



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Election Petition 15 of 2008**

**MAHAMUD MUHUMED SIRAT .....PETITIONER**

**VERSUS**

**ALI HASSAN ABDIRAHMAN .....1<sup>ST</sup> RESPONDENT**

**IBRAHIM HISH ADAN (RETURNING OFFICER).....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> respondent, Ali Hassan Abdirahman moved this court by notice of motion purportedly made under the provisions of Sections 35(1), 43(1), 44(1) of the Constitution of Kenya, Section 4A of the National Assembly and Presidential Elections Act and Section 3A of the Civil Procedure Act seeking to have the election petition herein dismissed with costs essentially on the grounds that the petitioner is not a Kenyan citizen. It is the 1<sup>st</sup> respondent's case that the petitioner had voluntarily acquired the citizenship of Australia and therefore owed allegiance to the government of Australia. The 1<sup>st</sup> respondent contends that the petitioner was not eligible or ought not to have been registered as a voter in Kenya or offered himself and be nominated to be elected as a member of parliament in Kenya or further to seek any other elective post. He further states that the petitioner was unqualified and ineligible to participate in an election in Kenya because he was not a Kenyan citizen and therefore lacked legal and constitutional capacity to institute or proceed with the present election petition. The 1<sup>st</sup> respondent observed that the judicial review application filed by the petitioner in Nairobi HCCC Misc. Application No. 316 of 2008 Republic vs. Otieno Kajwang', Minister for Immigration and Registration of Persons and the Attorney General exparte Mahamud Muhumed Sirat did not determine the issue of the petitioner's citizenship and therefore it was upon this court to make such decision. The 1<sup>st</sup> respondent reiterated that the petitioner, having renounced his Kenyan citizenship, and having acquired Australian nationality lacks *locus standi* to file and present an election petition. The 1<sup>st</sup> respondent was of the view that the court lacks jurisdiction to hear any facets of the election petition as the petitioner herein was not a Kenyan national. He therefore

urged the court to dismiss the petition. The application is supported by the annexed affidavit of the 1<sup>st</sup> respondent.

The application is opposed. Mahamud Muhumed Sirat swore a replying affidavit in opposition to the application. He was of the view that the application was frivolous, vexatious, incompetent and an abuse of the court process and was meant to frustrate him from prosecuting the present election petition. The petitioner reiterated that he was a Kenya citizen by birth, both his parents being Kenyan. He further stated that he was a holder of a Kenyan national identity card. He denied having ever renounced his Kenyan citizenship in preference to an Australian one. He stated that he is a holder of a valid Kenyan passport issued to him by the immigration department. He was of the view that the court which considered the judicial review application had reprimanded the Minister of Immigration and Registration of Persons for purporting to determine the petitioner's citizenship and thereby purporting to deport him from the country. The petitioner reiterated that he had given evidence on the status of his Kenyan citizenship and was cross-examined at length by the advocate of the 1<sup>st</sup> respondent in regard to the same. He urged the court to disallow the application and proceed with the hearing of the petition.

Prior to the oral hearing of the application, counsel for the parties to this application, Mr. Ahmed Nasir for the 1<sup>st</sup> Respondent and Miss Kethi Kilonzo for the petitioner filed written submissions in support of their respective clients' position. They also filed a list of authorities in support of their respective opposing positions. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the rival arguments made by counsel of the parties. I am in agreement with Mr. Ahmed Nasir that if the court is to reach a determination that the petitioner is not a Kenyan citizen, then, this court will have no option but to dismiss the petition. Section 44 (1) of the Constitution grants this court jurisdiction to hear and determine any question whether a person has been validly elected as a member of the national assembly. Section 44(2) of the Constitution provides that a challenge to the election of a member of the national assembly may be made by any person who was entitled to vote in the election to which the petition relates. Section 35(1) of the Constitution provides that no person shall be qualified to be elected a member of the national assembly, *inter alia*, if at the time of his nomination by virtue of his own act, is under an acknowledgement of allegiance, obedience or adherence to a foreign state. To emphasize the importance of a member of the national assembly being Kenyan citizen, Section 39(1)(a) of the Constitution provides that a member of the national assembly shall vacate his seat if he ceases to be a citizen of Kenya. Section 34 of the Constitution states as follows in regard to the qualification of a person who wishes to be elected as member of the national assembly:

