THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 290 OF 2019

AHMED ABDULLAHI ADAN.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

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

JUDGMENT

1. The Petitioner, Ahmed Abdullahi Adan, is a male adult of sound mind residing in the Republic of Kenya has commenced this suit by virtue of Articles 3(1) and 22 of the Constitution.

2. The 1st Respondent, the Attorney General, is the principal legal adviser of the Government of Kenya and is constitutionally charged with representing the national government in any legal proceedings, apart from criminal proceedings, to which the national government is a party.

3. The 2nd Respondent is the Cabinet Secretary for Interior and Co-ordination of National Government.

4. The 3rd Respondent is the Principal Registrar of Persons appointed under Section 4 of the Registration of Persons Act, Cap. 107 which makes provision for the registration of persons and issuance of identity cards.

5. The petition dated 22nd July, 2019 is premised on Articles 3, 10, 12, 13, 14, 18, 20(1), 27, 28, 29(f), 35, 40, 41, 43, 47, 48, 57, 73(1)(a), 156, 201(a) and 206 of the Constitution; sections 6 & 9 of the Registration of Persons Act, Cap. 107; and, Section 22(1)(g) of the Kenya Citizenship and Immigration Act, 2011. The petition is supported by the Petitioner's supporting affidavit and verifying affidavit both sworn on the date of the petition.

6. Through the petition, the Petitioner seeks orders as follows:

i) It be declared that the Respondents have contravened the Petitioner's Constitutional rights to an identification card and therefore that their inaction is unconstitutional and illegal;

ii) An order of mandamus do issue to compel the Respondents to issue the Petitioner with an identification card;

iii) A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of his fundamental rights under the aforementioned provisions of the Constitution;

iv) Interests and costs;

v) Any other relief the Court might deem just and equitable.

7. The Petitioner avers that he was born in Wajir County on or about 1960. He states that in the year 1986 he was a resident at Busia County where he was issued with national identification card number [...]. It is his account that in the year 1989 while in Nairobi, the Somali community was screened and his identification card confiscated by the authorities. He states that the identification card was never returned and his attempts to be issued with another one from the relevant authorities have failed.

8. The crux of this petition, as supported by the averments in the Petitioner's affidavits is premised on the respondents' failure to issue the Petitioner with an identity card and to provide any reasons for the refusal to issue the identity card. The Petitioner asserts that the respondents' actions are in direct violation of his right to have a document of identification and further in direct violation of the dictates of Article 14 of the Constitution.

9. The 1st and 2nd respondents object to the petition through grounds of opposition dated 28th August, 2019. The 1st and 2nd respondents contend that the petition is prematurely before the Court as there is no evidence submitted to demonstrate that the Petitioner sought the services of the 3rd Respondent to replace his national identity card and that his application was denied. It is moreover asserted that the petition does not meet the threshold for instituting a constitutional petition as it is based on assumptions and should therefore be dismissed for lack of merit.

10. The 3rd Respondent filed a replying affidavit sworn on 22nd October, 2019 by John M. Kinyumu, the Deputy Director of the National Registration Bureau. He avers that following the Ethiopia/Somali Ogaden War of 1977 to 1978 and towards the end of 1989 there was an influx of non-Kenyan Somalis in the country which saw an increase of banditry attacks in North Eastern region. Following the events, the Principal Registrar of Persons vide Gazette Notice No. 5319 dated 7th November, 1989 appointed senior public officials as registrars (famously referred to as the *Yusuf Haji Special Task Force*) to confirm the veracity of registration documents of all Kenyans of Somali origin. Correspondingly vide Gazette Notice No. 5320 of even date all persons of Somali origin of over 18 years were required to appear and present documentary evidence before the Taskforce in various centers across the country.

11. It is deposed that the following the investigations, verification certificates were issued to Kenyan Somalis' and the identification cards of non-Kenyan Somalis were withdrawn and repatriation orders issued. It is averred that the names and identification cards of the non-Kenyan Somalis, which included that of the Petitioner, were then forwarded to the Principal Registrar for cancellation and invalidation of their records. According to the 3rd Respondent, it is on this premise that it could not re-issue the identification card to the Petitioner.

