Egal v Director General of Kenya Citizens and Foreign National Services & 2 others (Petition E127 of 2023) [2024] KEHC 183 (KLR) (Constitutional and Human Rights) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E127 OF 2023

LN MUGAMBI, J

JANUARY 19, 2024

BETWEEN

HAMZA MOHAMED OSMAN EGAL ..... PETITIONER

AND

DIRECTOR GENERAL OF KENYA CITIZENS AND FOREIGN NATIONAL SERVICES ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS ..... 3RD RESPONDENT

Five year delay in processing a citizenship application is inordinate and a violation of the right to fair administrative action.

Reported by John Ribia

Constitutional Law *- citizenship – renounced citizenship – renounced citizenship by birth under the repealed Constitution due to lack of dual citizenship – status of such a person – application for dual citizenship under the Constitution of Kenya, 2010 - whether a person who was a citizen by birth who renounced their Kenyan citizenship under the repealed Constitution due to the lack of legal provisions on dual citizenship was automatically entitled to citizenship rights under the Constitution of Kenya, 2010 or whether it was subject to a formal application process - what did a person who renounced their Kenyan citizenship under the repealed Constitution due to lack of dual citizenship need to prove to regain their citizenship - Constitution of Kenya, 2010 articles 12(1)(a), 14(1), 39(3), and 47(2); Kenya Citizenship and Immigration Act (Cap 170) section 10.*

Constitutional Law *- fundamental rights and freedoms - right to fair administrative action - whether the Director General of Kenya Citizens and Foreign National Services violated the right to fair administrative action of the petitioner by declaring the petitioner a prohibited/inadmissible person and issuing red alerts, without*

providing specific reasons or evidence to justify such actions - whether a delay of five years in processing an application for citizenship was a violation of the right to fair administrative action - Constitution of Kenya, 2010 articles 12(1)(a), 14(1), 39(3), and 47(2).

Constitutional Law *- citizenship - proof of citizenship - whether a person, who was a citizen by birth who renounced their Kenyan citizenship under the repealed Constitution, who possessed a Kenyan birth certificate and national identity card, despite not having regained Kenyan citizenship, cast doubt on the authenticity of those documents and the integrity of the administrative processes involved - Constitution of Kenya, 2010 articles 12(1)(a), 14(1), 39(3), and 47(2); Kenya Citizenship and Immigration Act (Cap 170) section 10; Registration of Persons Act (Cap 107) section 2.*

Jurisdiction *- jurisdiction of the High Court - whether the High Court had the mandate to assess the merits of an application to regain Kenyan citizenship or whether that responsibility exclusively lay with the Cabinet Secretary as provided under section 10 of the Kenya Citizenship and Immigration Act - whether the High Court had the power to direct that was required under article 14 (5) of the Constitution, which provided for an application to regain citizenship by birth - Constitution of Kenya, 2010 articles 12(1)(a), 14(1), 39(3), and 47(2); Kenya Citizenship and Immigration Act (Cap 170) section 10; Registration of Persons Act (Cap 107) section 2.*

Brief facts

The petitioner was born in 1983 to a Kenyan mother. After his mother's death in 1996, he moved to Kenya as a minor and lived with his grandmother, attending school until 2000. He later relocated to the United Kingdom, where he pursued higher education and became a citizen.

In 2012, he returned to Kenya and applied for a birth certificate as a Kenyan citizen born abroad, which he received in 2013. He also applied for a Kenyan national identity card in 2015, which was issued in 2017. Despite those documents, the petitioner was declared inadmissible by the 1st respondent in December 2016 and barred from entering Kenya without a clear explanation.

On December 20, 2017, the petitioner applied to regain Kenyan citizenship under article 14(5) of the Constitution, but the application remained unprocessed for over five years. He alleged that the delay, as well as the continued issuance of red alerts against him, violated his constitutional rights. The respondents denied any deliberate refusal to process the application and cited the sensitive nature of citizenship matters.

Issues

i. Whether a person who was a citizen by birth who renounced their Kenyan citizenship under the repealed Constitution due to the lack of legal provisions on dual citizenship then, was automatically entitled to citizenship rights under the Constitution of Kenya, 2010 or whether it was subject to a formal application process.

ii. What did a person who renounced their Kenyan citizenship (citizenship by birth) under the repealed Constitution need to prove to regain their citizenship?

iii. Whether the Director General of Kenya Citizens and Foreign National Services violated the right to fair administrative action of the petitioner by declaring the petitioner a prohibited/inadmissible person and issuing red alerts, without providing specific reasons or evidence to justify such actions.

iv. Whether a person who was a citizen by birth who renounced their Kenyan citizenship under the repealed Constitution but possessed a Kenyan birth certificate and national identity card, despite not having regained Kenyan citizenship, cast doubt on the authenticity of those documents and the integrity of the administrative processes involved.

v. Whether the High Court had the mandate to assess the merits of an application to regain Kenyan citizenship or whether that responsibility exclusively lay with the Cabinet Secretary as provided under section 10 of the Kenya Citizenship and Immigration Act.

vi. Whether the High Court had the power to direct what was required for an application to regain citizenship by birth under article 14 (5) of the Constitution.

Held

1. The Constitution of Kenya, 2010 (the Constitution) was a departure from the repealed Constitution in that it allowed dual citizenship which was not possible in the repealed Constitution. Previously, if one became a citizen of another country, he was required to renounce his Kenyan citizenship. That was no longer the case. Under the Constitution, Kenyan citizens by birth that had lost citizenship after they became citizens of other countries could now apply to regain their Kenyan citizenship.
2. The petitioner was born of a Kenyan mother before the effective date outside Kenya. The petitioner became a citizen of United Kingdom. The repealed Constitution did not permit dual citizenship. He could not become a Kenyan citizen. By becoming a citizen of United Kingdom, he had forfeited his Kenyan Citizenship. Nevertheless, it was possible to regain his citizenship. By dint of article 14(5) of the Constitution, that did not occur automatically as it was subject to an application by the person concerned.
3. The petitioner could not claim that he was a Kenyan citizen unless and until the application referred to in article 14(5) of the Constitution had been made and fully processed. The Constitution was silent on where the application under article 14(5) was to be made. The procedure and the requirements for the application were provided for in section 10 of the Kenya Citizenship and Immigration Act.
4. The two major requirements specified in section 10(2) of the Kenyan Citizenship and Immigration Act (the Act) were that: the applicant was required to attach proof of previous Kenyan citizenship and the proof of citizenship of the other country. In regard to previous Kenyan citizenship, it meant that such an applicant must demonstrate to the satisfaction of the Cabinet Secretary concerned that he once was, or was previously qualified to be a citizen of Kenya by birth save for the legal limitations that existed to bar dual citizenship at the time. The Cabinet Secretary concerned had a responsibility of verifying the evidence provided to ensure that it was credible hence there was no such thing as automatic conferment of citizenship. The respondents were not mandatorily required to accord citizenship status as no consideration was required under article 14 (5) of the Constitution. Conferment would only be done once proof of previous Kenyan Citizenship had been provided and was successfully authenticated.
5. The court could not be the one to undertake the task of assessing the sufficiency and the quality of proof provided by the petitioner which was part of processing the application. That was a statutory responsibility given to the 1st respondent through the Cabinet Secretary concerned under section 10 of the Kenya Citizenship and Immigration Act.
6. The acquisition of the Certificate of Birth by a Kenyan citizen born abroad by the petitioner and the subsequent issuance to him of the Kenyan National Identity Card prior to regaining his Kenyan citizenship was highly irregular since a Kenyan Identity card could only be issued to a citizen. The 1st respondent was thus justified in casting doubts on the validity of those two documents that the petitioner had presented in support of his application to regain citizenship.
7. The court declined to consider the merit of the application as the primary responsibility of processing an application to regain Kenyan Citizenship lay with the Cabinet Secretary concerned. The intervention by the court could be raised if there was manifest injustice in the process such as the respondent's deliberate refusal to perform the statutory mandate of considering the application, the respondent acting outside its legal mandate that was given, or considering the application but arriving at an unreasonable or arbitrary decision.
8. The status of citizenship conferred one with a bundle of privileges and rights. Meticulous scrutiny to detect fraudulent cases to ensure that only genuine cases were approved was necessary. For the applicants, prolonged delay in processing their applications in a way also denied them the opportunity to enjoy the rights as citizens. It was important to strike a balance between the interests of the state to protect itself from hastily processing such applications and making mistakes and the rights of the applicants to have their applications considered expeditiously.

9. In determining if the delay complained of was unreasonable, the court must examine the length of delay, reasons for the delay, the conduct of the party complaining about the delay and finally, whether real prejudice had been demonstrated by the petitioner arising from that delay. It was five years since the petitioner made the application. It was acknowledged by the respondent in April, 2023. Although there was no time limit given for processing such applications, a delay of five years to process an application was such a long period to keep an applicant waiting.
10. The 1st respondent had no specific reasons, just general reasons. The need for extra caution because matters of citizenship were sensitive, no more. The respondent had never reverted to the petitioner asking for supply of any additional information or clarification on any information he had given. The reasons for such long delay by the respondent were not intrinsically convincing. That was an inexcusable slackness.
11. Nothing so far demonstrated that the petitioner had had his fair share of blame in the matter. He stated that he submitted all what was required in good time.
12. The petitioner demonstrated that he had suffered untold prejudice due to the inordinate delay. He had been barred from setting foot in Kenya. He had relatives he could not visit. Assuming that he was a citizen, an order barring from visiting Kenya would not arise. His right of movement had been curtailed. Article 4 (2) the Constitution provided that if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for the action. Despite writing to the 1st respondent, no written reasons had been provided.
13. The 1st respondent had inordinately delayed considering the petitioner's application for regaining of citizenship which was a violation of article 47(1) of the Constitution and section 4 of Fair Administrative Actions Act that entitled every person the right to administrative action that was expeditious. Moreover, the refusal to give written reasons for the action which had outrightly affected the petitioner's right of movement violated article 47(2) of the Constitution.
14. One of the requirements that must be present for one to be declared an inadmissible person was that the person must not be a Kenyan Citizen. The petitioner was not a Kenyan Citizen until and unless the application to regain Kenyan Citizenship under article 14(5) of the Constitution was fully processed. Having been a citizen of another country before 2010, he could not at the same time be a Kenyan citizen as dual citizenship was not allowed then. He must first apply and the application was subject to proof of his previous citizenship. The acquisition of the identity card was therefore, irregular.
15. The reason that the respondent gave in the notice to remove him was a blanket reason that did not enumerate any of the specific reasons under section 33(2) of the Act. Failure to specify the reason for the petitioner's removal, made the notice vague. The petitioner ought to have been told at the point of expulsion/removal the exact reason for such removal.
16. Even assuming it was a security report that advised the expulsion of the petitioner, which due to sensitive nature of its contents, could not be publicly revealed, there was no attempt made to brief the court. It was impossible to tell whether such a report existed.
17. The petitioner's rights were violated especially the failure to vividly give him the reasons for his removal yet he had been residing in Kenya. The actions by the respondent against the petitioner were taken arbitrarily in the absence of reasonable grounds to justify the same.
18. Damages were awarded at the discretion of the court. The petitioner made a serious admission. He was in possession of documents issuable to Kenyan citizens whilst his application for regaining of citizenship was still pending. That was highly irregular. It was not appropriate to grant damages to the petitioner taking into account that conduct.

