



**Ebuka v Director of Immigration Services & 2 others (Petition E256 of 2022)
[2025] KEHC 4138 (KLR) (Constitutional and Human Rights) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E256 OF 2022

AB MWAMUYE, J

MARCH 27, 2025

BETWEEN

ECHITABI BEN EBUKA PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

**CABINET SECRETARY, INTERIOR AND COORDINATION 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner through the Petition dated 17th May, 2022 seeks the following remedies: -
 - i. A declaration that the Respondents violated the Petitioner's rights under Article 22, 25, 27, 35, 47, 50 and 51 of *the Constitution*.
 - ii. A declaration that the inclusion of the Petitioner's name in the list of prohibited immigrants is in breach of the Petitioner's constitutional rights and fundamental freedoms.
 - iii. An order of Mandamus compelling the Respondents to remove the Petitioner's name from the list of prohibited immigrants.
 - iv. An order of Mandamus to compel the Respondents whether by themselves and or through their agents or officers to forthwith allow the Petitioner peaceful entry, exit, residence, stay, working and or carry out business in Kenya.
 - v. Costs of the petition.



2. The Petitioner describes himself as a Nigerian National of the Federal Republic of Nigeria Passport No. A11972836.
3. It is contended by the Petitioner that on or about the 26th February, 2022 officers purporting to be immigration officers arrested him in Busia where he was carrying out his business of selling clothes. Without notice, they detained him at Busia Police station for a day and subsequently transferred him to Kilimani Police Station where he was detained incommunicado for two days. He was later transferred to the Immigration holding cell at Nyayo House before being deported to Nigeria on 2nd March, 2022.
4. It is asserted by the petitioner herein that he was neither served with an arrest warrant nor deportation order or any order from the 2nd Respondent declaring him to be a prohibited person. He was also never informed of the reasons for his deportation.
5. It is the Petitioner's contention that the immigration officers' action of deporting him without a formal process and without serving him with a formal deportation order or written reasons for his deportation or allowing him an opportunity to appeal against the deportation and /or seek legal representation was unlawful, illegal and a violation of his fundamental rights and freedoms.

Respondent's Case

6. The Petition was opposed by way of a Replying Affidavit deposed to on the 7th February, 2023 by Christine Kinyua, a Senior Immigration Officer who works under the 1st Respondent's office in the Enforcement and Compliance section.
7. It was her case that on 27th September, 2013 the Petitioner was denied entry at Jomo Kenyatta International Airport because he had been watch listed for investigation and was taken to the immigration headquarters. It was indicated that nothing incriminating was found in the records and was therefore released. The 1st Respondent continued with its investigations and established that the Petitioner had initiated an application for a Kenyan Passport with the name Ben Ebuka supported by a fake birth certificate entry no. 14198552 and a fake Kenya National Identity Card No. 26764556.
8. The 1st Respondent further deposed that on the 12th October, 2016, the Petitioner watch-list status was updated to active after receiving information from the security agencies that the Petitioner had fraudulently acquired a Kenyan Passport number A1531410 on 13th October, 2010. It was indicated that the Petitioner was declared a prohibited immigrant by the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government on the 28th October, 2016.
9. After having declared the Petitioner a prohibited immigrant, the cabinet secretary in charge of interior and co-ordination of National Government issued orders on 28th October, 2016 to the effect that the Petitioner be removed from Kenya in accordance with Section 43 of the [Kenya Citizenship and Immigration Act, 2010](#).
10. Further, on 31st March, 2017, the Petitioner, having been declared a prohibited immigrant was arrested while in the compound of Nyayo house, he was informed that he was unwanted in Kenya because he had been declared a prohibited immigrant, a one-way ticket to his country of origin (Nigeria) was purchased for him by the 1st Respondent and was deported on 1st April, 2017.

Detremination

11. I have considered the pleadings and submissions made by the parties herein, and find that the issues for determination are;



- a. Whether the respondents acted legally in deporting the Petitioner.
 - b. Whether the Petitioner is deserving of the orders sought.
12. It is not in contention that a deportation order was made in respect of the Petitioner. The order was made on the 28th October 2016. However, the Respondents in this respect contend that the deportation was made lawfully in exercise of powers granted to the Cabinet Secretary and in compliance with the provisions of the [Kenya Citizenship and Immigration Act](#).
13. It is evident from the annexures provided by the Respondents that there were two declarations made by the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government on 28th October 2016. The first read as follows:

“declaration Under Section 33 (1) of The [Kenya Citizenship And Immigration Act](#) 2011, Laws Of Kenya

I, Maj. Gen. (Rtd), Joseph K. Nkaissery, Cabinet Secretary, Ministry of Interior and Co-ordination of National Government in the exercise of the powers vested in me by Section 33(1)(b) of the [Kenya Citizenship and Immigration Act](#) 2011, do hereby declare that the entry or presence of :-

Ben Ebuka Echitabi

Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest; in consequence of this declaration, the said:

Ben Ebuka Echitabi

Is for all purposes of the [Kenya Citizenship and Immigration Act](#) 2011, other than for the purposes of sub-section (6) of Section 33, a member of the Prohibited class and a Prohibited Immigrant.

Dated 28th day of October 2016”

14. The second declaration stated as follows:

“Declaration Under Section 43 of The [Kenya Citizenship And Immigration Act](#) 2011, Laws of Kenya

I, Maj. Gen.(Rtd), Joseph K. Nkaissery, Cabinet Secretary, Ministry of Interior and Co-ordination of National Government responsible for Immigration matters, in the exercise of the powers vested in me by Section 43(1) of the [Kenya Citizenship and Immigration Act](#) 2011, do hereby declare that:-

Ben Ebuka Echitabi

Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest; be removed from Kenya to his country of origin NIGERIA immediately, and further direct that the said:

Ben Ebuka Echitabi

Remain in prison custody while arrangements for removal are being undertaken, and this order is sufficient warrant to keep the said Ben Ebuka Echitabi in custody.

Dated 28th day of October 2016”



15. Both declarations were signed by the 1st Respondent.
16. The first declaration declares the Petitioner a prohibited Immigrant under section 33(1)(B) of the [Kenya Citizenship and Immigration Act](#). The second declaration is the one that orders the removal of the Petitioner from Kenya, and it is clearly indicated therein that it is made pursuant to section 43(1) of the [Kenya Citizenship and Immigration Act](#) 2011.
17. The Petitioner’s deportation was therefore pursuant to section 43(1) of the [Kenya Citizenship and Immigration Act](#) 2011 which provides 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](#) (Cap. 63), 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.”

18. In addition, the section that was relied upon by the Cabinet Secretary is section 33(1)(b) of the [Kenya Citizenship and Immigration Act](#) 2011 to declare the Petitioner a prohibited immigrant. Section 33(1) of the Act provides as follows:

- “33(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—
- (a) not having received a pardon—
- (i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;
- (ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;



- (iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;
- (b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;
- (c) a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;
- (d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;
- (e) a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;
- (f) a person whose presence in or entry into Kenya is unlawful under any written law;
- (g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;
- (h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;
- (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;
- (j) a person involved in or is reasonably suspected to be engaged in money laundering;
- (k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- (l) a person engaged in or suspected to be engaged in illicit arms trade;
- (m) a person engaged in or suspected to be engaged in illegal human body organs trade;
- (n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber- crimes and related crimes;
- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;



- (q) a person whose conduct offends public morality;
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;
- (s) a person who is seeking to enter Kenya illegally;
- (t) a person who is a fugitive from justice;
- (u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006); and
- (v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed);
- (w) a person who has been repatriated and or removed from Kenya under any lawful order.”

19. The Cabinet Secretary could therefore only declare any person a prohibited immigrant if the person falls under the classes created by Section 33(1). It was in this regard aptly observed by Odunga J (as he then was) in *Republic v Minister of State For Immigration And Registration of Persons Ex-Parte C.O. [2013] eKLR* as follows:

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based on irrelevant matter.”

20. Korir J (as he then was) in *Republic v Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad [2015] eKLR* where a similar declaration as in the present Petition was quashed by the Court, in arriving at this decision stated thus:

“The words “a person whose presence in Kenya is contrary to national interest” do not appear in Section 33(1) (a)-(v). Therefore, the 1st Respondent could not declare the Petitioner a prohibited immigrant on the ground that his presence in Kenya was contrary to national interest as alleged in the declaration dated 9th November, 2013. Consequently, he had no power to order his removal from Kenya under Section 43 (1) of *Kenya Citizenship and Immigration Act, 2011*. The 1st Respondent’s actions were not based on the powers granted to him by Section 33(1). He could only do that which the statute allowed him to do.”

21. In the present case, the category under which the Petitioner was declared a prohibited immigrant is clearly stated as being pursuant to Section 33(1)(b) of the Act. The Respondents in this respect also annexed a letter from the Ministry of Immigration and Registration of Persons stating that the birth certificate the Petitioner had used to make his Kenyan Passport Application was fake and also a letter from the National Registration Bureau disowning the Kenyan National Identity Card that the petitioner had used to make his Kenyan passport application. The Respondents also annexed a copy of a Kenyan passport that the Petitioner had fraudulently acquired.



22. It is clear, therefore, that the Respondents had good and justifiable cause, backed by evidence and on grounds supported by the law, to take the impugned actions as against the Petitioner.
23. It is thus my finding from the foregoing that in the present case, the actions and decision of the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government were lawful, as he acted within his statutory mandate, and has also demonstrated a good reason to place the Petitioner under a recognized category of prohibited immigrants.
24. Likewise, I am of the view that the orders sought in the Petition are not merited for the same reasons, and that issuing the said orders in the manner proposed by the Petitioner would amount to interfering with the exercise of the statutory powers of the 1st and 2nd Respondents without a justifiable basis being laid. Overall, I find no error or law or violation of the rights of the Petitioner, and I accordingly decline to issue the remedies sought by the Petitioner.
25. In the premises, I find that the Petition dated 17th May 2022 is not merited, and it is accordingly dismissed with no order as to costs.
26. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Mr. Kyallo – Counsel for the Petitioner

Ms. Robi – Counsel for the Respondents

Ms. Neema – Court Assistant

