

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E345 OF 2024

BETWEEN

BISHASHA AMBASSADE.....
.....PETITIONER

VERSUS

REFUGEE CONSORTIUM OF KENYA.....
.....1ST RESPONDENT

DEPARTMENT FOR REFUGEE SERVICES.....
.....2ND RESPONDENT

SENIOR COMMUNITY SERVICES ASSISTANT AT
UNHCR.....3RD

RESPONDENT

COMMISSIONER FOR REFUGEE
AFFAIRS.....4TH RESPONDENT

INSPECTOR GENERAL OF
POLICE.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH
RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 15th January 2024 is supported by the Petitioner’s affidavit in support sworn on even date and a further affidavit dated 16th September 2024.

2. The main grievance in this Petition is about the treatment that the Petitioner claims he has been subjected to by the Respondents as a refugee/ asylum seeker in Kenya which he contends violates the rights of an asylum seeker and infringes on constitutional rights and rights under international refugee law.
3. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

DECLARATIONS

- a) ***A declaration that the Respondents have jointly and severally violated and contravened Articles 21, 27 and 43 of the Constitution.***
- b) ***A declaration that the Respondents have jointly and severally violated and contravened Articles 3, 18 and 28 of the Refugees Convention, 1951.***
- c) ***A declaration that the Respondents have jointly and severally violated and contravened Articles 7, 9 and 17 of the International Convention on Civil and Political Rights.***
- d) ***A declaration that the Respondents have jointly and severally violated and contravened Articles 7 and 23 of the Universal Declaration of Human Rights.***
- e) ***A declaration that the Respondents have jointly and severally violated and contravened Section 8 (m) of the Refugees Act, Cap 173.***

- f) A declaration that the Respondents have jointly and severally violated and contravened Articles 4 of the Organisation of African Unity Convention.**
- g) A declaration that the Petitioner's right to own property is curtailed by the refusal to issue him with identification documents being mandate and alien identification card.**
- h) A declaration be issued to the effect that the failure to issue the identification documents was a violation of Article 27 of the 1951 Convention relating to the status of refugees, Article 27, 28 and 29 of the Constitution.**
- i) Damages be awarded to the Petitioner with regards to the violation of the refusal to issue identification documents as prayed in prayer (h) above.**
- j) A declaration that the Petitioner was entitled to identification documents as matter of right.**
- k) A declaration be issued that the Petitioner's detention for 11 days was a violation of his rights under Article 29 of the Constitution.**
- l) Upon the declaration in (k) above damages be awarded to the Petitioner.**
- m) A declaration be issued to the effect that the insistence on the Respondents to forcefully move the Petitioner back to Kakuma before his security issue was addressed is a violation of Article 3 and 26 of the 1951 Convention relating to the status of refugees, Article 9 of the Convention of the**

Civil and Political Rights Article 39(1) of the Constitution.

- n) Damages be awarded to the Petitioner with regard to prayer (m) above.***
- o) A declaration be granted that the delay in issuing the Petitioner with identification documents was an inordinate delay.***
- p) A declaration be granted that the delay in communicating the Petitioner's refugee status was in violation of Article 28 and 47 of the Constitution.***
- q) Damages be granted with regards to prayers (o) and (p) above.***
- r) A declaration be issued to the effect that the Respondents delay in processing the Petitioner as a Refugee is a direct co-relation with the Petitioner's quality of life.***
- s) Damages be granted with regards to the Respondent's delay in processing the Petitioner as envisioned in prayer (r) above.***
- t) A declaration that the Respondents behaviour towards the Petitioner amounts to torture and cruel treatment in violation to Article 7 of the International Convention on Civil and Political Rights.***
- u) Damages to be awarded to the Petitioner with regard to prayer (t) above.***
- v) A declaration to be issued to the effect that the failure to issue the Petitioner with identification documents was a violation of his rights to seek employment or self - employ as envisioned under Article 23 of the Universal Declaration of Human Rights,***

Article 17 and 18 of the 1951 Convention relating to the status of Refugees.

- w) Damages be awarded to the Petitioner with regard to prayer (v) above.**
- x) A declaration that the Petitioner's right as provided under Article 37 of 1951 Convention relating to status of refugees have been violated with regard to the failure to issue relevant documents to assist the Petitioner commence the process.**
- y) Damages to be awarded with regard to prayer (x) above.**
- z) A declaration to be issued to the 2nd and 4th Respondents that they owe a duty to the Petitioner with regard to resettlement or assimilation.**
- aa) A declaration be issued that the 2nd and 4th Respondents have failed in their duty with regards to (z) above with regards to the Petitioner.**
- bb) The Court do direct the 2nd and 4th Respondents to report back to Court within a period of ninety (90) days after the granting of this order and report to the court on the steps taken to redress the violations in this petition especially but limited to prayer (aa) and issuance of identification to the Petitioner.**

ORDERS

- a) An order granting the Petitioner actual custody of his children.**

- b) An order compelling the 1st and 2nd Respondents to release the Petitioner's refugee documents to him.**
- c) An order compelling the Respondents to grant the Petitioner safety and security within the Kenyan territory.**
- d) An order compelling the Respondents to conduct the eligibility test to enable the Petitioner get a mandate and an alien identity card securing consistent means of income to provide for himself and his children.**
- e) An order quashing the terrorism charges pressed against him by the 1st Respondent.**
- f) Any other or further remedy that this Court shall deem fit to grant.**
- g) An order that the Respondents do compensate the Petitioner for the loss of his tools of trade.**
- h) An order for general damages.**
- i) Interest on any amounts awarded.**
- j) An order that the Respondents do bear the costs of this Petition.**

Petitioner's Case

4. The Petitioner is an immigrant from Congo and came to Kenya on 26th February 2021. He asserts that upon his arrival, the 4th Respondent never issued him with an asylum seeker pass as required by law.

5. He depones that back in May and October 2021, he was attacked by persons in Kakuma Refugee Camp who wanted to take away his children. He avers that he reported the matter to the 1st and 2nd Respondent's representatives in the camp and the police, who then arrested the culprits. He however claims that the investigation and prosecution of these persons was mishandled and as such they returned back to the camp.
6. He alleges that upon the return, the perpetrator proceeded to attack him in his home and broke his arm. He informs that his neighbours rescued and saved him and his children. Fearing for the welfare of his children, he avers that he relocated to Nairobi in November 2021 with the assistance of the Child Protection officer at Kakuma Camp. It is there that he started his business.
7. He depones that on 7th January 2023, the Chief of Kangemi and Officer in Charge of Station (OCS) of Spring Valley Police Station arrested him while engaging in his business. He states that before arresting him, they took away his tools of trade. In addition, they took his children and placed them in a children's home as no one else could look after them.
8. He states that he was detained for 11 days and never presented in Court during this period. He claims that he was instructed to pay Ksh.300,000 so that he can be issued with his tools of trade. Since he had no money, he requested he

be issued with an inventory of the items that were seized. He claims that this request was not granted.

