



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.105 OF 2015

BETWEEN

HEINZ BROER.....PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES.....1ST RESPONDENT

MINISTRY OF FOREIGN AFFAIRS.....2ND RESPONDENT

JUDGMENT

1. Heinz Broer is a German National who claims that he lawfully entered Kenya in 1987 after working for more than 20 years as a Manager at Telekom Germany.
2. He was however charged in **CM's Court at Nairobi Criminal Case No.1064 of 2013** with the offence of being unlawfully present in Kenya contrary to **Section 53(i)** of the **Kenya Citizenship and Immigration Act**. At the conclusion of the trial, he was found guilty but noting that he was married to a Kenyan woman, he was ordered to regularise his status within 12 months failure to which he would be repatriated back to his Country of origin. The 12 months lapsed on 18th March 2015 and in his Petition filed on the same day, he has stated that;
 - i. He has applied for a Kenyan Identity Card but the same has never been given to him and his follow up letters up have never been responded to by the Respondents.
 - ii. He is entitled to the said Identity Card because he has properties in Kenya, is married to a Kenyan woman, has stayed in Kenya for more than 7 years and;
 - iii. He has been unlawfully and improperly treated by the Respondents.
3. Although no specific reference is made to any breaches of the Constitution, in the body of his Petition, all that I gather is that the Petitioner now prays that:

“I ask the Immigration Office for the ID Card of Kenya.” (sic)

4. I note further that the Petition is titled:

“In the Matter of the Enforcement of the Bill of Rights Article 22 Freedom of Security

Article 29 Freedom of Movement Article 39/40.

And

In the Matter of Alleged Contraventions of Right or Fundamental Freedoms under Article 39 and Citizenship by Registration Article 15(1)(2) Constitution of Kenya 2010”
(sic)

5. At paragraph 13 of his Supporting Affidavit sworn on 16th March 2015, the Petitioner has attached letters written by the Petitioner, between 25th May 2014 and 3rd March 2015, to the Respondents, demanding a Kenyan Identity Card. Apparently there was no response to any of those letters.
6. Upon being served with the Petition, Mr. Alfred Abuya Omangi, Chief Immigration Officer in the Investigation and Prosecution Section of the Department of Immigration, filed a Replying Affidavit sworn on 7th August 2015 and deponed that:
 - i. The Petitioner, upon entry to Kenya, was issued with a Class K Entry Permit on 8th November 2002 and which was renewed for three years on 11th May 2005.
 - ii. On 16th January 2009, after the Petitioner had applied for change of his Entry Permit from Class K to H (as an investor), the 1st Respondent requested him to present additional documents in that regard, including a letter explaining the nature of the business he would be engaged in and evidence of funds transferred to local banks as proof of capital for his investment.
 - iii. There is no record anywhere that he ever complied with that request.
 - iv. After the Judgment in the criminal case aforesaid, the Petitioner did not make any application to regularise his immigration status in Kenya.
 - v. The Petitioner can make such an application as a dependant, a permit holder and/or register as a citizen.
 - vi. Without (v) above, he cannot be eligible for grant of a Kenyan Identity Card.
7. On my part, the matter portends no difficulty at all. The Petitioner is not a Kenyan and is therefore not entitled to a Kenyan Identity Card as a matter of right (he seems to strongly believe in that mistaken view).
8. The procedure to follow in obtaining a Kenyan Identity Card must begin with compliance of and with **Article 15(2)** of the **Constitution** which provides as follows:
 - “1) ...
 - 2) ***A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.***
 - 3) ...
 - 4) ...
 - 5) ...” (Emphasis added)
9. The **Act of Parliament** referred to above is the **Kenya Citizenship and Immigration Act No.12 of 2011. Section 13(1) and (2)** of that **Act**, from the facts before me, apply squarely to the

Petitioner's case. It provides as follows:

“(1) A person who has attained the age of majority and capacity who has been lawfully resident in Kenya for a continuous period of at least seven years may on application be registered as a citizen if that person—

- a. ***has been ordinarily resident in Kenya for a period of seven years, immediately preceding the date of application;***
- b. ***has been a resident under the authority of a valid permit or has been exempted by the Cabinet Secretary, in accordance with section 34(3)(h) and who is not enjoying the privileges and immunities under the Privileges and Immunities Act (Cap. 179);***
- c. ***has resided in Kenya throughout the period of twelve months immediately preceding the date of the application;***
- d. ***has an adequate knowledge of Kenya and of the duties and rights of citizens as contained in this act;***
- e. ***is able to understand and speak Kiswahili or a local dialect;***
- f. ***understands the nature of the application under subsection (1);***
- g. ***has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;***
- h. ***satisfies the Cabinet Secretary that he or she intends to reside in Kenya after registration;***
- i. ***has been determined, through an objective criteria, and the justification made, in writing, that he or she has made or is capable of making a substantive contribution to the progress or advancement in any area of national development within Kenya; and***
- j. ***is not an adjudged bankrupt.***

(2) The Cabinet Secretary shall not register an applicant as a citizen of Kenya under this section if at the date of making the application applicant's country of citizenship is at war with Kenya.

(3) ...

(4) ...” (Emphasis added)

10. It was the above, or any other relevant procedure that the Petitioner was expected to undertake in compliance with the directive in the criminal case above that he should regularise his stay in Kenya, within 12 months. Has he made any application in that regard?

11. I have read the Petition and annexures to the Supporting Affidavit and severally asked the Petitioner whether he did so but no such application seems to exist. Indeed Mr. Omani confirms that he has seen none in his records. What I have seen are letters and not an application, in which the Petitioner is demanding to be granted a Kenyan Identity Card (not even a certificate of registration and resultant documents upon an application to be registered as a citizen of Kenya). Indeed in a letter to this Court dated 14th October 2015 (during the pendency of the Petition), the Petitioner stated thus, in part:

“After the judgment I started writing letters to the immigration without any answer”.

12. It is apparent therefore that the Petitioner, not knowing the formalities of the law, assumed that his

letters were the application for registration as a citizen. The 1st Respondent did not also seem to offer him any guidance hence his present predicament.

13. What then should this Court do in the circumstances? Under **Article 23(3)** of the **Constitution**, this Court is enjoined to grant an appropriate remedy where there has been proof of violation of constitutional rights.

14. In the present case, as can be seen above, there is absolutely no proof that any rights were violated because it is the Petitioner, in ignorance, who did not comply with the law and the directions of the Chief Magistrate's Court.

15. In the event, the only concluding statement I can make is that the Petitioner ought to properly apply for registration as a citizen, by filling in the requisite forms and paying the necessary fees. The office of the 1st Respondent would then be under an obligation to scrutinise the same within its lawful mandate.

16. In that context, what should I do with the Petition? It is hereby ordered to be dismissed but with the following orders made *suo motu*:

- a. In view of the nature of the Petition before me, the decision of the Chief Magistrate in **CM's Criminal Case No.1064 of 2013**, the Petitioner shall remain in Kenya for a further 12 months to enable him comply with the directives in that case and the directions given in this judgment.
- b. Each Party shall bear its own costs.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner present

Mr. Sekwe holding brief for Miss Mwangi for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE