



**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 206 OF 2011**

**BETWEEN**

SAMOW MUMIN MOHAMED ..... 1<sup>ST</sup> PETITIONER  
ABUKAR ABDULLAHI IBRAHIM ..... 2<sup>ND</sup> PETITIONER  
MOHAMED ASER ALI ..... 3<sup>RD</sup> PETITIONER  
JEMALI ABUKAR MOHAMED ..... 4<sup>TH</sup> PETITIONER  
DHAGAHOW DAHIR ABDALA ..... 5<sup>TH</sup> PETITIONER  
ADTIDON ADBUISALAM MOHAMED ..... 6<sup>TH</sup> PETITIONER  
HASSAN KHADIJA AHMED ..... 7<sup>TH</sup> PETITIONER  
AHMED MAHAMED HASSAN ..... 8<sup>TH</sup> PETITIONER  
MOHAMED IBRAHIM DIIRSHE ..... 9<sup>TH</sup> PETITIONER  
YUSUF MUSA SHEIKH ..... 10<sup>TH</sup> PETITIONER

**AND**

**CABINET SECRETARY, MINISTRY OF INTERIOR**

**SECURITY AND CO-ORDINATION ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER FOR**

**REFUGEE AFFAIRS ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

## JUDGMENT

### Introduction

1. The petitioners claim that they are all refugees. The 1<sup>st</sup> respondent is the Cabinet Secretary in Charge of refugee affairs while the Commissioner of Refugees is an office created by the **Refugee Act, 2006**.
2. They have filed this petition challenging the constitutionality of the Directive issued by the 1<sup>st</sup> respondent, the Cabinet Secretary, Ministry of Interior Security and Coordination (“the Secretary”) contained in the **Gazette Notice No. 1927** (“the Gazette Notice”) in which the 1<sup>st</sup> respondent designated the areas specified in the schedule as Refugee Camps as follows;

*The Refugees Act*

*(No. 3 of 2006, L.N 64 of 2007)*

### *DESIGNATION OF AREAS AS REFUGEE CAMPS*

*IN EXERCISE of the powers conferred by Section 16(2) of the Refugees Act, 2006, the Cabinet Secretary for interior and Coordination of National Government designates the areas specified in the schedule as Refugee Camps*

### *SCHEDULE*

1. *The Ifo 1 and Ifo 2 and Dagahaley in Dadaab Ward of the Dadaab Sub-County in Garissa County.*
2. *Hagardera and Kambioos in Jarajilla Ward of the Fafi Sub-County in Garissa County*
3. *Kakuma of Kakuma Ward in the Turkana West Sub-County in Turkana County.*

*JOSEPH OLE LENKU*

*Cabinet Secretary*

3. They also challenge the Government directive issued via a press statement by the Secretary on 26<sup>th</sup> March 2014 and titled, “*Press Statement by Cabinet Secretary for Interior and Coordination of National Government on Refugees and National Security Issues*” (“the Directive”) which stated as follows;

### ***Press Statement by Cabinet Secretary For Interior & Coordination of National Government on Refugees and National Security issues on 26th March 2014.***

*Owing to the emerging security challenges in our urban centers and the need to streamline the management of refugees, drawing the powers conferred under Section 16(2) of the Refugees Act 2006, I as the Cabinet Secretary responsible for Security and refugee affairs, informs the public of the following decisions by the Government;*

1. *All refugees residing outside the designated refugee camps of Kakuma and Dadaab are hereby directed to return to their respective camps with immediate effect. There are no other designated refugee camps outside these areas. Any refugee found flouting this directive will be dealt with in accordance with the law. Consequently, all refugee registration centres in urban areas-Nairobi, Mombasa, Malindi, Isiolo and Nakuru are hereby closed.*
2. *All Kenyans are requested to report to the police any refugee and or illegal immigrants found*

outside the designated refugee camps.

3. Furthermore, an additional 500 police officers will be deployed with immediate effect in Nairobi, Mombasa and their environs to enhance security and surveillance. Other security organs will support the exercise.

