



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 173 of 2013

MARYAN HUSSEIN MOHAMED.....PETITIONER

AND

**THE DIRECTOR OF IMMIGRATION AND REGISTRATION OF PERSONS.....1ST
RESPONDENT**

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

SHUKRAN HUSSEIN GURE.....INTERESTED PARTY

JUDGMENT

1. By a petition dated 21st March 2013, the petitioner moved the court for the following orders;

a) A declaration that failure by the 1st Respondent to disclose information relating to the citizenship and travel history of the Interested Party violates Articles 35 and 48 of the Constitution of Kenya, 2010.

b) An order that the 1st Respondent does disclose to the Petitioner the following information relating to the Interested Party:

i. travel history of the Interested Party including the date of travel into or and/or out of Kenya and the passport used for such travel by the interested party.

ii. confirmation of citizenship status and type of the interested party as at 27th August 2010.

iii. validity of Kenyan passport number A1942231 or any other Kenyan passport issued to the interested party (if any).

iv. date and year of issuance of the Kenyan passport to the interested party and date of renewal.

c) An order that the 1st respondent to make disclosure to the petitioner of the information in [b] above forthwith and in any event within three(3) days of the day of the Order or any such reasonable time line as the court may order.

- d) A declaration that the disclosure by the 1st respondent to the petitioner relating to the citizenship and travel history of the interested party is in the public interest.
- e) A declaration that the disclosure by the 1st respondent to the petitioner relating to the citizenship and travel history of the interested party does not violate her privacy
- f) Any other relief the Honourable court may deem fit to grant;
- g) The costs of this petition.

2. The petitioner's claim is based on **Article 35(1)** of the Constitution which protects the fundamental right of access to information held by the state and by third parties necessary for the exercise of fundamental right and freedoms. In this case the petitioner wishes to have the information regarding the interested party to enable her lodge an election petition.

3. The petitioner states that she has reason to believe that the interested party is a citizen of the United States of America and that she had emigrated to the United States of America using a travel document issued by the United States. She later returned to vie successfully for the Garissa Woman County representative seat. The petitioner avers that she complained to the returning officer about the interested party's eligibility but this was in vain.

4. In a letter dated 13th March 2013, the petitioner's lawyers wrote to the Department of Immigration setting out the grounds for belief that the interested party was an American citizen and requested that the office confirm, "*the above position relating to the citizenship of the said SHUKRAN HUSSEIN GURE.*" The Department of Immigration by its letter dated 18th March 2013 replied in part by stating that, "*According to our records Shukran Hussein Gure has never held an American passport.*"

5. Counsel for the petitioner, Mr Keya, emphasised that this matter was one of public interest and that the petitioner had a right to information from the 1st respondent, who is a custodian of public records, and the interested party's right to privacy would not be breached by enforcing the provisions of **Article 35**. He also submitted that there was reasonable evidence to believe that the interested party was a citizen of the United States and therefore not qualified to vie for public office.

6. Mr Obura, counsel for the respondents, informed the Court that the Director of Immigration was ready to comply with any order made by the court.

7. The petition is opposed by the interested party on the basis of her affidavit sworn on 2nd April 2013 in which she denies the allegations that she is an American citizen. She has deponed that she is a Kenyan citizen by birth as she holds a Kenyan national identity card and passport. She also notes that the Director of Immigration confirmed the fact that she has never held an American passport.

8. Mr Shijenje, counsel for the interested party, submitted that the interested party's right to privacy protected under the provisions of **Article 31** must also be respected in the circumstances and the facts do not warrant the grant of such an order.

9. I have considered the arguments and depositions in this matter and I take the following view of the matter. The right of access to information under **Article 35** is not absolute; it may be limited under the circumstances in **Article 24**. It is also not absolute in the sense that every individual has a right to privacy enshrined under **Article 31**. These rights must be weighed and balanced.

10. I do not think a failure to disclose the petitioner's travel information is a breach of **Articles 35** and **48** as such information, though in custody of the State, is personal information. The travel history of a person is such personal information and I do not see that there is a greater public interest, at least in this case, in disclosing it to a third party.

11. The request by the petitioner to the Director of Immigration to confirm the interested party's citizenship was dealt with and the documents furnished in the Replying Affidavit will assist the petitioner make further inquiries or investigate the matter further.

12. I am also of the view that the Court dealing with the intended petition has the power to summons any witnesses and call for any evidence, where sufficient basis has been laid. On the whole, I am not satisfied that the petitioner has made out a case for the Court to intrude upon the privacy of the third party at this stage. Although the Department of Immigration, like any other public institution holds information on persons, that information does not necessarily become public information. It is still protected and that is why the right to privacy exists.

13. I am constrained to dismiss the petition and it is hereby dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of April 2013.

D. S. MAJANJA

JUDGE

Mr Keya instructed by Kibungei and Company Advocates for the petitioner.

Mr Obura, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Shijenje instructed for the Kilonzo and Company Advocates for the third party.