9. The Petitioner states that upon his release on 7th March 2023, he sought assistance from the 1st Respondent through its officer Madam Grace so as to recover his goods. In addition, he hoped to be given Ksh.45,000 so that he could pay his rent since he had been evicted from his house. He asserts that instead of assisting him, the 1st Respondent threatened to take him back to Kakuma Camp.
10. He avers that when he sought to get his children back, the Children Officer informed him that this was not possible as there were allegations against him that he had defiled the children. His attempt to further get assistance from the 3rd Respondent is said to have also been futile.
11. The Petitioner informs that since he had nowhere else to go, he went back to the 1st Respondent on 8th March 2023 with his belongings. He was however locked out of the premises which caused him to pitch a tent outside Haki House. He avers that his persistent stay there, caused Madam Grace to intervene. She informed him that she would assist him get a license and secure funding from one of the organizations on the condition that he would cease following up on the seized goods and leave the office premises. He declined this proposal.

12. The Petitioner depones that when the 1st Respondent attempted to relocate him and his family in April 2023, he fled. When he returned the following day to take his belongings, he learnt that the same had been taken by the 1st and 3rd Respondents' officers. In addition, he claims that he was beaten by Cobra Security guards and thereafter taken to Kilimani Police Station.
13. He depones that he was detained and charged with the offence of raiding the 1st Respondent's offices, breaking the windows of the vehicles parked there in the parking bay, interrupting the operations of the 1st Respondent and presenting himself naked. These charges are said to have been lodged by Madam Grace.
14. The Petitioner was arraigned in Kibera Law Courts the following day. He denied the charges and was later on remanded at Industrial Area for 3 weeks. At the next Court mention, he admitted that he had committed the offences and narrated his account which led him to the 1st Respondent. He avers that following this, the Hon. Magistrate directed the 1st Respondent to assist the Petitioner and also released him.
15. The Petitioner depones that on the following day, he went back to the 1st Respondent but his request to meet the representatives was declined. He alleges that he was

attacked on 20th August 2023 by policemen instructed by the 1st Respondent without any justification.

16. On the following day, as he headed to the 1st Respondent's office, he asserts that he saw his belongings being carried away by the 1st and 2nd Respondent's personnel. He depones that when he went to report the matter at Kilimani Police Station, he was instead informed that the 1st Respondent had lodged terrorism charges against him thus advised him not to press any charges. He claims that these false charges are being used to tarnish his character and status as a refugee.
17. The Petitioner informs that since the 1st and 2nd Respondent took away his refugee documents, he cannot relocate to another country. He is apprehensive that the Respondents will continue to torture him in the manner they have. In fact, he avers that the 1st Respondent has even had him followed by its personnel.
18. He further notes that the asylum seeker pass issued on 15th August 2024 relied upon by the 4th Respondent is false as well as the manifest claimed to have been issued to him on 23rd March 2021. He claims that he was never issued with these documents and moreover the asylum pass does not bear the 4th Respondent's signature. In fact, the Petitioner questions why the 4th Respondent is in possession of these documents which should have been issued to him 4 years ago terming the action overall as malicious.

1st Respondent's Case

19. The 1st Respondent filed Grounds of Opposition dated 26th September 2024 on the basis that:

- i. The 1st Respondent is not a state organ and therefore it does not owe any obligations towards the Petitioner under Article 21 of the Constitution. This Article places the obligation on the state and state organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*
- ii. The 1st Respondent did not discriminate against the Petitioner. The 1st Respondent's failure to issue assistance requested by the Petitioner was justifiable because the assistance sought was not within the mandate of the 1st Respondent a fact that was duly explained to the Petitioner.*
- iii. The 1st Respondent is a Non-Governmental Organization established and registered in Kenya with the following objectives:*
 - a. Representing refugees and asylum seekers who are arrested in police stations, prisons and courts of law and on issues related to their asylum in Kenya.*
 - b. Providing legal support, advice and accompanying refugee complainants to the courts of law especially survivors of sexual violence, gender-based violence and on issues of child welfare.*
 - c. Representing refugees in child protection matters including child custody and child maintenance.*

- d. *Counselling of refugees with trauma problems and who are being assisted with services.*
 - e. *Training refugees on self-representation skills.*
 - f. *Sensitizing refugees on refugee law including the duty to comply with the laws of Kenya among other areas of law as identified through needs assessment.*
- iv. *The 1st Respondent's failure to offer economic support and repatriation did not amount to discrimination as alleged by the Petitioner but rather an adherence to the objectives of the 1st Respondent. Furthermore, the Petitioner was referred to other agencies that could offer the assistance he sought, a process followed by all other refugees and asylum seekers who find themselves in similar circumstances.*
 - v. *Under Article 21(2) of the Constitution as read together with Article 43, the obligation to provide decent housing is firmly placed on the state and not private agencies such as the 1st Respondent. The 1st Respondent therefore did not violate the Petitioner's right to decent housing.*
 - vi. *Under Article 18 and 28 of the 1951 Convention Relating to the Status of Refugees, it is the role of the contracting states to issue travel documents, work permits and other necessary documents to refugees to facilitate their capacity to engage in self-employment, and not private agencies such as the 1st Respondent.*
 - vii. *Under Part III of the Criminal Procedure Code, the arrest of suspects and the subsequent decision to charge or release them is the responsibility of the National Police Service in conjunction with the*

Director of Public prosecutions. Therefore, any grievances and alleged violations relating to his arrest, detention and arraignment in court should not be directed at the 1st Respondent.

- viii. *The 1st Respondent played no role in the closure of the business of the Petitioner and only learnt of this after the Petitioner reported on said closure to its officer in Nairobi.*
 - ix. *Under Section 8(m) of the Refugees Act 2021, provision of security to refugees and asylum seekers is a function of the Commissioner for Refugee Affairs and not the 1st Respondent.*
 - x. *The Petition is otherwise incompetent, baseless and an abuse of the process of this Court as the Petitioner's rights have not been violated in any manner as alleged or at all and the same ought to be dismissed with costs.*
20. In addition, the 1st Respondent through its Executive Director, Barlet Colly Jaji filed its Replying Affidavit sworn on 26th September 2024.
21. To begin with, he avers that the Petitioner did not report the alleged attack that occurred in May and October 2021. He nonetheless notes that the 1st Respondent is not vested with the mandate to prosecute criminal matters. He states that the 1st Respondent's assistance revolves around representing and supporting refugees and asylum seekers.
22. He depones that the Petitioner came to the 1st Respondent on 21st February 2023 and was attended to by Fresha Nabwire. He informed them that his children had been taken

to alternative care. This was after his liquor business was raided and liquor worth Ksh.79,000 confiscated by the police.

23. He states that the Petitioner in addition sought assistance to pay his rent and to be repatriated to his Congo with his children. With regard to the second request, the Petitioner was referred to the 2nd and 3rd Respondents as they are the only agencies whose mandate extends to repatriation.
24. He claims that the Petitioner is cognizant of the 1st Respondent's mandate and also that it lacks capacity to provide him with house rent as sought. He stresses that doing so would be acting outside its scope.
25. He depones that the 1st Respondent in a bid to assist the Petitioner visited the area chief and Kangemi Police Station. He states that Ms.Fresha was informed that the Petitioner was running an illegal wines and spirits shop in Kangemi without a license. Furthermore, she was informed that the Petitioner had been arrested severally and released with a warning over the issue.
26. He depones that Ms. Fresha advised the Petitioner that the 1st Respondent would assist him secure a work permit for his business. He states that the Petitioner declined this offer and persisted that he only wants to be repatriated.

