



**Barre v Director-Legal National Registration Bureau & 2 others
(Constitutional Petition 388 of 2019) [2025] KEHC 8862 (KLR)
(Constitutional and Human Rights) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 388 OF 2019**

EC MWITA, J

JUNE 20, 2025

BETWEEN

ARTAN MIRE BARRE PETITIONER

AND

**DIRECTOR-LEGAL NATIONAL REGISTRATION BUREAU 1ST
RESPONDENT**

**MINISTRY OF INTERIOR& COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner was born in 1965 in Central Village, Bullapesa Sub Location, Isiolo Location Isiolo County. He holds national identification documents, namely; identity card No 11XXXXX11 and Passport No. No. 85XXXXX68.
2. In 2009, the petitioner was arrested and charged with obtaining registration by false pretence contrary to section 320 of the *Penal Code*; being in Kenya unlawfully contrary to section 13(2) of the Immigration Act; failure to report entry to the nearest immigration officers contrary to regulation 3 (i) of Immigration Regulations and Failure to register as an alien contrary to regulation 4(i) of the Aliens Regulations Order read with regulation 3(3) of the Alien Restriction Act, Cap 173 Laws of Kenya.
3. The petitioner was acquitted on 20th June 2010 on all counts under section 215 of the *Criminal Procedure Code* after the court found him not guilty. The prosecution did not appeal against the petitioner’s acquittal. However, the petitioner’s identity card was flagged and as a result he has not



been able to travel or renew his passport so that he can engage in gainful and legitimate business. The petitioner stated that he unsuccessfully made enquiries, requests and demands from relevant authorities.

4. The petitioner filed this petition, amended on 13th June 2023, seeking various declarations on violation of his rights and orders. The petition was supported by his affidavit and written submissions. The petitioner asserted that the 1st respondent's actions violated article 12 of *the Constitution* and his rights to non-discrimination and fair administrative action on account of his origin and flagging his data without a fair hearing. The respondents' actions violated articles 27, 28, 39, and 50(1) of *the Constitution*.
5. The petitioner argued that this court has jurisdiction under articles 165 (3) (b) and 258 of *the Constitution* to hear and determine this petition. The petitioner asserted that the petition met the threshold set in *Anarita Karimi Njeru v Attorney General* [1979] eKLR and *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR.
6. According to the petitioner, the respondents only filed grounds of opposition without a replying affidavit and, therefore, the petitioner's averments in the petition and depositions in the supporting affidavit were uncontroverted. Counsel relied on the decision in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR; *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR; *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] eKLR and *Gulleid v Registrar of Persons & another* [2021] KEHC 110 (KLR) to support their position.
7. The petitioner maintained that his rights and fundamental freedoms were violated; that the right to fair administrative action guaranteed under article 47 (1) of *the Constitution* was infringed and that despite his acquittal, the 1st respondent placed red flags on his data without giving him a chance to be heard or written reasons for doing so. Reliance was placed on the decisions in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR and *Miguna Miguna v Fred Okengo Matiang'i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party)* [2018] eKLR.
8. The petitioner again relied on articles 12 and 14(1) of *the Constitution* for the position that he is a Kenyan citizen having been born to Kenyan parents and is entitled to enjoy the benefits of citizenships subject to justifiable limitations. He further argued that the respondents violated his rights guaranteed articles 27 and 39 of *the Constitution*.

Respondent's case

9. The respondents opposed the petition through grounds of opposition and written submissions. It was their position that the petition offends the doctrine of constitutional avoidance and the issues raised are non-justiciable. Further, that no reasonable cause of action has been set out against them and the claims against them are unclear thus, the petition does not meet the threshold in *Anarita Karimi Njeru v Republic* [1979] eKLR.
10. The respondents dismissed the petitioner's allegations on discrimination and violation of his rights to citizenship. According to the respondents, this court has no jurisdiction over this petition. reliance was placed on the decisions in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] eKLR; *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR and *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* [2012] eKLR on jurisdiction.
11. The respondents contended that the petitioner having based his arguments on violation of article 47 of *the Constitution*, by dint of section 9(2) and (3) of the *Fair Administrative Action Act* 2015, this court is



precluded from reviewing their decision unless the petitioner had exhausted all the remedies available. They relied on *Republic v Kenya Revenue Authority Ex parte Style Industries Limited* [2019] eKLR.