12. It is further the Respondent's defense that the Petitioner has not demonstrated to the Court his pursuit of the identification documentation from the 3rd Respondent which would have been evidenced by an application, payment of requisite fees and denial of the application. It is the 3rd Respondent's case therefore that the petition does not disclose any case to warrant the grant of prayers sought from this Court.

13. The Petitioner through written submissions dated 7th December, 2020 contends that Article 27 of the Constitution guarantees every person the right to equality and non-discrimination which the Petitioner was denied by virtue of his being of Somali origin. Further, that no clear basis was given for the withdrawal and invalidation of his identity card. He adds that the Taskforce report relied on by the 3 rd Respondent was not submitted to the Court. The Petitioner also submits that he was not granted any hearing prior to the invalidation of his identification card.

14. In support of his arguments, the Petitioner placed reliance on a number of cases, including **Mohammed Mire v Attorney General & another [2016] eKLR** where it was held that even where a person is not qualified to be issued with an identification document, the respondents' officers are required to follow the due process in conformity with Articles 12, 27 and 47(1) of the Constitution. The Petitioner also cites the case of **Miguna Miguna v Dr. Fred Okengo Matiangi & others [2019] eKLR** where it was held that even if the petitioner deserved to be removed from Kenya, he was to be subjected to the provisions of the Fair Administrative Action Act, 2015 and Articles 47(1) and 50(1) of the Constitution so that whatever the respondents were doing had to comply with constitutional standards of procedural fairness and fair hearing.

15. The respondents filed joint submissions dated 3rd March, 2021 and urged that the Petitioner has not substantiated through the submission of any documentation by himself or relatives his claim that he was born in Wajir County in 1960 in order to satisfy the requirements of Articles 14 and 15 of the Constitution on citizenship. It is urged that in such circumstances the Petitioner cannot exercise the right to an identification documentation as envisaged in Article 12(1)(b) of the Constitution.

16. The respondents submit that even if this Court finds that the Petitioner is a citizen of Kenya the right under Article 12(1)(b) is not absolute but can be limited under Article 12(2) of the Constitution. According to the respondents, the withdrawal of the Petitioner's Identification Card No. 9229219 was justified by the findings of the special Taskforce as averred in the 3rd Respondent's replying affidavit.

17. It is additionally the respondents' contention that the Petitioner has not discharged the burden of proof as per the provisions of Section 107 of the Evidence Act. The respondents assert that the Petitioner has not provided any evidence in support of his deposition that he made an application to the 3rd Respondent for replacement of his national identification card. It is their case therefore that without sufficient demonstration by the Petitioner of his attempts to have his identity card replaced, he cannot claim that there was a violation of his right to an identity.

18. Turning to the prayers sought by the Petitioner, the respondents submit that although the Court can examine the legality of their actions, it cannot grant an order of mandamus against them as this would offend the doctrine of separation of powers. To buttress this argument reliance was placed on the decision in **Hersi Hassan Gutale & another v Attorney General & another [2013] eKLR** where it was held that the Court cannot usurp the role of the Registrar of Persons unless the decision of the Registrar contravenes the Constitution and the law. Also cited in support of the argument is the case of **Muslims for Human Rights (Muhuri) on behalf of 40 others v Minister for**

Immigration & 5 others [2017] eKLR where it was held that the Court had no authority to declare the petitioners as citizens of Kenya nor compel the Registrar of Persons to issue them with national identity cards. The Court is therefore urged to find that the Petitioner has not made a case to warrant grant of the remedies sought.

19. A perusal of the pleadings and submissions filed before this Court disclose that the core issue for the determination of this Court is whether the respondents' actions violated the Petitioner's rights and fundamental freedoms. The Petitioner argues that the respondents' failure to issue him with an identity card and failure to provide any reasons for the refusal violated his right as envisaged under Article 14 of the Constitution. The respondents on the other hand deny this allegation stating that petition is premature as there is no evidence submitted to demonstrate that the Petitioner sought the services of the 3rd Respondent to replace his national identity card and that the application had been denied. The respondents additionally assert that the petition has not met the requisite constitutional threshold.

20. In a constitutional claim, the party who alleges violation of rights must plead with reasonable precision the manner in which the rights have been violated. This principle is now well established in the courts' jurisprudence and was pronounced in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**. The Court of Appeal reaffirmed the principle in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** when it observed that:

> **"(42) …the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A* and *1B* of the Civil Procedure Act (Cap 21) and *section 3A* and *3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth (1876) 3 Ch. D. 637* at 639 holds true today:**
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> > ***"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***
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> **(43) The petition before the High Court referred to *Articles 1, 2, 3, 4, 10, 19, 20* and *73* of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.**
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> **(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."**

21. My interpretation of the cited cases is that for a constitutional petition to be sustainable it must speak out clearly on the grievance of the petitioner and the remedy sought. It is not sufficient for the petitioner to merely cite constitutional provisions and hope that the court will shift the chaff from the wheat and understand what the grievance is. A petitioner must identify the constitutional provisions allegedly violated and the manner in those provisions were offended.

22. In the case before this Court, the Petitioner states that he was born in Kenya and issued with national identity card number 9229219 which was confiscated in the year 1989. His case is that the action of confiscating his identification document infringed on his right of citizenship by birth as envisaged in Article 14 and the right to equality and non-discrimination under Article 27 of the Constitution. He additionally states that he was not granted any hearing prior to the invalidation of his identification card. Moreover, he faults the respondents for failing to issue him with identification documentation and not giving reasons for the decision.

23. The Petitioner's claim is therefore precise as to the provisions of the Constitution that were violated, the nature of the violation, the injury sustained and the remedies sought to rectify the violations. It cannot therefore be said that there is no proper petition before this Court as alleged in the 1st and 2nd respondents' grounds of opposition. Their attack on the petition on this particular ground therefore fails.

24. As regards the Petitioner's substantive claim, I note that the right to citizenship by birth is guaranteed by the Constitution under Article 14(1) which states that 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."** Article 12 of the Constitution provides the rights that accrue to a citizen as follows:

> **12. (1) Every citizen is entitled to —**
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> **(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and**

(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.

(2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria referred to in Article 24.

25. I find the decision in the case of **Hersi Hassan Gutale & another v Attorney General & another [2013] eKLR** quite illuminating on the cited provisions of the Constitution when the Court observes that:

"24. Citizenship of any person is a very serious matter and that is why the provisions of Article 24 are applied to any Act that is enacted to take away any person's right to citizenship. I would hasten to add that the citizenship of a natural born citizen cannot be taken away or privileges or benefits of citizenship taken away by refusal to provide documents of identification."

26. The jurisprudence in the wider African region and international law echo a similar view. The UN Refugee Agency, United Nations High Commissioner for Refugees, in a study conducted in 2018 titled '*Statelessness and Citizenship in the East African Community'* at page 74 observe that perhaps most importantly the African Commission on Human and Peoples' Rights has found that the provision of Article 5 of the African Charter on Human and Peoples' Rights that states in part that *"[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status"* applies specifically to attempts to denationalize individuals and render them stateless. The study notes that in 2015, in a decision adopted in relation to the Nubian community in Kenya, the Commission had reaffirmed that nationality is intricately linked to an individual's juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality.

27. Again, the African Court on Human and Peoples' Rights in the matter of **Anudo Ochieng Anudo v United Republic of Tanzania Application No. 012/2015** found Tanzania to be in violation of numerous human rights obligations, especially in relation to the application of due process of law. The Court in its finding recommended that the burden of proof should be on the State to justify rejection of an application if a person has previously held documents recognizing nationality. The Court observed as follows:

"77. In international law, it is recognized that the granting of nationality falls within the ambit of the sovereignty of States and, consequently, each State determines the conditions for attribution of nationality.

78. However, the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness.

79. International Law does not allow, save under very exceptional situations, the loss of nationality. The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guaranties which must be respected, allowing the concerned to defend himself before an independent body."

28. It is accordingly appreciated that the inability of a person in Kenya who has an accrued right to citizenship to have identification documents has a strong adverse impact on that person's capacity to enjoy the basic rights guaranteed to the citizens of Kenya and the ability to participate fully in the economic, social and political life of the country.