27. With regard to the Petitioner's children, it is alleged that as per the OCS, the Petitioner had abandoned his children at the police station following his release, arguing that the police had taken his source of income and so was unable to take care of them a fact that was unknown to the 1st Respondent. He informs that the police treated the children as abandoned and handed them over to the children's department who then took them to Nairobi Children Rescue Center on 21st January 2023. Later on, on 14th August 2023, they were transferred to Tumshangilie Children's home.
28. It is noted that when Ms. Fresha visited the children, she was informed that no court process had been initiated in their case. They in addition required Ms. Fresha to provide a physical location of the Petitioner so as to assess suitability in line with the principle of a child's best interest.
29. He states that the Petitioner returned to the 1st Respondent's offices in May 2023 and camped outside their office thereafter. He notes that Ms. Grace's attempt to assist him get a license was vehemently declined by the Petitioner. In addition, the Petitioner is said to have stripped naked causing a lot of commotion. At this juncture, he notes that they had to engage the services of security agents, Cobra Security team who forcibly dressed the Petitioner and took him to Kilimani Police Station.

30. He depones that following this incident, the City Council decided to remove all the campers outside their premises. The 2nd Respondent relocated them to Kakuma camp. He adds that the campers including the Petitioner had camp documents however had not requested for a change of address from the 4th Respondent.
31. In view of this, he informs that the Petitioner was not forcibly removed outside their offices and his belongings taken as alleged. Likewise, he states that when the Petitioner was arrested he was only charged with public indecency and not terrorism as alleged. Equally, the 1st Respondent did not take his refugee documentation as claimed.
32. He argues that the Petitioner in bringing this Petition has come with unclean hands as depones false and misleading information. On this basis, he states that the Petition does not have any merit.

2nd, 3rd and 6th Respondents' Case

33. The 2nd, 3rd and 6th Respondents responses and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

4th Respondent's Case

34. The 4th Respondent, John Burugu filed his Replying Affidavit sworn on 14th August 2024. He informs that he is the head of

the Department of the Refugee Services established under the Refugees Act.

35. He depones that contrary to the Petitioner's allegation that his Department has refused to issue him identification documents, he affirms that the Petitioner was issued with an asylum seeker's pass which serves as proof of a bona fide application for recognition as a refugee and proof of registration which allows his children to enroll in school.
36. He notes that although this is a temporary document, it legalizes the Petitioner's presence in Kenya. The same is issued pending the processing and consideration of issuance of a refugee identification. He avers that issuance of this document is dependent on approval of the refugee status application on a discretionary basis. Considering this, he stresses that the same cannot be presumed or demanded as the Petitioner is seeking to do. He however notes that the discretionary power to issue it is based on national and international legal standards which safeguards the integrity of the asylum process.
37. He points out that the Petitioner conceded that he left Kakuma Refugee Camp without obtaining proper authorization forms and in addition failed to notify him. He informs that this is contrary to the law and **contravenes Section 31 of the Refugee Act which requires refugees and asylum seekers to stay in the designated areas.**

He informs that these designated areas are equipped to provide security, food, shelter, education and medical assistance. As such, he argues that the Petitioner's decision to relocate to Nairobi in addition to being unlawful was unwarranted and premature.

38. He makes known that resettlement and assimilation as sought is not a matter of right but a solution offered to these groups on a discretionary basis. He informs that this process is overseen by the United Nations High Commissioner for Refugees (UNHCR).
39. It is deponed that in the circumstances of this case, he is not able to continue the process of determining the Petitioner's refugee status until he is acquitted of the terrorism charges as deponed by the Petitioner. He avers that he is obligated to balance protection of asylum seekers and refugees with the imperative of first safeguarding national security under Section 27 of the Refugee Act.
40. In light of this and as guided by the law, he concludes that the Petitioner obligated to prove the allegations cited in his Petition.

5th Respondent's Submissions

41. CI Albert Chebii and OCS for Kilimani Police Station on behalf of the 5th Respondent filed a Replying Affidavit sworn on 16th September 2024.
42. He depones that on 8th May 2023 at 9:00am, they received a complaint from the 1st Respondent's officer, Grace Maina. She reported that the Petitioner was outside their gate with placards stating '*Haki Iko Wapi*' and began shouting as he demanded to be let in. The report added that the Petitioner had become violent and even stripped naked causing a disturbance contrary to Section 95(1) of the Penal Code. The 1st Respondent's team is said to have dressed him and then brought him to the station. The complaint was recorded under *OB Entry Number 17/08/05/2023*.
43. He depones that in addition to Grace Maina's statement, they recorded a statement from the security guard, Kennedy Ondieki Maranga. He informs that the arrest was done by PC Tabitha N. Nkaitole. The matter was reported to the Office of the Director of Public Prosecutions on 9th May 2023 and Petitioner arraigned before Kibera Law Courts.
44. He makes known that the allegation that the 1st Respondent lodged a terrorism claim against the Petitioner is false. He states that their Occurrence Book records indicates that no such complaint has ever been lodged. He further affirms that the whole process was conducted in accordance with the law. For this reason, he argues that the Petition does not

disclose any legal and justifiable claim against the 5th Respondent.

Petitioner's Submissions

45. On 16th January 2024, Mutungi Kithinji and Company Advocates filed submissions on behalf of the Petitioner and highlighted the issues for discussion as: *whether the 1st and 3rd Respondents failed to exercise their mandate by refusing to assist the Petitioner; whether the 2nd and 4th Respondent failed to exercise their mandate by refusing to issue the Petitioner the required documents and whether the 5th and 6th Respondent failed to exercise their mandate to offer the Petitioner protection.*
46. Counsel in the first issue submitted that the 1st Respondent's mandate is to promote and protect the rights of refugees and asylum seekers. Reiterating the averments in the Petitioner's affidavit, Counsel submitted that when the Petitioner sought assistance and legal representation from the 1st Respondent to recover his children, goods and to be issued with house rent, he was threatened that he would be returned to Kakuma Refugee Camp if he kept asking for help.
47. Counsel further submitted that the Petitioner was charged at Kilimani Police Station following the 1st Respondent

complaint against him and no evidence was adduced to support it. Counsel recapping the unfortunate events that befell the Petitioner submitted that the 1st Respondent had acted contrary to its mandate in relation to the Petitioner and his children's case.

48. Counsel stated that the Court in **Kituo Cha Sheria and others vs Attorney General (2013) eKLR**, affirmed that refugees fall within the category of vulnerable persons as lack means, support systems of family and friends and also by the fact of being in a foreign land where hostility is never very far. Counsel stated that UNHCR in its Guidelines on protection and care of refugee children directs that children need special attention. Equally the Constitution under Article 53 affirms that a child's best interest is of paramount importance in every matter concerning the child. Counsel submitted that similar protections are accorded in the Children Act and the Convention on Rights of the Child.
49. In Counsel's view, the 1st and 3rd Respondents failed to assist the Petitioner get back his children despite the 1st Respondent being the reason the minor children were taken away from him. Furthermore, that the 1st Respondent denied the Petitioner access to his children. All these acts are said not to have been in the children's best interest. As such, Counsel submitted that the Petitioner's rights had been grossly violated by the 1st and 3rd Respondent.

50. The 2nd and 4th Respondents' are argued to have also violated the Petitioner's rights as they failed to issue him with the relevant documents. Counsel submitted that when the Petitioner and his children were received on 26th February 2021, they were not issued with any asylum seeker pass as required by law. Counsel stated that the asylum seeker pass adduced by the 4th Respondent shows that it was issued on 15th August 2024, yet the date of entry indicates that the Petitioner entered the country on 26th February 2021, a clear indication of mischief by the 4th Respondent.
51. Counsel further stated that the 4th Respondent in its Replying Affidavit had admitted that they had suspended the Petitioner's refugee status process owing to allegations of terrorism charges. Counsel pointed out that the 4th Respondent did not produce any evidence to prove the terrorism charges. Counsel reasoned that if at all the Petitioner had been charged with terrorism he would not have been released from Kibera Law Courts.
52. Counsel relied in **Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM(2016)eKLR** where it was held that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

53. Counsel contended that as a result of this claim the 2nd and 4th Respondents had willingly refused to process the Petitioner's refugee status and grant him the required documentation.
54. On the final issue, Counsel submitted that the 5th Respondent's action of continually arresting and beating the Petitioner for no particular reason violated his rights as an arrested person under Article 49(1)(f) (i) of the Constitution. The 6th Respondent is accused of failing in his capacity as the overseer of various legal sector institutions to call out the 5th Respondent on the illegal arrests and detention of the Petitioner and also not offering him any assistance.

1st Respondent Submissions

55. The 1st Respondent's Counsel, Sandra Wabosha filed submissions dated 26th September 2024 and underscored the issues for examination: whether the 1st Respondent has violated the Petitioner's rights under *Article 21, 27 and 43 of the Constitution*, whether the 1st Respondent has violated the Petitioner's rights under *Article 3, 18 and 28 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, whether the 1st Respondent has violated the Petitioner's rights under *Article 7, 9 and 17 of the International Covenant on Civil and Political Rights*, whether

the 1st Respondent has violated the Petitioner's rights under Article 7 and 23 of the Universal Declaration of Human Rights, whether the 1st Respondent has violated Section 8(m) of the Refugee Act and whether the 1st Respondent has violated Article 4 of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

56. Counsel in the first issue, submitted that the 1st Respondent was unable to respond to the Petition appropriately due to the unspecific, generic, vague and omnibus nature of the Petitioner's allegations. Counsel argued as such that the 1st Respondent was unable to ascertain precisely the nature of allegations against it. Counsel relied in **Anarita Karimi Njeru Vs. Republic (1970) eKLR**, where it was held as follows:

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

57. Counsel further stressed that the Petitioner had not explained how the Respondents had actually violated his rights and the manner in which these violations had been done. Counsel pointed out that the ambiguity was further made manifest by the Petitioner's claim that the 1st

Respondent had violated his right under Article 43 of the Constitution for failing to provide him a decent standard of living. Counsel noted that this right is primarily imposed on the State not private entities such as the 1st Respondent.

58. To buttress this point reliance was placed in **William Musembi & 13 Others V Moi Educational Centre Co. Ltd & 3 Others [2021] eKLR** where it was held that:

“From the foregoing, it is manifestly evident in the present context that the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st Respondent, a private entity. Even though the 1st Respondent has a negative obligation to ensure that it does not violate the rights of the Petitioners, it is not under any obligation to ensure that those rights are realized, either progressively or immediately. The Court of Appeal thus correctly held that the progressive realization of Article 43 rights was the mandate of the State, and that obligation does not extend horizontally to private entities.”

59. Counsel argued that the Petitioner in view of Section 107(1) of the Evidence Act was under an obligation to prove his allegations however had failed to do so. Instead it was argued that the Petitioner had issued vague allegations reflecting a troubling pattern throughout the Petition.
60. Counsel registered similar sentiments in relation to the other issues. Primarily Counsel stressed that various allegations of violations had been made by the Petitioner however no evidence was adduced to buttress the same.

61. In relation to Article 3, 8 and 28 of the 1951 Convention Relating to the Status of Refugees, Counsel stated that the 1st Respondent has no authority to issue such documentation. Nonetheless Counsel stated that no evidence was adduced to show that the 1st Respondent seized the Petitioner's personal and travel documents.
62. Consequently, Counsel submitted that the Petition ought to be dismissed as consists solely of allegations, none of which are substantiated by cogent evidence. Reliance was placed in **Christian Juma Wabwire V Attorney General [2019]eKLR** where it was held that:

"I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought."

4th and 5th Respondents' Submissions

63. These Respondents' through Senior State Counsel, Macheso Weche filed submissions dated 24th February 2025 and set

out the issues as: *whether the Petitioner should be granted actual custody of his children, whether the Petitioner is entitled to the right to safety and security, whether an alien identification card can be issued to the Petitioner as a matter of right and whether the Petitioner is entitled to compensation of his tools of trade.*

64. On the first issue, Counsel stated that Article 53 of the Constitution echoed and effected under Section 8(1) of the Children Act safeguards a child's best interests. Counsel noted that it was reported that the Petitioner had abandoned his children which is in breach of this right and further failed to adhere to his parental responsibility. Counsel submitted that the Court in **RA v JNO Children's Appeal Case E001 of (2024) eKLR** held that the welfare and best interest of the child principle is the primary factor of consideration when deciding custody cases. On this basis, Counsel argued that it would be detrimental to the children's welfare if the Petitioner is granted custody.
65. On the next issue, Counsel submitted that the Petitioner had failed to demonstrate the manner in which his fundamental rights had been infringed. On the flipside, Counsel submitted that the Respondents had acted as required by the law.
66. Counsel informed that when the Petitioner visited the police at Spring Valley Police Station on 23rd January 2024, he caused a disturbance as he demanded the return of his

children causing him to be arrested for the unruly behavior. On the next day, he was taken to the UNHCR offices for confirmation of his refugee status which was stated to be legal. He was released on 25th January 2024. On the contrary, Counsel submitted that as per the material in this case, the Petitioner is seen to throughout issue contradictory assertions. Counsel affirmed that it was evident that the Petitioner's right to safety and security had not been breached as alleged.

67. Counsel on the third issue stressed that procuring an alien identification card is not a matter of right as the same under Section 12 of the Refugee Act is contingent on approval of a refugee status application. This is done through an evaluation process where an interview is conducted to ascertain the candidate's merits. Therefore, Counsel submitted that the 4th Respondent is accorded discretionary authority to make this determination and where assessment is positive issue refugee identification. In this case, it was argued that the Petitioner's alleged terrorism charges precludes the 4th Respondent from proceeding with the determination.
68. On the final issue, Counsel submitted that the Petitioner's claims that his tools of trade were confiscated must fail as the same was not substantiated by any evidence and is a

false assertion. Counsel argued that no list of inventory for the goods had been produced to support this claim.

69. Similarly, Counsel submitted that the Petitioner had failed to show how his allegations violate fundamental rights and freedoms to justify an order of compensation. On this premise, Counsel argued that the Petitioner was not entitled to the order of compensation.

