



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.586 OF 2012

BETWEEN

BASHIR MOHAMED JAMA ABDI.....PETITIONER

(On Behalf Of The Subject: **Abdi Bashir Mohamed**
Alias **Cabdiqani Bashir Maxamed**)

AND

THE MINISTER FOR IMMIGRATION AND

REGISTRATION OF PERSONS.....1ST RESPONDENT

THE MINISTER FOR FOREIGN AFFAIRS AND

INTERNATIONAL CO-OPERATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. This case brings to the fore the delicate balance between the sensitive issue around the need to protect Kenya and its citizens from terrorist activities and the sacred need to protect individual rights and freedoms.
2. The Petition dated 20/12/2012 was filed by Bashir Mohamed Jama Abdi on behalf of one, Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed and the following orders are sought;

“i) A declaration that the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is by Article 13(1),(2),14(1),(2), (5) and 16 of the Constitution a citizen of Kenya by birth and/or a person entitled to regain his Kenyan citizenship.

ii) A declaration that the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is entitled to all rights of a citizen of Kenya under Articles 12, 27(1), 39(3), 45(1), (2) and 50(1) of the

Constitution.

- iii) A declaration that under Regulations 7 and 8 of the Kenya Citizenship and Immigration Regulations, 2012 the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is entitled to entry into Kenya as a Kenyan citizen using his British passport and to endorsement of his British passport with the fact of his being a citizen of Kenya.**
- iv) A declaration that by denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed entry into Kenya and deporting him to the UK without a formal process or service on him with any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subject's constitutional rights of a citizen under Article 12, his fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family and to a fair hearing under Articles, 27(1), 39, 45(1), 47 and 50(1) of the Constitution.**
- v) An order of mandamus and/or mandatory injunction compelling the 1st and 2nd Respondent to facilitate, accept and expedite endorsement of Kenyan citizenship on the subject's British passport and processing of application for regaining Kenyan citizenship by the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed in his name of birth of "ABDI BASHIR MOHAMED" at any of the Kenyan diplomatic missions abroad.**
- vi) An order of mandamus and/or mandatory injunction compelling the 1st and 2nd Respondents to facilitate, accept and expedite application by the subject for issuance with a Kenyan passport to the subject in his name of birth "ABDI BASHIR MOHAMED" at any of the Kenyan diplomatic Missions abroad.**
- vii) An award of general damages for violations of the constitutional rights and fundamental rights and freedoms of the subject in prayer (iv) above as may be assessed by this Honourable Court.**
- viii) Costs of this Petition.**
- ix) Interest on (vi) and (viii) above."**

Factual Background

3. In the Supporting Affidavit of the Petitioner sworn on 20/12/2012, his Further Affidavit of 11/4/2013 and in the Replying Affidavit of Alfred Omangi Abuya sworn on 18/3/2013 and a Further Replying Affidavit sworn on 16/5/2013 on behalf of the Respondents, the following facts emerge;
4. That on 7/7/2012, Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed (*hereinafter "Abdi"*) had travelled from the United Kingdom (UK) to Kenya aboard a Kenya Airways Flight No. KQ 0101 and on arrival at the Jomo Kenyatta International Airport, he was stopped at the Immigration Desk and informed that he was not allowed to enter Kenya because he was involved in terrorist activities. He was thereafter put on the next flight to the United Kingdom where he has been living freely and without any charges being preferred against him and from evidence on record, he was not even interrogated by British authorities on the allegations levelled against him.
5. The above action triggered the present Petition.

Petitioner's Case

6. The Petitioner is the biological father of Abdi and in the cause of these proceedings, I ordered a DNA test to be conducted to confirm that fact and a report was submitted by Dr. Andrew Gachie of Nairobi Hospital. In that report, it is conclusively determined that Abdi is the son of the

Petitioner and that his biological mother is Halima Jama Hassan, wife of the Petitioner.