Petition partly allowed.

Orders

i. *Declaration issued that by arbitrarily declaring the petitioner an inadmissible person without specifying the reasons to him and further failing to provide him with the written reasons for the decision even after he had sought the same, the 1st respondent violated the petitioner's right to fair administrative action under article 47 (2) of the Constitution.*

ii. *Declaration issued that there had been inordinate delay by the respondents in processing the petitioner's application to regain citizenship which was a violation petitioner's right to an expeditious administrative action under article 47 (1) of the Constitution and section 4 of the Fair Administrative Actions Act.*

iii. *An order of mandamus was issued compelling the 1st respondent to expedite the processing of the application for regaining of Kenyan Citizenship by the petitioner and advise the petitioner on the results of his application not later than the six months from the date of the instant order.*

iv. *Each party was to bear its own costs.*

Citations

Cases

Kenya

1. *Bashir Mohamed Jama Abdi (on Behalf of the Subject: Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed) v Minister for Immigration and Registration of Persons & 2 others* Petition 586 of 2012; [2014] KEHC 7673 (KLR) - (Applied)
2. *Republic v Julius Kamau Mbugua* Criminal Case 12 of 2006; [2011] KEHC 459 (KLR) - (Applied)
3. *Republic v Lucas M Maitha Chairman Betting Control and Licensing Board & 2 others Ex-Parte Interactive Gaming and Lotteries Limited* Miscellaneous Civil Application 370 of 2010; [2015] KEHC 6746 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 12(1)(a); 14(1)(5); 39(3); 47(2) - (Interpreted)
2. Fair Administrative Action Act (cap 7L) section 4 - (Interpreted)
3. Kenya Citizenship and Immigration Act (cap 170) section 10 - (Interpreted)
4. Refugees Act (cap 173) section 33(2) - (Interpreted)
5. Registration of Persons Act (cap 107) - (Interpreted)

Advocates

None mentioned

JUDGMENT

Background

1. The Petition is dated April 20, 2023. The gravamen of this Petition is the claim by the petitioner that although he is currently a citizen of United Kingdom of Great Britain and Northern Ireland, he is a Kenyan citizen by birth due to the fact that he was born of Kenyan mother yet the respondents have frustrated his efforts for Kenyan citizenship by inordinately delaying processing of his application. That sometime in December, 2016; the respondents went to the extent of declaring him an inadmissible person and barred him from entering Kenya despite glaring evidence of his Kenyan roots.

Petitioner's Case

2. the petitioner stated he currently resides and holds a passport of United Kingdom of Great Britain and Northern Ireland. He however contends that he was was born of Kenyan mother in the year 1983 hence is a Kenyan Citizen by birth.

3. He stated that in 1996, as a minor he moved to Kenya after the death of his mother to live with his grandmother. Between 1996 and 2000 he attended schools in Kenya.

4. He subsequently relocated to United Kingdom to study for his degree in Law and a Masters in Public Administration. At the time of relocation to the United Kingdom, he was still a minor. As such, he stated that he could not have applied for the Kenyan identity card and the birth certificate.

5. In the year 2012 he and his family returned to Kenya. That is when he applied for the birth certificate of a Kenyan Citizen born abroad.

6. In the year 2015, he applied for his Kenyan National Identity card which was issued in 2017 after a thorough vetting process.

7. the petitioner disclosed that he has close relatives who are Kenyan citizens living in various parts of the country. Further, his wife and children are also Kenyan citizens though residing with him in the United Kingdom.

8. During the period he lived in Kenya, he worked with various organizations in the field of Agriculture, Human Rights and Education.

9. In December, 2016; he was travelling back to Kenya after a trip when he was denied entry on the ground that he was an inadmissible person. He was not given any explanation.

10. He stated that he has subsequently tried on several occasions to come to Kenya but this has not been thwarted by the red alerts issued by the respondents.

11. That despite seeking reasons for the respondents actions none has been provided to him in violation article 47(2) of right to fair administrative action.

12. That he applied to regain his Kenyan Citizenship as required by law on December 20, 2017 but the application has never been dealt with to date which he protested amounts to inordinate delay.

13. As a consequence, the petitioner sought the following reliefs:

    a. A declaration that the actions by the respondents of arbitrarily issuing red alert and/or notice to return a prohibited immigrant/inadmissible person against the petitioner is unlawful and in violation of article 12(1)(a), 14(1), 39(3) and 47(2) of the *Constitution*.

    b. A declaration that the petitioner is a Kenyan Citizen by birth entitled to rights, privileges and benefits of citizenship including, but not limited to, the right to enter, remain in and reside anywhere in Kenya

    c. A declaration that the inordinate delay by the respondents in processing of the petitioner's application for regaining of citizenship is unlawful and in violation of articles 12(1)(a), 14(1), 14(5), 39(3) and 47(2) of *the Constitution*.

    d. An order of *certiorari* removing into the High Court and quashing the decision, declaration and directive of the respondents arbitrarily issuing a red alert and/or notice to return/ convey a prohibited immigrant /inadmissible person against the petitioner.

e. An order of *mandamus* compelling the respondents to issue the petitioner with Kenyan Citizenship in accordance with article 14(5) of *the Constitution*.

f. An order of prohibition prohibiting the respondents from reissuing and/or further issuing any red alert and/or notice to return/convey a prohibited immigrant/inadmissible person against the petitioner.

g. General damages

h. Costs and interests.

Respondents Case

14. Only the 1st respondent filed a replying affidavit through a Senior Immigration Officer, Christine Kinyua sworn on June 3, 2023.

15. In its response, the 1st respondent denied that it has deliberately refused to finalize the application for citizenship by the petitioner and indicated that it was still deliberating on the same.

16. It stated that matters of citizenship are sensitive and have to be handled gradually, not only in Kenya but also the world over since proof of citizenship has to be established beyond any doubt because the 1st respondent has to ensure citizenship is being conferred to the right person.

17. That previously, Kenyan primary documents have been acquired by some foreigners through misrepresentation and fraud thus acquisition of a Kenyan birth certificate in 2013 and Kenyan identity card in 2017 does not automatically confer Kenyan citizenship.

18. The 1st respondent questioned why the petitioner had to wait for 30 years to apply for birth certificate of Kenyan born abroad yet in his Petition and paragraph 8 of the supporting affidavit he had moved to Kenya in 1996 and attended schools in Kenya having left for United Kingdom in the year 2000. Moreover, the 1st respondent contended that it is common knowledge that for one to register in any school in Kenya, a birth certificate and a passport for a foreigner is required hence wondered what the petitioner used to register in the Kenyan Schools he claimed to have studied in until the year 2000.

19. The 1st respondent contended that the order of inadmissible person was issued on the advice of the security agency hence the matter did not originate from the 1st respondent.

20. The 1st respondent urged the court not to issue the orders sought as granting those orders would amount to usurping the constitutional and statutory mandate of the respondents. Further that the petitioner has willfully failed and neglected to exhaust all the administrative avenues available to him.

21. That Petition is frivolous and vexatious.

Rejoinder

22. In a further affidavit sworn on 26th June, the petitioner reiterated that being born of a Kenyan mother and living half of his life in Kenya and having majority of his close family members hailing from Kenya and living in Kenya; he is entitled to regain his citizenship and it is the responsibility of the 1st respondent to ensure he regains it as it is a right granted to him by *the Constitution*.

23. He countered that it has been five years since he made the first application to gain his citizenship and ever since, the respondents have not indicated what consideration they have been making. He contended that he has been continuously raising the issue of inordinate delay in processing of his application with the respondentand continued enforcement of the red alerts against him as shown in

the annexures of his supporting affidavit yet the Respondent still want him to pursue administrative avenues.

24. That the claim that he could have acquired the Kenyan documents fraudulently is made without evidence and is baseless. Further, to suggest that he could have applied for the birth certificate between 1996 - 2000 is being ignorant of the fact that he was still a minor. Again, pre-2010, Kenyan laws did not allow dual citizenship and could thus not have applied for the Kenyan Birth Certificate while at the same time being a citizen of United Kingdom.

25. That it is baffling that the respondents question his attendance to Kenyan Schools yet he was a minor. He asserted that he was a citizen of United Kingdom and had legal documentation to allow him to attend any school of his choice.

26. That the respondents ought to have produced the security report that they allegedly based their actions against the petitioner on.

27. He winded up by stating his belief that the treatment meted on him by the respondents is purely because of his Somali ethnicity and nothing else and was the same justification that he was a security risk without any due process.

Issues

1. What is the Constitutional and statutory position on regaining of Kenyan Citizenship by birth, is it automatically conferred by the operation of law or subject to a legal process?

2. Having regard to the relevant Constitutional and

3. Have the respondents inordinately delayed the petitioner's application of regaining Kenyan citizenship?

4. Whether the 1st respondent's order declaring the petitioner a prohibited/inadmissible person and subsequent issuance of red alerts barring him from coming to Kenya violated his rights under *the Constitution*?

5. Having regard to the circumstances of this case, what reliefs should this court grant, if any?

1. What is the Constitutional and statutory position on regaining of Kenyan Citizenship by birth, is it automatically conferred by the operation of law or subject to a legal process? Does the court have jurisdiction over this matter?

28. The current Constitution is a departure from the previous one which was repealed in 2010 in that it allows dual citizenship which was not possible in pre-2010 Constitution. Previously, if one became a citizen of another country, he was required to renounce his Kenyan citizenship. This is no longer the case. Under the present Constitution, Kenyan citizens by birth that had lost citizenship after they became citizens of other countries can now apply to regain their Kenyan citizenship.

29. Article 14 of *the Constitution* states:

> 14. Citizenship by birth
>
> (1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.
>
> (2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendents of Kenyan citizens who are born outside Kenya.

(4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

(5) A person who is a Kenyan citizen by birth and who has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

30. Article 16 provides:

16. A citizen by birth does not lose citizenship by acquiring the citizenship of another country.

31. the petitioner was born of a Kenyan mother before the effective date outside Kenya. This is deposed in his supporting affidavit. He became a citizen of United Kingdom. The pre-2010 Constitution did not permit dual citizenship. It means he could not become a Kenyan citizen. By becoming a citizen of United Kingdom, he had forfeited his Kenyan Citizenship. Nevertheless, it is now possible to regain his citizenship. By dint of article 14(5) of *the Constitution*, this does not occur automatically as it is subject to an application by the person concerned.

32. the petitioner having ceased to be a citizen of Kenya by becoming a citizen of United Kingdom under pre- 2010 Constitution cannot, therefore, claim that he is a Kenyan citizen unless and until the application referred to in article 14 (5) of *the Constitution* has been made and fully processed.

33. *The Constitution* is silent on where the application under article 14 (5) is to be made. The procedure and the requirements for the application are provided for in the *Kenya Citizenship and Immigration Act, 2011* section 10 which provides as follows:

Regaining Citizenship

1) A person who was a citizen of Kenya by birth and who ceased to be a citizen of Kenya because he or she acquired the citizenship of another country may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship.

(2) The application under subsection (1) shall be accompanied by:

(a) proof of applicant's previous Kenyan citizenship;

(b) proof of citizenship of the other country.

(3) Upon receipt of an application made under subsection (1), the Cabinet Secretary shall cause the application to be registered and keep a record of such application.

(4) The Cabinet Secretary shall after registering an application, issue a certificate in a prescribed form to the applicant.

(5) The Cabinet Secretary may issue an extract of the register to the applicant and such further extracts to such third parties as shall be entitled upon application and payment of such fees as may be prescribed.

34. The two major requirements specified in section 10(2) of the *Kenyan Citizenship and Immigration Act* are that: the applicant is required to attach proof of previous Kenyan citizenship and the proof of

citizenship of the other country. In regard to previous Kenyan citizenship, it therefore means that such an applicant must demonstrate to the satisfaction of the Cabinet Secretary concerned that he once was, or was previously qualified to be a citizen of Kenya by birth save for the legal limitations that existed to bar dual citizenship at the time. The Cabinet Secretary concerned has a responsibility of verifying the evidence provided to ensure that it is credible hence there no such thing as automatic conferment of citizenship. The submission by the petitioner's counsel to the effect the respondents are mandatorily required to accord citizenship status as no consideration is required under article 14(5) is misconceived. Conferment would only be done once proof of previous Kenyan Citizenship has been provided and is successfully authenticated.

35. the petitioner's contention that he is a Kenyan citizen having been born of the Kenyan mother, that he has majority of his close relatives in Kenya, has a wife and children who are all Kenyans are relevant facts which the 1st Respondent through the Cabinet Secretary concerned may consider in assessing whether adequate proof has been tabled. This also goes to the issue of birth to a Kenyan mother which is also an important factor that the 1st Respondent has to verify.

36. This court cannot be the one to undertake the task assessing the sufficiency and the quality of proof provided by the petitioner which is part processing the application. This is a statutory responsibility given to the 1st Respondent through the Cabinet Secretary concerned under section 10 of the *Kenya Citizenship and Immigration Act*. In *Pevans East Africa Ltd & Another v Chairman, Betting Control & Licensing Board & 7 Others* (2018) eKLR the court held:

> "...Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over the organs which constitutional power reposes, because those organs have the expertise in their area of mandate which courts do not normally have. We must accordingly shun invitation to dabble in matters..."

37. The above notwithstanding, this court finds it necessary to comment on one particular contention by the petitioner which it considered to unsettling. the petitioner deposed that he possesses the birth certificate of a Kenyan Citizen born abroad and the Kenyan National Identity Card. This is despite the fact that the petitioner is yet to regain his Kenyan Citizenship. The certificate of birth of Kenyan Citizen born abroad was issued to him upon application in 2013, he was 30 years old by then and a citizen of United Kingdom. Similarly, he went ahead and applied for the Kenyan National identity card in 2015 and was issued to him in 2017, was still a citizen of United Kingdom. How then did the petitioner, who had lost Kenyan citizenship after becoming a citizen of another country pre-2010 obtain the Kenyan identity card which is a document reserved for Kenyan citizens before regaining his Kenyan citizenship?

38. The *Registration of Persons Act*, cap 107; states in section 2:

> Application:
>
> > This Act shall apply to all persons who are citizens of Kenya and who have attained the age of eighteen years or over or where no proof of age exists, are of the apparent age of eighteen years or over.

39. In *Bashir Mohamed Jama Abdi v The Minister for Immigration and Registration of Persons and 2 others* (2014) eKLR Justice Lenaola remarked thus:

> "...What I have seen is an application for an Identity card pursuant to provisions of *Registration of Persons Act*, cap 107. That application could only be made after and not before an application to regain citizenship had been made so it was clearly premature..."

40. The acquisition of the Certificate of birth by a Kenyan citizen born abroad by the petitioner and the subsequent issuance to him of the Kenyan National Identity Card prior to regaining his Kenyan citizenship is highly irregular since a Kenyan Identity card can only be issued to a citizen. The 1st Respondent was thus justified in casting doubts on the validity of those two documents that the petitioner had presented in support of his application to regain citizenship.

41. The upshot of the foregoing is that the court declines to consider the merit of the application as the primary responsibility of processing an application to regain Kenyan Citizenship lies with the Cabinet Secretary concerned. The intervention by the court can raised if there is manifest injustice in the process such as the respondent's deliberate refusal to perform the statutory mandate of considering the application, the respondent acting outside its legal mandate that is given, or considering the application but arriving at an unreasonable or arbitrary decision. This now takes me to the next issue.

2. Has the 1st Respondent inordinately delayed the petitioner's application of regaining Kenyan citizenship?

42. the petitioner contended that the respondent has inordinately delayed the processing his application to regain his Kenyan Citizenship. He deposed that his application was made in the year 2017 but to date, five years later, the same remains pending. Further, that this state of affairs is also exacerbated by red alerts that have been issued by the 1st respondent barring the petitioner from coming to Kenya.

43. The 1st respondent denied that it has deliberately failed or refused to finalize processing the application by the petitioner and pointed out that it had acknowledged the application by the petitioner to regain citizenship through an acknowledgment dated April 6, 2023 which the petitioner exhibited and was being informed that he will be contacted once it had been processed and that the matter was still under consideration.

44. *The Constitution* provides the benchmark against which administrative actions that affect an individual must adhere to. Article 47 of *the Constitution* states:

> 47. Fair administrative action
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) 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.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> (b) promote efficient administration.

45. Parliament went ahead and enacted the *Fair Administrative Actions Act* which amplifies article 47. Section 4 of the Act emphasizes the need to conclude an administrative action timeously. It states:

> 3. Administrative action to be taken expeditiously, efficiently, lawfully etc (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

46. In *Julius Kamau Mbugua Vs Republic* (2010) eKLR it was held that the determination of whether or not there has been unreasonable delay is not a question of mathematical or administrative formula to be applied but rather it is a judicial determination by the court based on consideration of all the relevant factors within the context of the entire proceedings.

47. the court must thus look at all the circumstances of the matter in question in deciding whether or not delay complained of is unreasonable for it is a question of fact that is specific to a particular case.

48. In the instant matter, the petitioner applied for regaining of citizenship in the year 2017. This is not disputed by the 1st respondent which five years later has not processed the application.

49. The respondent acknowledged receipt of that application. By way of response it also stated that the application is still being deliberated upon and that it needs to approach the whole issue with caution because matters of citizenship are sensitive and are done gradually to ensure that the same is conferred to the right person.

50. The status of citizenship confers one with a bundle of privileges and rights. As stated by the respondent, meticulous scrutiny to detect fraudulent cases to ensure that only genuine cases are approved is necessary. It is also equally important to underscore the fact that for the applicants, prolonged delay in processing their applications in a way also denies them the opportunity to enjoy the rights as citizens. It is therefore important to strike a balance between the interests of the state to protect itself from hastily processing such applications and making mistakes and the rights of the applicants to have their applications considered expeditiously.

51. In determining if the delay complained of is unreasonable, the court must examine the length of delay, reasons for the delay, the conduct of the party complaining about the delay and finally, whether real prejudice has been demonstrated by the petitioner arising from that delay.

52. In the instant case, since the petitioner made the application, it is five years ago. It was acknowledged by the respondent in April, 2023. Although there is no time limit given for processing such applications, a delay of five years to process an application is such a long period to keep an applicant waiting.

53. What were the reasons? The 1st respondent has no specific reasons, just general reasons. The need for extra caution because matters of citizenship are sensitive, no more. The respondent has never reverted to the petitioner asking for supply of any additional information or clarification on any information he had given. The reasons for such long delay by the respondent are not intrinsically convincing. This is an inexcusable slackness.

54. On the issue of the conduct by the petitioner, nothing so far demonstrates that the petitioner has had his fair share of blame in this matter. He stated he submitted all what was required. So far, nothing has been required of him by the 1st respondent which he has delayed that can be said to have contributed to the said delay.

55. Finally, is the question of prejudice? the petitioner has been able to demonstrate that he has suffered untold prejudice due to the inordinate delay. He has been barred from setting foot in Kenya. He says he has relatives he cannot visit. Assuming that he was a citizen, an order barring from visiting Kenya would

not arise. His right of movement has been curtailed. Under article 47(2) *the Constitution* provides: "If a right or fundamental freedom of a person has been or likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

56. the petitioner deposed that despite writing to the 1st respondent, no written reasons have been provided.

57. The upshot of the foregoing is that the court finds that the 1st respondent has inordinately delayed considering the petitioner's application of regaining of citizenship which is a violation of article 47(1) of *the Constitution* and section 4 of *Fair Administrative Actions Act* that entitles every person the right to administrative action that is expeditious. Moreover, the refusal to give written reasons for the action which has out rightly affected the petitioner right of movement violates article 47(2) of *the Constitution*.

4. Whether the 1st Respondent's order declaring the petitioner a prohibited/inadmissible person and subsequent issuance of red alerts barring him from coming to Kenya violated his rights under *the Constitution*?

58. the petitioner deposed that in the year 2016, the 1st respondent declared him a prohibited/inadmissible person as he was returning to Kenya from a trip and proceeded thereafter to issue red alerts that have ensured he is barred from setting foot in this country. the petitioner accuses the respondent for not giving him an explanation for taking such a drastic action against him. He questioned the reason given in the 1st respondents replying affidavit that that the red alerts were issued pursuant to advice from security organs yet the security organ is not even named or the basis of such advice given.

59. the petitioner attached a copy of notice to return or convey a prohibited immigrant/ inadmissible person that was issued to Station Manager/Captain Agent, Qatar Airways dated and stamped December 5, 2016(annexure- HMOE-11). The same is indicated to have been issued under section 44(3)(b) of the *Kenya Citizenship and Immigration Act*. The reason for removal is indicated as "Inadmissible."

60. The *Kenya Citizenship and Immigration Act* section 2(1) provides: "inadmissible person" means a person declared under section 33(2) as an inadmissible person. Section 33(2) provides thus:

> 33(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—
>
> (a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;
>
> (b) the family and dependants of a prohibited immigrant;
>
> (c) incapable of supporting himself and his dependants (if any) in Kenya;
>
> (d) is adjudged bankrupt;
>
> (e) anyone who has been judicially declared incompetent;
>
> (f) an asylum seeker whose application for grant of refugee status has been rejected under the *Refugee Act*, 2006 (No 13 of 2006); or
>
> (g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.

61. One of the requirements that must be present for one to be declared an inadmissible person is that the person must not be a Kenyan Citizen. the petitioner vehemently submitted that he could not be removed because he is a Kenyan Citizen. the petitioner's counsel argued:

> " Your Lordship, the petitioner has adduced evidence (birth certificate -annexure HMOE- 3) evidencing that he is a Kenyan Citizen born of Kenyan mother...Additionally, the petitioner has adduced evidence showing he is holder of a National identity card..."

62. The above submission does not hold any water. the petitioner is not a Kenyan Citizen until and unless the application to regain Kenyan Citizenship under article 14(5) is fully processed. Having been a Citizen of another country pre-2010, he could not at the same time be a Kenyan Citizen as dual citizenship was not allowed then. He must first apply and the application is subject to proof of his previous citizenship. The acquisition of the identity card was therefore, irregular.

63. That said, the reason that the respondent gave in the notice to remove him is a blanket reason that does not enumerate any of the specific reasons under section 33(2). Failure to specify the reason for the petitioner's removal, made the notice vague. the petitioner ought to have been told at the point of expulsion/removal the exact reason for such removal.

64. Moreover, even after this Petition was filed, the Respondent seems to perpetuate the same vagueness. In paragraph 10 of the replying affidavit of the 1st respondent, the 1st respondent depones:

> " That the order of inadmissible person addressed on paragraph 39 of the Petition was issued on advice of security agency's report and therefore the matter did not originate from the 1st respondent"

65. The 1st respondent claims to have relied on a report that was not exhibited. Even assuming it was a security report which due to sensitive nature of its contents, could not be publicly revealed, there was no attempt made to brief the court. In the circumstances, it impossible to tell whether such a report existed.

66. This manner the petitioner was treated bears resemblance to what ensued in *Bashir Mohamed Jama Abdi v Minister For Immigration and Registration of Persons & 2 Others* (supra) where Justice Lenaola observed:

> " ...Mohochi's circumstances bear similarity to Abdi's and whatever the reasons for denying Abdi entry into Kenya, some measure of due process should have been followed including letting him know of the reasons why, while he had left Kenya without incident, he was now being denied entry..."

The Judge remarked further at paragraph 41-

> " ... whether or not there were plausible grounds on account of national security as against Abdi, the respondents breached the law in the casual manner they treated Abdi in the circumstances. Even if certain material is considered classified, it is the view of this court that when a challenge is made in court, the respondents can and should have applied for the court to view the 'closed' material for it to understand the enormity of the threat posed... By Keeping mum, its actions however noble, may not pass the test of legal scrutiny. The conclusion to be reached is that although not a citizen of Kenya, due process was not

followed in denying him entry into Kenya and the procedure followed was not in line with the expectations of the Act and *the Constitution*..."

67. It is the finding of this court that the petitioner's rights were violated especially the failure to vividly give him the reasons for his removal yet he had been residing in the Country. Secondly, the respondents could also not prove to the satisfaction of this court that there was indeed existence of security threat that was posed by the petitioner. Despite alleging that their actions were necessitated by a security report, it remained just an allegation known only to the 1st respondent. No such report was disclosed even to the court confidentially. The actions by the respondent against the petitioner were thus taken arbitrarily in the absence of reasonable grounds to justify the same.

5. Having regard to the circumstances of this case, what reliefs should this court grant, if any?

68. Firstly, let me make it clear that until the petitioner makes a successful application for regaining of citizenship, he is not a citizen of Kenya. Prayer (b) that seeks a declaration that the petitioner is a Kenyan Citizen by birth entitled to rights, privileges and benefits of citizenship including but not limited to the right to enter, remain in and reside anywhere in Kenya. This is incapable of being granted. He must first successfully pursue and regain his citizenship. Again, that application is not the mandate of the court to handle, it lies with the the Cabinet Secretary concerned.

69. Prayer (a) that a declaration that the actions of the respondents of arbitrarily issuing a red alert and/or notice to return a prohibited immigrant/inadmissible person against the petitioner is unlawful and in violation of articles 12(1)(a), 14(1) 39(3) and 47(2). the petitioner is not a citizen of Kenya hence to the extent that he claims his rights under article 12(1)(a), 14(1) and 39(3) were violated, that is not possible. Nevertheless, his right to fair administrative action under article 47(2) was violated by arbitrarily declaring him an inadmissible person without specifying the exact reason to him and failing to provide him with written reasons for the action even after he had sought the same.

70. Prayer (c) seeks a declaration that the inordinate delay by the respondents in processing the petitioner's application for regaining citizenship is unlawful. This is allowed only to the extent that it violates the petitioner's rights to an expeditious administrative action under article 47(1) of *the Constitution*. However, he is not yet a citizen hence his rights under article 12(1)(a), 14(5) and 39(3) could not have been violated by the respondents.

71. Prayer (d) seeks an order of *certiorari* removing into the High Court and quashing the decision, the declaration and directive of the respondents arbitrarily issuing a red alert and/or notice to return/convey a prohibited immigrant/inadmissible person against the petitioner. All what the petitioner was able to demonstrate was the issuance of notice of removal as an inadmissible person. There was no evidence of the so called 'red alerts' that were shown to the court. the court cannot act on assumptions.

72. Prayer (e), the petitioner seeks an order of *mandamus* to compel the respondents to issue the petitioner with Kenyan Citizenship in accordance with article 14(5). I have already said why this is not possible. Article 14(5) requires the petitioner to apply to regain the Citizenship. The article is silent on the nature or requirements of the application. The requirements are provided in section 10 of the *Kenya Citizenship and Immigration Act*. Among the requirements is proof of previous Kenyan Citizenship. That has to be established as part of what is to be considered. The responsibility to process and verify the condition is met is vested on the Cabinet Secretary concerned, not the court.

73. Prayer (f) seeks an order of prohibition prohibiting the respondents and/or further issuing red alert and/or notice to return/convey a prohibited/inadmissible person against the petitioner. No one knows what the future holds, the court cannot give such a blanket futuristic order. Every case or circumstance has to be evaluated on its merits.

74. General damages. It is trite law that damages are awarded at the discretion of the court. the petitioner made a serious admission. He is possession of documents issuable to Kenyan citizens whilst his application for regaining of citizenship is still pending. This is highly irregular. I do not find it appropriate to grant damages to the petitioner taking into account the above conducts.

75. On costs, the respondents have succeeded partly just as the petitioner on certain aspects of the Petition. Each Party will thus bear its own costs.

Disposition

In the final analysis, I make the following orders:

1. A declaration be and is hereby issued that by arbitrarily declaring the petitioner an inadmissible person without specifying the reasons to him and further failing to provide him with the written reasons for the decision even after he had sought the same, the 1st respondent violated the petitioner's right to fair administrative action under article 47(2) of *the Constitution*.

2. A declaration be and is hereby issued that there has been inordinate delay by the respondents in processing the petitioners application to regain citizenship which is a violation petitioner's right to an expeditious administrative action under article 47(1) of *the Constitution* and section 4 of the *Fair Administrative Actions Act*.

3. An order of *mandamus* be and is hereby issued compelling the 1st respondent to expedite the processing of the application for regaining of Kenyan Citizenship by the petitioner and advise the petitioner on the results of his application not later than the six months from the date of this order.

4. Each party to bear its own costs of this Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

.....

L N MUGAMBI

JUDGE