



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 50 of 2011

HERSI HASSAN GUTALE ..... 1<sup>ST</sup> PETITIONER

ABDULLAHI MOHAMED AHMED ..... 2<sup>ND</sup> PETITIONER

AND

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

THE PRINCIPAL REGISTRAR OF PERSONS ..... 2<sup>ND</sup> RESPONDENT

JUDGMENT

Introduction

1. The genesis of this matter can be traced to **Gazette Notice No. 5320** issued by the Principal Registrar of Persons (“the Registrar”) published in the Kenya Gazette of 10<sup>th</sup> November 1989 which stated;

***“IN ACCORDANCE with section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic Community resident in Kenya who are eighteen (18) years and above to attend before the registration officers at the centre specified in the Second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13<sup>th</sup> November 1989 and 4<sup>th</sup> December 1989.”***

2. Under an earlier **Gazette Notice No. 5319** dated 7<sup>th</sup> November 1989, the Registrar had appointed senior public officials as registrars to confirm the veracity of registration documents of all Kenyans of Somali origin. This task force referred to the Yusuf Haji Taskforce (“the Task Force”). The Task Force proceeded to receive documentary evidence in accordance with Gazette Notice No. 5320 and issued special verification certificates to persons it considered genuine Kenyan Somali’s. The said Task Force submitted to the Registrar a list of persons affected and whose registration records were endorsed and cancelled. The petitioners are among those persons whose registration records were endorsed as cancelled.

3. The petitioners claim is that they are Kenyan citizens and holders of the old generation identity cards and Kenyan passports but have been denied new generation identity cards thereby affecting their rights, privileges and benefits of citizenship.

4. The 1<sup>st</sup> petitioner, Hassan Gutale, obtained a letter dated 24<sup>th</sup> June 2002 from the Registrar addressed to the Registrar of Persons, Nairobi which stated that he could not be issued with an identity card. It stated, *“Please note that he was declared to be a non Kenya Somali by the Yusuf Haji Task Force”*. Gutale was subsequently charged with an offence of being in unlawful possession of an identity card

contrary to **section 14(4)** of the *Registration of Person Act (Chapter 107 of the Laws of Kenya)*. The proceedings being *Garissa DM Criminal Case No. 107 of 1989* were subsequently terminated by the Attorney General entering a *nolle prosequi*.

5. As the petitioners were aggrieved by the **Gazette Notice No. 5320** and the manner in which it was implemented, they filed an application to the High Court seeking relief under **section 84** of the former Constitution on the ground, inter alia, that the said notice was discriminatory in so far as it targeted Kenyans of Somali origin. The petitioners also sought an order under prayer 9 of the Originating Summons, that, ***“A declaration that the applicants herein are Kenyan citizens and that they cannot be declared non citizens by the Yusuf Haji task force which in any case was illegally constituted on the “authority” of an illegal and unconstitutional order or any other task force as there are no legal provisions in our laws to that effect.”***

6. The application *Nairobi HC Misc. Application No. 774 of 2004 Hersi Hassan Gulate and Abdullahi Mohammed Ahmed v Principal Registrar of Persons & Attorney General* was heard and dismissed by Hon. Justices P J Kamau and P J Ransley. The two learned judges in separate judgments concluded that the **Gazette Notice No. 5320** was neither illegal nor unconstitutional in the circumstances.

7. The result of the judgment was that the screening process was upheld but the petitioners’ right to obtain new generation identity cards was not dealt with and it is for this reason that the petitioners have moved the Court claiming that the continued denial of their identity cards constitutes a violation of **Article 12 and 14** of the Constitution which protects their citizenship rights. The petitioners now seek the following reliefs;

(a) *That a declaration be issued that the petitioners are citizens of Kenya by birth within the meaning of Articles 12 and 14 of the Constitution.*

(b) *That a declaration be issued to declare that under Articles 12 and 14 of the Constitution of Kenya, 2010 each of the petitioners is entitled to be issued with a National identity Card and or any other document or identification as Kenya citizens.*

(c) *That an order of mandatory injunction be issued to compel the Second Respondent to issue each of the petitioner herein with a National Identity Card.*