4. Regarding security in Mombasa, the operation by security agencies to track and arrest suspects of the Likoni Church attack continues and so far 109 suspects have been arrested

5. Once again, I appeal to Kenyans to always remember security is a shared responsibility and citizens should cooperate with law enforcement agencies at all times.

4. The petitioners claim that the **Gazette Notice** is unconstitutional and that the Directive violates their fundamental rights and freedoms. In their petition dated 2<sup>nd</sup> May 2014 they seek the following orders;
  - a. A declaration that the respondents have contravened the Petitioners' rights under Articles 25, 27, 28, 29, 31, 39, 40, 47, 49 and 50 of the Constitution.
  - b. An order of certiorari to remove to the High Court and quash the Gazette Notice No. 1927 as well as press statement by Cabinet Secretary for Interior and Coordination of National government.
  - c. A declaration that any act undertaken by the Respondents pursuant to Gazette Notice No. 1927 as well as the Press Statement issued on 26th March 2014 is unconstitutional, null and void as it violates the Constitution.
  - d. That the costs of this Petition be provided for.
  - e. Any other orders that this court may deem fit to grant in the interests of justice.

#### **Petitioners' Case**

5. The petitioners' case is outlined in the affidavit in support of the petition sworn on 2<sup>nd</sup> May 2014 and supplementary affidavit sworn on 22<sup>nd</sup> May 2014 by Samow Mumin Mohamed. He alleges that the Directive is inconsistent with the provisions of the Constitution, the **Refugee Act, 2006** and international law as it amounts to taking away the accrued or acquired rights by the petitioners without following the due process and therefore is discriminatory in nature. The petitioners contend that the Press Statement runs contrary to the decision in the case of **Kituo cha Sheria & Another v The Hon. Attorney General Nairobi Petition No. 115 of 2013 [2013]eKLR**.
6. The 1<sup>st</sup> petitioner complains that he was issued with a movement pass dated 29<sup>th</sup> April 2014, directing him to travel to Kakuma Refugee Camp for registration and residence by 7<sup>th</sup> April 2014, in violation of the court orders in the decision in the **Kituo cha Sheria Case**.
7. The petitioners claim that they all hold valid refugee identity cards and or had applied for renewal of the same and the policy or relocation and encampment adopted by the respondent fails to take into account families with children, those on medical treatment, those carrying on business like the petitioners and the specific situation of the individual refugee. They claim that they have heavily invested in the Kenyan economy and all run businesses within Eastleigh area in Nairobi, that they pay taxes like all other Kenyans and therefore if the directive was to be implemented, they would be deprived their right to own property, protection against discrimination and right to work as enshrined in various international human rights instruments such as **Universal Declaration of Human Rights**, the **International Covenant on Civil and Political Rights** and the **African Charter on Human and People's Rights**.
8. They petitioners aver that if they are encamped and taken to the designated refugee camps, they would likely face persecution in those designated refugee's camps owing to their ethnic affiliation. They claim that the government directive is not fair and reasonable within the meaning of **Article 47(1)** of the Constitution in so far as it does not provide for application of due process in adjudicating the rights of persons with refugee status.
9. The petitioners allege that the continued implementation of the government Directive is a breach

of the principle of non-refoulement as contained under **section 18** of the *Refugee Act, 2006* and that the government must demonstrate that the directive to relocate and encamp urban refugees is in harmony with the **Article 24** of the Constitution which provides for the limitation of fundamental rights and freedoms. The petitioners contend that there is no nexus between them and the alleged danger to national security posed by the petitioners and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. They submit that the respondents must demonstrate that there are adequate facilities and security provided within the refugee camps.