Analysis and Determination

70. In my humble view, the key issues that arise for determination in this matter are as follows:

- i. Whether the Petition satisfies the threshold of a Constitutional Petition.***
- ii. Whether the Respondents' violated the Petitioner's rights as an asylum seeker.***
- iii. Whether the Petitioner is entitled to be reunited with his children***
- iv. Whether the Petitioner is entitled to the relief sought.***

Whether the Petition satisfies the threshold of a Constitutional Petition

71. The 1st Respondent contended that the Petition makes omnibus, unspecific, generic, vague allegations and does not explain how the 1st Respondent had actually violated his rights or the manner in which these violations were done. It was the 1st Respondent's position that this ambiguity is

further made manifest by the Petitioner's claim that the 1st Respondent had violated his right under Article 43 of the Constitution by failing to provide him a decent standard of living yet that right is primarily a responsibility of the State and not private entities such as the 1st Respondent.

72. It must be underscored that the consideration of whether a Petition meets the threshold focusses only on the scrutiny of the allegations pleaded to determine if they reasonably make out a case for the violation of the Constitution by the Respondent, at this juncture, it is not the business of the Court to examine the evidence to see whether the Petition can be proved.
73. It is now settled that a Petition must disclose the provisions of the Constitution alleged to have been violated and the manner in which the alleged violations took place as firmly laid down in the celebrated case of **Anarita Karimi Njeru v R 1979 eKLR** where the Court held thus:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

74. Equally, in Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru [2018] KEHC 4861 (KLR) the Court stated:

“15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR thus:-

“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

75. In the present case, I have carefully examined the Petition and even though the 1st Respondent claims that the Petition is non-specific, the Petitioner was able to set out the facts constituting his grievance in the Petition aligning them with the Constitutional provisions he alleges were breached by the Respondents and the manner of their breach. Whether or not he would prove those allegations is a different matter, hence the Petition in my view satisfies the threshold of a Constitution Petition.

Whether the Respondents' violated the Petitioner's rights as an asylum seeker.

76. The law-governing refugees is found both in the national law as well as under the international law. It is thus important to underscore what **Article 2 (5)** and **2 (6)** of the Constitution provides.

Art. 2 (5) The general rules of international law shall form part of the law of Kenya.

Art. 2 (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

77. Having set out the above provisions, it is thus important to underscore that Kenya is a signatory to several Conventions and treaties that relate to refugees and their protection. These are: *The 1951 Convention Relating to the Status of Refugees* ("1951 Convention"), *The 1967 Protocol relating to*

the Status of Refugees, The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“AU Convention”). In addition, Kenya is signatory to a number of international legal instruments covering international human rights law including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights “(The African Charter)”.

78. Besides duty imposed on Kenya by International Law, the Constitution provides for a Bill of Rights where Article 20 (2) declares that:

“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of right or fundamental freedom.”

79. The rights and fundamental freedoms in the Constitution thus apply to all persons within the Republic.
80. The law on refugees in this Country is the **Refugees Act, Cap 173** whose preamble provides thus:

‘Act of Parliament to provide for the recognition, protection and management of refugees; to give effect to the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the

Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and for connected purposes’.

81. **Asylum seeker** in Section 2 means ‘a person seeking protection in Kenya in accordance with the provisions of this Act but whose application has not been determined.’
82. ‘Refugee’ is defined to also include an asylum seeker.
83. The Act provides in Section 7(2) that the Department of Refugee Services, (that is, the 2nd Respondent) shall:
 - (a) be responsible for all administrative matters concerning asylum seekers and refugees in Kenya;
 - (b) co-ordinate activities and programmes relating to asylum seekers and refugees; and
 - (c) handle all operational aspects of protection and assistance of refugees.
84. The Commissioner for Refugee Affairs on its part (that is the 4th Respondent) is mandated to:
 - (a) convene and chair the Refugee Advisory Committee;
 - (b) receive, register and maintain a register for all refugees in Kenya;
 - (c) receive and process applications for refugee status;

- (d) *issue refugee identification documents and facilitate issuance of civil registration and other relevant documentation by other government agencies;*
- (e) *co-ordinate all measures necessary for promoting the welfare and protection of refugees and asylum seekers and advise the Cabinet Secretary and the Committee thereon;*
- (f) *ensure in liaison with other relevant agencies the provision of adequate facilities and services for the protection, reception and care of asylum seekers and refugees within Kenya;*
- (g) *promote as far as possible durable solutions for refugees granted asylum in Kenya;*
- (h) *be the liaison between the department, state actors and relevant stakeholders and shall in that capacity, sensitize and inform on new developments and policy;*
- (i) *in liaison with Director of Immigration, process and issue conventional travel documents;*
- (j) *in liaison with the police, arrest any person suspected of committing an offence under this Act;*
- (k) *manage refugee designated areas and other related facilities;*
- (l) *form sub-committees and assign to such sub-committees functions to be exercised in relation to the reception, treatment and welfare of asylum seekers and refugees;*

- (m) co-ordinate the provision of overall security, protection and assistance for asylum seekers and refugees in the designated areas;
- (n) co-ordinate activities to ensure the civilian and humanitarian character of the designated areas is maintained;
- (o) issue movement passes to refugees and asylum seekers wishing to travel outside the designated areas and within Kenya;
- (p) exempt asylum seekers and refugees from residing in designated areas where there are compelling reasons to do so;
- (q) ensure treatment of all asylum seekers and refugees in compliance with national law;
- (r) issue visitor permits for entry into refugee camps in accordance with regulations;
- (s) in consultation with the Cabinet Secretary, establish structures and mechanisms for management of refugee humanitarian emergencies;
- (t) initiate, in collaboration with the development partners, projects that promote peaceful and harmonious co-existence between the host communities and refugees;
- (u) co-ordinate, where relevant in collaboration with county authorities, all services and activities provided to refugees and asylum seekers by implementing agencies;
- (v) ensure that refugee economic and productive activities do not have a negative impact on host

communities, natural resources or the local environment;

- (w) ensure sustainable use of resources in designated refugee hosting areas; and*
- (x) promote, insofar as is practicable, the procurement or purchase of local products and services in support of refugee intervention and support programmes.*

85. In addition, the Act with reference to application for refugee status informs under Section 12 that:

- (1) An application for the grant of refugee status shall be made to the Commissioner either directly or through an authorized officer.*
- (2) An authorized officer to whom any asylum seeker presents himself or herself shall refer that asylum seeker to the relevant authority.*
- (3) The Commissioner shall, on receiving the application, invite the applicant to appear before him or her, to provide oral or documentary evidence in support of the claim for asylum.*
- (4) The Applicant shall present his claim in person but retains the right to be accompanied by legal practitioner if he or she desires, provided that the expense for legal representation shall not be borne by the Department.*
- (5) The decision of the Commissioner to grant or not to grant the application shall be notified to the applicant in writing and where the application is refused, the Commissioner shall give reasons for the refusal.*

- (6) *The Commissioner may delegate the function of conducting interviews to his or her staff within the Department who shall, upon finalization of the interview, forward the interview files to the Status Eligibility Panel for further review.*
- (7) *The Eligibility Panel shall, upon review, forward to the Commissioner recommendations to grant or not grant status on a case by case basis.*
- (8) *The Commissioner shall, on receiving an application for status, issue a temporary pass to the applicant pending the determination of the application.*
- (9) *The Commissioner shall make a determination for status application within ninety days from the date of receiving the application, provided that this time-line may be extended on reasonable cause depending on the circumstances of the cases.*

86. An applicant seeking refugee status in Kenya is entitled to be issued with an **asylum seeker's pass under Section 23** of the Act as follows:

