



IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 50 OF 2011

IN THE MATTER OF CHAPTER 1, 3 AND 4 OF THE CONSTITUTION OF KENYA WHICH PARTS RELATE RESPECTIVELY TO CITIZENSHIP AND THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION

AND

IN THE MATTER OF: THE RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: CITIZENSHIP AND ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS SECTION 3, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 27, 47, 258, 259 AND THE CONSTITUTION OF KENYA

BETWEEN

MUSLIMS FOR HUMAN RIGHTS (MUHURI) ON BEHALF OF MOHAMMED ADEN MOHAMMED & 39 OTHERS PETITIONERS

THE MINISTER FOR IMMIGRATION 1ST RESPONDENT

THE PRINCIPAL REGISTRAR OF PERSONS 2ND RESPONDENT

THE MINISTER FOR JUSTICE AND

RULING

1. The Petition herein dated 19th August 2011 is presented by the organization MUSLIMS FOR HUMAN RIGHTS (MUHURI) on behalf of MOHAMMED ADEN MOHAMMED & 39 OTHERS who the organization alleges to 'belong to a minority group the Galjeel Somali of Tana River' which the organization claimed to have worked with for a long time in addressing the challenges facing the Community.
2. The petition seeks in accordance with Article 12 of the Constitution that the petitioners as citizens of Kenya be issued with identification documents and prays for the following specific **orders**:
 - a. ***A declaration as unlawful, null and void the Respondents' actions of denying the Petitioners identification documents.***
 - b. ***An order directing and/or compelling the 1st and 2nd Respondents to recognize and register the Petitioners as citizens of Kenya and issue the Petitioners with national identity cards.***
 - c. ***The Respondents be condemned to pay the Petitioners' costs of and incidental to this petition.***
 - d. ***Such further and consequential orders as this honourable court may deem fit.***
3. The petitioners' case is set out in paragraphs 8-13 of the Petition as follows:
 8. ***That sometimes in the year 1990 the Petitioners identity cards were officially confiscated by the Government of Kenya until further notice by a state appointed task force for registration of Kenya Somalis under the directorship of the then Hon. Yusuf Haji.***
 9. ***That the task force issue letters to the Petitioners who come from the Galjeel Community to serve as identification documents pending the investigation.***
 10. ***That the said investigations were completed twenty (20) days after the identity cards were confiscated.***
 11. ***That despite the completion of the said investigations and the confirmation that they were Kenyans of Somali descent their identity cards were not released and/or returned to them to date.***
 12. ***That in the year 2005 a handful of the Petitioners herein were issued with waiting cards and are yet to be issued with identity cards.***
 13. ***That the denial of the Petitioners of national identification is a violation of their constitutional rights.***
4. For the respondents a REPLYING AFFIDAVIT sworn on 11th January 2012 by Principal Registration Officer John Muiwa Kinyumu was filed putting their principal defence that the petitioners had been established by the Task Force appointed under Gazette Notice No. 5319 of 10th November 1989 as being non-Kenyans and were therefore not entitled to be registered as Kenyan citizens. Paragraphs 13 – 18 of the said affidavit set out the respondents case as follows:
 13. ***THAT the Special Task force submitted a list to the Principal registrar of Persons of the affected persons whose registration records were endorsed as cancelled and that the names of the petitioners herein appeared on the said list.***
 14. ***THAT in light of the foregoing the Principal Registrar of Persons is unable to issue the petitioners with national identity cards as the records in respect of the petitioners have been cancelled.***
 15. ***THAT the purpose of issuing Kenya citizens with identity cards is to identify them so that they may enjoy the benefits and privileges enshrined in the Constitution.***
 16. ***THAT the Principal registrar of Persons had a statutory mandate to forbid the subsequent production of an identity card if it is discovered that a person who had previously been registered and issued with an identity card is not a Kenyan citizen or had procured one by fraud or***

- misrepresentation.*
17. **THAT** it is not disputed that the petitioners were issued with national identity cards between 1978 and 1985 but their registration records were subsequently expunged in 1991 upon discovering that they were not Kenyan citizens and their national identity cards were confiscated.
 18. **THAT** the Principal Registrar of Persons is unable to issue the new generation identity cards to the petitioners because their records indicate that their registration has been cancelled and that they are not citizens of this country.
5. Against this background of facts, counsel for the parties – Mr. Lumatete for the petitioners and Mr. Eredi for the Respondents – filed written submissions and subsequently made supplementary oral submissions and ruling was reserved.
 6. Both counsel relied on the decision of the High Court in Nairobi High Court Constitutional Petition No. 50 of 2011 *Hersi Hassan Gutale and Anor. v Attorney General and Anor.* (2013) eKLR in which the court (Majanja, J) held that the issue of validity of the screening exercise was *res judicata* by virtue of a two judge bench in an earlier case Nairobi HC Misc. Application No. 774 of 2004 *Hersi Hassan Gulate and Anor. v. Principal Registrar of Persons and Anor.* had upheld the constitutionality of Gazette Notice No. 5320 of 1989 under which the Haji Task Force referred to herein had carried out its mandate to screen all persons of Somali ethnic community in Kenya to establish Kenya and Non-Kenyan Somalis. The Court in the subsequent case however found that as there was no replying affidavit filed by the respondents it was not disputed that the petitioners in the case were Kenyans of Somali origin and holders of Kenya Birth certificates, old generation Identity cards and Kenya passports and that “the gravamen of the petitioners’ case is that they have not been issued with the new generation identity cards on account of findings of the Task Force.”
 7. In his determination, Majanja, J stated that –
25. ***Whereas the petitioners urge the court to declare them citizens, I think a proper approach to this matter must be founded on the facts as presented. The case is founded on the Registrar's refusal to issue registration documents to the petitioners. I am satisfied that on the material before the court and in particular based on the judgment of the Court in HC Misc. Appli. No. 774 of 2004, the issue of the petitioners' citizenship has not been determined and no material has been placed before the court to demonstrate a reasonable basis for denying he petitioners of the right to a new generation identity card.***
 26. **The duty to carry out appropriate inquiries and to hear the petitioners is a duty cast upon the Registrar by the Registration of Persons Act. In exercising such authority the Registrar must act in accordance with the law bearing in mind the provisions of the constitution particularly the fundamental rights and freedoms of the petitioners which entitle the petitioners to fair administrative action guaranteed under Article 47. It is not for this Court to substitute itself as the registrar unless the decision of the Registrar contravenes the Constitution and the law.**
 27. ***The appropriate remedy in this case would be to direct the Registrar to consider the petitioners' application for new generation identity cards having regard to the provisions of the Constitution.***
8. The counsel for the applicants rely on the decision to support their case for the principal relief sought in the petition for ‘***[a]n order directing and/or compelling the 1st and 2nd Respondents to recognize and register the Petitioners as citizens of Kenya and issue the Petitioners with national identity cards.***’
 9. Counsel for the respondent rely on the decision to support the submission that the Gazette Notice No. 5320 of 1989 and the procedure for the screening of persons of Somali ethnic community was constitutional and by extension validity of its resultant report on whether the applicants were Kenyans. The respondents therefore contend that having been determined as non-Kenyans, the applicants were not entitled to be registered as citizens of Kenya and given identity documents as such.

Issues

10. The issue for determination is whether the court can in the circumstances of this case declare the applicants as citizens of Kenya and consequently direct their registration as such and order the issuance of identity documents as sought in the petition.

Determination

11. To be sure the Court in Nairobi HC Pet. No. 50 of 2011 did not direct the Registrar to register the applicant in that case as citizens of Kenya but rather to “***to consider the petitioners’ application for new generation identity cards having regard to the provisions of the Constitution.***” The court in that case had, however, found that there was no dispute that the applicants were citizens of Kenya there having been no replying affidavit by the respondents on the matter.
12. In the present case, there is a positive averment by a replying affidavit of the Principal Registration Officer that the applicants herein had been established to be non-Kenyans by the Task Force set up for that purpose by Gazette Notices Nos. 5319 and 5320 of 1989. I agree with the court in Nairobi HC Pet. No. 50 of 2011 that it was the duty of the Registrar to consider applications for registration of persons as citizens and issue them with identity documents and the court could not usurp that role unless the decision of the Registrar contravenes the Constitution and the law. Hence the direction in that case for the registrar to consider the applicants’ application for new generation identity cards.
13. In the case before this court, the respondents have explained their position in failure to grant the identity cards on the basis of the Report of the Task Force which indicated that the applicants were not Kenyans. But the respondents did not inform the respondents - there is no evidence of such information – that the report of the Task Force had been negative with regard to their cases. What the officers of the Government did was to give the applicants letters explaining that their identity cards had been taken for verification and the letters were to act as their identity documents in the meantime. Later in 2005 some of the applicants were on application given the waiting cards for the issuance of the new generation identity cards but never issued with the cards thereafter, for which the respondents explained that they subsequently discovered that they had records of the applicants having erased their records following the determination by the Task Force that the applicants were not Kenyans.
14. Without informing the applicants of the outcome of the investigations by the Task Force with respect to the status of applicants and their applications for the new generation identity cards, since the Task Force investigations of 1990 and the application for new identity cards in 2005 and subsequently to date, the respondents are in clear violation of the principle of fair administrative justice as now entrenched in Article 47 of the Constitution of Kenya which is a right available to every person including non citizens.
15. Without the reasons for the rejection of their registration and issuance of identity cards, the applicants could not challenge in court the decision of the registrar and or the findings of the Task Force with respect to their citizenship status. The applicant must still be able to launch a judicial challenge of the decision of the Registrar and that of the Task Force upon which the former’s is allegedly based.
16. The court is not able to declare the applicants citizens of Kenya without determining the *validity and accuracy* of the Report of the Task Force as opposed the constitutionality of the Task Force which has already been settled by a judgment *in rem* on its status by the two judge-bench in Nairobi HC Misc. Application No. 774 of 2004 *Hersi Hassan Gulate and Anor. v. Principal Registrar of Persons and Anor.* The Task Force Report in the material facts affecting the applicants must therefore be availed to the applicants and the court so that the applicants have an opportunity to challenge the findings of the Report.

Orders

17. The direction that therefore commends itself to the court in the circumstances of this case is an order that the 2nd respondent, the Principal Registrar of Persons, considers on a case by case basis the application for identity cards by the applicants as citizens of Kenya and to give reasons for its decision if it be a adverse to interests of the applicants to enable them challenge the decision before the court by further proceedings.

18. The Report by the Muslim for Human Rights published in the book **Banditry and the Politics of Citizenship: The Case of Galjeel Somali of Tana River**, Muhuri (1999), on Galjeel Somalis of Tana River with a population of 2400 as at the year 1999, of whom the applicants are said to be members, persuades the court that the matter is serious and important enough to warrant the calling in of expert assistance of the specialized state organizations on human rights and equality to aid in the determination of the truth as to the applicants' citizenship.
19. The Kenya National Human Rights Commission and the National Gender and Equality Commission have under their respective statutes, Acts Nos. 14 and 15 of 2011, the functions of promoting respectively human rights and freedom from discrimination, issues which are raised in the petition before the court. This court has under clause 6 (c) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** the power to invite amicus curiae to assist the court in the following terms:
- “(c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.”**
20. Accordingly, without in any way fettering the wide discretion enjoyed by two organizations under their respective statutes to take up complaints of violations, the court respectfully brings this matter to the attention of the organizations with an invitation that they consider investigating the matter and assist both the registrar of persons and the court in reaching a fair decision in the matter of the question of the applicants' citizenship. The court will therefore invite the two human rights and equality Commissions, **The Kenya National Human Rights Commission** and **the National Gender and Equality Commission**, to attend court as *amici curiae* and assist in the fair determination of the dispute.
21. The court considers that further proceedings should be had before the registrar with the assistance of the two national Human Rights and Equality Commissions with report to the court before final orders are made in this case. This matter will therefore be mentioned in 60 days to determine the outcome of the process before the registrar and for further orders of the court. There shall be no orders as to costs.

Dated, signed and delivered this 1st day of August, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Petitioners

Miss Lutta for the Respondents

Miss Moriasi - Court Assistant