### **The Respondents' Case**

10. The respondents oppose the petition based on the replying affidavit and further affidavit of Haron Komen, the Acting Commissioner for Refugees Affairs sworn on 12<sup>th</sup> May 2014 and 27<sup>th</sup> May 2014 respectively.
11. The respondents submit that the *Gazette Notice* was issued pursuant to the powers conferred by **section 16(2)** of the *Refugee Act, 2006* and that the press statement directed all the refugees residing outside the designated refugee camps to return to the camps in Kakuma and Daadab. They further submit that under **Article 4** of the *International Covenant on Civil and Political Rights*, countries are allowed to take measures derogating from certain of their obligations under the Covenant including the right to freedom of movement 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' and that under **Article 26** of the *1951 Geneva Convention*, refugees do not have absolute freedom of movement rights as that freedom can be limited. The Secretary asserts that under **section 16** of the *Refugee Act*, the Secretary in consultation with the host community has powers to designate places in Kenya as refugee camps.
12. The respondents further submit that in order for the petitioners to engage in any in any occupation including carrying on business, they must apply and be issued with a Class M work permit as provided for under **regulation 20(2)** of the *Seventh Schedule* of the *Citizenships and Immigration Act, 2012*. Since the petitioners have not demonstrated that they have applied for those requisite permits, the respondent's contend that the petitioners are in violation of the Kenyan law on immigration and employment by foreigners. The Commissioner, in his affidavit, states that all refugees are accorded necessary facilitation and documentation in order to attend public universities, institutions of higher learning and even those who are in need of medical attention.
13. The respondents reject the accusation by the petitioners that the State has violated the principle of *non-refoulement* and assert that the State is committed to it. They contend that by issuing the *Gazette Notice* and the Directive, the respondents are not returning the refugees to hostile territories outside Kenya but are instead designating refugee camps where the petitioners and other refugees can be better protected. The respondents aver that they have demonstrated that the designated and gazetted refugee camps have adequate amenities like schools, hospitals, roads, street lights and police stations and that the refugees engage in economic activities within the camp.
14. The respondents' contend that they have carried out their mandate within the applicable law and the Constitution particularly the national security principles enshrined at **Article 238** of the Constitution. They submit that it is the duty of every refugee to conform to the laws and regulations and any measures that the host country has enacted for the maintenance of public order. They further submit that under **Article 39** of the Constitution the right of refugees to enter, remain and reside anywhere in the country is not absolute as they are not citizens and that the freedom of movement for refugees can be curtailed for security reasons. They therefore urged the court to dismiss the petition.

### **Determination**

15. It is not in dispute that refugees are entitled to the full panoply of rights and fundamental freedoms guaranteed by the Constitution, *Refugee Act, 2006* and international treaties and conventions governing refugees. The issues for determination in this matter are evident from the prayers in the petition and are as follows;

- a. Whether the petitioners rights and fundamental freedoms under **Articles 25, 27, 28, 29, 31, 39, 47, 49 and 50** of the Constitution.
- b. Whether the petitioners' rights and fundamental freedoms are violated as a result of the Directive issued by the Secretary.
- c. Whether **Gazette Notice No. 1927** designating certain areas as Refugee Camps is unconstitutional.