(d) *That a declaration be issued to declare that screening exercise conducted pursuant to Gazette Notice No. 5320 dated 7<sup>th</sup> November 1989 issued by the Second Respondent and published in the Kenya Gazette of 10<sup>th</sup> November 1989 was and remains null and void ab initio for being in violation of the rights of members of the Somali in Kenya, including the petitioners, enshrined in Articles 27 and 28 of the Constitution.*

(e) *The costs of this petition be borne by the respondents in any event.*

### **Submissions**

8. The respondent did not file any replying affidavit opposing the petitioners’ claim but filed grounds of opposition dated 18<sup>th</sup> July 2011. Both parties filed written submissions to support their respective cases.

9. The principal objection raised by the State to these proceedings is that in view of the judgment in *HC Misc. Appl. No. 774 of 2004*, this petition is *res judicata*. In support of this contention, Mr Wamotsa, counsel for the respondents, submitted that the matters for determination in this suit were raised in *HC Misc. Appl. No. 774 of 2004*. Counsel submitted that the judgment dealt with the legality of the Task Force and discrimination against Kenyan of Somali origin therefore as long as the judgment remains in place the petitioners are debarred by the doctrine of *res-judicata* from raising these issues. Mr Wamotsa argued that the petitioners were not issued with new identification cards as a result of the decision. It is the respondent’s position that the issue cannot be re-opened and the petition should be dismissed.

10. Mr Kibe Mungai, counsel for the petitioners, emphasized that the issue here is one of citizenship and as a result of the failure by the state to provide identity cards, the petitioners could not take the advantage of the rights and benefits of citizenship protected by the Constitution. As regards the decision in ***HC Misc. Appl. No. 774 of 2004***, Mr Mungai, submitted that the two judgments in the matter did not declare that the petitioners are not citizens, it only declared that the screening exercise was constitutional and did not violate the rights of the petitioners. Consequently, this suit is not *res-judicata* as the previous suits dealt only with legality of process and no finding was made on the status of the petitioners.

### **Res-judicata**

11. The resolution of the matters in this petition turns on the question of whether this suit is *res judicata* in light of the judgment in ***HC Misc. Appl. No. 774 of 2004***. The doctrine of *res-judicata* is that where there is a final judgment given in a matter by a competent Court, then subsequent litigation between the same parties, or their privies, in regard to the same subject matter and based on the same cause of action is not permissible. This doctrine has a statutory underpinning **section 7** of the ***Civil Procedure Act*** and is well established under common law (see ***Benjoh Amalgamated Limited and Another v Kenya Commercial Bank Limited Nairobi CA Civil Appeal No. 239 of 2004 (Unreported) [2006]eKLR, Greenfield Investment Limited v Baber Alibhai Mawji Nairobi CA Civil Appeal No. 160 of 1997 (Unreported)***).

12. In cases for the enforcement of fundamental rights and freedoms under the Constitution and former Constitution, the Courts have expressed the view that the doctrine is applicable to the enforcement to relief for breach of fundamental rights and freedoms (See ***Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2011 (Unreported), Richard Nduati Kariuki v Leonard Nduati Kairuki and Another Nairobi HC Misc. Appl. No. 7 of 2006 (Unreported), Booth Irrigation v Mombasa Water Products Limited (Booth Irrigation No. 1), Nairobi HC Misc. Appl. 1052 of 2004 (Unreported)*** and ***Thomas v Attorney General of Trinidad and Tobago [1991] LRC (Court), 101, Privy Council***).

13. A strict application of the doctrine of *res-judicata* or issue estoppel would adversely apply to this matter as the parties are the same and more particularly as evidenced by prayer (d) of the petition, the petitioners are attempting to re-open the constitutionality of the **Gazette Notice No. 5320** which the High Court has made a pronouncement.

14. I take this position that the court having pronounced on the Constitutionality of the screening exercise, this matter cannot be re-opened for re-examination under the Constitution. But this does not end the matter, the issue here in this case goes further that the procedure or process of screening persons of Somali origin. The issue the petitioners' present is whether they are citizens and are therefore entitled to the privileges and benefits of citizenship conferred by the Constitution under **Article 12 and 14**.