29. As already established, the Petitioner is required to demonstrate the manner of infringement by laying a factual basis for the allegation by way of evidence. In that regard it was held in the case of **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR** that:

"72. Section 107 (1) of the Evidence Act [36] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:- [37]

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [38] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

30. On the same issue of proof, it was held in the case of **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR** as follows:

> **"987. With respect to the burden of proof on a claim that an action or law is discriminatory, it has been held that the burden lies on a person alleging unfair discrimination to establish his claim. In Mohammed Abduba Dida v Debate Media Limited & another [2017] eKLR, the court (Mativo J) stated as follows:**
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> **"I must add that if the discrimination is based on any of the listed grounds in Article 27 (4) of the Constitution, it is presumed to be unfair. It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in article 27 (4) of the constitution is made and established, the burden lies on the Respondent to prove that such discrimination did not take place or that it is justified.**
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> **On the other hand, where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.""**

31. I have perused the pleadings of the Petitioner and observe that his averment that he was issued with national identity card number 9229219 in 1986 which was later confiscated in 1989 following the screening of members of the Somali community has not been rebutted by the respondents. Indeed, the 3rd Respondent confirms at paragraph 8 of the replying affidavit that upon inspection of the report of the Yusuf Haji Taskforce, the Petitioner's identity card number [...] was revealed to be among the identification documents that were withdrawn and invalidated. The processes of the Taskforce have not been placed before the Court so that it can be firmly stated that the Petitioner was rendered stateless without being accorded an opportunity to provide evidence in support of his citizenship. It is, however, agreed that the Somali question is an intricate and delicate affair because of the history alluded to in the 3rd Respondent's replying affidavit. However, the right to citizenship is a very crucial right that should not be trifled with.

32. It is noted that the events complained of by the Petitioner occurred during the old constitutional dispensation and the right to citizenship may not have been well illuminated by the repealed Constitution as it is now. However, the Petitioner's statelessness remains unaddressed. Fortunately, the 3rd Respondent has opened a window for the Petitioner to reapply for a national identity card. Such an application will give the Petitioner an opportunity to provide afresh the evidence of his Kenyan citizenship.

33. As correctly pointed out by the respondents, the Petitioner has not placed any documentary evidence before this Court in support of his averment that he made an application to the 3rd Respondent to be issued with an identification card and the application had been rejected. It is also observed that the Petitioner has not produced evidence to show that he had asked the 3rd Respondent for the reasons of the alleged rejection of his application. It is only upon the production of such documents that the Court could have interrogated whether the process undertaken by the 3rd Respondent was in line with the constitutional principles of fair administrative action as provided under Article 47 of the Constitution.

34. In the case before me the Petitioner has anchored his claim on events that occurred prior to the promulgation of the Constitution of Kenya, 2010. He has, in the process, failed to demonstrate how the repealed Constitution was violated by the respondents. As was held in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR**:

> **"74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."**

35. From the material placed before this Court, I am unable to fashion any useful remedy for the Petitioner. Had he demonstrated that there is indeed a pending application for an identity card before the 3rd Respondent, this Court would have directed the 3rd Respondent to consider such an application within a given time frame. As already stated, he has not shown that he has made such an application for an identity card. He has also failed to show the provisions of the repealed Constitution that were violated by the respondents. I am accordingly compelled to find that the respondents in this matter did not violate the Petitioner's constitutional rights.

36. Notwithstanding the outcome of this matter, this petition has not been made in vain, in the event the Petitioner does make an application to be issued with an identity card, the 3rd Respondent will in exercise of the authority of that office be bound by the national values and principles of governance which include the rule of law, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. The 3rd Respondent will also be expected to adhere to the principles of fair administrative action grounded on Article 47 of the Constitution. In that regard the 3rd Respondent ought to give a fair hearing, inform the Petitioner of the outcome, and grant him an opportunity to defend his case while providing reasons for any adverse decision. Failure to do so grants the Petitioner an opportunity to petition this Court afresh to seek redress.

37. For the reasons stated in this judgement, I find the petition dated 22nd July, 2019 has no merit and it is dismissed. The parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT