Haki na Sheria Initiative & 2 others v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 3 others (Petition E001 of 2023) [2024] KEHC 3015 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3015 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

PETITION E001 OF 2023

JN ONYIEGO, J

MARCH 8, 2024

IN THE MATTER OF: ARTICLES (1) & (3) (B),2(1), (2), (5) & (6), 10 ,12,15(1) (4) & (5),18,19,20,21,22(1) & 2(C),23 (1) & (3),27,28,45,47,56,73(1) (A) (I),129 & 153 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 3(1),22(1) & 2 (C), 23,165 (3) (B), (D) (I) & (II) AND 258 (1) & 2(C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ARTICLE 15(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 11 OF THE KENYA CITIZENSHIP AND IMMIGRATION (NO. 12 OF 2011)

BETWEEN

HAKI NA SHERIA INITIATIVE...1ST PETITIONER

FATUMA YUSSUF OMAR..2ND PETITIONER

FOZIA MOHAMED ABDILLE..3RD PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT..........1ST RESPONDENT

DIRECTOR GENERAL OF CITIZENSHIP AND

IMMIGRATION SERVICES..2ND RESPONDENT

PRINCIPAL REGISTRAR OF PERSONS..................................3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..........................4TH RESPONDENT

BETWEEN

HAKI NA SHERIA INITIATIVE .... 1ST PETITIONER

FATUMA YUSSUF OMAR .... 2ND PETITIONER

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AND

CABINET SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT .... 1ST RESPONDENT

DIRECTOR GENERAL OF CITIZENSHIP AND IMMIGRATION SERVICES .... 2ND RESPONDENT

PRINCIPAL REGISTRAR OF PERSONS .... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .... 4TH RESPONDENT

RULING

1. The petitioners herein came to Court with a petition dated 7.2.23 seeking the following declarations;

   a. A declaration that Section 11 of the *Kenya Citizenship and Immigration Act* is inconsistent with or in contravention of the Article 15(1) and 45 of *the Constitution* in so far as it establishes residency as an additional criterion for citizenship by marriage.

   b. A declaration that the residency status is not a requirement for attaining citizenship by marriage under Article 15 (1) of *the Constitution*.

   c. A declaration that all spouses of Kenyan citizens including persons having Refugees status and persons who have sought refugee status but their refugee eligibility has not been conclusively determined are entitled to Kenyan citizenship by marriage on complying with Article 15 (1) of *the Constitution* and are entitled to all rights, privileges and benefits granted by law.

   d. A declaration that Refugee status granted after Refugee Status Determination is lawful residence under the national and international laws governing Kenya.

   e. A declaration that the legislative and administrative hurdles placed against refugee spouses of Kenyan citizens- based on interpretation and application of Section 11 of *Kenya Citizenship and Immigration Act* about the grant of citizenship by marriage- are unreasonable and unfair and threaten or violate the right to fair administrative action contrary to Article 47 of *the Constitution*.

   f. A mandamus order directing the 3rd Respondent to register the 2nd and 3rd petitioners as citizens by marriage.

   g. Costs of this suit.

2. The petitioners/applicants herein filed an application dated 07.11.2023 through the firm of Bashir Noor Advocates seeking the following orders:

    i. That the Honourable Court be pleased to certify that the petition herein raises substantial questions of law and forthwith refer the case to her Ladyship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to article 165(4) of *the constitution*.

    ii. That consequent to the grant of the prayer (i) above, the Honourable Court be pleased to issue further orders and directions as may be necessary to give effect to the foregoing order and /or favour the cause of justice including consolidation of this matter with related cases including Petition No. E011 of 2022 Haki na Sheria Initiative v CS Ministry of Interior & Co-ordination of National Government and 4 Others so as to be heard by the same bench.

    iii. That the Honourable Court do issue any other reliefs as it deems fit and proper.

3. According to the petitioners/applicants, the issues raised in the suit herein are substantial questions of law to warrant the empanelment of a bench of an uneven number of judges being not less than three pursuant to article 165(4) of *the Constitution*. That it is desirable if the file herein would be referred to the Honourable Chief Justice for *the constitution* of a bench to hear and determine the petition after the same has been consolidated with Petition No. E011 of 2022 Haki na Sheria Initiative v CS Ministry of Interior & Co-ordination of National Government and 4 Others.

4. To the petitioners/applicants, the suit herein is one of public importance and significance in our constitutional democracy to wit; it affects and determines the fate of nearly 700,000 refugee population living in the refugee camps in Kenya. That the same is necessary for the determination of issues as follows:

    i. Whether Section 11 of *the constitution* of the *Kenya Citizenship and Immigration Act* is inconsistent with or in contravention of the article 15(1) and 45 of *the constitution* in so far as it establishes an additional criterion for citizenship by marriage.

    ii. Whether seeking documentary proof that would be extremely challenging or impossible for Refugees Spouses to procure such as entry visa and setting the same as pre-condition to attainment of residency status and by extension citizenship documents is exclusionary and discriminatory to Refugee Spouses.

    iii. Whether the provisions of Regulation 27 which envision foreign nationals outside the country as the only beneficiaries to the Dependent's pass fails to take account of refugees already in the country.

    iv. Whether the requirements set out in note 4 of Form 28 of Kenya Citizenship and Immigration Regulation 2012 as stipulated or understood and applied by the respondents results in the exclusion of refugees from potential to seek citizenship contrary to article 27 of *the constitution*.

    v. Whether a refugee status attained after undergoing the Refugee Status Determination established under national and international law is useful residence under the *Kenya Citizenship and Immigration Act*.

    vi. Whether it is necessary for refugees to take out a permit or pass to attain lawful residence in addition to having a refugee identification card to prove lawful residence.

vii. Whether the lack of clear guidelines on the process of acquiring the class M permit and the grounds of issuance of the sole requirement of clearance letter from the 4th respondents results in denial or likely denial of permit granting residency status and by extension citizenship documents.

viii. Whether the legal and administrative hurdles to citizenship by marriage that make it challenging or impractical for refugees' spouses to attain citizenship by marriage renders the administrative process of citizenship registration unreasonable and unfair contrary to article 47 of *the constitution*.

ix. Whether the additional illegal criterion of residency for attainment of citizenship by marriage not envisaged by article 15(1) of *the constitution* in fact makes it difficult especially for refugees to attain citizenship by marriage and results in disunification of families contravenes article 45 of *the constitution* on the right to family.

5. That the matter shall settle key issues relating to the distinct ways of acquiring citizenship in Kenya and the legality of combining these pathways to citizenship. It was urged that the issues canvassed transcends the circumstances of the 2nd and 3rd petitioners and have a significant bearing on the public interest in so far as the unique rights attached to citizenship for Kenyans is concerned.

6. Counsel argued that; this matter of conferment of citizenship of refugees is indeed a novel point and is yet to be determined by any other court in Kenya; the same is weighty given what it means for the refugees to be citizens of Kenya from a political, social, and economic stand point. It was urged that the suit herein is thus an open question that requires debate.

7. That the effect of the prayers sought in the petition and the level of public interest generated by the petition transcends the circumstances of this particular case and will affect not just Kenya, but in the long run may impact a significant bearing on the public interest litigation.

8. The application was however opposed by the respondents via grounds of opposition dated 23.11.2023. According to the respondents, this Honourable Court is vested with unlimited original jurisdiction in both criminal and civil matters including the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and jurisdiction to hear any question in respect to the interpretation of *the constitution*. That by dint of article 165(4) of *the constitution*, the application is not demonstrative of any substantial or novel question of law capable of being referred to an uneven number of judges for determination.

9. It was contended that the application is an afterthought as the petition having been filed one year ago, substantive directions have been issued on the hearing including rulings on interlocutory applications made by parties in the course of proceedings. This court was therefore urged to disallow the prayers sought herein.

10. Directions were taken that the application be canvassed by way of written submissions.

11. The applicants submitted that the Petition raises numerous questions as already set out in the face of the petition and whether the additional illegal criterion of residency for attainment of citizenship by marriage not envisaged by Article 15 (1) of *the Constitution* in fact makes it difficult especially for refugees to attain citizenship by marriage which leads to disunification of families. That the same contravenes Article 45 of *the Constitution* on the right to family.

12. That the second element in the determination of the main issue in the application is, that those questions of law must not be ordinary questions of law but substantial questions of law.

13. In attempt to explore a specific definition of what a " substantial question of law" in our Constitution entails, the applicant sought reliance to an array of articulate legal precedents set out by various courts on this phrase inter alia; The Supreme Court of India's locus classicus case of Sir Chunilal vs Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314 the Supreme Court of India in which the apex court held—

> " A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."

14. In the case of Martin Nyaga and Others vs Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR, the Court articulated that the principles applicable when making a declaration under Article 165(4) include:

    i. Whether the matter is complex; whether the matter raises a novel point;

    ii. Whether the matter by itself requires a substantial amount of time to be disposed of;

    iii. The effect of the prayers sought in the Petition and the level of public interest generated by the Petition.

15. In view of the principles set out in the above authorities, it was submitted firstly, that this matter is indeed one of public importance and of public interest. That the grant or eligibility to be granted citizenship for refugees transcends the circumstances of the Petitioners in this matter. That the same has far-reaching implications for the more than approximately 700,000 refugees currently living in Kenya, the host community, government, political ecosystem, security apparatus etc.

16. Secondly, that the matter herein, is one that portrays a state of uncertainty in the law in that, *the Constitution* does not expressly mention refugees in anyway whatsoever. That there is thus heavy reliance on International law and best practices all of which calls for judicial interpretation.

17. Thirdly, counsel submitted that the matter is a novel one, whose determination shall clarify among other issues whether a Refugee status attained after undergoing the Refugee Status Determination established under national and international law is lawful residence under the *Kenya Citizenship and Immigration Act*; it will also have a significant impact on the ongoing efforts in shaping policies for refugees, such as the Shirka Plans and the Refugee Act 2021. It was contended that the outcome of the case is poised to establish benchmarks not only within the national legal context but also on an international scale. Consequently, this case presents a distinctive opportunity for the courts to establish legal precedents on this issue.

18. Lastly, it was further contended that this matter calls for discussion of alternative views owing to its controversial nature. It was further argued that, the determination of this matter shall have tremendous effect on rights on the individual refugees, their families, host communities from a social-cultural angle, the government and the country in its entirety from an economic and political standpoint.

19. The court was invited to take note of other comparable issues of similar controversy in Kenya interalia; the LGBTQI, Abortion, Female Genital Mutilation (FGM) among others, all of which were heard by a bench as sought. Reliance to that end was drawn from the case of Eric Gitari v Attorney General &

another [2016] eKLR, where Lenaola J. on whether a bench should be empaneled to hear the LGBTQI case held—

> “29. There is however huge debate in the public domain with civil society and others arguing that Kenya's laws that discriminate against LGBTIQ persons and their intimate activities based on the grounds of their sexual orientation are unconstitutional are therefore void. The basis of this has been the evolution of thinking around human rights, so that human rights are now considered to include LGBTIQ rights and that human rights cannot be implemented selectively. But others seem to reason that this kind of thinking is based on opportunism by the proponents of human rights for the LGBTIQ community and therefore has no place in law.
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> 30. These views, behind which strong convictions indubitably lie, are varied. A lot of them are informed by the reality that the LGBTIQ community is hardly a popular or accepted group in the Kenyan society. This in turn makes the LGBTIQ community subject to physical and sexual harassment by the police and members of the public, extortion and blackmail etc.
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> 31. Apart from their weightiness, which is evident in the above discussion, I note that the identified issues have not been determined by any other Court in Kenya as this unique aspect of LGBTIQ issues is not one that has been broached by the Courts in the past, especially in light of the previous constitutional dispensation and there are therefore no ready and available answers thereto; these issues clearly raise substantial questions of the law.”

20. A comparison to the above case was drawn by the applicant to which it was submitted that, in similar fashion, the economic, social-cultural, political context surrounding refugees in Kenya is an emotive one soliciting varying reaction from various stakeholders, from refugees who simply want to be treated equally with human dignity, to host communities where others may want to unify with them as families and other viewing them as outsiders, politicians who may be worried about them as voters and government who may be concerned about what increase in citizenship population may mean, civil societies that want to support them, neighboring countries wherefrom the refugees are and international community especially refugee agencies concerned with durable solutions for refugees.

21. In the end, this court was urged that due to the reasons highlighted, the prayers for empaneling of a bench ought to be allowed.

22. The respondents vide their submissions dated 23.11.2023, contended that this court is vested with the jurisdiction to determine the question whether a right or a fundamental freedom in the Bill of rights has been denied, violated or threatened. Reliance was placed on the case of Harrison Kinyanjui v Attorney General & another [2012] eKLR where it was held that since *the constitution* does not define what a substantial question of law means, the same is left to an individual judge to satisfy himself or herself to what extent the matter warrants reference to the Chief Justice.

23. Further, reliance was placed on the case of the Supreme Court of India, Chunilal v Mehta v Century Spinning and Manufacturing Co. AIR (supra) and Shantosh Hazari v Prurushottam Tiwari (2001) 3 SCC 179 where a test for determining what a substantial question of law was addressed as; whether the same directly or indirectly affected substantial rights of the parties; whether the question is of general public importance; whether the issue is not free from difficulty; and whether the issue calls for a discussion for an alternative view.

24. That in seeking a certification under article 165(4) of *the constitution*, it is not enough for the petitioners to claim that their rights and fundamental freedoms in the Bill of Right have been denied, violated, infringed or threatened or that their petition raises issues of interpretation. It was stated that the substantive prayer in the petition is granting of prerogative rights and interpretation of *the constitution*. That such prayers do not form any substantial question of law to empanel a numerically enlarged bench. It was further urged that single judges have rendered decisions in several matters involving interpretation of *the constitution*. In the end, the respondents urged this court to dismiss the application herein for being destitute of merit.

25. The interested party stated that it was not opposed to the application.

Determination

26. I have considered the application herein and submissions made by counsel for the parties herein. The key issue for determination is whether the petition herein raises substantial question/s of law which are of public importance and which have not been settled by our judicial system. In seeking to determine whether the orders sought can be granted, I would seek guidance in the decision by the Court of Appeal in Peter Nganga Muiruri vs Credit Bank Limited & Another Civil Appeal No. 203 of 2006 where the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question.

27. Therefore, the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However, like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

28. The petitioners/applicants argued that the suit herein raises substantial questions of law requiring empaneling of a three judge bench. Majanja J in the case of Harrison Kinyanjui vs Attorney General & Another [2012] eKLR dealt with the meaning of substantial justice wherein he was of the view that:

> “the meaning of ‘substantial question’ must take into account the provisions of *the Constitution* as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of *the Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”

[Also see the case of Vadag Establishment vs Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011 and Article 165 of *the constitution*].

29. Therefore, the only constitutional provision that expressly permits *the constitution* of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose, the High Court must certify that the matter raises a substantial question of law in the following instances:

    i. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or

ii. That it involves a question respecting the interpretation of *the Constitution* and under this is included (i) the question whether any law is inconsistent with or in contravention of *the Constitution*; (ii) the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.

30. The petitioners/applicants contended that the matter of conferment of citizenship of refugees is indeed a novel point that is yet to be determined by any other court in Kenya; that the same is not only weighty given the weight it means for refugees to be citizens of Kenya from a political, social, economic standpoint but also what that may look like for the host communities and other related implications.

31. The above notwithstanding, it suffices to say that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In other words, it raises the issue of interpretation of *the Constitution*; the Court must go further and satisfy itself that the issue also raises a substantial question of law. Therefore, the mere fact that a party or parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.

32. In the same breadth and as correctly submitted by the respondents, which submissions this court is in agreement with, even a single judge is endowed with the requisite jurisdiction to determine weighty issues involving determination of rights. [See article 23, 165 of *the constitution*; the case of Community Advocacy Awareness Trust & Others vs The Attorney General & Others High Court Petition No. 243 of 2011].

33. Having read and understood well what is sought in the suit herein, respectfully, I am of the view that issues of rights and/or determination of rights in as far as refugees are concerned have been dealt with by various courts there before. As such, the specific and isolated issues herein are not novel having in mind that novelty alone does not qualify a matter as raising a substantial question of law in as much it is one of the many factors to be considered.

34. As a consequence of the above, it is my humble view that the application dated 07.11.2023 fails the litmus test to warrant reference to the Chief Justice as required under Article 165(4) of *the Constitution*.

35. The next question is whether the Honourable Court should issue further orders and directions as may be necessary to give effect to the consolidation of this matter with related cases including Petition No. E011 of 2022 Haki na Sheria Initiative v CS Ministry of Interior & Co-ordination of National Government and 4 Others.

36. The jurisdiction to consolidate suit is donated by order 11 Rule 3 of the Civil Procedure Rules. In Prem Lala Nahata & Anor vs Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551, the India Supreme Court held: -

> " It cannot be disputed that the Court has power to consolidate suits in appropriate cases... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of

the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit."

[Also See Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others [2014] eKLR].

37. From the foregoing, it is clear that the Court has wide discretion in ordering for consolidation of suits. It is trite that the same can only be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*, Cap 21 Laws of Kenya. [See John Gakure & 148 Others vs Dawa Pharmaceuticals Company Ltd CA 299 of 2007].

38. In as much as the parties herein did not submit on the said prayer, having looked at the Petition herein and Petition No. E011 of 2022, the prayers made therein inter-alia raise a common question of law and fact, that the transactions are inter-related and it would be convenient to try the suits together.

39. It is not controverted that the two petitions (Petition No. E001 of 2023 and Petition No. E011 of 2022) and the respective prayers sought therein hold, a common thread.

40. In the Court's view, it would be convenient and expedient to try the suits together as it would obviate the multiplicity of suits. It will lead to the determination of all the issues arising in all the two suits at the same trial. It will be less costly and will save the Court precious judicial time. It is also noteworthy that the suits are part heard but the same notwithstanding, that should not be a bar for consolidation. See Benson G. Mutahi & Raphael Gichove Munene Kabutu & 4 Others [2014] eKLR, where the court held: -

> "It is also clear from a reading of the Court of Appeal's decision in NGUMBAO VS MWATATE & 2 OTHERS [1988] KLR 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore, submissions of Mr Muyodi that this case cannot be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition."

41. In view of the above findings, it is my considered view that consolidating these suits is the best way forward. My view is hinged on article 159 and the overriding objectives of the *Civil Procedure Act*, which dictates that justice should be dispensed without undue delay.

42. In view of the above holding, I am inclined to make the following orders;

    i. That the prayer for empanelment of a three-judge bench is disallowed

    ii. That Petition No. E011 of 2022 is hereby consolidated with Petition No. E001 of 2023.

    iii. That Petition No. E011 of 2022 shall be the lead file.

    iv. That parties do file and exchange their consolidated bundle of documents within 28 days of the ruling herein.

    v. That costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH MARCH 2024

J. N. ONYIEGO

JUDGE