



**Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General
& 4 others; Kenya National Commission on Human Rights & another
(Interested Parties) (Petition E123, E102 & 4 (ELD) of 2021 (Consolidated))
[2024] KEHC 2973 (KLR) (Constitutional and Human Rights) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E123, E102 & 4 (ELD) OF 2021 (CONSOLIDATED)**

M THANDE, J

MARCH 15, 2024

BETWEEN

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA 1ST PETITIONER
KASHINDI THOMAS DEBORA 2ND PETITIONER
PETER SOLOMON GICHIRA 3RD PETITIONER
MAINA NYABUTI 4TH PETITIONER
BRIAN ONYANGO 5TH PETITIONER
CLINTON NYAMONGO 6TH PETITIONER**

AND

**THE HON ATTORNEY GENERAL 1ST RESPONDENT
MINISTRY OF INTERIOR & COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT 3RD RESPONDENT
HON FRED MATIANGI 4TH RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT 5TH RESPONDENT**

AND

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ... INTERESTED
PARTY**



UNITED NATIONS HIGH COMMISSION FOR REFUGEES INTERESTED PARTY

The closure of Kakuma and Dadaab Refugee Camps is unconstitutional for violation of public participation requirements, right to fair administration and the principle of non-refoulement.

The petitions challenged directives issued in March and April 2021 by Kenya's Cabinet Secretary for Interior, ordering the closure of Dadaab and Kakuma refugee camps by June 2022. The petitioners, including Kituo Cha Sheria and asylum seekers, alleged violations of constitutional rights and international refugee law, citing lack of public participation and threats to the principle of non-refoulement. The respondents argued the closure was lawful and necessary to address camp conditions. The High Court found the directives unconstitutional, ruling they violated public participation requirements, refugee rights, and Kenya's international obligations. The court quashed the directives and mandated compliance with due process.

Reported by John Ribia

Constitutional Law – national values and principles of governance – public participation – decision to close refugee camps – claims of lack of public participation - whether the directive to close the Kakuma and Daadab Refugee Camps was unconstitutional for want of public participation – Constitution of Kenya, 2010, article 10.

Constitutional Law – fundamental rights and freedoms – right to fair administrative action - decision to close refugee camps – whether the directive to close the Kakuma and Daadab Refugee Camps was a violation of the right to fair administrative action of the refugees – Constitution of Kenya, 2010, article 47; Fair Administrative Action Act (cap 7L) sections 2, and 5(1).

International Humanitarian Law – refugees – asylum seekers – principle of non refoulement - decision to close Kakuma and Daadab Refugee Camps – claim that it violated the principle of non refoulement - whether the directive to close the Kakuma and Daadab Refugee Camps violated the principle of non-refoulement of refugees - Refugees Act (cap 173) section 29; Refugees Act (Repealed) (No 13 of 2006) section 18; Convention Relating to the Status of Refugees, 1951 articles 1(2), and 33; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 articles 1, 2(3), and 2(4); Universal Declaration of Human Rights (UNDHR), 1948, article 14.

Brief facts

The consolidated petitions arose from directives issued by the Cabinet Secretary, Ministry of Interior and Coordination of National Government, on March 24, 2021, and April 29, 2021, ordering the closure of the Dadaab and Kakuma refugee camps by June 30, 2022. The directives were communicated to the United Nations High Commissioner for Refugees (UNHCR) and mandated a roadmap for repatriation or socio-economic integration of refugees.

The petitioners, including Kituo Cha Sheria and individual asylum seekers, challenged the directives, alleging violations of constitutional and international refugee rights, particularly non-refoulement. They contended that the directives were issued without public participation or stakeholder engagement, violating articles 10, 47, and other constitutional provisions, as well as Kenya's international obligations under the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention.

The respondents argued that the closure was legal and aimed to address concerns over the camps' conditions. An internal committee with UNHCR participation was established, but no evidence of broader consultation or adherence to due process was presented. The petitioners sought to quash the directives, mandate public participation, and enforce compliance with constitutional and international legal standards.

Issues

- i. Whether the directive to close the Kakuma and Daadab Refugee Camps was unconstitutional for want of public participation.



- ii. Whether the directive to close the Kakuma and Daadab Refugee Camps was a violation of the right to fair administrative action of the refugees.
- iii. Whether the directive to close the Kakuma and Daadab Refugee Camps violated the principle of non-refoulement of refugees.

Held

1. The national values and principles of governance stipulated under article 10 of the Constitution were binding on all State organs, State officers, public officers and all persons. It informed stakeholders and the public of what was intended and afforded them an opportunity to express and have their views taken into account.
2. Information in respect of which views were sought must be reasonably accessible to the public in a timely fashion. Understanding of the issue was also critical and the public must be sufficiently sensitized to enable them give informed views on the same. Factors such as illiteracy and language barriers, disability, etc. must also be taken into account. Adequate time must be given to the public to interrogate and process the information. Further, the manner in which the public was to give their views or otherwise participate in the matter must be clearly defined.
3. The extent and manner in which public participation was conducted in the formulation and implementation of laws and policy must accord with the nature of the subject matter. What constituted reasonable and meaningful public participation was determined on a case to case basis.
4. The intended closure of the refugee camps in question had far reaching implications and consequences. It could not be done with a stroke of a pen. The views and input of those affected or likely to be affected by the closure of the camps must be considered and taken into account before such a drastic action was taken.
5. There was no public participation of any form prior to the issuance of the impugned directive. The stakeholders were not afforded an opportunity to express concerns, fears or even make demands. To the extent that the decision to close the two refugee camps was made without consulting the public and the persons affected, the result could never be an informed decision.
6. An internal working committee had been established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the refugee camps. Without the participation of the public and in particular refugees and asylum seekers, the establishment and workings of the said committee could not be said to meet the effective, meaningful and substantive constitutional threshold for public participation.
7. The requirement in section 5 of the Fair Administrative Action Act (FAAA) was key to ensuring fairness where an administrative action was taken. The participation of the public was mandatory prior to the taking of an administrative action. Before taking the action, an administrator was required to notify the public of the same, invite and consider all views submitted. Upon taking the action, the administrator must give reasons for the same, notify the public of the available internal mechanisms for appeal to any person affected by the decision and specify the manner and period within which such appeal must be lodged.
8. The impugned directive was an administrative action within the meaning of section 2 of the FAAA. As such, the participation of the petitioners and the public in general and the 2nd petitioner and other refugees and asylum seekers in particular was mandatory prior to the issuance of the impugned directive. The Cabinet Secretary was required to notify the public and the persons to be most affected, of the same, invite and consider all views submitted. Thereafter upon taking the action, the Cabinet Secretary ought to give reasons for the same, notify the public and those concerned of the available internal mechanisms for appeal to any person affected by the decision and specify the manner and period within which such appeal must be lodged. In the instant case, none of the foregoing was done. Accordingly, the impugned directive was issued in violation of the provisions of article 47 of the Constitution and of the FAAA.



9. Closure of refugee camps was legally accessible to the Government by dint of article 2(4) of the Convention Governing the Specific Aspects of Refugee Problems in Africa. To that end, an internal working committee was established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the Dadaab and Kakuma Refugee Camps. That would ensure that closure was done with due process.
10. Article 2(4) of Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention) was to the effect that it provided the procedure to be followed when a member state that hosts refugees, experienced challenges in continuing to do so. Such member may appeal directly to other member states or through the organisation for assistance. Such member states were then required in the spirit of solidarity and international cooperation to take appropriate measures to help ease the burden of the member state in distress. The Government as a member state to the Convention ought to have appealed to other member states either directly or through the Organization for assistance to lighten its burden. Instead of following the laid-out procedure the Cabinet Secretary issued the impugned directive, in violation of article 2(4) of the Convention.
11. A refugee was a person who had 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 was unable to return to without placing his life or freedom at great risk. Conflict and persecution caused displacement of persons from their countries of origin or residence, making their return impossible. Refugee protection remained urgently needed by those forced to leave their countries.
12. The principle of non-refoulment was that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. The principle had acquired the status of a rule of customary international law. It was binding on all States, regardless of whether they had acceded to the global 1951 Convention or 1967 Protocol or regional instruments. States were prohibited from transferring or removing individuals from their jurisdiction when there were substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.
13. The principle of non-refoulment was also anchored in municipal law. The Refugees Act, 2006 (repealed) provided for the non-return of refugees, their families or other persons. So critical was the safeguard against refoulement, that the Refugees Act, 2021, made specific provision for non-refoulment. The wording was similar to that in the 1951 Convention.
14. When Kenya acceded to the 1951 Convention and the 1969 OAU Convention and subsequently domesticated the same through the enactment of the Refugees Act, it demonstrated its commitment to treating refugees in accordance with internationally recognized legal and humanitarian standards. At the material time, Kenya was hosting more than 500,000 refugees and asylum seekers who were accorded the rights as envisaged in the international refugee instruments, Kenyan law and the Constitution of Kenya.
15. The application of article 33(2) the 1951 Convention required an individualized determination by the country in which the refugee was that he or she came within one of the two categories provided for under article 33(2). That ruled out group or generalized application or collective condemnation. Unfortunately, the averment by the Government that the two exceptions were applicable and not based on individual consideration or determination to each affected refugee but were dangerously generalized in a manner that was akin to collective punishment.
16. The blanket implementation of the intended closure of the two camps posed the danger of denying refugees and asylum seekers individualised consideration and determination of their individual and personal circumstances and subjected them to generalised and collective condemnation which would undoubtedly include involuntary repatriation.



17. Closure of the camps would inevitably result in repatriation of asylum seekers and refugees, which without their participation in the process, would be involuntary. That violated the principle of non-refoulement. The conflict in the 2nd petitioner's country of the DRC subsisted and her return was untenable given the threat to her life and security of her person as well as human rights violation. The impugned directive went against Kenya's obligations in respect of the principle of non-refoulement.
18. The refugees and asylum seekers in the two camps enjoyed the rights available to them in the camps including the right to protection and security. The intended closure of the certainly posed a real threat and apprehension in the minds of those who had been granted refuge therein, including the threat to involuntary repatriation.
19. Article 29 of the Constitution guaranteed every person the right to freedom and security of the person. The right was available to every person, including persons who sought and were granted refuge in Kenya. The intended closure of the refugee camps would pose a threat to the right. Refugees and asylum seekers were very vulnerable and required protection of the State. The intended closure of the camps went against the obligation of the State to address the needs of the vulnerable under article 21(3) of the Constitution.
20. The impugned directive violated the rights of refugees and asylum seekers in the two refugee camps. The directive further exposed them to vulnerability which was inconsistent with Kenya's commitment and duty to take care of refugees and asylum seekers within its borders. The closure of any of the refugee camps in Kenya must be done in a manner that followed due process and in compliance with the State's obligations under both international and municipal law.

Petition allowed.