12. The respondents again argued that under section 9(4) of the *Fair Administrative Action Act*, the petitioner needed to seek leave before filing this petition after meeting the requirements in section 9(1) of that Act. In the respondents' view, the issues raised in this petition do not meet constitutional threshold in terms of the position in the *CNM v WMG* [2018] eKLR. They place reliance on the decision in *Muema Mativo v Director of Criminal Investigations & 2 others; HFC Limited (Interested Party)* [2021] eKLR. They urged the court to dismiss the petition.

Determination

13. Upon considering the petition, response and arguments by parties, two issues arise for determination. First, whether the court has jurisdiction to hear and determine this matter. And, depending on the answer to this issue, whether the petitioner's rights and fundamental freedoms were violated.
14. The facts of this petition are not in dispute. The petitioner was born in 1965 in Isiolo County, then Isiolo District. He was thereafter issued with a Kenyan identity card and Passport. The petitioner was later charged and prosecuted for various offences relating to obtaining registration by false pretences; being in the country illegally and not registering as an alien. The petitioner went through trial but was acquitted on 20th June 2010 after the prosecution failed to prove any of the charges levelled against him. The allegation that the petitioner was not a Kenyan citizen therefore failed.
15. The petitioner's acquittal notwithstanding, the 1st respondent flagged his data and documents with the result that he could not travel. The petitioner felt aggrieved and filed this petition, arguing that the respondents' actions were a direct violation of his rights and fundamental freedoms. The respondents not only denied violating the petitioner's rights and fundamental freedoms, they also urged that this court has no jurisdiction over this matter as the petitioner did not exhaust alternative remedies available in law.

Jurisdiction

16. The respondents' position was that this court has no jurisdiction as the petitioner had not complied with provisions of the Fair Administrative Actions Act and ought to have exhausted the alternative remedy first or should have sought leave of this court to file this petition.
17. Jurisdiction is the power or authority given to a court to hear and determine a dispute presented before it. In that regard, when jurisdiction of the court is in issue, the Court has to carefully consider and determine this fundamental question of its jurisdiction over the matter. Whether a court has jurisdiction to hear a matter or not, is a threshold question to be determined based on the facts of the matter before court and at the earliest opportunity.
18. If a court determines that it has no jurisdiction to hear a matter, that should be the end of the matter. The court should not take any further step, but down its tools. (See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
19. Speaking on the issue of jurisdiction in *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated:

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the



Court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

20. In re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, the Supreme Court, after referring to the decision in Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited (supra), observed:
 30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.
21. It follows that jurisdiction of a court must flow from *the Constitution*, statute or both. The court should only exercise jurisdiction as conferred on it by *the Constitution* or the law. It must not act without jurisdiction.
22. The respondents argued that this court has no jurisdiction because the petitioner had as remedy under the *Fair Administrative Action Act*. According to the respondents, the petitioner having based his arguments on the violation of article 47 of *the Constitution*, by virtue of section 9(2) and (3) of that Act, this court is precluded from reviewing their decision unless the petitioner had exhausted all the remedies available.
23. Section 6 of the Act provides that a person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides for the decisions the tribunal may make in reviewing the administrative action. Section 8 states that an application for the review of an administrative action or an appeal under the Act should be determined within ninety days of filing the application.
24. On the other hand, section 9(1) provides that subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to by article 22(3) of *the Constitution*. Subsection (2) states that the High Court or a subordinate court under subsection (1) should not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
25. Under subsection (3), The High Court or a subordinate Court should, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant to first exhaust such remedy before instituting proceedings under subsection (1).
26. Sub section (4) states that notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice, while subsection (5) provides that a person aggrieved by an order made in exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.



27. The import of section 9(2) is that a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of *the Constitution* after being satisfied that alternative remedies have been exhausted. If not, the court should direct the person to first exhaust such remedies before instituting proceedings before it.
28. The petitioner's case is that he is a Kenyan born citizen and even after being acquitted of the charges of being in Kenya illegally and not registering as a foreigner, the 1st respondent flagged his identity card and passport with the effect that he is unable to travel without those documents, work and earn a living. The action of flagging his documents, he asserted, violated his rights guaranteed under articles 47 of *the Constitution*. It is because of the claim founded on article 47 that the respondents argued that this court has no jurisdiction because of section 9(2) of the *Fair Administrative Action Act* requires that alternative remedy be exhausted before approaching this court.
29. The petitioner was arrested and charged in 2009 and acquitted in 2010. The Act relied on was assented to on 27th May 2015 and commenced on 17th June 2015. It is plain that the Act did not exist at the time and therefore the petitioner did not fail to comply with its provisions. And even then, the respondents did not show when the action the petitioner complained of was taken; that the petitioner was aware of the action and that he deliberately failed to invoke the provisions of the Act. The respondents did not also argue that a remedy existed under any other law, identify that law which provided a remedy the petitioner should have exhausted before approaching this court. The respondents did not also demonstrate that such remedy was efficient and effective and identify the body that provided the alternative remedy.
30. In *Union of India v. T.R. Verma*, 1957 AIR 882, 1958 SCR 499, the Supreme Court of India stated that "It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ."
- (See also *Rajasthan State Electricity Board v. Union of India*-Civil Appeal No.7337 of 2002).
31. This court is of the view, that where the controversy is a purely legal one and does not involve disputed questions of fact but only questions of law, it should be decided by this court instead of dismissing the petition on the ground of availability of an alternative remedy. This view is informed by the fact that article 22 of *the Constitution* grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 (1) then provides that the High Court has jurisdiction in accordance with article 165 to hear and determine the applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights; while clause (3) provides for the remedies the court may grant in respect of proceedings brought under article 22.
32. Article 165(3) (b) again provides that this court has jurisdiction to determine the question whether a right and fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. And indeed, section 9(1) of the Act acknowledges that original jurisdiction is conferred on this court pursuant to article 22(3) of *the Constitution*. In that regard, everything else, including exhaustion of alternative remedy is subject to *the Constitution* and not otherwise.
33. As the Supreme of India observed in *Godrej sara lee Ltd v the Excise and Taxation Officer-Cum-Assessing Authority & Others* (Civil Appeal No 5393 of 2010) (1stFebruary2023) "entertainability" and "maintainability" of a writ petition are distinct concepts. Availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition. The rule which requires



a party to pursue the alternative remedy provided by a statute is a rule of policy, convenience and discretion rather than a rule of law.

34. In the circumstances, the respondents having not demonstrated that there was another remedy available to the petitioner then, which body could provide that remedy and that the remedy was efficacious and effective, the argument that this court has no jurisdiction must fail.

Violation of rights

35. The petitioner was born in Isiolo, Kenya in 1965 to Kenyan parents. He has a Kenyan identity card and passport. He was arrested and charged with migration offences and after a full trial, he was acquitted after the prosecution failed to prove its case beyond reasonable doubt. The respondents did not appeal against the petitioner's acquittal thus, the petitioner's position as a Kenyan citizen remains uncontested. The claim that he was not a Kenyan was not proved.

36. The fact that the petitioner is a Kenyan citizen notwithstanding, the respondents went ahead and flagged his identity card and passport without assigning any reason for doing so, with the result that he could not travel, a violation his rights guaranteed under article 47 (1) and (2) of *the Constitution*.

37. Article 47(1) provides that every person has the right to an administrative action that is expeditious, lawful, reasonable and procedurally fair. Sub article (2) adds that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Article 47 embodies the common law principle of natural justice and principally the right against bias and the right to a fair hearing intended to check illegality, unreasonableness or irrationality and procedural irregularity.

38. In *Krishnadatt v state of M.P & another Civil Appeal No(s). 4806 of 2011 (consolidated with Civil Appeal No. 4807; 4808 and Civil Appeal No 4809.-on 29 January, 2025*, the Supreme Court of India stated that judicial review of administrative actions are permissible on the grounds of illegality, unreasonableness or irrationality and procedural irregularity. Additionally, administrative action can be reviewed on the ground of proportionality if it affects fundamental rights guaranteed under *the Constitution*.