### **Whether rights and fundamental freedoms are violated**

16. The first two issues are interlinked. The petitioners' case is that the Government directive issued through the press violates the petitioner's fundamental rights and freedoms. The petitioners have cited **Articles 25, 27, 28, 29, 31, 39, 40, 47, 49 and 50** of the Constitution which protect the following rights and fundamental freedoms; the right to equality and freedom from discrimination, right to human dignity, freedom and security of the person, right to privacy, freedom of movement and residence, right to own property, right to fair administrative action and the right to a fair hearing.
17. The general principle of law is that a party who moves the court for the enforcement of fundamental rights and freedoms under **Article 22** of the Constitution must state his claim with such precision as regards the right violated and demonstrate how it has been violated in relation to him. This principle established in *Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154* was re-emphasized by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others CA Civil Appeal No. 290 of 2012 [2013]eKLR*, "(41) *We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.*"
18. The petitioners' case is supported by the affidavit of the 1<sup>st</sup> petitioner, Samow Mumin Mohamed which for the most part contains statements of law and legal argument. There is also the affidavit sworn on 2<sup>nd</sup> May 2014 in support of the Notice of Motion seeking conservatory orders.
19. The 1<sup>st</sup> petitioner depones that the himself and the other petitioners; Abubakar Abdullahi Ibrahim, Mohamed Aser Ali, Jemale Abubakar Mohamoud, Abdallahi Khathar Abdi, Hassan Khadija Ahmed, Abtidon Abdissalam Mohamed, Ahmed Mahamed Hasan all hold alien registration cards while Diirshe Mohamed Ibrahim holds a refugee certificate which was issued in 2009 and expired on 16<sup>th</sup> December 2013. The alien certificates produced by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> petitioners were issued on diverse dates in 2006 and were set to expiry on different dates in 2008. The 4<sup>th</sup> and 10<sup>th</sup> petitioners did not avail to the court any of their identification documents. While the State admits that the petitioners are refugees, it is apparent from the evidence that the terms of identification documents of the petitioners have expired and must be renewed. In order to do so they petitioners must attend to the relevant officer under appointed by the 2<sup>nd</sup> respondent.
20. In the petition, the 1<sup>st</sup> petitioner or the petitioners did bring the petition in any representative capacity or bring it on behalf of any persons who could not file it in their own names. The 1<sup>st</sup> petitioner's supplementary affidavit sworn on 22<sup>nd</sup> May 2014 introduces new allegations. At paragraph 10 he states, "*THAT together with my co-petitioners we represent a group of about 500 other refugees all residing within Eastleigh area in Nairobi and we have established ourselves as business since the 2<sup>nd</sup> respondent granted us the status of refugees.*" This case is introduced in the supplementary affidavit, without an amendment to the petition, effectively denying the

respondents the opportunity to respond to the new allegations.

21. The petitioners place much reliance on the decision in the ***Kituo Cha Sheria Case (supra)***. In that case, the Secretary issued several directives regarding the relocation of urban refugees to Dadaab and Kakuma Refugee Camps. The relocation was to be achieved through a security operation where urban refugees were to be rounded up and held at Thika Municipal Stadium and taken to refugee camps. Further directions were issued to humanitarian organisations to stop giving aid and assistance to urban refugees. The State's attempt to justify its action under **Article 24** of the Constitution was unsuccessful. It is in these circumstances, that the court declared the directives contrary to the Constitution.
22. As regards the right to movement and residence, the court in the ***Kituo Cha Sheria Case***, expressed itself as follows, "As far as refugees are concerned, two conclusions may be drawn from **Article 39** of the Constitution. First, although the right under **Article 39(3)** is limited to citizens, it does not expressly limit the right of refugees to move within Kenya guaranteed under **Article 39(1)**. Second, it does not expressly recognize the right of refugees to reside anywhere in Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya. Such a right is readily available to refugees by reason of application of the **1951 Convention** and application of **Article 19(3)(b)** of the Constitution which states that, "The rights and fundamental freedoms in the Bill of Rights – (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter." It follows therefore that any limitations to these rights cannot be arbitrary and must comply with the standards set out in **Article 24**."
23. While the court expressed the view that the closure of urban refugee registration centres was likely to have a deleterious effect on urban refugees particularly the petitioners in that case, the decision did not affect the existence of refugee camps which are provided for under the law. **Section 16** of the **Refugee Act** provides as follows;
1. Subject to this Act, every recognized refugee and every member of his family in Kenya—
    - (a) shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party;
    - (b) shall be subject to all laws in force in Kenya.
  2. The Minister may, by notice in the Gazette, in consultation with the host community, designate places and areas in Kenya to be—
    - a. transit centres for the purposes of temporarily accommodating persons who have applied for recognition as refugees or members of the refugees' families while their applications for refugee status are being processed; or
    - b. refugee camps.
  3. The designated areas provided for in subsection (2) shall be maintained and managed in an environmentally sound manner.
  4. Subject to this Act, every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya.
24. The **Refugee Act, 2006** and the **Refugee (Reception, Registration and Adjudication) Regulations, 2009** ("the **Regulations**") contemplates that refugees may be accommodated in regulated refugee camps. The **Regulations** govern the movement of refugees outside the camps. For example, **Regulation 35(1)** states as follows, "The Commissioner shall issue a movement pass to an asylum seeker or a refugee who has a valid reason to travel outside a designated area."

**Regulation 35(4)** requires the reasons for refusal to be in writing. The respondents have relied on the letters dated 27<sup>th</sup> March 2014 and 8<sup>th</sup> May 2014 to show that the Commissioner considers individual circumstances in issuing movement passes. In the said letters the Commissioner instructed to the Camp officers to issue movement passes in three circumstances only; Medical cases referred by Red Cross, Ifo Referral Hospital or Kakuma Mission Hospital, Education in Kenya Public Institutions, educational institutions abroad and referred by Windle Trust and/or UHNCR and relocation to third countries forwarded by UHNCR and IOM. In my view, such instructions limits the discretion of the Commissioner and camp officers in a manner not contemplated by the **Regulations** by imposing an *a priori* determination without regard to the individual circumstances of the applicant bearing in mind that written reasons for the decision must be given. This is a clear a violation of **Article 47(1)** of the Constitution as the discretion of the Commissioner and officers to take into account individual circumstances.

25. The Directive is directed at refugees who reside in camps and who are subject to the regulations governing refugee camps. As I have stated, it is clear that the petitioner's refugee status as evidenced by their alien cards is in doubt, they must now subject themselves to the lawful process.
26. Unlike in the **Kituo Cha Sheria Case**, the petitioners have not established a basis for persecution if they return to the refugee camps. Other than exhibiting business permits issued by the Nairobi City County, there is nothing to show that their business will be disrupted if they are required to renew their registration at designated points. Where an applicant has business interests, this is legitimate ground upon which the Commissioner may issue a movement permit. Under **section 16(2)** of the **Refugee Act, 2006**, refugees must seek the necessary permits under the **Kenya Citizenship and Immigration Act, 2011** if they wish to apply for employment.
27. The petitioners did not demonstrate by way affidavit evidence how the Directive affects their individual circumstances to the extent that their fundamental rights and freedoms are violated. I therefore find and hold that the petitioners have not demonstrated that the Directive violates their rights and fundamental freedoms.
28. As regards **Gazette Notice**, the Cabinet Secretary has the power, under **section 16(2)** of the **Refugee Act**, to designate specific areas as Refugee camps. In **Law Society of Kenya v Attorney General and Others Nairobi Petition No. 318 of 2012 [2013]eKLR**, the court held that, “[52] *The burden of proof of showing that there has been no public participation or that the level of public participation within the process does not meet constitutional standards is on the petitioner.*” The reason for this is that once the Cabinet Secretary has exercised a statutory power, the court is entitled to presume that all the antecedents including public participation have been complied with. According to the case of **Raila Odinga v IEBC & Others SCK Petition No. 5 of 2013[2013]eKLR**, “*This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. “Omnia praesumuntur rite et solemniter esse acta” - All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law,*”
29. Other than making a bare allegation that there has been no public participation, the petitioners have not established that **Gazette Notice No. No. 1927 of 2013** is void for want of public participation.

### **Conclusion and Disposition**

30. In conclusion my findings on the three issues framed for determination are as follows;
  - a. The petitioners have not established that their rights and fundamental freedoms under **Articles 25, 27, 28, 29, 31, 39, 47, 49** and **50** of the Constitution have been violated by the respondents
  - b. The Press Statement issued by Cabinet Secretary on 26<sup>th</sup> March 2014 does not violate the petitioners' rights and fundamental freedoms.
  - c. **Gazette Notice No. 1927** designating certain areas as Refugee Camps is not unconstitutional.

31. In the circumstances the petition is dismissed with no order as to costs.

**SIGNED BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of JUNE 2014.**

**I. LENAOLA**

**JUDGE**

Mr Karige instructed by Waiganjo Wachira and Company Advocates for the petitioners.

Mr Kuria, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.