- (1) *A person who has submitted an application for refugee status in accordance with the Act shall be issued with a temporary pass valid for ninety days and it shall be evidence that the person has applied for refugee status in Kenya.*
- (2) *Every member of the family of the applicant shall also be issued with a similar document.*
- (3) *The temporary pass issued under this Act shall entitle the applicant and all the members of his or her family to remain in Kenya—*

a) *until his or her application is granted or rejected and no appeal has been filed with the Appeals Committee; and*

b) *until that person has exhausted his or her right of appeal.*

(4) *A temporary pass issued under this Act shall be renewed after the expiry of ninety days until all rights connected with or incidental to an application for refugee status have been exhausted.*

(5) *A person who has submitted an application for refugee status shall be under obligation to abide by all the laws of Kenya including all the lawful orders given by the mandated institutions under this Act.*

87. During their stay, the Act states under Section 28 that refugees and every asylum seeker have the following rights and obligations:

(1) *Subject to this Act, every refugee and every asylum seeker within Kenya shall be entitled to the rights and be subject—*

(a) *to the duties contained in the UN Convention, its Protocol and the OAU Convention; and*

(b) *all the laws in force in Kenya.*

(2) *The Cabinet Secretary may, by notice in the Gazette and in consultation with the relevant county governments, designate specific counties to host refugees.*

(3) *The Cabinet Secretary may, by notice in the Gazette, designate places and areas in Kenya to*

be transit centres for purposes of temporarily accommodating refugees.

- (4) Subject to this Act, refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to, and issuance of, the required documentation at both levels of Government.*
- (5) Subject to the laws applicable and taking into special consideration the special circumstances of refugees, a refugee recognized under this Act shall have the right to engage individually or in a group, in gainful employment or enterprise or to practice a profession or trade where he holds qualifications recognized by competent authorities in Kenya.*
- (6) A refugee and an asylum seeker shall have the right to identification and civil registration documents and such documents shall be sufficient to identify a refugee or asylum seeker for the purposes of access to rights and services under this Act and any other applicable law.*
- (7) Without prejudice to the generality of the foregoing, and subject to the special circumstances of refugees, the Refugee Identity Card shall at a minimum have a similar status to the Foreign National Registration Certificate issued under section 56 (2) of the Kenya Citizenship and Immigration Act (Cap. 170) for the purposes of accessing the rights and fulfilling obligations under this law.*
- (8) A person from a Partner State of the East African Community who has been recognized as a refugee under this Act may opt to voluntarily give up his or her refugee status for the purposes of enjoying any of the benefits due to him or her under the*

Treaty for the Establishment of the East African Community, the Protocol for the Establishment of the East African Community Common Market, and any other relevant written law.

88. The Court in **Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties) [2024] KEHC 2973 (KLR)** observed as follows:

“43. A refugee is a person who has been forced to flee conflict, persecution or human rights abuses and has crossed an international border to seek safety. As a result of the conditions prevailing in his country such person is unable to return to without placing his life or freedom at great risk... This continues to cause displacement of persons from their countries of origin or residence, making their return impossible. Refugee protection thus remains urgently needed by those forced to leave their countries.”

89. Refugees are vulnerable persons deserving special measures to protect them because without the protection of their countries they could be exposed to exploitation, abuse and violence and are also likely to encounter various hurdles in getting even basic services such as healthcare, education and shelter. Refugees thus perfectly qualify to be in the category ***‘vulnerable groups within the society’*** of which the State under Article 21 (3) is specifically required to put

measures in place to address their needs. The needs in my view must include protection and support.

Article 21 (3) of the Constitution provides:

'20 (3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

90. The fact that the Constitution uses the word 'including' to precede the identification of groups deemed vulnerable means that this list is non-exhaustive. The drafters of the Constitution did not thus provide a closed list of vulnerable members of the society as they were well aware that it was a matter that depended on many possible factors and criterion. Given the unique circumstances of refugees, it is my finding that they fall in the special category of vulnerable persons.
91. It is however important to note that even though the refugees have the right to enjoy the Constitutional rights in the Bill of Rights, there are lawful limitations in regard to right of movement. As was held in **Kituo Cha Sheria & 8 others v Attorney General [2013] KEHC 6039 (KLR)**

“The right protected in Article 39 of the Constitution makes a distinction between person and citizen (see Famy Care Ltd v Procurement Administrative Review board and Another Petition No. 43 of 2012 [2012]eKLR and Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 Others Petition No. 278 of 2011 [2013]eKLR). Freedom of movement under the Constitution relates to everyone, but the right to enter, remain and reside anywhere in Kenya is accorded only to citizens hence the State may impose reasonable condition upon the right to enter, remain in and reside anywhere in Kenya upon non-citizens. This approach, in my view, is consistent with General Comment No. 27 I have cited above.

As far as refugees are concerned, two conclusions may be drawn from Article 39 of the Constitution. First, although the right under Article 39(3) is limited to citizens, it does not expressly limit the right of refugees to move within Kenya guaranteed under Article 39(1). Second, it does not expressly recognize the right of refugees to reside anywhere Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya. Such a right is readily available to refugees by reason of application of the 1951 Convention and application of Article 19(3)(b) of the Constitution which states that, “The rights and fundamental freedoms in the Bill of Rights - (b) do not exclude other rights and fundamental freedom not in the Bill if Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter.” It follows therefore that any limitations to these rights cannot be arbitrary and must comply with the standards set out in Article 24...”

92. From the facts of this case, the Petitioner stated that in May and October 2021, he was attacked by persons in Kakuma Refugee Camp who we believed were people who wanted to take away his children. He stated that he reported the matter to the 1st and 2nd Respondent's representatives in the camp and to the police, who arrested the suspects but the investigation and prosecution of these persons was mishandled and as such these people returned back to the camp. The perpetrators struck again, broke into his home, beat him and broke his arm. He informs that his neighbours rescued him and saved him and his children. Fearing for the welfare of his children and his life, he relocated to Nairobi in November 2021 with the assistance of a Child Protection officer at Kakuma Camp. In Nairobi, he started his business which he now claims was raided and by officers of the 5th Respondent who carried away all the stock in trade rendering him a destitute who could no longer support himself and the children.

93. The 4th Respondent strongly denied the Petitioner's allegation that his department has refused to issue him identification documents and stated that the Petitioner was issued with an asylum seekers' pass which serves as proof of a bona fide application for recognition as a refugee and proof of registration. He stated that although it is a temporary document, it legalizes the presence of the Petitioner in

Kenya and even allows his children to enroll in school and access other services within the Country. The document is issued pending the processing and consideration of issuance of a refugee identification which is subject to the approval of the refugee status application and thus the Petitioner cannot demand issuance of identification documents as of both national and international legal standards have to be satisfied before being issued with the said document.

94. He faulted the Petitioner for leaving Kakuma Refugee Camp without obtaining proper authorization forms or notifying the 4th Respondent and contended that this action was contravenes **Section 31 of the Refugee Act which requires refugees and asylum seekers to stay in the designated areas** where they are provided with security, food, shelter, education and healthcare.
95. It is not in dispute that the Petitioner has the legal documentation necessary to qualify him to be treated as a refugee in Kenya. Under Section 2 of the Refugees Act, the *person seeking protection in Kenya in accordance with the provisions of the Act is known as an asylum seeker but even before the status of his application is determined, upon issuance of asylum seeker pass, the person falls in the definition of a 'Refugee'* meaning he enjoys protection and status accorded to refugees.

