



Haki Na Sheria Initiative & 3 others v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 4 others; Katiba Institute & 2 others (Interested Parties); Global Strategic Litigation Council for Refugee Rights (Amicus Curiae) (Constitutional Petition E011 of 2022 & Petition E001 of 2023 (Consolidated)) [2024] KEHC 15353 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E011 OF 2022
& PETITION E001 OF 2023 (CONSOLIDATED)**

JN ONYIEGO, J

DECEMBER 6, 2024

**IN THE MATTER OF ARTICLE 1(1), 1(3)(B), 3(1),10,12,14(1),18,19,20,21,22(1)
(2(C),27,29,38,39,43,45,47,53,73(1)(A)(I), 129,153(4),
159, 165(3) AND 258 OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTION 7 OF THE BIRTHS
AND DEATHS REGISTRATION ACT CAP 149**

BETWEEN

HAKI NA SHERIA INITIATIVE 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 BIRTHS AND DEATHS 3RD RESPONDENT

COMMISSION FOR REFUGEE AFFAIRS 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

AND



GLOBAL STRATEGIC LITIGATION COUNCIL FOR REFUGEE RIGHTS AMICUS CURIAE

**AS CONSOLIDATED WITH
PETITION E001 OF 2023**

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 BIRTHS AND DEATHS 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY
KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. Vide a notice of motion dated 17-September 2024, filed pursuant to Article 10,50,159 and 165 of *the constitution* of Kenya, the applicants/petitioners sought orders as hereunder;
 - a. That the honourable court do set a side the orders issued on 20th June 2023 expunging the expert affidavit of Mr. Abiy Ashenafi dated 30th June 2023 from the record.
 - b. That the expunged expert affidavit of Mr. Abiy Ashenafi dated 30th day of June 2023 be reinstated and be deemed as properly filed upon reinstatement.
 - c. That this honourable court do issue such other or further orders as are fit in the circumstances of this case.
 - d. That the honourable court do issue any other relief as it deems fit and proper.
2. The application is supported by the particulars set out on the face of it and further amplified by the affidavit of Abiy Ashenafi sworn on 17th day of September 2024 in which he averred that he is an expert in refugee affairs. That the delay in filing an affidavit to introduce an expert report on refugee affairs



was occasioned by the unfortunate family reasons occasioned by a sick family member back in Ethiopia hence was away from his office in Pretoria South Africa.

3. He further averred that the reason for the delay was not foreseeable, deliberate and unavoidable. He therefore sought orders reviewing the orders of this court dated 20th June 2024 expunging the said affidavit from the court record on account of being filed out of time. That the said affidavit and report is critical and in the interest of over 700,000 refugees living in refugee camps in Kenya. He deposed that there will be no prejudice suffered by the respondents if the application is allowed.
4. Despite service of the application, the respondents did not file any response thereof. The application is therefore not opposed.
5. I have considered the application herein and the affidavit thereof. The genesis of the application herein was the filing of an affidavit of the alleged expert in law seeking to introduce an expert report on refugee law without leave of the court. The said affidavit was therefore expunged from the court record the same having been filed before seeking court's leave and after the court had made final directions on the hearing of the petition.
6. There is no dispute that the application is not opposed. The applicant urges the court to automatically allow the application on the grounds that the same is not opposed. It is trite that an application does not automatically succeed simply because the same is not opposed. The applicant is duty bound to prove the same to the required degree and the court to determine it on its merits. See *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli, Elijah Mbogo & Independent Electoral and Boundaries Commission (Civil Application 26 of 2018)* [2018] KESC 58 (KLR) (Civ) (7 September 2018) (Ruling) where the supreme court held that the fact that the application was not opposed was not a ground to allow the same. The supreme court added that the court had to determine the application on merit.
7. As stated above, the main reason given for expunging the impugned affidavit from the court record was that it was filed out of time without seeking leave of the court and that the information contained in the expert report could as well be ventilated through submissions. Since leave has been sought and the applicant has not opposed the application, I do not find any prejudice in granting the said leave.
8. Having regularized the same, and considering that this is a weighty matter requiring heavy research and contribution from legal expertise in that field, and further taking into account that the delay in filing the impugned affidavit late was due to the deponent's engagement in a pressing family affair of a close relative's sickness, I am sufficiently persuaded to allow the application which I hereby do as prayed. Accordingly, the affidavit which was expunged from the court record is reinstated and shall form part of the court record. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

