitlement to a Kenyan passport.

8. In his submissions, Mr. Okemwa went on to state that **Article 12 of the Constitution** entitles every Kenyan to a passport and that under **Article 24 of the Constitution**, any limitation to that right is not justifiable in a democratic and just society.

9. On the fact that the Petitioner holds a valid Kenyan identity card, Mr. Okemwa relies on the decision in **Sirat vs Abdirahman & 2 Others [2010] eKLR** where Kimaru J stated that “**a validly issued Kenyan identity card is prima facie evidence of Kenyan citizenship**”.

10. Regarding the purpose for which a passport is generally issued, he submitted that in **Deepak Chamanlal Kamani vs Principal Immigration officer & 2 Others [2010] eKLR, R vs Brallsford (1905)2 K.B. 730 Kent vs Dulles 357 vs 116 (1958), Edith Nawawi vs AG 1990 – 1992 ZR 112, Abdirahman Khadir vs AG for Canada 2006 FC 727** the principle that a passport is not a privilege but a necessity was reiterated. That in fact it is not merely a travel document but one that also confers social, economic improvement as well as being a means to personal security.

11. Mr. Okemwa also invoked **Article 47 of the Constitution** to make the point that by refusing to give a formal explanation as to why she has refused to issue a passport to the Petitioner. The 1st Respondent has denied the Petitioner the right to fair and administrative action. In that regard, he relied on the decision in **Charkaoni vs Minister of Citizenship and Immigration [2007] SCR 350**.

12. He further submitted that any public body or office that acts casually, tardily and incompetently in a matter affecting the fundamental rights of citizens must meet the sanction of the Court. He relied on **R vs Somerset County Council ex-parte Fewings & Others [1995] 1 All E.R.513** and **R vs Cabinet Secretary for Ministry of Interior and Co-ordination of National Government & 2 Others ex-parte Patricia Olga Harson [2013] eKLR** for that proposition.

13. For the above reasons, the Petitioner now seeks the following orders;

“(i) A declaration that the Petitioner by dint of Articles 13(1), (2); 14(1), (2), (5) and 16 of the Constitution is a bonafide and rightful citizen of Kenya by birth and/or registration and his holding of a National identity Card as evidence is sufficient proof of his Kenyan Citizenship.

(ii) A declaration that the Petitioner is entitled to all rights of a citizen of Kenya under Articles 12, (1) (a) and (b); 16, 27(1) (2); 39(3); 35(2) and 50(1) of the Constitution. And therefore the decision of the 1st Respondent and her officers to reject or refuse registration

and issuance of the Petitioner with a Kenyan passport is hereby declared unconstitutional and void as it violates his rights under the said Articles.

(iii) A declaration that it is the Petitioner's constitutional right and entitlement to dual citizenship and therefore it is his right to acquire a Kenyan passport and retain his British passport by dint of Article 16 of the Constitution.

(iv) A declaration that Section 97 of the former Constitution is inapplicable in the new constitutional dispensation and therefore cannot be retrospectively applied after the applicant has been registered and issued with an identity card as the 1st Respondent purports.

(v) An order of mandamus and/or mandatory injunction compelling the 1st Respondent and her officers to facilitate, accept and expedite application by the Petitioner for issuance of a Kenyan passport having met all conditions or alternatively an endorsement of his British passport with the fact of his being a citizen of Kenya within 14 days of the orders herein.

(vi) An award, of general damages for violations of the Petitioner's constitutional rights and fundamental rights and freedoms of the subject in prayer (i), (ii) and (iii) above and the quantum of such award be assessed by this Honourable Court.

(vii) Costs and interest incidental to this Petition."

Respondent's case

14. In response to the Petition, the Respondents filed a Replying Affidavit sworn on 1st July 2014 by Alfred Omangi Abuya, Chief Immigration Officer at the Department of Immigration Services. Mr. Mohamed, learned State Counsel also filed written submissions.
15. Their case is firstly, that the Petitioner is not a citizen of Kenya because he was born before his father acquired Kenyan citizenship (His parents were born in India and not Kenya). In the circumstances, the principle applicable to his case is acquisition of birth *jus sanguinis* (by blood) and not *jus soli* (by soil or place of birth).
16. Secondly, the fact that the Petitioner holds a birth certificate issued in Kenya is only proof of birth in Kenya and not citizenship.
17. Thirdly, that the Kenyan identity card issued to him is invalid as it could have been issued to him while he continued being a British citizen. That the said identity card ought therefor to be surrendered back to the Government of Kenya for cancellation.
18. Fourthly, that the Petitioner has admitted that he was not a citizen of Kenya by formally applying for such citizenship since prior to 2010, dual nationality was not lawful in Kenya. That **Section 97** of the **Repealed Constitution** was therefore invoked to make that point and no other.
19. Fifthly, that the Petitioner cannot be issued with a passport until he is registered as a citizen of Kenya and since he has not been declared as such, his Petition is misconceived.
20. Mr. Mohamed added in submissions that the Petitioner has failed to meet the test set in **Annarita Karimi Njeru vs AG (1976 – 1980) KLR 1272** that any person alleging violation of fundamental rights and freedoms must do so with a measure of particularity.
21. As to the application of **Section 97** of the **Repealed Constitution**, he submitted that without proof that he has renounced his British citizenship, any identification document acquired as a Kenyan was invalid.

22. For the above reasons, the Respondents prayed that the Petition be dismissed with costs.

Determination

23. Although principally the dispute forming the substance of the present Petition is whether the Petitioner is entitled to a Kenyan passport, a number of issues would need to be determined first. They are the following;

- a. Is the Petitioner a citizen of Kenya?
- b. Have any fundamental rights and freedoms been violated by the Respondents in respect of the Petitioner?
- c. Is the Petitioner entitled to the orders that he has sought?

Is the Petitioner a citizen of Kenya?

24. To answer this question, it is not denied that the Petitioner's parents were not born in Kenya. They were born in India and from their Kenyan passports Nos. A1234337 and A128080, his father was born in 1926 while his mother was born in 1932. The Petitioner was born in 1952 and his birth certificate issued on 6th May 1952 indicates that his parents were of Indian Nationality at the time.

25. Further, by letter dated 19th July 1968, A. J. Omanga, Permanent Secretary, Office of the Vice-President and Ministry of Home Affairs wrote to the Petitioner's father and stated that the then Vice-President and Minister for Home Affairs, D.T Arap Moi, had approved his application for Kenyan citizenship and **“also the citizenship of the following persons;-**

Mrs. Raman Bala Narottam Hemraj

Miss Latta Narottam Hemraj Premji Pattni

Jisvin Chandra Narottam Hemraj Premji Pattni

Niton Chandra Narottam Hemraj Premji Pattni”

26. In the same letter, the Petitioner's father was required to **“obtain citizenship certificates”** from the Immigration Department. Pausing here for a minute, the Petitioner was certainly granted citizenship by that letter and I have also seen evidence that he obtained a citizenship certificate on 19th August 1968.

27. In addition to that fact, I have also seen a letter dated 2nd October 2012 signed by one, Queenter Ondigo, for the Director of Immigration Services and addressed to the Director, National Registration Bureau. In that letter, it is stated that the Petitioner **“has been registered/naturalized as a citizen of Kenya and his/her alien card withdrawn.”** His former nationality is indicated therein as Indian. No other evidence of such nationality has however been placed before this Court.

28. Over and above all the above facts, the Petitioner at paragraph 8 of his Petition averred that he has **“a British Passport which was renewed from time to time”**. No information has been given as to when the British passport was first issued and in what circumstances it was given. I have however seen a British passport issued on 15th August 2006 but it is even less clear when he acquired his British nationality and when he lost his Indian nationality and how.

29. Despite the above *lacunae*, the Petitioner at paragraph 5 of his Further Affidavit merely deponed as follows;

“... I am advised by my advocates which advice I believe to be true and correct that the former Constitution did not allow for dual citizenship since I was supposed to renounce my British citizenship which I did not.”

30. At paragraph 7 of the same Further Affidavit, he deponed as follows;

“That I am on a work permit and with a British passport which was about to expire.”

31. At paragraph 16 thereof, he then deponed as follows;

“That after lawfully and procedurally obtaining my Kenyan Identity card I applied for a passport document as a matter of right as a Kenyan citizen”

32. The above statements merely lead to more confusion as to this finding then leads me to the contentious **Section 97** of the **Repealed Constitution**. It provided as follows;

“(1) A person who, upon the attainment of the age of twenty-one years, is a citizen of Kenya and also a citizen of some country other than Kenya shall, subject to subsection (7), cease to be a citizen of Kenya upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who was born outside Kenya, made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.

(2) A person who –

a. has attained the age of twenty-one years before 12th December, 1963; and

b. becomes a citizen of Kenya on that day by virtue of Section 87; and

(c) is immediately after that day also a citizen of some country other than Kenya, shall subject to subsection (7), ceases to be a citizen of Kenya upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Kenya by virtue of Section 87 (2), made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.

(3) A citizen of Kenya shall, subject to subsection (7), cease to be such a citizen if –

(a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Kenya by voluntary act (other than marriage); or

c. having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Kenya and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.

(4) A person who has attained the age of twenty-one years (or is a woman who is or has been married) and who –

(a) becomes a citizen of Kenya by registration under Section 88, 91, 92 or 96 or by naturalization under Section 93 or 96; and

(b) is immediately after the day upon which he becomes a citizen of Kenya, also a citizen of some other Country, shall, subject to subsection (7), ceases to be a citizen of Kenya upon the specified date unless he has renounced his citizenship of that

other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.

(5) For the purposes of this section, where, under the law of a Country other than Kenya, a person cannot renounce his citizenship of that other country, he need not make the renunciation but he may instead be required to make such declaration concerning that citizenship as may be prescribed by or under an Act of Parliament.

(6) In this Section “the specified date” means –

(a) in relation to a person to whom subsection (1) refers, the date on which he attains the age of twenty-three years;

(b) in relation to a person to whom subsection (2) refers, 12th December, 1965;

(c) in relation to a person to whom subsection (3)(b) refers, the expiration of a period of two years commencing with the date on which he acquired the citizenship of the country other than Kenya; and

(d) in relation to a person to whom subsection (4) refers, the expiration of a period of three months after the date upon which he became a citizen of Kenya, or, in the case of a person of unsound mind, such later date as may be prescribed by or under an Act of Parliament.

(7) Provision may be made by or under an Act of Parliament for extending beyond the specified date the period in which a person may make a renunciation of citizenship, take an oath or make or register a declaration for the purposes of this section, and, if provision is so made, that person shall not cease to be a citizen of Kenya upon the specified date but shall cease to be a citizen upon the expiration of the extended period if he has not then made the renunciation, taken the oath or made or registered the declaration, as the case may be.”

33. How does the above provision impact on the Petitioner? There is no doubt that as of 12th December 1963 when Kenya became a Republic, he was only 11 years old and a foreign national (whether British or Indian). He attained the age of twenty-one years on 22nd March 1973 and as at that date, he had already acquired the citizenship of Kenya (by fact of registration on 19th August 1968). It is also true that as at both dates, he had not renounced his foreign citizenship (whether Indian or British) neither had he taken an oath of allegiance. This means that flowing from the summary of facts obtaining as regards the Petitioner, he ceased to be a citizen of Kenya by dint of **Section 97(3)** of the **Repealed Constitution** on 22nd March 1973 and he only retained his foreign nationality (whether Indian or British as that date).

34. Further, by his own admission and in line with my findings above, as late as 9th March 2012, he was only in Kenya by dint of an Entry Permit issued to him as a British Citizen and he was not residing in Kenya as a Kenyan citizen.

35. I need not emphasize the point that dual nationality was not recognized by the **Repealed Constitution** or any Statute enacted pursuant to **Section 97** aforesaid and the Petitioner cannot but accept the lawful fact that by holding British nationality and a British passport and having neglected and/or refused to renounce that nationality by the date above, he had no legal capacity to acquire either a Kenyan identity card nor a Kenyan passport. I have therefore no doubt that the Kenyan identity card that he holds is invalid and he would be best advised to surrender it or face criminal sanction.

36. Having found as above and based on the facts as applied to **Section 97** of the **Constitution**, the Petitioner is not a citizen of Kenya and **Articles 13, 14 and 15** of the **Constitution 2010** are irrelevant to that extent. They would only have been relevant if the Petitioner had admitted that he is not a citizen of Kenya but is intent on applying for registration as such citizen under **Article 15(2)** as read with **Article 16** of the **Constitution**. These Articles entitle a person in his position to apply for such registration without losing his current nationality; in his case, British nationality. I so find and hold.

Have any Fundamental Rights and Freedoms been violated by the Respondents in respect of the Petitioner

37. It would seem that only the right to fair administrative action under **Article 40** of the **Constitution** requires my attention because I have already disposed of any claim under **Articles 12, 13, 14, 15 and 16** of the **Constitution** (relating to citizenship and how it can be acquired).

38. What then is the Petitioner's complaints in the above regard? In his Petition at paragraph 23, he averred that;

“... denial of your Petitioner a Kenyan passport smacks of impunity and violates his due process rights to a fair administrative action and natural justice as envisaged by Article 47 of the Constitution ...” (sic)

39. In his submission, Mr. Okemwa added that failure to respond to the Petitioner's and his advocates' query as to why he had been denied a Kenyan passport amounted to a further violation of **Article 47** of the **Constitution**.

Article 47(1) provides as follows;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) ...

(3) ...”

40. In the above context, the right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed in the terms that a party should not be condemned unheard (*audi alteram partem*). The Court of Appeal in **Onyango Oloo vs Republic (1986-1989) EA 456** stated as follows as regards the importance of the right to be heard;

“It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

I am duly guided and it is thus a settled principle of law that the right to be heard requires that whenever an administrative decision has to be made, the person affected by such a decision should be given an opportunity to express himself in that regard. - See ***Ahmed Hassan Issack vs Auditor General (2015) e KLR***.

41. I agree with the above exposition of the law but having said so, I have seen a letter dated 10th March 2014 addressed to the Petitioner by one, F. Anyango on behalf of the Director of Immigration Services. For avoidance of doubt, it reads as follows;

“Department of Immigration

P.O. Box 30191-00100

NAIROBI, KENYA

Ref:29228/1/(603) 10th March, 2014

Mr.Jisvin Chandra N. Hemraj

P.O. Box 43406-00100

NAIROBI

Dear Sir,

RE: KENYA CITIZENSHIP

Reference is made to your letter dated 2nd December 2013. Be informed that you were required to renounce the British citizenship by 21/3/1975 which you did not as evidenced by possession of British passport issued in 2006.

You therefore ceased being a Kenyan citizen under provisions of Section 97 of the former Constitution of Kenya.

Signed

F. Anyango

For: Director of immigration Services”

42.The above letter save for the date of “21/03/1975” is in tandem with my findings above. What other information or decision did the Petitioner expect in his self-created difficult position? I pose the question because once the 1st Respondent had declined to grant Kenyan citizenship to him for valid and lawful reasons, no Kenyan passport could be issued and the matter should have ended there.

43.In the circumstances, I see no violation of **Article 47(1)** as alleged and that is all to say on that matter.

Is the Petitioner entitled to the orders that he has sought?

44.Elsewhere above I have reproduced the prayers made in the Petition. I have addressed prayers (i) and (ii) save to add that no facts were adduced and no submissions were made regarding alleged violation of **Article 27 (freedom from discrimination), Article 35 (right to information), Article 36 (freedom of association) and Article 50 (fair hearing)**. I will make no findings on those Articles but will instead dismiss prayers (i) and (ii) as framed.

45.On prayer (iii), dual citizenship cannot be acquired by a Petition to this Court at the first instance. The procedure for so doing is well set out in **Section 8** of the **Kenya Citizenship and Immigration Act, Cap 172**.

46.The manner in which an aggrieved party can approach this Court ought to be known to such a party. In any event, from my findings elsewhere above, the said prayer cannot be granted and I am not even certain that **Section 8** can properly be applied to the Petitioner.

47.Regarding prayer (iv), I have said enough to show that **Section 97** of the **Repealed Constitution**

is not irrelevant to the present Petition. If any further clarity is needed, **Section 7** of the **6th Schedule** to the **Constitution** saved existing laws subject to the alterations and qualifications necessary. To argue that the Petitioner's history and applicable law pre-2010 is irrelevant to the determination of his citizenship today is mischievous and misguided. Prayer (iv) cannot be granted for three reasons.

48. Prayers (iv) and (v) cannot also be granted because the Petitioner is the author of his own mischief. Had he renounced his British or Indian citizenship in 1973, he would be living comfortably as a Kenyan. What did he instead do? He lived on a British passport, acquired an Entry Permit to Kenya as a foreigner, obtained a Kenyan identity card and obviously used it to his favour and now comes to this Court claiming that he is a Kenyan. That is what is called abuse of the legal and Court process. Granted, the 1st Respondent cannot escape blame either and I will shortly say why. In any event, the Petitioner cannot benefit from prayers (iv) and (v).

49. As for costs, each party, save the Attorney General, is to blame for the untidy situation that they are in. The 1st Respondent ought to have cancelled the Certificate of Registration No.11875 once the Petitioner had not renounced his foreign citizenship by 22nd March 1973. To-date it has not done so. Instead, by letter dated 2nd October 2012 it wrote to the Director, National Registration Bureau and stated that the Petitioner was a citizen of Kenya. By that date, the Petitioner had, on 1st March 2012 been issued with a Kenyan identity card number 30202752. On what basis was such a letter done and on what basis was a Kenyan identity card issued to a British national who was in Kenya courtesy of an Entry Permit? It cannot be awarded costs in such circumstances.

Disposition

50. It is obvious that I see no merit in the Petition dated 30th May 2014 and the same is hereby dismissed. Let each party bear its own costs.

51. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Okemwa for Petitioner

Mr. Mohamed for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

17/9/2015