96. The process that follows requires strict scrutiny where eligibility requirements for a person to be accorded the status of a refugee and is verified by the 4th Respondent before the refugee identification documents can be issued. Although the 4th Respondent is required to communicate the determination of status of the application within 3 months, Section 12 (9) allows extension of that time from time to time if circumstances demand. It states:

“The Commissioner shall make a determination for status application within ninety days from the date of receiving the application, provided that this time-line may be extended on reasonable cause depending on the circumstances of the cases.”

97. Meanwhile, the Petitioner presence in the Country as a refugee is deemed lawful based on the temporary documentation already granted (asylum seekers past) pending determination of the application or even any appeal.

98. In my view, the 4th Respondent is within its right to undertake a scrupulous verification process of the application to ensure that only genuine refugees who meet the strict legal and integrity requirements are registered. The Constitution under Article 47 requires that administrative action be lawful, reasonable and procedurally fair. The only time that this Court can intervene is when there is proof that the 4th Respondent’s decision is illegal,

irrational to the extent that no reasonable authority could be expected to arrive at a questionable decision given the facts in issue or when the decision taken is procedurally wrong, made in bad faith or is in breach of human rights.

99. In the present case, the Petitioner appears to complain of the delayed determination but even as he does so, he is already enjoying the benefits of a refugee because even with the temporary registration that he has he is not exposed to any prejudice sine he has asylum seeker past. The process cannot be rushed to suit the Petitioner's alone as there is also the need to ensure balance with interests of the public as well as other security concerns.
100. The assertion that the Petitioner's rights as an asylum seeker have been violated is thus misplaced and is rejected.
101. On the contrary, it is manifest that it is the Petitioner may have contravened the law considering to Section 31 of the Act. The Petitioner was required to seek the authority of the 4th Respondent if for any compelling reasons he was forced to reside elsewhere other than the designated area. He alleges he had to escape insecurity at Kakuma but there is no documented report that he brought this to the attention of the 4th Respondent either before or after he relocated to Nairobi. What he says now as the reason that compelled him

to relocate to Nairobi from Kakuma cannot be verified. Section 31 (4) provides:

“Every refugee or asylum seeker who wishes to change his or her place of residence shall notify the Commissioner in the prescribed manner.”

Whether the Petitioner’s Constitutional rights were violated

102. The Petitioner claimed that his property in form of stock in trade from his business was unlawfully taken away by the 5th Respondent in violation of his right to property. He equally claimed that he was arrested based on false charges of terrorism and destruction of property and prosecuted.

103. It is a requirement of law that he who alleges must prove. The Evidence Act Cap 80 provides:

107. Burden of proof

- (1) 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.*
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

104. This principle was discussed in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR)** as follows:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

105. Alice Wanjiru Ruhiru v Messiac Assembly of Yahweh
[2021] KEHC 13098 (KLR) the Court cited with approval as follows:

22. I also refer to *The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:*

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

106. The Supreme Court in **Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another [2017] KESC 42 (KLR)** guided as follows:

***“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.*”**

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....”

107. In addition, the Court in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR)** observed as follows:

" Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-

"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 :-

"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.”

108. In the instant case, the Petitioner alleged that his property which was meant for his business was seized by the officers of the 5th Respondent. The 5th Respondent did not specifically deny this claim.
109. In the Replying Affidavit of the 1st Respondent sworn by Barler Colly Jaji on 26th September, 2021; the 1st Respondent confirms in paragraph 10 to 11 that its own officer, Fresha Nabwire; she visited Kangemi Police Station and also the area Chief to follow up on the Petitioner’s grievance on 7th March, 2023.
110. That in the ensuing interaction between the Chief and Ms. Fresha, it was revealed that the Petitioner had been illegally operating a wines and spirits shop at Kangemi as he did not have a trading licence to run the business and had been arrested severally and given warnings. That according to the Chief, the Petitioner was arrested on 7th January, 2023 by the OCS Kangemi and his liquor was confiscated as a result of illegal trading.
111. That upon getting the information, Ms. Fresha advised the Petitioner on the possibility of the 1st Respondent assisting

him to obtain a work permit for his business but he was adamant he wanted to be repatriated complaining that life in Nairobi was unbearable.

112. Petitioner's assertion that his by 1st respond and possessions in terms of stock in trade from his business was seized is that corroborated is not specifically denied by the 5th Respondent. According to the 1st Respondent, in paragraph 3 of the Replying Affidavit: *"...The Applicant reported that his children were taken to alternative care after his business was raided and all his stock (Liquour) worth Kshs. 79,000 was confiscated by police officers from Kitisuru Police Station."*
113. No other evidence of the actual value of goods confiscated was provided not even by the Petitioner.
114. The the 5th Respondent admitted the arrest and prosecution of the Petitioner for the offence of creating disturbance based on the complaint duly laid out against the Petitioner by the 1st Respondent for exhibiting violent behaviour and stripping naked at the 1st Respondent's office on 8th May, 2023.
115. The Petitioner was charged in Court. He pleaded guilty on 30/5/2023 vide Criminal Case Number E644/2023 before Kibera Law Courts and was upon mitigation discharged

under Section 35 (1) of the Penal Code as per the annexure to the 1st Respondent Replying Affidavit.

116. The fact that the petitioner is a refugee does not exempt him for prosecution if he breaks the law of the host country. Section 23 (5) provides that a person who has submitted an application for registration shall be subject to the laws of Kenya. It states:

“A person who has submitted an application for refugee status shall be under obligation to abide by all the laws of Kenya including all the lawful orders given by the mandated institutions under this Act.”

117. In respect of the offence of creating disturbance, the 5th Respondent merely executed its mandate under Section 24 (e) & (h) of the National Police Service Act in investigating the complaint, apprehension and prosecution of the Petitioner in discharging its mandate of maintaining law and order. The Petitioner has not presented any evidence that the 5th Respondent abused its mandate for the arrest and prosecution in respect of the offence of creating disturbance.

118. On the Petitioner’s grievance that he was arrested and charged with destruction of property and terrorism charges, the Petitioner claims in the affidavit supporting to the Petition sworn on 15th July, 2024 that the 1st Respondent through its officer Grace Maina had pressed terrorism

charges against him. He stated at paragraph 52 and 53 as follows:

“53. That on 21st August, 2023 while I was heading to the 1st Respondent Offices, I noticed the 1st Respondent personnel carting away all my goods that I had bought again.”

“54. That when I went to report the matter at Kilimani Police Station I was informed that the 1st Respondent had pressed terrorism charges against me for no apparent reason and it would be advisable for me if I did not press any charges.”

119. The Respondents have denied that there were terrorism or destruction of property charges levelled against the Petitioner. Chief Inspector Albert Chebii, the OCS Kilimani Police Station in his Replying Affidavit sworn on 16th September, 2024 stated that the complaint received from the 1st Respondent from Grace Maina, an officer of the 1st Respondent on 8th May, 2023 related to the Petitioner causing disturbance and stripping naked and it was booked vide OB Number 17/08/05/2023 and statements recorded as exhibited in his replying affidavit. He specifically denied Petitioner’s assertions about terrorism charges, stating thus at paragraph 6:

“That the Petitioner’s assertions in paragraphs 25 and 54 of the supporting affidavits of the Application and Petition respectively, wherein he claims he attempted to file a complaint against the 1st Respondent at the Station but was

informed that the 1st Respondent had already lodged a terrorism complaint against him, and that he was consequently advised not to file his complaint, are categorically false. A thorough review of our occurrence book reveals no record of any terrorism complaint being filed against the Petitioner.

120. The 4th Respondent talked about terrorism charges. However, a careful reading shows he was merely echoing what was perceptible from the Petitioner's own affidavit and not asserting a fact of his own knowledge. He states at paragraph 11 of the affidavit:

121. **“The Petitioner acknowledges being charged with the offense of terrorism by 5th Respondent.** Consequently, the 4th Respondent is precluded from proceeding with determination of the Petitioner's refugee status until he is acquitted of the charges. The pendency of such serious criminal allegations necessitates a suspension of the refugee status determination process to ensure that the integrity and security of the asylum system is maintained.”

122. On its part, the 1st Respondent through the Replying Affidavit of Barlet Colly Jaji sworn on 26th September, 2024 categorically denies at paragraph 29 presuming terrorism charges or compliant against the petition. She states:

“That I am a total stranger to the contents of paragraph 25 and I wish to state that the 1st Respondent did not make any report to Kilimani

Police Station for that matter accusing the Applicant of terrorism. The Applicant is invited to very strict proof of the contrary.”

123. In the Petition, one of the orders being sought by the Petitioner is an ***“order quashing the terrorism charges pressed by the 1st Respondent.”***

124. There is no proof that any such charges exist or were levelled against the Petitioner. That is a figment of the Petitioner’s imagination as the claim absolutely lacks any factual support.

125. The only thorny issue that remains is on the issue of whether the Police forcefully confiscated Petitioner’s stock in trade.

126. The **1951 Refugee Convention at Article 18** provides for the refugees the right to engage in self-employment (agriculture, trade etc.) similar to the rights enjoyed by other aliens residing in the host Country *but subject to the domestic laws of the State*. A deprivation of property must be lawful, proportionate and justifiable with the objective of maintaining public order or the prevention of crime.

127. The question that this Court needs to answer is whether the confiscation of the Petitioner’s stock in trade, (Liquour) by police on the basis that he was conducting business illegally followed the due process. In my view, conducting business illegally does not permit arbitrary seizure of one’s property,

what the police were required to do was to arrest the Petitioner and prefer the necessary charges including the alleged escape from the refugee camp and for conducting a business without the necessary authorization so that Court can mete out the appropriate punishment which could include forfeiture if the Court found fit to do so.

128. In the present case however, despite arresting and seizing the Petitioner's possession in stock, in trade, the Petitioner was not charged for illegally operating the said business as a refugee without the requisite authorization or permit and neither was the said property presented before any Court to be dealt with. The seizure of the Petitioner's property was therefore arbitrary. Operating a business without a valid work permit could only attract apprehension of the Petitioner and production of the seized goods before a Court of law by the Police under a relevant charge. It did not give the police the power to violate the Petitioner's property rights. The action of the 5th Respondent of seizing the property of the Petitioner without regard to the due process violated Article 40 (3) of the Constitution.

129. **Article 40 (3) of the Constitution** *provides thus:*

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- a) *results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five;*
or
- b) *is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*
 - (i) *requires prompt payment in full, of just compensation to the person; and*
 - (ii) *allows any person who has an interest in, or right over, that property a right of access to a court of law.”*

Whether the Petitioner is entitled to be reunited with his children

130. The Petitioner sought actual custody of his children. The Petitioner narrated the manner he lost his children. He depones that on 7th January 2023, the Chief of Kangemi and Officer in Charge of Station (OCS) of Spring Valley Police Station arrested him while engaging in his business and confiscated his tools of trade. In addition, they also took away his children and placed them in a children’s home as no one else could look after them.

131. The 1st Respondent, a non-governmental organization, whose mandate includes representing refugees in child protection matters including child custody and child maintenance stated that the Petitioner visited their offices on 21/2/2023 and reported that his children had been placed under

alternative care by the police. An officer of the 1st Respondent, Ms. Fresha visited Spring Valley Police Station and held a discussion with the OCS concerning the children.

132. According to the OCS, the Petitioner had abandoned his children at the police station following his release, claiming that the police had taken his source of income hence was unable to take care of them.

133. As such, the police treated the children as abandoned and took them to the children department which took them to Nairobi Children Rescue Center on 21st January 2023.

134. Later on, on 14th August 2023, they were transferred to Tumshangilie Children's home.

135. Ms. Fresha visited the children home. She was asked to provide the physical location of the Petitioner so that an inquiry to assess suitability of the Petitioner regaining custody can be established by the Children Officer under the principle of a child's best interest.

136. In situations such as these, the best interest of the children is the one that must receive the primary consideration.

137. Ordinarily, a parent who is fit and is desirous of residing with his own children should not be denied the opportunity. Removing children from the custody of the parent can only arise if there are compelling reasons such as unsuitable

living conditions, abuse or neglect of the children, substance abuse, abandonment of the children without care, commission of serious crime against the children to mention but a few.

138. **Article 53 (c) & (d)** of the Constitution provides that every child has a right to-

(c) **to basic nutrition, shelter and health care;**

(d) **to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;**

139. Unless it is demonstrated that there exist compelling reasons, I believe a **'A child's best interests which is the most paramount principle in every matter concerning the child'** is that no parent should be deprived the opportunity of bringing up his/her own children and no child should equally be removed from the custody and care of his parents or parent.

140. I note that the committal of the two children to Tumshangilie Children Home was done through the **Care and Protection Case Number E435 of 2023- Children Court at Nairobi on 27th September, 2023** wherein the order of committal was given for one year. This order must have

been premised on the circumstances that the Petitioner faced at the time as manifested in this case.

141. If the Petitioner's situation has changed, nothing stops him from moving to the children court to reconsider the matter by way of review. Further, the Petitioner may, if dissatisfied appeal the decision. This is a matter whose procedure is well regulated under the Children Act, a statute and would thus not require the application of the Constitution to resolve. I would decline to address it under the doctrine of constitutional avoidance.

Whether the Petitioner is entitled to reliefs sought

142. The upshot of the foregoing therefore is that the Court finds that the Petition has succeeded on one only, namely, the arbitrary deprivation of the Petitioner's stock in trade by the 5th Respondent in violation of Article 40 (3) of the Constitution.

143. This Court thus finds that the Petitioner is entitled to compensation. The Petitioner did not tender proof as to the value of the goods. However, the 1st Respondent, where the Petitioner had gone first to seek assistance before their relationship soured, told this Court that the Petitioner had mentioned the value the value of impounded Liquor to be worth Kshs.79,000/-. (paragraph 5 of the 1st Respondent's

Replying Affidavit- Barlet Colly Jaji sworn on 26th September, 2024).

144. There being no other evidence, the Court will base its compensation on this amount but slightly increase in consideration of passage of time and possible profits.

145. Having regard to the foregoing, I order the 5th Respondent to compensate the Petitioner to the tune of Kshs.250,000/- forceful deprivation of property without the due process.

146. I also award costs of this petition.

147. For avoidance of doubt, any order not specifically granted is declined.

Dated, signed and delivered virtually at Nairobi this 30th day of October, 2025.

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L N MUGAMBI
JUDGE