7. It is now the Petitioner's case that his son, Abdi, is entitled to the citizenship of the Republic of Kenya and that although the said Abdi is now a naturalised citizen of the United Kingdom, he is still entitled to the citizenship of Kenya and as a citizen of dual nationality under the Kenya Citizenship and Immigration Act, 2011. That although he has applied for a Kenyan passport, the same has been denied to him, unlawfully, on the grounds that he is involved in terrorist activities which allegation is unfounded.
8. For the above reasons, the Petitioner seeks the orders elsewhere reproduced above.

Respondent's Case

9. The Respondents filed a Replying Affidavit sworn by Alfred Omangi Abuya aforesaid and their case is simple; that on 13/6/2013, the Director General of the National Security Intelligence Service wrote to the Director of Immigration Services and stated that one Cabdiqani Bahir Maxamed alias Abdulghani Bashir Mohamed born on 29/6/1973 and of British Nationality (Passport No.GBR 800613668) expiring on 5th June 2018 “*is suspected to be abetting terrorist activities while in Kenya*” and “*in order to deter his activities kindly declare him a prohibited Immigrant*”.

Consequently, he was put on the Terrorist Watch List and he was prohibited from entering Kenya in accordance with the provisions of **Section 33** of the **Kenya Citizenship and Immigration Act, 2011**.

10. At paragraph 7 of that Affidavit, Abuya further deponed as follows;

“That whereas Passport No.A1 55858 may have been issued to one Abdi Bashir Mohamed there is nothing to show that he is one and the same person as CABDIQANI BASHIR MAXAMED”

11. In his Further Replying Affidavit sworn on 16/5/2013, Abuya has made the further point that Cabdiqani Bashir Mohamed has held several British passports since 2002 and he has always declared that he was born in Mogadishu, Somalia and has never made any attempt to rectify the anomaly, if at all. That he has also made no attempt to show, by Deed Poll, that he is the same person as Abdi Bashir Mohamed.

12. Further, that there are no records that he has applied for dual citizenship and his Application for a Kenyan Identity Card is incomplete and the particulars therein are also inconsistent with the facts set out in the Petition.

13. It is also his deposition that no details are given of the passports issued on 7/9/1989 and in 1994 and the names appearing in Kenyan Passport No.155858 are not the same as the ones appearing in the Birth Certificate used to apply for a Kenyan Identity Card by the said Abdi.

14. Lastly, that Cabdiqani Bashir Maxamed is being sought by British authorities in relation to involvement in terrorist activities in Kenya and in the United Kingdom and has filed the present Petition to circumvent the due process of the law by way of material non-disclosure and falsehoods and the same should be dismissed.

Submission

In his Submissions, Mr. Mbugua Mureithi, learned advocate for the Petitioner argued that;

- (i) Abdi had been issued with a Kenyan Passport No.A155858 on 7/9/1989 while only 16 years old and the said Passport expired in 1994 and he was issued with another one (details unsupplied) which subsequently got lost. That when he moved to the United Kingdom in 1995, he assumed the name

“*Cabdiqani Bashir Maxamed and was naturalised as a British Citizen*” “*on the regrettable information that he was born in Mogadishu, Somalia*”

That he returned to Kenya in 2003 and settled with his family and only begun attempts at regaining his Kenyan Citizenship in 2012. His intention was to acquire dual nationality and by time of his deportation, he had not succeeded in that quest. Mr. Mureithi submitted that the Respondents, in the circumstances, were obligated to furnish Abdi with the reasons for their actions including failure to issue him with a Kenyan Passport but that they had failed to do so.

(ii) Having proved by irrefutable DNA evidence that he is the biological son of the Petitioner, Abdi is entitled to the citizenship of Kenya by birth in the meaning of **Articles 13(1), (2), 14(1), (2), (5) and 16 of the Constitution and Section 6, 7, 8 and 10 of the Kenya Citizenship and Immigration Act, 2011.**

(iii) On the issue whether the Petitioner is properly before the Court and whether Abdi should have filed the Petition on his own behalf, Mr. Mureithi submitted that under **Article 22(2) of the Constitution**, any person can institute proceedings claiming violation of fundamental rights against a party that is unable to act in their own name and in the instant case, that Abdi, for reasons of inability to be in Kenya is unable to file any proceedings in his own name.