15. Whether this court grants relief is dependent of what the judgments of the learned judges in ***HC Misc. Appl. No. 774 of 2004*** stated. Hon. Justice Ransley on the issue of the petitioner's quest to be declared citizens stated as follows, ***"One last matter raised in order 9 above was for a declaration that the applicants are Kenyan citizens. If the applicants are dissatisfied with my decision of Government which has removed the applicant's rights to be a Kenyan citizen then that decision must be challenged in an application for Judicial Review directed at the appropriate Government offices. It is not a matter which can be dealt with in an application of this kind."***

16. Hon. Justice P. J. Kamau addressed the issue of the petitioner's citizenship as follows, ***"I further decline to grant the ninth declaration herein as the declaration sought there under was not within the purview of the said Notice and the resulting screening exercise nor was the 2<sup>nd</sup> respondent the authority charged with issuing or granting certificate of citizenship."***

17. The result of the judgment was that though the Court dealt with the issue legality of the screening process, the learned Judges specifically declined to deal with the petitioners' citizenship. I therefore find and hold that the issue of the petitioner's citizenship is not *res-judicata* as the learned judges specifically declined to deal with it. The petitioners' position regarding their citizenship has been in limbo since then

hence these proceedings and prayers (a), (b) and (c) of the petition seek relief in this regard.

### **Determination**

18. It is not disputed that the petitioners are Kenyans of Somali origin and are holders of Kenya birth certificates, old generation identity cards and Kenyan passports. 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. The respondent has not filed any affidavit to demonstrate the findings and the basis of the decision declining to issue the petitioners with the new generation identity cards.

19. **Article 12** of the Constitution provides as follows;

12. (1) *Every citizen is entitled to —*

*(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and*

*(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.*

*(2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria referred to in Article 24.*

20. In essence, **Article 12** entitles every citizen to a Kenyan passport and any document of registration and this document may only be denied by an Act of Parliament that satisfies the criteria referred to in **Article 24**. **Article 24** deals with limitation of fundamental rights and freedoms and provides that fundamental rights and freedoms may only be limited by a law of general application and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

21. In the event the petitioners are citizens they would be entitled to the identity documents issued in accordance with the **Registration of Persons Act** to enable them benefit fully as citizens. In granting or denying documents of registration, the registrar is entitled to address himself as to whether the applicant is entitled to such documents as a citizen. In this case, there is nothing to show that the registrar addressed his mind to the citizenship of the petitioners.

22. It is true that the High Court in **HC Misc. Appl. No. 774 of 2004** did not invalidate the procedure and process adopted by the Task Force but this case is about two persons, who claim to be citizens and they are entitled to have their case considered on its own merits. Indeed, the judges in the previous case noted that they could challenge the decision of the Registrar and I deem these proceedings to be such a challenge.

23. There is nothing on the record to show the nature and evidence that was proffered to enable the Registrar conclude that petitioners are not citizens. The criminal proceedings that would have established beyond reasonable doubt that the 1<sup>st</sup> petitioner was not a citizen were discontinued by the State.

24. Citizenship of any person is a very serious matter and that is why the provisions of **Article 24** are applied to any Act that is enacted to take away any person's right to citizenship. I would hasten to add that the citizenship of a natural born citizen cannot be taken away or privileges or benefits of citizenship taken away by refusal to provide documents of identification.

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. Appl. 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 the 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.

**Disposition**

28. Taking into account the circumstances of this case I now make the following orders;

- (a) The Principal Registrar of Persons be and is hereby directed to consider the petitioners' application for new generation identity cards within the next forty five (45) days from the date hereof.
- (b) The petitioners shall have the costs of this petition.

**DATED** and **DELIVERED** at **NAIROBI** this 21st day of January 2013

**D.S. MAJANJA**  
**JUDGE**

Mr K. Mungai instructed by Kinoti and Kibe Advocates for the petitioners.

Mr Wamosta, Litigation Counsel, instructed by the State Law Office for the respondents.