Orders

- i. *Declaration issued that the directives on closure of Dadaab and Kakuma Refugee Camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on March 24, 2021 and March 29, 2024 respectively were unconstitutional, were inconsistent with, violated and contravened articles 10, 19 20, 21, 24, 29 and 47 of the Constitution.*
- ii. *Declaration issued that the directives on closure of Dadaab and Kakuma refugee camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on March 24, 2021 and March 29, 2021 respectively contravened article 33 of the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol; article 2(3) of the 1969 OAU Convention Governing the Specific Aspects of Refuge problems in Africa and section 18 of the Refugees Act, 2006 (repealed).*
- iii. *Order of certiorari issued to bring to the High Court for purposes of quashing and to quash the directives on closure of Dadaab and Kakuma Refugee Camps made on March 24, 2021 and March 29, 2021 respectively, contained in the 2nd respondent's twitter account and joint statement published by UNHCR in its website on March 29, 2021.*
- iv. *Order of mandamus directed to the respondents mandating them to undertake the required lawful process and procedures including but not limited to undertaking public participation prior to taking administrative actions on the closure of Dadaab and Kakuma refugee camps.*
- v. *Order of prohibition directed to the respondents, their agents, officers, undisclosed principals and any other persons acting on their behalf or instructions from closing Dadaab and Kakuma refugee camps without following due process or in pursuance of a lawful directive and or decision.*

Citations

Cases

1. Attorney General v Kituo Cha Sheria, Abebe Dadi Tullu & 6 others (Civil Appeal 108 of 2014; [2017] KECA 773 (KLR); [2017] eKLR) — Explained
2. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained



3. Kaps Parking Limited & Paytech Limited v County Government of Nairobi & Nairobi City County Assembly (Petition 104 of 2020; [2021] KEHC 5819 (KLR)) — Explained
4. Kenya National Commission on Human Rights & Legal Advice Centre t/a Kituo Cha Sheria v Attorney General, Ministry of Interior & Coordination of National Government, Joseph Nkaissery & Karanja Kibicho (Constitutional Petition 227 of 2016; [2017] KEHC 8086 (KLR)) — Explained
5. Kituo Cha Sheria & 8 others v Attorney General (Petition 19 & 115 of 2013; [2013] KEHC 6039 (KLR); [2013] eKLR) — Explained
6. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2015] eKLR) — Explained
7. Republic v Fazul Mahamed, NGOS Coordination Board, M/s Irene Khan & Makau Mutua Ex-Parte Okiya Omtatah Okoiti (Miscellaneous Civil Application 617 of 2017; [2018] KEHC 9435 (KLR)) — Explained
8. Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Petition 532 of 2014; [2014] KEHC 7516 (KLR)) — Explained
9. Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) (Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR)) — Explained
10. Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010)) — Explained

Statutes

1. Constitution of Kenya — article 1; 2; 3; 10; 19; 20; 21; 24; 27(1); 28; 29; 39; 43; 47; 53; 75; 259(1) — Interpreted
2. Fair Administrative Action Act (cap 7L) — section 2; 5(1) — Interpreted
3. Refugees Act (cap 173) — section 29 — Interpreted
4. Refugees Act (Repealed) (No 13 of 2006) — section 18 — Interpreted

International Instruments

1. Convention Relating to the Status of Refugees, 1951 — article 1(2); 33
2. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 — article 1; 2(3); 2(4)
3. Protocol Relating to the Status of Refugees, 1967
4. Universal Declaration of Human Rights (UNDHR), 1948 — article 14

Advocates

None mentioned

JUDGMENT

1. The 3 petitions before once again bring into focus, Kenya's obligations under international law, international and regional conventions, municipal law with respect to refugees and asylum seekers within its borders and the circumstances under which refugee camps may be closed. This has been provoked by a notice issued by the 3rd respondent, Cabinet Secretary, Ministry of Interior & Coordination of National Government (Cabinet Secretary) on 24.3.21 vide the official twitter account, to the United Nations High Commission for Refugees, the 2nd interested party (UNHCR) of the intention of the Government of Kenya, to close the Dadaab and Kakuma Refugee Camps in 14 days.
2. NRB Petition No. E123 is dated 10.4.21 and amended on 7.7.21 and filed by Legal Advice Centre T/A Kituo Cha Sheria and Kashindi Thomas Debora, the 1st and 2nd petitioners. The 1st petitioner



describes itself as a non-governmental human rights organization that champions the protection and promotion of human rights of the poor and marginalized in Kenya. It has since 2008, implemented a strong legal protection and empowerment programme targeting refugees and asylum seekers with the core mandate of monitoring the implementation of the [Refugee Act](#) and the [Constitution](#).

3. The 2nd petitioner is a duly registered asylum seeker of Congolese extraction currently residing at the Kakuma Refugee Camp.
4. The petitioners' complaint is that on 29.4.21, following a meeting between the 3rd respondent and the UNHCR, the 2nd respondent, through its twitter account, formally communicated to refugees its decision to close Dadaab & Kakuma camps by 30.6.22. The roadmap includes repatriation of refugees to countries of origin & socio-economic integration of some through work/residence permit. The petitioners contend that the 1st and 2nd respondents have constituted a taskforce to implement the aforementioned directives. It is the petitioners' case that the impugned directives were issued without public participation, consultation or stakeholder engagement, thereby violating the [Constitution](#) as well as international instruments relating to the rights of refugees and in particular the principle of non-refoulement. The petitioners thus seek the following reliefs:
 - a. A declaration that the directives/decisions and or policy of 2nd respondent made on March 24, 2021 and April 29, 2021 to collectively repatriate all refugees in Dadaab and Kakuma Refugee Camp to the frontiers of their country of origin against their will violates the principle on non-refoulement as expressed in article 33 of the 1951 [UN Convention relating to the status of Refugees](#), article 2(3) of the [OAU Convention Governing the Specific Aspects of Refugee Problems in Africa](#) as well as section 18 of the [Refugee Act](#) 2006.
 - b. A declaration be and is hereby issued declaring the directive of the 2nd respondent of March 24, 2021 revoking, cancelling and/or in any way terminating the refugee status of refugees and asylum seekers in Dadaab and Kakuma refugee camps *ultra vires* the powers of the 2nd respondent and hence null and void.
 - c. A declaration be and is hereby issued that the 2nd respondents directive of March 24, 2021 specifically targeting asylum seekers and refugees based on their status amounts to collective punishment, is illegal, discriminatory and therefore unconstitutional.
 - d. That each party to bear its own costs.
 - e. A declaration be and is hereby issued that the directive on closure of Dadaab and Kakuma refugee camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on March 24, 2021 and April 29, 2021 respectively are unconstitutional, are inconsistent with, violates and contravenes articles 1 3 2 10 19 20, 21 24, 27 1), 29, 39, 43,47 (1) and (2) and 53 of the [Constitution](#).
 - f. A declaration be and is hereby issued that the directive on closure of Dadaab and Kakuma refugee camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on March 24, 2021 and April 29, 2021 respectively contravenes the article 33 of the 1951 [UN Convention relating to the Status of Refugees](#) and its 1967 [Protocol](#); article 2(3) of the 1969 [OAU Convention Governing the Specific Aspects of Refuge problems in Africa](#) and Section 18 of the [Refugees Act](#) 2006 as read with various international laws and principles.
 - g. An order of certiorari be and is hereby issued to bring to the High Court for purposes of quashing and to quash the directives on closure of Dadaab and Kakuma refugee camps made by the respondent on March 24, 2021 and April 21, 2021 respectively contained in the 1st



respondent's twitter account and joint statement published by UNHCR in its website on April 29, 2021

- h. An order of mandamus directed to the respondents mandating them to undertake the required lawful process and procedures including but not limited to undertaking public participation prior to taking administrative actions on the closure of Dadaab and Kakuma refugee camps.
 - i. An order of prohibition directed to the respondents, their agents, officers, undisclosed principals and any other persons acting on their behalf or instructions from closing Dadaab and Kakuma refugee camps without following due process or in pursuance of a lawful directive and or decision.
 - j. A declaration that the directives/decisions and Oi policy of 2nd respondent made on March 24, 2021 and April 29, 2021 impedes the right to seek and enjoy asylum in Kenya which is explicit in article 14 of the [Universal Declaration of Human Rights](#) and implicit in the 1951 [UN Convention Relation to Status of Refugees](#) and its 1967 [Protocol](#), the 1969 [OAU Convention Governing the Specific Aspects of Refugee Problems in Africa](#) and the [international bill of rights](#).
 - k. Any other relief the honourable court deems appropriate, just and fit to grant.
5. NRB Petition No E123 of 2021 is dated 29.3.21 and filed by Peter Solomon Gichira, the 3rd petitioner who describes himself as a private citizen with a keen interest in public matters revolving around safeguarding the [Constitution](#), upholding the rule of law and protection of basic human rights and fundamental freedoms. He is concerned that the intended closure of the 2 refugee camps will violate the rights of the hundreds of refugees hosted therein. This will negate Kenya's commitment under the various international treaties it has ratified in this regard. Further that under the [Refugee Act](#), 2006, Kenya put in place a national framework regarding the protection of refugee rights and management of refugee affairs. The 3rd Petitioner is also concerned that the countries of origin of the refugees hosted in Dadaab and Kakuma Refugee Camps are still unstable and there is no report indicating otherwise. The intended closure of the 2 Camps during the deadly Covid-19 pandemic thus violates the provisions of the [Act](#) on non-refoulement as well as the rights of refugees envisaged in the international treaties and in the Bill of Rights in the [Constitution of Kenya](#), 2010. He prays for the following reliefs:
- a. A declaration do issuethat the directive on closure of Kakuma and Dadaab refugee camps is unconstitutional and therefore null and void.
 - b. A declaration do issuethat the intended closure of Kakuma and Dadaab refugee camps violates the [Constitution of Kenya](#), International Laws and Treaties regarding protection of refugee rights and is therefore null and void.
 - c. A declaration do issuethat the respondents and/or any other person within the Republic of Kenya must provide a report on the state of the countries of origin of the refugees in accordance with the provisions under section 18 of the [Refugees Act](#), 2006 on non-refoulement.
 - d. An order of permanent injunction doissuepermanently restraining and staying the implementation and enforcement of the current directive or any future directive on closure of the Dadaab and/or Kakuma refugee camps without proper consultations and/or in circumstances which violate Chapter VI and other provisions of the [Constitution](#).
 - e. This honourable court be pleased to grant such other or further orders as it may deem just and appropriate in the circumstances.



- f. This honourable court be pleased to order that the respondents pay the costs of these proceedings.
6. ELD Petition No E004 of 2021 was filed by Maina Nyabuti, Brian Onyango and Clinton Nyamongo the 4th – 6th petitioners. They also centre their case on the impugned directive by the 3rd respondent to the 2nd interested party of the intended closure of the 2 refugee camps. They contend that the impugned directive of the intended closure of the camps threatens to infringe article 47 of the *Constitution*. The requirement by the respondents that UNHCR comes up with a roadmap on closure of the camps within 14 days threatens to infringe on article 28 of the *Constitution*. The directive is arbitrary and discriminative, impractical and unreasonable. The petitioners are concerned that the refugees have not been heard on the matter and the intended closure will breach the non-refoulement principle. The petitioners seek the following reliefs:
- a. That this honourable court be pleased to issue a declaration that the notice by Government of the Republic of Kenya, through the 2nd and 3rd respondents to the United Nations High Commission for Refugees to come up with a roadmap on closure of the Dadaab and Kakuma Refugee Camps within fourteen days breaches the non-refoulement principle and threatens and/or infringes the rights of refugees to non-discrimination, dignity and fair administration action.
 - b. That this honourable court be pleased to permanently restrain or stop the Government of Kenya or through its agencies to forcefully repatriate refugees from the Dadaab and Kakuma Refugee Camps en masse.
 - c. That this honourable court be pleased to declare that to the extent that the decision of the Government of the Republic of Kenya was undertaken without giving the stakeholders and the affected parties an opportunity to make representations either in person or through their representatives, the right to a fair administrative action as guaranteed by article 47 of the *Constitution* has been denied, violated, infringed or is threatened, hence the said decision is null and void.
 - d. That this honourable court be pleased to declare that the notice by the 2nd respondent is a violation of article 2(5) and 2(6) of the *Constitution* and Kenya's international legal obligations under the 1951 *UN Convention relating to the Status of Refugees* and the 1969 *Organization of Africa Unity Convention Governing the Specific Aspects of Refugees in Africa*, hence the said directive is null and void.
 - e. That this honourable court be pleased to declare that the notice by the 2nd respondent is in abuse of their power, in violation of the rule of law and in contravention of the 2nd respondent's oaths of office contrary to article 2, 3, 10 and 75(1)(c) of the *Constitution*.
 - f. That this honourable court be pleased to declare that the notice by the 2nd respondent will violate the principle of non-refoulement as expressed in article 33 of the 1951 *UN Convention relating to the Status of Refugees* as well as Section 18 of the *Refugee Act* 2006.
 - g. That this honourable court be pleased to do and hereby issue an order that each party bears its own costs.
7. The respondents opposed the petition vide a further replying affidavit sworn on 18.7.22 by Luka Katee Mwanza, the Commissioner of Refugee Affairs at the Ministry of Interior and Co-ordination of National Government within the Refugee Affairs Secretariat. This is the only response on record. He stated that Kenya currently hosts more than 500,000 refugees and asylum seekers who are accorded



the rights as envisaged in the International Refugee Instruments, Kenyan law and the [Constitution of Kenya](#).

8. The deponent averred that the intended closure was informed by the need to address the plight of refugees following various concerns raised with regard to the state of and quality within the Kakuma and Dadaab Refugee Camps. He stated that closure of refugee camps is legally accessible to the Government by dint of article 2(4) of the [Convention Governing the Specific Aspects of Refugee Problems in Africa](#). To this end, an internal working Committee was established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the Dadaab and Kakuma Refugee Camps. This will ensure that closure is done with due process. The Committee presented its report to the Government for further directions. The petitioners have failed to demonstrate that closure of the camps signifies the forceful return of the refugees.
9. It was further averred that the Government is well within its rights to ensure that a country specific framework containing mechanisms and protocols for the closure of camps exists and is available if and at when necessary to guide any process of closure which is in the interests of all stakeholders. The petition thus constitutes a pre-emptive strike and unjustified attempt to curtail Kenya's sovereign right in the absence of any valid claims of infringement of the [Constitution](#), International law, International Humanitarian Law, Refugee Law and/or National Law. Additionally, the petition has failed to demonstrate the manner in which the impugned directive infringes upon certain delineated rights. The petitioners have misunderstood the use of structural interdicts as a remedy before the honourable court vis-a-vis the principle of separation of powers. The respondents urged that the petition be dismissed.
10. To support his averments, the deponent referred to various annexures. Notably however, the said annexures were not uploaded. Neither were they served upon the petitioners in spite of requests that they be served with the same.
11. Directions were given for filing of submissions. However, neither the respondents nor the 2nd interested party filed submissions. After considering the petition, response and submissions, the issues distilled or determination are:
 - a. Whether the impugned directive is in violation of the [Constitution](#) and the law for want of public participation.
 - b. Whether the impugned directive violated the Refugee's right to fair administrative action.
 - c. Whether impugned directive violated the principle of non-refoulement and incompatible with Kenya's obligations under the 1969 [OAU Convention](#) and the 1951 [Convention](#).
12. In answering these questions, the court is called upon to interpret the provisions of the [Constitution](#). The parties have cited a plethora of judicial decisions setting the climate for interpreting and applying the [Constitution](#). This court is guided by article 259(1) which provides that the [Constitution](#) shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. The court is thus commanded to take a purposive approach in interpreting the [Constitution](#) which is a transformative charter, intended to break from the past and look to the future. In this regard, the Supreme Court in the case of [Speaker of Senate v Attorney General and 4 Others](#) SCK Advisory Opinion No. 2 of 2013 [2013] eKLR, stated:

Kenya's [Constitution](#) of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's [Constitution](#) is to institute social change and



reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

“Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”

13. With this background I now consider the issues for determination as framed. As I do so, it is necessary to look at the directives in question. The first directive is dated 24.3.21 and issued by the Cabinet Secretary in the official twitter account Ministry of Interior @InteriorKE and is reproduced hereunder.

CS @Fred Matiangi issues UNHCR with 14 day ultimatum to have road map on definite closure of Dadaab and Kakuma refugee camps. Says no room for further negotiations.

Whether the impugned directive is in violation of the Constitution and the law for want of public participation

14. The petitioners contend that the Cabinet Secretary had stated that the Government had formally communicated its decision to close the camps by 30.6.22 to UNHCR and that there was no room for further negotiations. It is the Petitioners’ case that the impugned directive violated the Constitution and the law in that there was no public participation, a requirement anchored in articles 1(2) and 10 of the Constitution. They argued that the bilateral talks between the Respondents and UNHCR cannot amount to meaningful and adequate public participation. Further that the population affected by the impugned directive is discernible, yet they were not accorded an opportunity to be heard. Additionally, it was submitted that majority of the refugees hosted based in the 2 Camps are from Democratic Republic of Congo, Burundi, Somalia, Eritrea, Rwanda, Ethiopia and South Sudan, most of whom are not proficient in English.
15. On her part, the 2nd petitioner from South Kivu in the Democratic Republic of Congo stated that she fled the conflict in her country in 2014 and has since been residing in Kakuma Refugee Camp, where she depends on humanitarian agencies for protection and assistance. Her case is that when she learnt of the Government’s intention, vide the impugned directive, to close the Camp, she was shocked as there was no prior consultation or participation of the refugees and asylum seekers. She averred that there exists good administrative and governance structures within the Camp which the respondents would have engaged through the Refugee Affairs Secretariat. Yet this was not done.
16. In light of the foregoing, the petitioners contend that the impugned directive having been issued without public participation resulted in violation of their petitioners’ right under article 10 of the Constitution.
17. Public participation has been entrenched in our Constitution as one of the national values and principles of governance. Article 10 of the Constitution as follows:
- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them--
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.



- 2) The national values and principles of governance include--
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and;
 - (d) sustainable development.
18. The national values and principles of governance stipulated in the above provision are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account.
19. In the oft cited South African case of *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5, the court captured the essence of public participation thus:
- [E]ngagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.
20. In the case of *Kaps Parking Limited & another v County Government of Nairobi & another* [2021] eKLR, Mrima, J set out basic minimum parameters for public participation as follows:
137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.
 138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the *Constitution* and the law will be achieved. (See *Robert M Gakuru's case (supra)* among others).



21. Information in respect of which views are sought must be reasonably accessible to the public in a timely fashion. Understanding of the issue is also critical and the public must be sufficiently sensitized to enable them give informed views on the same. Factors such as illiteracy and language barriers, disability, etc. must also be taken into account. Adequate time must be given to the public to interrogate and process the information. Further the manner in which the public is to give their views or otherwise participate in the matter must be clearly defined.
22. The constitutional imperative of getting information out to the public about an intended policy or action and invitation for views cannot be gainsaid. This was underscored in the case of *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR, where Odunga J (as he then was) stated:

In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.

23. The extent and manner in which public participation is conducted in the formulation and implementation of laws and policy must accord with the nature of the subject matter. As to what constitutes reasonable and meaningful public participation is thus determined on a case to case basis.
24. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, a 3 judge bench of this court after analyzing case law, international law and comparative law, set out the following principles that public participation entails:
 - a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
 - b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the



day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (*Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC))”

- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v The Attorney General & another ex parte Hon Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e. Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.
25. The intended closure of the Refugee camps in question has far reaching implications and consequences. As such, the same cannot be done with a stroke of a pen. The views and input of those affected or likely to be affected by the closure of the Camps must be considered and taken into account before such a drastic action is taken. Applying the test set out in the cited authorities, it is quite evident that there was no public participation of any form prior to the issuance of the impugned directive. The stakeholders were not afforded an opportunity to express concerns, fears or even make demands. To the extent that the decision to close the 2 Refugee Camps was made without consulting the public and the persons affected, the result can never be an informed decision. In their defence, the Respondents stated that an internal working committee had been established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the Refugee Camps. Without



the participation of the public and in particular refugees and asylum seekers, the establishment and workings of the said committee cannot be said to meet the effective, meaningful and substantive constitutional threshold for public participation.

Whether the impugned directive violated the Refugee's right to fair administrative action

26. The 1st interested party submitted that the right to fair administrative action under article 47 of the Constitution is guaranteed to every person regardless of nationality and status. It was further submitted that refugees and asylum seekers were never served the required notice under the Fair Administrative Action Act (FAAA) of the impugned directive, nor were they invited to give their views thereon. They were also not afforded an opportunity to make representations or even furnished with information, material or evidence relied on in making the decision to close the Camps. As such, the impugned directive failed to meet constitutional muster rendering it illegal and unconstitutional.

27. Article 47 of the Constitution which provides:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.

28. Parliament did enact the FAAA to give effect to the right to fair administrative action as guaranteed under article 47(1). Section 2 of the Fair Administrative Actions Act defines an Administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. An administrator is defined as a person who takes an administrative action or who makes an administrative decision.

29. In the case of Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR, Mativo, J (as he then was) stated:

The right to fair administrative action is enshrined in the Constitution of Kenya 2010 and has been given content and meaning by the Fair of Administrative Act, 2015. The Act gives effect to the scope and meaning of this constitutional right to procedural fairness by prescribing particular procedures, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society.

30. The Court of Appeal in the case of Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR considered the import of Article 47 of the Constitution and stated:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the



Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.

31. In all cases of an administrative action affecting the public, section 5(1) of the [FAAA](#) places certain obligations upon an administrator as follows:

- (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—
 - (a) issue a public notice of the proposed administrative action inviting public views in that regard;
 - (b) consider all views submitted in relation to the matter before taking the administrative action;
 - (c) consider all relevant and materials facts; and
 - (d) where the administrator proceeds to take the administrative action proposed in the notice—
 - (i) give reasons for the decision of administrative action as taken;
 - (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
 - (iii) specify the manner and period within the which such appeal shall be lodged.

32. The requirement in section 5 is key to ensuring fairness where an administrative action is taken. As such, the participation of the public is mandatory prior to the taking of an administrative action. Before taking the action, an administrator is required to notify the public of the same, invite and consider all views submitted. Upon taking the action, the administrator must give reasons for the same, notify the public of the available internal mechanisms for appeal to any person affected by the decision and specify the manner and period within which such appeal must be lodged.

33. In the case of [Republic v Fazul Mohamed & 3 Others ex-parte Okiya Omtatah Okoiti](#) [2018] eKLR stated as follows: -

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 others v The County Government of Nyeri & another* the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

- a. Illegality - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.
- b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and



it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

- c. Irrationality and proportionality - The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming...

34. The impugned directive is an administrative action within the meaning of section 2 of the [FAAA](#). The requirement in section 5 is key to ensuring fairness where an administrative action is taken. As such, the participation of the Petitioners and the public in general and the 2nd petitioner and other refugees and asylum seekers in particular was mandatory prior to the issuance of the impugned directive. The Cabinet Secretary was required to notify the public and the persons to be most affected, of the same, invite and consider all views submitted. Thereafter upon taking the action, the Cabinet Secretary ought to give reasons for the same, notify the public and those concerned of the available internal mechanisms for appeal to any person affected by the decision and specify the manner and period within which such appeal must be lodged. In the present case, none of the foregoing was done. Accordingly, the impugned directive was issued in violation of the provisions of article 47 of the [Constitution](#) and of the [FAAA](#).
35. The court notes that the respondents have stated that closure of refugee camps is legally accessible to the Government by dint of article 2(4) of the [Convention Governing the Specific Aspects of Refugee Problems in Africa](#). To this end, an internal working committee was established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the Dadaab and Kakuma Refugee Camps. This will ensure that closure is done with due process.
36. Article 2(4) of [Convention Governing the Specific Aspects of Refugee Problems in Africa](#) (the 1969 OAU Convention) relied upon by the Respondents provides as follows:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.
37. My understanding of the above provision is that it provides the procedure to be followed when a member state that hosts refugees, experiences challenges in continuing to do so. Such member may appeal directly to other member states or through the organisation for assistance. Such member states are then required in the spirit of solidarity and international cooperation to take appropriate measures to help ease the burden of the member state in distress. The respondents herein have stated that the intended closure was informed by the need to address the plight of refugees following various concerns raised with regard to the state of and quality within the Kakuma and Dadaab Refugee Camps. My understanding of article 2(4) is that the Government as a member state to the [Convention](#) ought to have appealed to other member states either directly or through the Organization for assistance to lighten its burden. Instead of following the laid-out procedure the Cabinet Secretary issued the impugned directive, in violation of article 2(4) of the [Convention](#).



Whether impugned directive violated the principle of non-refoulement and incompatible with Kenya's obligations under the 1969 OAU Convention and the 1951 Convention

38. The petitioners and the 1st interested party submitted that the directive by the Cabinet Secretary to UNHCR to come up with a road map on closure of the 2 Refugee Camps threatens or breaches the non-refoulement principle. It was argued that the timebound closure of the camps without durable solutions or local integration mechanisms expels refugees from the country involuntarily. This will violate the human right of non-refoulment which is entrenched in regional and international human rights instruments to which Kenya is a party. The impugned directive is thus a breach of Kenya's obligations under the said instruments.
39. The 2nd petitioner's case is that the conflict from which she fled in the DRC subsists to date. Both government forces and rebels have consistently used conflict related sexual violence to achieve their objectives. As a result, women have borne the brunt of the conflict, which still subsists. She has since been residing in Kakuma Refugee Camp with her 4 children where she depends on humanitarian agencies for protection and assistance. She is apprehensive that the intended closure of the Camp in which she resides would mean her return to the DRC. This is untenable she would be put at risk of serious human rights violations by the various rebel groups controlling the eastern part of the DRC. This would violate her right to security of person, respect and dignity that are protected by international rights instruments and the *Constitution of Kenya*.
40. Kenya is a member state of inter alia the 1951 *Convention Relating to the Status of Refugees* (the 1951 Convention) and its 1967 *Protocol*, as well as the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (the 1969 OAU Convention).
41. Article 1(2) of the 1951 *Convention* defines a refugee as a person who:
- As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
42. Article 1 of the 1969 *OAU Convention* defines a refugee as:
1. For the purposes of this *Convention*, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
 2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or



the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

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.

The reality of conflict, violence and persecution cannot be gainsaid. 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.

44. A key aspect for the protection of the rights of refugees under international law and instruments is the principle of non-refoulement. The principle is that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. So central is this principle to the protection of refugees that it has acquired the status of a rule of customary international law. As such it is binding on all States, regardless of whether they have acceded to the global 1951 [Convention](#) or 1967 [Protocol](#) or regional instruments. States are thus prohibited from transferring or removing individuals from their jurisdiction when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.

45. The principle of non-refoulement is also embedded in international and regional instruments as well as municipal law. Article 33 of the 1951 [Convention](#) prohibits the expulsion or return (“refoulement”) of refugees as follows:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

46. In recognition of the importance of the principle of non-refoulement, Article 33 is listed as one of the provisions in respect of which reservations may not be made. Article 42(1) provides:

At the time of signature, ratification or accession, any State may make reservations to articles of the [Convention other than](#) to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. (emphasis added)

47. Regionally, the principle of non-refoulement is stipulated in Article 2(3) of the 1969 [OAU Convention](#) as follows:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

48. The principle of non-refoulement is also anchored in municipal law. The [Refugees Act](#), 2006 (now repealed) provided for the non-return of refugees, their families or other persons at Section 18 thus:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion,



return or other measure, such person is compelled to return to or remain in a country where

- (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

49. So critical is the safeguard against refoulement, that the [Refugees Act, 2021](#), made specific provision for non-refoulement. The wording is similar to that in the 1951 [Convention](#). Section 29 of the [Act](#) provides:

1. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—
 - a. the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
 - b. the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.
2. The benefit of subsection 1 may not, however, be claimed by a refugee or asylum seeker whom there are reasonable grounds for him or her being regarded as a danger to the national security of Kenya.

50. When Kenya acceded to the 1951 [Convention](#) and the 1969 [OAU Convention](#) and subsequently domesticated the same through the enactment of the [Refugees Act](#), it demonstrated its commitment to treating refugees in accordance with internationally recognized legal and humanitarian standards. Indeed, in his further replying affidavit, the Commissioner of Refugee Affairs stated that Kenya currently hosts more than 500,000 refugees and asylum seekers who are accorded the rights as envisaged in the international refugee instruments, Kenyan law and the [Constitution of Kenya](#).

51. In the case of [Kenya National Commission on Human Rights case \(supra\)](#) Mativo, J. (as he then was considered the principle of non-refoulement and stated:

The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions,” and non-admission at the border in the circumstances described below. This is evident from the wording of article 33(1) of the 1951 [Convention](#), which refers to expulsion or return (refoulement) “in any manner whatsoever.” It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 [Convention](#), or from where he or she risks being sent to such a risk.[24]

The application of article 33(2) requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under article 33(2) of the 1951 [Convention](#). Thus, this rules out group or generalized application or collective condemnation. Unfortunately, the averment by the Government that the two exceptions discussed herein are applicable and not based on individual consideration or



determination to each affected refugee but are dangerously generalized in a manner that is a kin to collective punishment.

52. The blanket implementation of the intended closure of the 2 camps poses the danger of denying refugees and asylum seekers individualised consideration and determination of their individual and personal circumstances and subject them to generalised and collective condemnation which will undoubtedly include involuntary repatriation.
53. And in *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR, Majanja, J quashed the Government directive inter alia to stop reception, registration and close down all registration centres in urban areas with immediate effect, and to host all asylum seekers and refugees at the refugee camps. The decision was upheld by the Court of Appeal in *Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR, which stated:

The learned Judge arrived at the conclusion that the Directive could not stand by reason of its being violative of various rights and fundamental freedoms of the refugees and asylum seekers and for violating international refugee law. We have already dealt with those violations in some detail but we would like to point out in particular the fact that the directive was an assault on the principle of non-refoulement, which the State itself tacitly acknowledges. It is not open for the State to go against that peremptory norm of international law and its having done so is alone sufficient to justify the quashing of the directive.

54. The intended closure of the 2 Refugee Camps is conceded by the Respondents whose assertion is that the same was informed by the need to address the plight of refugees following various concerns raised with regard to the state of and quality within the Kakuma and Dadaab Refugee Camps. The respondents contended that closure of refugee camps can be done legally under article 2(4) of the 1969 *OAU Convention*. To achieve its intention to close the camps, an internal working committee was established comprising of Government officials and members of the UNHCR to develop a roadmap or strategy on closure of the Dadaab and Kakuma Refugee Camps. As indicated earlier in this judgment, the exclusive engagement of the government and UNHCR to the exclusion of the public and persons that will be most affected by the closure of the camps does not meet the constitutional muster of public participation. Closure of the camps will inevitably result in repatriation of asylum seekers and refugees, which without their participation in the process, will be involuntary. This clearly violates the principle of non-refoulement. Indeed the 2nd petitioner stated that the conflict in her country of the DRC subsists to date and her return there is untenable given the threat to her life and security of her person as well as human rights violation. In light of the foregoing, I find and hold that the impugned directive goes against Kenya's obligations in respect of the principle of non-refoulement.
55. The Bill of Rights in the *Constitution of Kenya*, guarantees fundamental rights to all persons within the borders of Kenya, including refugees. Article 19 provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Further that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Article 20 guarantees that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Further that the Bill of Rights applies to all law and binds all State organs and all persons. Article 24 stipulates that A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable



in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

56. The refugees and asylum seekers in the 2 camps enjoy the rights available to them in the camps including the right to protection and security. The intended closure of the camps certainly poses a real threat and apprehension in the minds of those who have been granted refuge therein, including the threat to involuntary repatriation.

57. Article 29 of the *Constitution* guarantees to every person the freedom and security of the person as follows:

Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

58. Refugees and asylum seekers by definition, are persons who flee their countries due to violation or threat to violation of their right to freedom and security of the person. The 2nd petitioner is one such case. This right is available to every person, including persons who seek and are granted refuge in Kenya. Accordingly, the intended closure of the Refugee Camps will pose a threat to this right. Because of the circumstances in which refugees and asylum seekers find themselves, they are very vulnerable. As such, they require protection of the State. The intended closure of the camps goes against the obligation of the State to address the needs of the vulnerable under article 21(3) of the *Constitution* which provides:

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.

59. The court finds that the impugned directive violates the rights of refugees and asylum seekers in the 2 Refugee Camps. The directive further exposes them to vulnerability which is inconsistent with Kenya's commitment and duty to take care of refugees and asylum seekers within its borders. The closure of any of the refugee camps in Kenya must be done in a manner that follows due process and in compliance with the State's obligations under both international and municipal law.

60. In the end and in view of the foregoing, consolidated Petitions are merited and grants the following reliefs:

- a. A declaration be and is hereby issued that the directive on closure of Dadaab and Kakuma Refugee Camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on 24.3.21 and 29.4.21 respectively are unconstitutional, are inconsistent with, violates and contravenes articles 10, 19 20, 21, 24, 29 and 47 of the *Constitution*.



- b. A declaration be and is hereby issued that the directive on closure of Dadaab and Kakuma refugee camps issued by the Cabinet Secretary for Interior and Co-ordination of National Government on 24.3.21 and 29.4.21 respectively contravenes the article 33 of the 1951 [UN Convention relating to the Status of Refugees](#) and its 1967 [Protocol](#); article 2(3) of the 1969 [OAU Convention Governing the Specific Aspects of Refuge problems in Africa](#) and section 18 of the [Refugees Act](#) 2006.
- c. An order of certiorari be and is hereby issued to bring to the High Court for purposes of quashing and to quash the directives on closure of Dadaab and Kakuma Refugee Camps made on 24.3.21 and 29.4.21 respectively, contained in the 2nd respondent's twitter account and joint statement published by UNHCR in its website on 29.4.21
- d. An order of mandamus directed to the respondents mandating them to undertake the required lawful process and procedures including but not limited to undertaking public participation prior to taking administrative actions on the closure of Dadaab and Kakuma refugee camps.
- e. An order of prohibition directed to the respondents, their agents, officers, undisclosed principals and any other persons acting on their behalf or instructions from closing Dadaab and Kakuma refugee camps without following due process or in pursuance of a lawful directive and or decision.
- f. The nature of this matter does not call for an award of costs.

DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024

M. THANDE

JUDGE