*“Subject to Section 35, a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless, at the date of his nomination for election-*

- (a) he is a citizen of Kenya who has attained the age of twenty-one years; and*
- (b) he is registered in some constituency as a voter in elections to the National Assembly; and*
- (c) he is able to speak and, unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active*

*part in the proceedings of the National Assembly; and*  
(d) *he is nominated by a political party in the manner prescribed by or under an Act of Parliament.”*

The Act of Parliament that deals with the actual nomination and election of a member of the National Assembly is the National Assembly and Presidential Elections Act. Section 4A of the Act provides that:

*“Any citizen who upon proof that he or she has attained the age of majority as evidenced by either a national identity card or a Kenya passport shall be registered as a voter upon application to that effect.”*

Regulation 15 of the Presidential and Parliamentary Elections Regulations made under the said Act specifies the manner by which a candidate shall be nominated.

In the present petition, it is not disputed that the 2<sup>nd</sup> respondent, as a returning officer of Wajir South Constituency, during the election that was held on 27<sup>th</sup> December 2007 was satisfied that indeed the petitioner was qualified to be nominated by a political party to vie as a member of the National Assembly of the said constituency. There was no objection lodged to the nomination of the petitioner as a candidate of the Wajir South Constituency on any ground, including in particular the ground that the petitioner is not a citizen of Kenya.

According to the 1<sup>st</sup> respondent, the petitioner was a citizen of Australia, having renounced his Kenyan citizenship. In support of this assertion, the 1<sup>st</sup> respondent annexed in the affidavit in support of his application a photocopy of what he alleges to be the petitioner’s Australian passport. The photocopy of a page of the alleged passport lists the number of passports as LR 9977140 which was issued on 28<sup>th</sup> September 2001 at Sydney in Australia. The holder of the said passport is indicated as Mahamud Muhumed Sirat born at Habaswein. The 1<sup>st</sup> respondent relied on copies of entries made in relation to the use of the said passport in the travel by the holder thereof in the years 2004 and 2005. The 1<sup>st</sup> respondent was unable to produce the original of the alleged Australian passport issued to the petitioner. The 1<sup>st</sup> respondent relied to a large extent a letter dated 23<sup>rd</sup> May 2008 that was allegedly addressed by the Australian High Commission at Nairobi to the director of Immigration Services. The said letter contains a disclaimer that the information disclosed therein was limited or restricted for the purposes of enforcement of criminal law or of a law imposing pecuniary penalty. There was a caveat that the information obtained therefrom could not be used for any other purpose other than for the purpose alluded to above to which the information was sought. In the said letter, it was indicated that the Australian High Commission could not confirm the genuineness or otherwise of the alleged passport number L9977140 without examining the original document with a view to comparing it to Australian government passport records. The 1<sup>st</sup> respondent further relied on information obtained by one James Nyatigoh, the principal immigration officer in-charge of investigations and immigrations at the Immigration Department. This information is contained in a replying affidavit which the said officer swore in response to judicial review application which the petitioner filed to quash the decision of the Minister in charge of immigration to deport him to Australia on the grounds that was an Australian citizen.

In response to the allegation that he was an Australian citizen, the petitioner, during the hearing of

the petition (*wherein he testified as PW1, and which testimony he has concluded,*) denied that he was an Australian citizen. He denied that he was the holder of an Australian passport, and particularly passport number L9977140. He produced his Kenyan identity card No. 9749650 Serial No.221329812 which was re-issued to him on 2<sup>nd</sup> October 2006. The petitioner explained that the original identity card which was issued to him got lost hence the new identity card. In reply to the present application, the petitioner annexed copies of his birth certificate, copies of the national identity cards of both his parents and a copy of a certificate of verification then issued by the Kenya government to Kenya Somalis. He also produced copies of his school certificates which confirmed that the petitioner was a student at Habaswein primary school and Sabunley secondary school in Wajir district. The 1<sup>st</sup> respondent has not disputed that the petitioner indeed has Kenyan parents and was a student in Kenya prior to his alleged renunciation of Kenyan citizenship and the adoption of the Australian one. Indeed, it was acknowledged by the 1<sup>st</sup> respondent during the testimony of the petitioner that the 1<sup>st</sup> respondent was the headmaster of the school where the petitioner was a student prior to the 1<sup>st</sup> respondent's change of career to become member of the National Assembly. What the respondent is saying is that when the petitioner went to Australia for further studies, he acquired Australian citizenship.

Is the evidence supplied by the 1<sup>st</sup> respondent of such nature that this court may reach determination that the petitioner is indeed an Australian citizen? It is apparent that the 1<sup>st</sup> respondent is relying on Section 97(1) of the Constitution that outlaws dual citizenship to a citizen of Kenya. Section 97(1) provides as follows:

*“97. (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.”*

Section 97(7) states as follows:

*“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.”*

Section 89 of the Constitution guarantees any person born in Kenya after 11<sup>th</sup> December 1963 of citizenship of Kenya if at the date of his birth one of his parents is a citizen of Kenya. The petitioner therefore, by virtue of his birth in Kenya, and the fact that both his parents are citizens of Kenya, is entitled citizenship of Kenya. My understanding of the 1<sup>st</sup> respondent's application is that by acquiring Australian citizenship and thereby being issued with an Australian passport, the petitioner had ceased to be a Kenyan citizen. Does Section 97(1), (3) and (7) of the Constitution deprive a Kenyan citizen by birth his citizenship upon acquiring nationality of another country? My reading of Section 88, 90, 92, 93, 94, 95 and 97 of the Constitution leads me to the conclusion that the said Sections of the Law prohibited

persons of a particular category who are citizens of other countries at the time Kenya attained independence. It does not apply to citizen of Kenya who acquired citizenship by virtue of their birth from acquiring citizenship of another country after attaining twenty-one years of age. The said Sections of the Constitution must be read in the context by which they were enacted. At the time Kenya attained independence, certain category of persons who qualified to acquire Kenyan citizenship, and having the option of retaining British citizenship, were being subtly encouraged to decide whether they desired to be citizens of the newly independent Kenya or be subject of the United Kingdom and colonies.

Even assuming that the petitioner had indeed acquired Australian citizenship, there is nothing in the constitution that specifically prohibits the petitioner from acquiring such citizenship while at the same time retaining his Kenyan citizenship provided that Australian law allows for its citizens to acquire and have dual nationality. There is only one exception; this is where the petitioner specifically renounces his citizenship of Kenya and acquires citizenship of another country that does not allow dual citizenship. The 1<sup>st</sup> respondent placed no evidence before this court that establishes that the petitioner has indeed renounced his citizenship of Kenya as contemplated by Section 97(7) of the Constitution.

My evaluation of the evidence availed to the court by the 1<sup>st</sup> respondent in support of his assertion that the petitioner is an Australian citizen and the response thereto by the petitioner reiterating that he is a Kenyan citizen leads me to the conclusion that the petitioner has indeed established that he is a Kenyan citizen. The evidence adduced by the 1<sup>st</sup> respondent does not stand up to legal scrutiny. The 1<sup>st</sup> respondent's reliance on documents which in a normal court proceedings cannot be admitted in evidence doomed his case. The passport alleged to be the Australian passport of the petitioner is just but a piece of paper which could have been generated or downloaded in any cyber café. The 1<sup>st</sup> respondent did not produce the alleged Australian passport of the petitioner to prove or establish that indeed the petitioner is a citizen of Australia. The Australian High Commission was in fact unable to give conclusive information regarding whether or not the petitioner possesses an Australian passport. I therefore hold that the petitioner is a citizen of Kenya as prima facie evidenced by his possession of a Kenyan identity card and a Kenyan passport. Under Section 5, 6 and 9 of Registration of Persons Act, the issuance of a Kenyan identity card to a person under the Act shall be prima facie evidence that the person was so registered. This court shall not, as it is being invited to by the 1<sup>st</sup> respondent, look behind or beyond the national identity card that the petitioner possesses that prima facie establishes his Kenyan citizenship. If the 1<sup>st</sup> respondent doubts or doubted the authenticity of the petitioner's national identity card, and further if he is convinced that the petitioner obtained registration as a Kenyan citizen whilst in actual fact he was an Australian national, the 1<sup>st</sup> respondent should have made complaint to the appropriate authorities to enable the petitioner to be charged with a criminal offence under the relevant provisions of The Registration of Persons Act, and in particular Section 14 of the said Act so as to secure the cancellation of the said identity card which has been duly issued. This court lacks jurisdiction to invalidate or declare invalid a national identity card which has been duly issued. That jurisdiction is reserved for the court that

will hear the criminal case if the 1<sup>st</sup> respondent is minded to lodge such a complaint. For the above reasons, it is evident that the 1<sup>st</sup> respondent's application is for dismissal.

I will not conclude this ruling without commenting on the timing of the attempted deportation of the petitioner by the Minister of Immigration and Registration of Persons. This court did order on 15<sup>th</sup> May 2008 that the scrutiny of the ballots that were cast in Wajir South constituency commence on 26<sup>th</sup> May 2008. The court gave certain directions in regard to how the ballots would be scrutinized. A day before this court was to commence the scrutiny of the ballots, the petitioner was arrested by plainclothes police officers and taken to Jomo Kenyatta International Airport with a view to having him deported to Australia on orders of the Minister of Immigration and Registration of Persons. Having evaluated both submissions and affidavit evidence adduced in this application, it was clear that the deportation of the petitioner was instigated by the 1<sup>st</sup> respondent in an apparent bid to frustrate the hearing and conclusion of this petition. The issue of whether the petitioner is or is not an Australian citizen has been a live issue in this petition from the date this court commenced the hearing of the petition. The 1<sup>st</sup> respondent's advocate cross-examined the petitioner at length in regard to his alleged Australian citizenship.

The 1<sup>st</sup> respondent had indicated that he would file an appropriate application before this court regarding nationality of the petitioner. This court did on 11<sup>th</sup> February 2008, direct the 1<sup>st</sup> respondent to file an application, if he so deemed fit, challenging the petition herein on the grounds that the petitioner is not a Kenyan citizen. The court directed the 1<sup>st</sup> respondent to file such application within thirty (30) days of the said date. The 1<sup>st</sup> respondent did no such thing. The hearing of the petition commenced only to be interrupted by the attempted deportation of the petitioner. The action taken by the Minister of Immigration and Registration of Persons at the instance of the 1<sup>st</sup> respondent has succeeded in delaying the expeditious disposal of this petition.

It is this court's view that the present any application is yet another attempt by the 1<sup>st</sup> respondent to scuttle and frustrate the hearing of this petition. The 1<sup>st</sup> respondent did not present any application before this court challenging the citizenship of the petitioner at the earliest possible opportunity because, as it has become now apparent, he wanted to use the information regarding the alleged Australian citizenship of the petitioner to secure the deportation of the petitioner without reference to this court. The court issued the earlier direction to enable the parties to this petition to present and argue all preliminary issues for determination by the court prior to the commencement of the hearing of the petition. Now that 1<sup>st</sup> respondent failed to achieve his objective of removing the petitioner out of the jurisdiction of this court is the time that the 1<sup>st</sup> respondent desires to obtain an opinion from this court in regard to the issue of nationality. Taking into consideration the events that have taken place in regard to the prosecution of this petition, it is evident that this application has been presented in abuse of the due process of this court.

The upshot of the above reasons is that the 1<sup>st</sup> respondent's application dated 5<sup>th</sup> November 2009 lacks merit and is hereby dismissed with costs.

DATED at NAIROBI this 22<sup>nd</sup> day of JANUARY, 2010.

**L. KIMARU**

**JUDGE**