39. Regarding the right to be heard, the Court stated that the principle of the right to be heard (*audi alteram partem*) "lies at the very heart of procedural fairness, ensuring that no one is condemned or adversely affected, without being given an opportunity to present their case"

40. In *Mohinder Singh Gill v. Chief Election Commissioner, 1978 AIR 851, 1978 SCR (3) 272*, the same Court stated:

Today in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas, it is only improving the quality of government by injecting fair play into its wheels...law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by social necessity.

41. In *Maneka Gandhi vs Union Of India, 1978 AIR 597; 1978 SCR (2) 621*, Justice Bhagwati described natural justice as a profound 'humanising principle' designed to imbue the law with fairness and ensure justice.



42. In Kenya, Githinji, JA stated in *Judicial Service Commission v Mbalu Mutava & Another* [2015] KECA 741 (KLR)Githinji, JA;

22 ...The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge v Baldwin* (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.

(23) Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under *the Constitution*.

The common law principles of natural justice having been imported into article 47 of our Constitution, administrative actions must comply with not only the tenor, but also the spirit in article 47.

43. There is no doubt that the action taken against the petitioner was an administrative action. The action was required to be lawful, reasonable and procedurally fair. Regarding lawfulness, the respondents were under obligations to demonstrate to the court that the action of flagging the petitioner’s documents was lawful. The respondents did not attempt to show the court under which law they were acting in the manner they did. Respondents were also under duty to show the court that their action was reasonable. In other words, that the action was not arbitrary or obvious capricious decision-making. Reasonableness is the cornerstone of administrative law. It plays a crucial role in ensuring that decision-makers act fairly, justly, and within the bounds of their authority. Reasonableness means that decisions by administrative bodies should be rational, sensible, and not arbitrary or capricious.

44. An administrative action must be procedurally fair in that the affected person should be given a reasonable opportunity to be heard before the action is taken against him. The respondents did not demonstrate or even allege that the petitioner was subjected to some form of hearing before his documents were flagged. They also did not demonstrate that their action was based on any law to determine its lawfulness. The respondents acted arbitrarily and capriciously in making the impugned decision.

45. Moreover, article 47(2) requires that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Flagging of the petitioner’s documents had the singular effect of disabling his movement, a right guaranteed under article 39 of *the Constitution*. Indeed, the petitioner stated that the action had



rendered him immobile and he could not engage in legitimate business and earn a living, a claim the respondents did not dispute. Despite this, the respondents did not provide the petitioner with written reasons for their action.

46. As Githinji, JA stated in *Judicial Service Commission v Mbalu Mutava & Another* (supra);

23 ...Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

47. The respondents flagged the petitioner's documents without giving him a hearing and even then, without giving him written reason for their action after they had lost the allegation that he was not a Kenyan, an action that was in total disregard of the constitutional principles in article 47. In the circumstances, I am satisfied that the respondents violated the petitioner's rights and fundamental freedoms guaranteed by *the Constitution*.

48. Having considered the petition, response and arguments of the parties the conclusion I come to, is that the petitioner has made out a case and succeeds. Consequently, the court makes the following declarations and orders it considers appropriate:

1. Declaration is hereby issued that the 1st respondent's action purporting to put a red flag barring the petitioner from using his National Identity card and passport for travelling outside Kenya was made in violation of articles 47, 48 and 51(1) because it was done without due regard to the requirement of fair administrative action, access to justice and is therefore unconstitutional and invalid.
2. A declaration is hereby issued that restraining the petitioner from leaving Kenya without justification and without informing him of the reasons for the red flags was deplorable and inhumane and a violation of the petitioner's constitutional rights hence illegal, null and void.
3. An order of certiorari is hereby issued quashing the red flags placed on the petitioner's data held by the 1st respondent or any other public office.
4. An order of mandamus is hereby issued directing the respondents to immediately remove the red flags placed against the petitioner's National Identity Card, Passport or security data base in their custody.
5. The respondents do pay costs of the petition to the petitioner.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025

E C MWITA

JUDGE