(iv) The denial of entry into Kenya of Abdi on the allegations of involvement in terrorist activities was baseless because no evidence of investigations undertaken, action taken and proof of the allegations had been given. That although British Intelligence is cited as the primary source of that information, there is no evidence at all that there was tangible proof of that information more so where Abdi had been and continues to travel freely within and without the United Kingdom including making a trip to Ottawa, Canada at the same time as the present Petition was being filed.

In the event, that under **Section 33(1)(i) of the Kenya Citizenship and Immigration Act, 2011**, the grounds for declaring one a prohibited immigrant on grounds of engaging in, facilitating or being sympathetic to acts of terrorism or terrorist activities must be based on “*reasonable cause*” and not whimsical reasons as is the case in the Petition.

Further, it is Mr. Mureithi's submission that no declaration of prohibited immigrant has ever been made in respect of Abdi by the Cabinet Secretary pursuant to **Section 43 of the Act** and no hearing was afforded to him before his return to the United Kingdom which renders that action null and void for all purposes of the law.

(v) That following the Court decisions set out below, the Petition should be allowed as prayed. The decisions are;

(a) **United States vs Wong Kim Ark 169 U.S. 649 (1898)** where it was held *inter-alia* that “*the citizenship of a person is determined by the descent of his or her parents and does not depend on the place of birth*”.

(b) **Mohamud Muhumed Sirat vs Ali Hassan Abdirahman & 2 Others Election Petition No.15 of 2008** where it was stated that if there were doubts as to a person's registration documents, complaints should be made to the appropriate authority for action to be taken against him.

(c) **Samuel Mukira Mohochi vs AG of Uganda, EACJ Reference No.5 of 2011** where the East African Court of Justice wondered why a suspect was returned from one partner State of the East African Community to another while he was allegedly suspected of terrorism related activities without him being interrogated or questioned on those alleged activities.

(d) **Republic vs Otieno Kajwang ex-parte Mohmud Siras [2009] eKLR** where Dulu J stated that a suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him.

(e) **Leonard Sitamze vs Minister for Home Affairs & 2Others H.C. Misc. Application No.430 of 2004 (Nbi)** where Ojwang J. (*as he then was*) derided the casual nature in which information touching on national security was presented to Court and went on to hold that even in very sensitive matters, the Court, at the very least should be informed of the nature of the security threat to justify the arrest, internment and threat of deportation of a suspect in that regard.

(f) **Samura Engineering Ltd & 10 Others vs Kenya Revenue Authority H.C Petition No.54 of 2011** where Majanja J. stated that Kenya and its people “*must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning the Constitution*”

(g) **Sonia Kwamboka Rasugu vs Sandalwood Hotel a Resort Limited T/A Paradise Beach Resort & Anor, [2012]eKLR and Moses Oweno vs Commissioner of Police & Anor,H.C. Misc. Application No.265 of 2001** where damages were awarded to the Applicants for arbitrary deprivation of freedom.

15. I have seen no Submissions on the part of the Respondents as none were on the record at the time of writing this Judgment.

Determination

16. At the outset, I need to make it clear that from the evidence before this Court, there is no doubt that a person by the name Cabdiqani Bashir Maxamed is the biological son of the Petitioner and his wife, Halima Jama Hassan. The Petitioner and his wife are citizens of the Republic of Kenya and are both of the Somali Community. I say this because in the Report tabled by Dr. Gachie of Nairobi Hospital and admitted into the record without objection, Anglia DNA Services Ltd of Norwich, United Kingdom conducted a DNA analysis of blood samples from all the above three persons and the conclusion was as follows;

“Based on the swabs provided to us the DNA results give a probability of paternity of 99.99999990%. Therefore, it is 416546137 times more likely that the alleged father (Bashir Mohamed Jama) is the biological father of the child (Cabdiqani Bashir Maxamed) than an unrelated man of a similar ethnic origin.”

17. It is very difficult to fault the above scientifically proven fact and it follows therefore that it is most likely than not that the person born on 29/6/1973 and known as Abdi Bashir is the son of the Petitioner. The birth certificate marked as exhibit “G” indicates that the said person was born at Pumwani Hospital in Nairobi to Bashir Mohamed and Halimo Jama, a fact consistent with the Petitioner and his wife's identity.

18. I have also seen exhibit “H” which is a copy of a Kenyan Passport No.A155858 in the names of Abdi Bashir Mohamed born on 29/6/1973 in Nairobi, Kenya. The Passport was issued on 8/9/1989 and was to expire on 7/9/1994. It was issued under Immigration File No.R 368540 and I have no doubt that the reference is to Abdi Bashir Mohammed, son of the Petitioner.

19. **Who then is Cabdiqani Bashir Mohamed?** From the DNA Report, the said person and who was the one whose DNA was taken for analysis against that of the Petitioner is a biological son of the Petitioner and holder of British Passport Number GBR 099223366 issued on 28/10/2010. His date of birth is indicated to be 29/6/1973 and the place of birth is said to be Mogadishu, Somalia. A certificate of Naturalisation under the **British Nationality Act, 1981** similarly indicates that the said person was born on 29/6/1973 in Mogadishu, Somalia and that he obtained his United Kingdom Citizenship on 7/1/2002.

20. Again from a clear reading of all evidence before me, there is no doubt that it is most likely than not that the person born on 29/6/1973 as Abdi Bashir Mohamed in Nairobi, Kenya and the person allegedly born on 29/6/1973 in Mogadishu, Somalia as Cabdiqani Bashir Maxamed is the same

person save for the obvious anomaly about names and place of birth. **But what then caused the changes to name and place of birth?**

21. In his Solemn Declaration dated 8/4/2013 the said person, Abdi merely states that all the names refer to one and the same person i.e. himself. He said nothing of the very serious legal implications of these details which may well also mean that he lied when applying for citizenship of the United Kingdom, a fact that may well impact on his continued holding of it.

22. Mr. Mureithi in his Submissions referred to the anomaly as “*regrettable misinformation*” which tallies with my statement above that the misinformation was deliberately made by Abdi to obtain the citizenship of the United Kingdom. The justification for doing so is unclear but noting that Somalia has been in turmoil, a citizen of Somalia has a much greater chance of obtaining citizenship in friendly nations than a person from a much more stable Country like Kenya.

23. Having clarified the above issue, the next issue to address is the manner in which citizenship is acquired in Kenya. In that regard, **Article 14(1) and (2) of the Constitution** provides as follows;

“(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.”

24. From my findings elsewhere above, Abdi would have been entitled to the citizenship of Kenya as a birth right (*the principle of jus sanguinis*). It is not in doubt that both his parents were citizens of Kenya at the time of his birth and that explains the fact that he was indeed issued with a birth certificate and a Kenyan Passport.

25. Prior to the Promulgation of the Constitution on 27/8/2010, Kenya did not have any provision for dual citizenship and so upon acquiring the citizenship of the United Kingdom (*by falsely pretending that he had been born in Somalia*), Abdi automatically lost his Kenyan citizenship and he could only regain it through an application to do so, under **Article 14(5) of the Constitution** which provides as follows;

“(1)...

2)...

3)...

4)...

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

26. The action of regaining his citizenship and thereby acquiring dual nationality is at the centre of the present dispute and in that regard, **Section 10 of the Kenya Citizenship and Immigration Act** provides as follows;

“(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.”*

27. The above provisions are important because whereas the Petitioner has framed his Petition as if Abdi is entitled to citizenship *jus sanguinis*, that is not the legal position because he, voluntarily, applied for the citizenship of another Country, (the United Kingdom) and thereby lost his Kenyan citizenship as a matter of law. He could only therefore regain it by the procedure above and not as a matter of right.

28. **Rule 5 of the Kenya Citizenship and Immigration Regulations, 2012** (L.N. No.64/2012) creates Form 1 which is an application to regain Kenyan Citizenship and upon the Cabinet Secretary considering that application, he may issue a certificate in Form 2.

29. In the Petition before me, I have seen no application in the nature of Form 1 aforesaid. What I have seen is an application for an Identity card pursuant to the provisions of the **Registration of Persons Act, Cap.107**. That application could only be made after and not before an application to regain citizenship had been made and so it was clearly premature.

30. The next issue to consider is the action taken on 7/7/2012 against Abdi. It must in that regard be noted that the **Kenya Citizenship and Immigration Act** came into effect on 30/8/2011 and so it was the law applicable as at the time of Abdi's refusal of entry into Kenya on the material date. **Section 33(1) (i)** of the **Act** provides as follows;

“(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is —

(a) ...

(b) ..

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state.”

31. Further, to the above, **Section 43** then goes on to provide as follows;

“(1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person against whom an order has been made under this section shall—

(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or

(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.

(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.

(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.

(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.

(7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.”

32. Read together, the import of the above provisions is that the Act gives the Cabinet Secretary certain powers regarding persons considered to be undesirable in Kenya because of their actions including support for terrorism. It is obvious from the facts, as I have narrated above, that in the case of Abdi, there is no direct action taken by the Cabinet Secretary. All we have is a recommendation from the Director of the National Security Intelligence Service to the Director, Immigration Services who acted by having Abdi denied entry into Kenya. The Petitioner has taken issue with that procedure and in his submissions, Mr. Mureithi forcefully submitted that the procedure for declaration Abdi a prohibited immigrant was never followed and it is my view that the Petitioner's position is not idle. I say so because the Act seems to have a clear procedure to be followed before one is declared a prohibited immigrant and before deportation, removal or denial of entry into Kenya. In **Mohochi** (*supra*) for example, the East African Court of justice (and I was in that Bench) stated as follows;

“Finally in spite of paying close attention to the Respondent's evidence and submissions, we were unable to ascertain whether the Applicant was ever declared a prohibited immigrant, by what procedure and at what point. The only document that was issued

was the Notice to Return or Convey Prohibited immigrantThe Notice was issued to Kenya Airways, not to the Applicant.....94.....All we could see was Kenya Airways being condemned to removal, from Uganda, of a prohibited immigrant they had brought into the county but nowhere were we shown how, why, when, and by whom he was so declared. We were not shown whether the declaration was oral or it was documented. The Notice, in our view was not just irregular, it was unknown to Ugandan law. 95. The foregoing leaves us with our conclusions; Firstly, that the Applicant was not a prohibited immigrant, under the law, because there is no evidence that he was declared so.. Secondly, that Immigration Authorities merely labeled him a prohibited immigrant so as to deny him entry. Thirdly, that the notice was issued in order to corner Kenya Airways into returning him to Kenya and, finally, that the Immigration Authorities resorted to kangaroo methods for want of a lawful procedure by which to swiftly return the Applicant to Kenya”

33. 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 because of alleged terrorist links. I have seen the **Anti- Terrorism, Crime and Security Act, 2001** of the United Kingdom and at **Sections 21, 22 and 23** thereof, the Secretary of State has to take certain procedural steps before a suspected terrorist is either deported or detained. Those steps include;

(i) *issuance of a certificate in respect of a person suspected of international terrorism.*

(ii) *Notification to the suspect of the issuance of a certificate.*

(iii) *Sending of the certificate to the Special Immigration Appeals Commission.*

(iv) *Thereafter the suspect maybe removed or deported from the United Kingdom or he may be detained whether or not legal proceedings have been commenced challenging the actions of the Secretary of State.*

34. I have seen no evidence on the above provisions of the law were invoked against Abdi in the united Kingdom although Abuya stated that British Intelligence were aware of his alleged terrorist links. **Section 33(7)** of the **Act** provides that the Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons and read with **Section 33(5)** of the **Act**, Abdi was presumably denied entry into Kenya under those Regulations which are titled the **Kenya Citizenship and Immigration Regulations, 2012**. The power to issue a notice to a person declared a Prohibited Immigrant is delegated by the Cabinet Secretary to an Immigration officer pursuant to **Rule 37** and the actions to be taken include requiring the prohibited immigrant or inadmissible person;

“(a) *To remain on the carrier by which he entered, intended or attempted to enter Kenya.*

(b) *To leave Kenya by such means and within such period as may be stated in the notice.*

(c) *to enter or remain in Kenya subject to complying with such requirements as to place of residence, occupation, security or reporting to a specified authority as may be specified in the notice”*

35. Form 39 is a “Notice to Return or Convey a Prohibited Immigrant/Inadmissible person” under **Section 44(3)** of the **Act** and in the present case, no evidence has been tendered to show that Abdi was subjected to any process by which he was declared a Prohibited Immigrant and therein lies the problem.

36. As was stated in the **Mohochi** case by Ojwang J. (*as he was*) in **Sitamze** (*supra*), the Respondents seem to treat information about national security threats in a very casual manner. He stated thus;

“Counsel restated the content of the deposition by Damaris Mboya of the Immigration Department (dated 22nd April, 2004), that in considering the Applicant's case for renewal of the permit, some classified information had been received that the Applicant was a threat to national security. I have to note that not much information is given about this threat, and neither the formulation of the relevant affidavit on the question, nor the manner in which counsel communicated this claim before the Court, appeared business-like, done in genuine course of duty or indeed carried any conviction at all. The mode of presentation of this charge that the Applicant was a danger to national security was essentially casual, and the Court has no reason to believe it

Counsel for the Respondents also sought to rely on selected passages from Lord Denning's work, *The Due process of Law*. These passages tended to be highly restrictive of the rights of the individual when faced with the claims of national security. At page 85 of the work, Lord Denning states; “Now there is one type of inquiry in which natural justice is excluded. It is when it is necessary in the interests of national security. There is some information which is so secret that it cannot be disclosed – except to a very few.” To what extent would this authority help the Respondent's case? It is clear in my interpretation of the law, that I have preferred the more expansive approach which requires decisions by the Executive, which expose the individual to loss of his fundamental rights to be subjected to the test of legality as superintended and enforced by the High Court. But I also doubt whether the passage quoted above, from the work by the late Lord Denning, would avail the Respondent. This is because the learned Judge there acknowledged that “there is some information which is so secret that it cannot be disclosed – except to a very few.” I would hold that those “very few” would have to include the Judge. But in the present proceedings, even the Judge has been excluded; and therefore I am not convinced that there are any security reasons which would justify the arrest, internment and threatened deportation of the Applicant. I have with the utmost respect, to depart from the position taken by the late Mr. Justice Patel in *Kalu Timothy Iheke vs Republic*, the main authority relied on by the Respondents. I seriously doubt that that case represents the correct state of the law in Kenya today, given the express provisions of the Constitution on the Fundamental Rights of the individual; given the common law tradition of which this county forms part; given the commitment this county had assumed in international law, under the African Charter of Human and Peoples' Rights; and given the waves of constitutionalism and judicialism which today resonate throughout the Commonwealth and indeed, throughout the world”

37. I am in agreement with the learned Judge because in his two Affidavits, Abuya merely stated that once a letter was received from the Director General of NSIS, Immigration officers were alerted and when Abdi appeared at JKIA, he was promptly returned back to the United Kingdom. How safe is Kenya if a known sympathiser of International terrorism, instead of being arrested, interrogated and charged in a Court of law is let loose in the World and the United Kingdom gladly embraces him and even allows him to travel to Canada and elsewhere without restriction? Aside from the fact that the threat, if at all, that he may pose, is heightened, his own rights were completely trampled upon. I say so and in agreement with the statement made by the European Commissioner for Human Rights to the Council of Europe who in an opinion published in August 2002 stated as follows;

“Terrorist activity not only must, but can be, combated within framework of human rights guarantees, which provide precisely for a balancing, in questions concerning national security, of individual rights and the public interest and allow for the use of proportionate special powers. What is required is well-resourced policing, international cooperation and the forceful application of the law. It is to be noted, in this context, that in the Terrorist Act 2000, the United Kingdom already has amongst the toughest and most comprehensive anti-terror legislation in Europe”

38. The above statement was also quoted in Case of A. & Others vs United Kingdom –

3455/05[2009] ECHR 301 which was a case filed by a number of foreign nationals present in the United Kingdom and suspected of providing a support network for Islamist terrorist operations linked to Al Qaeda after 2001.

39. Similarly, the United Nations Committee on the Elimination of all Forms of Racial Discrimination in its Concluding Observation on the United Kingdom dated 10/12/2003 stated thus;

“The Committee is deeply concerned about provisions of the Anti- Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non- nationals of the United Kingdom who are suspected of terrorism-related activities.

While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to 'ensure that measures taken in the struggle against 'terrorism' do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin”

40. I wholly agree and as to the right to be informed of the allegations made against a suspect in **Charkaoui vs Minister of Citizenship and Immigration [2007], SCR 350**, McLachlin, CJ of Canada stated thus;

“Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it”

“... The Judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?”

41. Again I am in complete agreement with the above findings and my conclusions is that whether or not there were plausible grounds on account of national security as against Abdi, the Respondents breached the law in the casual nature 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 Abdi. By keeping mum, its actions, however noble, may not pass the test of legal scrutiny. As it is therefore, the only 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.

The Prayers in the Petition

42. Having held as above, I should now revisit the prayers in the Petition as follows;

43. (i) ***A declaration that the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is by Article 13(1),(2),14(1),(2), (5) and 16 of the Constitution a citizen of Kenya by birth and/or a person entitled to regain his Kenyan citizenship.***

It is obvious to me that whereas Abdi is entitled to apply to regain his citizenship, this Court cannot be the organ to grant it to him because it is not a matter of right. He should make the necessary application and if it is formally denied, then he can have recourse to the Court after that fact. This prayer is consequently denied.

44. **(ii)** *A declaration that the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is entitled to all rights of a citizen of Kenya under Articles 12, 27(1), 39(3), 45(1), (2) and 50(1) of the Constitution.*

Abdi is not a citizen of Kenya. He is a citizen of the United Kingdom and until he lawfully regains his citizenship, he is not entitled to this prayer which is therefore denied.

45. **(iii)** *A declaration that under Regulations 7 and 8 of the Kenya Citizenship and Immigration Regulations, 2012 the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed is entitled to entry into Kenya as a Kenyan citizen using his British passport and to endorsement of his British passport with the fact of his being a citizen of Kenya.*

Regulations 7 and 8 provide for “use of Kenyan Passport or the Passport of any other Country” and “endorsement of Passport of other Countries” respectively with regard to dual citizens.

Abdi is yet to obtain dual citizenship and as such those provisions of the law cannot apply to him and the prayer is therefore denied.

46.**(iv)** *A declaration that by denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed entry into Kenya and deporting him to the UK without a formal process or service on him with any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subject's constitutional rights of a citizen under Article 12, his fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family and to a fair hearing under Articles, 27(1), 39, 45(1), 47 and 50(1) of the Constitution.*

I have stated elsewhere above that it is indeed true that Abdi was denied due process of the law and so this prayer is justified save that **Article 39(3)** is limited to citizens of Kenya having the “right to enter, remain in and reside in Kenya”. He is not a citizen and that right is limited to that extent. **Articles 27 (non-discrimination) 39(1) and (2) (freedom of movement and residence, 45 (family), 47 (fair administrative action and 50 (right to fair hearing)** are rights granted to all persons and in this instance, Abdi was denied those rights and I so declare.

47.**(v)** *An order of mandamus and/or mandatory injunction compelling the 1st and 2nd Respondent to facilitate, accept and expedite endorsement of Kenyan citizenship on the subject's British passport and processing of application for regaining Kenyan citizenship by the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed in his name of birth of “ABDI BASHIR MOHAMED” at any of the Kenyan diplomatic missions abroad.*

This prayer has merit because every former citizen has a right to apply to regain his citizenship. However, there is no obligation on the part of the Kenyan Government “to accept” an application to regain citizenship because one must meet the lawful conditions set for so doing. I will therefore allow the prayer limited to the application being expedited and a decision made one way or the other.

48.**(vi)** *An order of mandamus and/or mandatory injunction compelling the 1st and 2nd Respondents to facilitate, accept and expedite application by the subject for issuance with a Kenyan passport to the subject in his name of birth “ABDI BASHIR MOHAMED” at any of the Kenyan diplomatic Missions abroad.*

It is obvious why I cannot accede to this prayer and I have elsewhere above explained why. It is quickly denied.

49.**(vii)** *An award of general damages for violations of the constitutional rights and fundamental rights and freedoms of the subject in prayer (iv) above as may be assessed by this*

Honourable Court.

In his submissions, Mr. Mbugua proposed that damages in the sum of Kshs.25 Million be granted to the Petitioner for violation of fundamental rights. I have taken time to consider this prayer and although I have found that due process was not followed in the way Abdi was denied entry to Kenya, the effect of that action and injury to him has not in any way been tabled for consideration by this Court. It has been urged that he has been separated from his family without gainful employment. That he was also subjected to “*quasi detention*” and “*quasi false imprisonment*” and needs compensation thereby.

50. I have taken two factors into account;

(i) *that general damages are awarded at the discretion of the Court*

and

(ii) *Abdi is not blameless in the whole saga. It was Abdi who lied to obtain the citizenship of the United Kingdom and it was Abdi who voluntarily and without prodding lost his Kenyan Citizenship. All his problems can be traced to that single act and he cannot expect that this Court would in the circumstances reward him for his sins. In any event, there is no statement from him anywhere on the record detailing out any suffering he may have undergone as a result of denial of entry into Kenya and his father, the Petitioner has not even attempted to show that suffering as should be compensated in damages occurred to Abdi.*

51. In the totality of things and since each case must turn on its own facts, damages cannot and should not be awarded to the Petitioner.

52. **(viii) Costs**

The nature of this case is that no party has wholly succeeded and it is fair that each bears its own costs.

Conclusion

53. This Judgment should serve as a wake up to all security agencies and those charged with issues of Immigration. Due process under the **Constitution 2010** is not illusory. It lives and thrives whatever the status of the person who demands it. The casual response to the present Petition is worrying and the trend, if it continues, may lead to decisions that would in the end compromise national security.

54. In any event, the final orders to be made are as follows;

(a) *Prayers (i), (ii), (iii), (iv) and (vii) of the Petition are denied.*

(b) *The following orders are made;*

(i) *A declaration that by denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK, was a violation of the subject's fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family under **Articles 27(1), 45(1) and 47 of the Constitution.***

(ii) *An order of mandamus and/or mandatory injunction compelling the 1st and 2nd Respondent to facilitate, and expedite the processing of an application for regaining Kenyan citizenship by the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Maxamed in his name of*

birth of “ABDI BASHIR MOHAMED” at any of the Kenyan diplomatic missions abroad and for a decision to be made one way or the other regarding that application.

(c) *Each Party shall bear its own costs.*

55.Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Mureithi for Petitioner

Mr. Maimbo holding brief for Mr. Kakoi for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE