

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E011 OF 2022

BETWEEN

HAKI NA SHERIA INITIATIVE PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

DIRECTOR GENERAL OF CITIZENSHIP
AND IMMIGRATION SERVICES.....2ND RESPONDENT

PRINCIPAL REGISTRAR OF BIRTHS AND DEATHS3RD RESPONDENT

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

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

AND

GLOBAL STRATEGIC LITIGATION
COUNCIL FOR REFUGEE RIGHTS.....AMICUS CURIAE

AS CONSOLIDATED WITH PETITION NO E001 OF 2023

BETWEEN

HAKI NA SHERIA INITIATIVE.....1ST PETITIONER

FATUMA YUSUF OMAR.....2ND PETITIONER

FOZIA MOHAMED ABDILLE.....3RD PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

DIRECTOR GENERAL OF CITIZENSHIP
AND IMMIGRATION SERVICES.....2ND RESPONDENT

PRINCIPAL REGISTRAR OF PERSONS.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

KATIBA INSTITUTE1ST INTERESTED PARTY

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

JUDGMENT

1. Quite often, the right to a person's nationality or citizenship can be taken for granted until the same is taken away or lost or worse still denied. The petitions herein revolve around two aspects; Firstly, the alleged denial of Kenyan citizenship to a child or children born by a Kenyan citizen married to a non-Kenyan citizen who is a refugee. Secondly, failure to recognize a refugee who has been married to a spouse who is a Kenyan citizen for over seven years as a Kenyan citizen after following due registration (application) process just like other foreigners in similar marriage status but who are not refugees.
2. The suit herein brings to sharp focus the Kenyan constitutional and statutory legal provisions on the aspect of the right to citizenship as an inalienable birth right vis avis international law on the right of a refugee not to be discriminated against by virtue of being a refugee.
3. Before this court are two petitions being petition Number E011 of 2022 and E001 of 2023 which were subsequently consolidated with Petition No. E011 of 2022 being the lead file.
4. In respect to petition E011 of 2022 dated 14.11.2022, it is seeking orders that;

- a. A declaration that all children arising from unions between a Kenyan and refugee or a person seeking refugee status are Kenyans by birth pursuant to article 14(1) of the constitution and are entitled to all rights, privileges and benefits granted by law.
- b. A declaration that the actions of the respondents in stamping the birth notifications with refugee agencies' stamp like International Rescue Committee (IRC) or marking certificates of Births 'Refugee' on the face thereof for children arising out of the unions between refugees and Kenyan citizens and subsequent entry of their particulars onto the Kenya/UNHCR Refugee Database is in contravention of articles 14(1) and 27 of the constitution.
- c. A declaration that the absence of the 3rd respondent's office in Refugee Camps such as Hagadera Refugee Camp in Dadaab which is a restricted zone, is an apparent denial of citizenship documents to persons restricted therein but entitled to the said documents in contravention of the right to fair administrative action enshrined in article 47 of the constitution.
- d. A declaration that the respondents' indifference and differential treatment of the children arising out of unions between Kenyan citizens and Refugees vis avis those that have both parents as Kenyans is discriminatory and degrading contrary to articles 10,27,28 and 53 of the constitution.
- e. A declaration that the respondents' designation of the children arising out of the union between Kenyan citizens and refugees' as refugees through the issuance of birth notifications or certificates of birth that bear refugees' agencies stamp such as the International Rescue Committee (IRC) or marked 'Refugee' respectively

accordingly leading to their encampment and restricting their right to movement contravenes article 29 and 39 of the constitution.

- f. A declaration that the respondents' forceful containment of children arising out of the union between Kenyan citizens and refugees in the refugee camps resulting in denial of their access to better quality of healthcare, housing, education, food, water, sanitation and other socio-economic rights is inconsistent with the provisions of articles 43 and 53 of the constitution.
- g. A declaration that the respondents' unjustified separation of children arising out of unions between refugees and Kenyan citizens from the rest of their Kenyan families is inconsistent with the provisions of articles 45 of the constitution on the protection of family as the basic unit.
- h. A mandamus order directing the 3rd respondent to conduct proper birth registration and issue all children arising from the unions between a Kenyan and a refugee parent with rightful birth notification less the Refugee Agencies stamps and certificates of births that do not feature any 'Refugee' markings on the face thereof.
- i. A mandamus order directing the respondents to remove all children arising from the unions between a Kenyan and a refugee from the Refugee Database.
- j. Costs of the suit.

5. The petition is premised on the grounds set out on the face of it and the annexed affidavit of Haretha M. Bulle the chairlady to the petitioner sworn on 14.11.2022. The petition is hinged on the fact that there are serious violations or threats to violation of fundamental rights occasioned by the respondents in relation to children born in Kenya of a parent who is a Kenyan

and a parent granted or seeking refugee status in Kenya. That such children receive differential treatment hence stripped off their Kenyan citizenship at birth thus rendering them stateless.

6. It is the petitioner's case that the respondents' preferential treatment and or discrimination of the children born of a Kenyan citizen and a non-Kenyan parent or spouse who is a refugee, brings to question the legality of that action thus impeding the attainment of citizenship rights and means to acquire registration documents that are crucial to the grant of citizenship to those children.
7. The petition has highlighted the case of AMM as a representative of countless children facing similar circumstances. That AMM was born at Hagadera refugee camp Dadaab to a Kenyan father holder of ID No.300829 and a refugee mother holder of refugee card No. A32639444. That at birth, AMM was issued with a birth notification bearing IRC a refugee agency and subsequently his particulars entered in the UNHCR/GoK refugee data base.
8. She further averred that, AMM's four other siblings born by the same parents in similar relationship, have been treated similarly thus confining them and the rest of the children born under similar circumstances to automatic refugee status from birth. That as a consequence, AMM and other children in similar situation have been encamped at the refugee camps thus limiting their freedom of movement to good medical facilities, school visits for their children and family functions owing to lack of necessary travelling documents available to the rest of the Kenyan citizens.
9. In contrast, it was deposed that, AMM who has also other siblings born by the same father with a Kenyan(wife) citizen among them MMM who lives in

Garissa town, have been granted birth notifications and birth certificates that do not bear any refugee markings.

10. It was the petitioner's contention that part of the contributing factors for this discrimination is lack of the respondent's office in Dadaab Sub-county bearing in mind that the nearest office is based in Garissa town about 100kms away.
11. That the respondents have stripped off Kenyan citizenship children born of one parent who is a Kenyan citizen and a spouse who is a refugee contrary to Section 3 of the Refugees Act 2021 and Article 14(1) of the constitution which recognizes as a Kenyan citizen a child born within Kenya by either the mother or father being a Kenyan citizen.
12. That as a consequence of the respondents' actions or inactions, children like AMM have been denied the right to acquire national ID cards upon attaining age of majority hence cannot enjoy the rights and privileges enjoyed by or entitled to the rest of Kenyan citizens.
13. To crown it all, it was the petitioner's position that failure to recognize children born out of the subject marriage arrangement is a clear manifestation of; discrimination, denial of right to dignity and violation of national values contrary to Article 10, 27, 28 and 53; violation of the right to freedom of movement and residence contrary to Article 29 and 39 of the constitution; violation of the right to citizenship and identity contrary to Article 14(1) of the constitution; violation of right to the best interests of a child and right to family contrary to Article 53 and 45 of the constitution respectively and; violation of social economic rights contrary to Article 43 of the constitution.

14. In response, Christine Kinyua, a Senior Immigration Officer at the Directorate of Immigration on behalf of the 2nd respondent filed a replying affidavit sworn on 19.04.2023 deposing that as a department, they are bound by both the municipal and international laws. That the 2nd respondent has not in any way infringed on the constitutional and fundamental human rights of children born by refugee mothers married to Kenyan fathers as alleged by the petitioner.
15. It was averred that a person is deemed to be a Kenyan citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of the person is a citizen. Further, that a person seeking refugee status does not qualify being a Kenyan citizen unless she/he makes an application for the registration under article 15 of the constitution and section 11 or section 13 of the Citizenship and Immigration Act. This court was thus urged to dismiss the suit herein as being frivolous and vexatious.
16. Lucia Mulandi, a Civil Registration Officer at the office of the 3rd respondent swore a replying affidavit on 28.02.2023 deposing that the Civil Registration Department is responsible for implementing the Births and Deaths Registration Act. That in registering births, the 3rd respondent first and foremost relies on information given by the parents of the child and only accepts information given by other persons in the absence of the father and the mother.
17. It was averred that section 10 of Cap 149 places a mandatory obligation and responsibility upon any person notifying a birth to make a genuine declaration on the prescribed particulars and not on the registrar registering the birth. She deposed that the 3rd respondent relies on the utmost good faith

from persons notifying a birth and that the informant must be genuine and correct.

18. That the petitioners' annextures reveal that the birth of MMM was registered under the provision for late registration of birth as provided for under section 8 of Cap 149 in the year 2012, thus approximately 8 years after his birth entry no. 0082114679 while the birth of AMM was registered within the mandatory period of six months. Additionally, that the informant of the births of both children was one Mahad Maulid Bashir who was indicated as the father of the minors and therefore, a person who would ordinarily know the correct particulars regarding himself and his children.
19. It was stated that in the registration of MMM, Mahad Maulid Bashir gave his identity card no. as 22300829 while in the registration of the birth of AMM, he gave his identity card no. as A3263944 which curiously is the same as the identity card no. of Fatuma Mohamed Hussein. That in the register of birth serial no. 5818539 of AMM, Mahad Maulid Bashir declared his and Fatuma Mohamed Hussein's nationality as Somali.
20. It was averred that in the register of birth serial no. 5818539, of AMM, Mahad Maulid Bashir attested to the correctness and truthfulness of the particulars he had given. Further, that the categorization of AMM as a refugee in Kenya if done, was based on the declaration by his father and secondly on the fact that he was born within Hagadera Camp, an area classified and gazetted as quarantine area for refugees.
21. It was her averment that the certificates of births of both AMM and MMM do not have the word 'refugee' stamped on them. That for the purposes of identifying the place of birth and therefore notification of a birth that has occurred in an institution, it is a requirement that the name of the institution

be indicated in the register of birth. That this is normally done by stamping the name of the institution on the register of birth or death.

22. Additionally, she averred that the 3rd respondent has an arrangement with UNHCR in which its staff visits the camps on a monthly basis to issue birth certificates of children born in the camps. It was averred that the arrangement has worked so well and therefore, the petitioners cannot be heard claiming that they face difficulty in accessing its services.
23. The deponent stated that it was untrue and fallacious for the petitioner to allege that the 3rd respondent had employed differential treatment as the same was not demonstrated. That the notification and certificate of birth marked as HMB1 and HMB2 respectively do not have the word 'refugee' stamped on them and therefore, the allegations by the petitioner is far-fetched from the truth. This court was therefore urged to dismiss the suit herein for want of merit.
24. Mr. John Burugu on behalf of the 4th respondent filed a replying affidavit sworn on 15.06.2023 acknowledging that the issuance of civil registration documents is a mandate of the registrar of births and deaths hence it does not stamp birth certificates with Refugee Agencies' Stamps as alleged.
25. He averred that his department only registers or captures biometrics of persons seeking asylum in Kenya voluntarily and as such, the department does not enter particulars of an individual in the database without verifying the asylum claim. That the petitioners are misinformed by claiming that the 4th respondent authorizes the Refugee agencies to stamp birth certificates as 'Refugees'. Further, that some of the issues raised by the petitioners may require legislative or policy changes. The deponent also averred that the

petition does not disclose any legal and justifiable claim against the 4th respondent and therefore, the same ought to be dismissed.

Pleadings in respect of petition number E001 of 2023.

26. Vide the petition dated 7-2-2023, the petitioners are seeking:

- a) A declaration that Section 11 of the Kenya Citizenship and immigration Act is inconsistent with or in contravention of Article 15(1) and 45 of the constitution in so far as it establishes residency as an additional criterion for citizenship by marriage.
- b) A declaration that the residency status is not a requirement for attaining citizenship by marriage under Article 15 (1) of the constitution.
- c) A declaration that all spouses of Kenyan citizens including persons having refugees' status and persons who have sought refugee status but their refugee eligibility has not been conclusively determined are entitled to Kenyan citizenship by marriage on complying with Article 15 (1) of the constitution and are entitled to all rights, privileges and benefits granted by law.
- d) A declaration that refugee status granted after refugee status determination is lawful residence under the national and international laws governing Kenya.
- e) A declaration that the legislative and administrative hurdles placed against refugee status of Kenyan citizens-based on interpretation and application of Section 11 of Kenya citizenship and immigration Act about the grant of citizenship by marriage-are unreasonable and unfair and threaten or violate the right to fair administrative action contrary to section 47 of the constitution.

- f) A mandamus order to issue directing the 3rd respondent to register the 2nd and 3rd petitioners as citizens by marriage.

27. The 1st petitioner Haki na Sheria is a non-governmental organization registered under the Non-Governmental co-ordination Act 19 of 1990 who have filed this suit in the public interest of spouses of Kenyan citizens who have been married for the stipulated period of at least 7 years and who are also either refugees or persons who have sought refugee status but their refugee status eligibility has not been conclusively determined and are unable to successfully realize their right to conferment of Kenyan citizenship by marriage.
28. The 2nd and 3rd petitioners are refugees or persons who have sought refugee status but their eligibility has not been fully concluded or determined and who are married to Kenyan citizens for over seven years. They claim to file this suit on their own behalf and those of persons in similar situation.
29. The petition is also anchored on grounds set out on the face of it and further amplified by averments contained in the affidavit in support sworn by Harietha M. Bulle the chairlady of the 1st petitioner. The crux of this matter revolve around the alleged violation of citizenship rights of non-Kenyan spouses married to Kenyan citizens for over 7 years but have been denied the right to apply for or acquire Kenyan citizenship through marriage as envisaged under the constitution.
30. The petitioners are therefore questioning the legality of the respondents' actions in impeding the attainment of citizenship by refugees married to Kenyan citizens for over 7 years. That section 11 of the Kenya Citizenship and Immigration Act is unconstitutional in as far as it provides for proof of residency by way of possession of a pass or permit which is not possible for

refugees by virtue of their status thus contravening Article 15 (1) and 45(1) of the constitution.

31. That the extra requirement of proof of possession of a pass or work permit under the Kenya Citizenship and Immigration Act instead of proof of marriage under Article 15 of the constitution is unreasonable demand which was not envisaged by the constitution and therefore implementation of that requirement will disfranchise refugees. In conclusion, it was urged that the respondents have violated the petitioners' right to citizenship, equality, right to fair administrative action and the right to family in contravention of Articles 2(5) & (6),10,15,19,27,28,47 and 45.
32. Subsequently, by a notice of motion dated 15-03-2023, Katiba institute sought to be enjoined as an interested party in support of the petition. Their application was based on the claim that they have a wealth of experience on constitutional and refugee matters having litigated in similar or related issues before the high court and court of appeal besides the supreme court. The application was by consent allowed thus becoming the 1st interested party.

1st interested party's case

33. Having been allowed to take part in these proceedings, the 1st interested party filed a replying affidavit sworn on 19-06-2026 by Christopher Kerkering manager Katiba institute challenging the constitutionality of Sections 11 and 34 of the Kenya Citizenship and Immigration Act in so far those sections discriminate against spouses who are refugees but married to spouses who are Kenyan citizens as opposed to non-Kenyan citizens who are not refugees but married to Kenyan citizens.

34. He averred that Article 15(1) and (2) only refers to a person who has been married to a Kenyan for over 7 years to apply for citizenship. That sub-article 2 only recognizes that such person ought to have been resident for over seven years. In his view, a refugee who is legally in Kenya in that capacity is entitled to be treated as a resident for purposes of article 15(1) of the constitution.
35. That for Section 34 of the Kenya Citizenship and Immigration Act to introduce a requirement for an applicant for citizenship under article 15 to produce possession of a pass or permit to establish residency for over 7 years is unreasonable condition which is not achievable for refugees given the stringent conditions attached before one can obtain one hence unconstitutional.
36. It was deposed that the unachievable conditions set out in form 28 of the regulations under the Act for application of citizenship on account of marriage to a foreigner by a Kenyan citizen is an affront to the constitutional imperative pursuant to article 15(1) and (2).

2nd interested party's case

37. The Kenya national commission on human rights via a notice of motion dated 7-02-2024 sought to be enjoined as an interested party. By a ruling dated 17-05-2024, the applicant was allowed to join as the 2nd interested party. The basis of their inclusion was begged on alleged possession of wide experience in constitutional issues and also as a defender of the people's right.
38. Dr. Benard Mogesa, the secretary/C.E.O. on its behalf vide a replying affidavit sworn on 13.06.2024 submitted that the commission received 132 complaints from refugees between August 2023 to June, 2024 across its six offices. It was averred that the legal and administrative hurdles under the

KCIA and its Regulations have made it impossible for refugees and asylum seekers to be considered for citizenship by registration which is a violation of the constitution and international law. That the pathway to citizenship, subject to legislative requirements would open doors for the vulnerable group including employment, access to financial services amongst others.

3rd interested party's case.

39. The Law Society of Kenya vide a notice of motion dated 7-3-25 sought to come on board as an interested party. Their application which was not opposed was allowed on 16-7-2024. The LSK basically came on board to assist in the public interest, the interpretation of Section 11 of the Kenya Citizenship and Immigration Act in so far as the right to refugees who are married to Kenyan Citizens are concerned. They basically supported the petitioners' case in its entirety.
40. Subsequently, the petitioners via an application dated 17-09-2024, sought leave of the court to admit expert opinion report (affidavit) on refugee matters authored by Abiy Ashenafi. Through a ruling delivered on 6th December 2024, the same was allowed.

Rejoinder by the 2nd petitioner.

41. As a response to the 2nd petitioner's response dated 27.03.2023, the 2nd petitioner filed a supplementary affidavit sworn on 10.11.2023 averring that she does not claim citizenship rights by the mere fact of being in Kenya for many years and neither does she claim conferment of rights pursuant to section 15(2) of the constitution. That she has satisfied the preconditions as set out in article 15(1) of the constitution and section 11 of the KCIA. She averred that she is a holder of Refugee Identity Card No. 732412 and that

she has been married to one Abshir Abdullahi Ibrahim, a Kenyan citizen holder of National Identification Card No. 24446680 for more than 18 years.

42. That their union was registered on 22.05.2005 and has since been blessed with four children. She decried the fact that she has been unable to fully participate in the lives of her young children including accompanying them to school and hospital thus delegating everything to her husband who is a Kenyan. She urged that it would only be fair that she be allowed to apply and be considered for citizenship by way of marriage without unreasonable legal and administrative barriers currently existing owing to her refugee status.
43. However, the application by kituo cha sheria to come on board as an interested party was rejected as per the ruling dated 26-06-2024. However, an organization by the name Global strategic litigation council for refugee rights was allowed to come in as an Amicus Curiae pursuant to its application dated 31-07-2024 which was not opposed.
44. The petition was canvassed by way of written submissions.

Petitioners' submissions.

45. The petitioners filed their written submissions dated 19.03.2025 urging on six issues as follows:
 - i. Whether a child born of a parent who is a Kenya citizen and a parent who is a refugee or an asylum seeker is a citizen of Kenya entitled to all rights under the constitution.

- ii. Whether designation of children arising out of the union between refugees and Kenyan citizens as refugees through the issuance of birth notifications and certificate of birth marked 'refugee' abrogate the children's rights to Kenyan citizenship and all the attendant rights.
 - iii. Whether the differential treatment of children with refugee parents, compared to those born of two Kenyan parents or a Kenyan parent and a foreign national who is not a refugee, constitutes discrimination contrary to article 27(1) – (4).
 - iv. Whether section 11 of the Kenyan Citizenship and Immigration Act is inconsistent with or in contravention of article 15(1) and 45 of the constitution in so far as it establishes residency as an additional criterion for citizenship by marriage.
 - v. Whether Refugee Status granted after Refugee Status determination is 'lawful residence' under the national and international laws governing Kenya.
 - vi. What are the appropriate reliefs?
46. On the first issue, it was urged that the right to citizenship is plausibly one of the most fundamental rights as it unlocks the enjoyment of other rights. That the right to nationality is expressly protected by the constitution under article 14(1) of the constitution. According to the petitioners, citizenship is conferred at birth, if that person on the day of his/her birth whether or not the person is in Kenya, has either a Kenyan mother or father. That this provision in its wording on citizenship by birth is clear beyond peradventure that children born of mixed unions are citizens entitled to all benefits, rights and privileges associated with such status.

47. It was contended that their nationality is automatically attributed by law from the moment of birth rather than acquired following any administrative process. Additionally, that article 18 of the constitution vests parliament with the authority to legislate on matters of citizenship, a mandate that culminated in the enactment of the Kenya Citizenship and Immigration Act which provides that a citizen by birth will carry the same meaning as provided under article 14 as read with clause 30 of the 6th Schedule of the constitution. Reliance was placed on the case of **Mulowayi & Others vs Minister of Home Affairs & Another CCT249/18**, where the Supreme Court of South Africa stated that:

“Citizenship is not subject to discretionary judgment, but rather a matter of legal inquiry. If the necessary conditions for acquiring citizenship are met, it becomes the obligation of the department of Home affairs to acknowledge such citizenship and proceed with associated administrative processes without additional deliberation”

48. On the second issue, this court was urged that the right of nationality and citizenship of children born out of mixed unions, is constantly being violated by the state due to laxity in implementing and putting in place mechanisms to enable them enjoy the said rights. That the absence of the 3rd respondent's office in the refugee camps such as Hagadera in Dadaab is an apparent denial of citizenship documents to persons restricted therein but entitled to the said documents. According to the petitioners, this is contrary to the right to fair administrative action enshrined in article 47 of the constitution. Equally, that the restriction inherent in camps also jeopardizes the refugees' right to housing and strips them of social and economic systems.

49. On the third issue, counsel urged that the respondent's indifference and differential treatment of AMM, his siblings with a refugee mother as well as

other children in similar circumstances as them vis a vis those with Kenyan mother, is discriminatory and degrading contrary to articles 10,27,28 and 53 of the constitution.

50. It was contended that the respondents have violated the constitutional obligation to ensure equality and freedom from discrimination as enshrined in article 27 of the constitution. Reliance was placed on the case of **Nelson Andayi Havi vs Law society of Kenya [2018] eKLR**, where the court drew inspiration from the South African Case of **Harksen vs Lane No. & Others** which presented a three part test to wit; the first part involves examining whether the differentiation amounts to 'discrimination' based on specified grounds or whether it impacts human dignity or individuals' wellbeing significantly; the second part evaluates whether the discrimination can be deemed 'unfair discrimination' within the meaning of article 27 of the constitution; the third part focuses on the impact of the discrimination on the complainant and others in his or her situation.
51. Further reliance was placed on the case of **Njenga vs Judicial Service Commission & 9 Others [2022] eKLR, Civil Appeal 234 of 2017** where the Court of Appeal cited with approval the decision in **Canadian National Railway Co. (CN) vs Canadian Human Rights commission [1987] SCR 114** thus stating that:
- 'It is not a question whether the discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is accidental by product or innocently motivate practices and systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory'.

52. On the fourth issue, it was submitted that Section 11(2) of KEIA establishes residency as a stand-alone criterion to attaining citizenship in Kenya. That the constitution recognizes family as the essential unit of the society. It was urged that the drafters of the constitution advertently established citizenship by marriage separate from citizenship by residency thus giving an inkling as to the importance of the institution of marriage as a basis for formalization of the family which is recognized as the fundamental unit of the society under article 45 of the constitution.
53. On the fifth issue, this court was urged that section 34(2) of KCIA sets out the mode of acquiring residency status in Kenya. Further, that section 34 of the KCIA only recognizes a permit or a pass as proof of lawful residence which is not available to asylum seekers fleeing from persecution. That it is worth noting that, the petitioners are excluded from all types of permit classes except class M which is issued to persons who have been granted refugee status in Kenya.
54. It was urged that to access a pass or permit for a refugee is improbable because the refugee spouses are unlikely to attain that residency status as currently required by the impugned provision. Additionally, that the requirements for permits and passes are tailor made for other foreign nationals to the exclusion of the refugees.

1st interested party's submissions.

55. The 1st interested party filed submissions dated 15.09.2023 in respect to petition No. E011 of 2022 in which they coined issues for determination as follows:

- i. Have the respondents violated the rights of children born in the refugee camps to one Kenyan parent to equal protection of the law and failed to act in the best interest of the child?
 - ii. Has the 3rd respondent's conduct unlawfully limited the right to citizenship by birth to children born in the refugee camps to one Kenya parent?
 - iii. What remedies are available should this court find violations of the constitution and the law?
56. On the first issue, it was submitted that children born of a refugee and a Kenyan citizen is entitled to Kenyan citizenship under Article 14 (1) as well as a name and nationality pursuant to Article 53(1)(a) of the constitution.
57. Further reliance was placed on articles 24(2) and (3) of the International Convention on Civil and Political Rights hereinafter ICCPR which stipulates that every child must be registered immediately after birth and that every child has the right to acquire nationality. To buttress on the significance of international law, reliance was placed on the case of **Mitu Bell Welfare Society vs Kenya Airports Authority & 2 Others [2021] KESC** where the court took cognisance of the treaties and conventions ratified by Kenya directly as applicable in the country's legal system.
58. The 3rd respondent was faulted for having appointed registration areas to cover all other parts of Kenya but failed to establish registration areas that would cover children born in the refugee camps.
59. That in as much as the respondents have admitted that the appointment of registration areas is not dependent on the presence of a refugee camp or settlement but based on administrative boundaries, the respondents have failed to put in place mechanisms that ensure these children's details are

captured correctly. Additionally, that in as much as there exist gaps in the law which could explain the violations, the same shouldn't be used as an excuse in executing the law and ensuring the best interests of the children born in the camps are upheld.

60. On the second issue, it was urged that the right to nationality at birth is a fundamental right guaranteed to all Kenyan children under article 53 of the constitution hence entitled to all the rights and privileges that accompany citizenship. That the respondents have not offered any viable reason as to why the said children born in the camp cannot be registered and recognized as Kenyan citizens. Counsel opined that discrimination of children such as AMM has long lasting effects like failure to acquire a national ID thus denying them several opportunities like employment.
61. On the remedies available, counsel urged that this court has the authority vide articles 23 and 165 of the constitution to grant appropriate reprieves to AMM and children like him. This court was urged to consider the Report of the Office of the United Nations High Commissioner for Human Rights, Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law.
62. The 1st interested party further filed its submissions dated 23.10.2023 in respect to Petition No. E001 of 2023 urging in reference to four issues coined for determination as follows:
 - i. Whether KCIA and its regulations impose hurdles on the refugees inconsistent with the Refugees Act and make it nearly impossible to be recognised as lawful residents.

- ii. Whether section 34(2) of KCIA and its Regulations violate the constitution for creating an unconstitutional and discriminatory scheme of acquisition of citizenship by foreign nationals.
 - iii. Whether section 34(2), implementing regulations, and the way they are applied are reasonable and justifiable limitations of fundamental rights and freedoms under article 24 of the constitution.
 - iv. Potential remedies for the violations of the law and the constitution.
63. On the first issue, it was submitted that the KCIA and its regulations violate the requirement under section 28 of the Refugees Act that refugees be given the same rights and privileges as other foreign nationals residing in Kenya. That failing to recognize the Refugee Identity Card as evidence of lawful residence is a prima facie violation of section 28. In the same breadth, requiring refugees to obtain a dependent's pass or work permit to have their legal status recognized as lawful residents does not give them the same rights as other foreigners who are expressly recognized as lawful residents by virtue of sections 34(2) and (3) (f) of the KCIA, which contemplates documents readily available to them.
64. Additionally, that by refusing to recognize a valid refugee identity card as evidence of legal immigration status to obtain a dependent's pass and requiring that a refugee has to obtain a work permit means that contrary to section 34(2) of the KCIA, refugees have an extraneous burden imposed on them to demonstrate legal status by requiring that they should have both the valid and work permit unlike other foreigners who may only provide either.
65. On the second issue, it was urged that article 15 (1) of the constitution creates the right of a non-Kenyan citizen to acquire citizenship by marriage to a

Kenyan citizen. That violations of articles 27 and 47 also construe violations of article 2 and 10 of the constitution.

66. On the third issue, counsel submitted that article 24 of the constitution allows the limitation of certain rights but under strict and elaborate scrutiny anchored upon the test of reasonability and justifiability. That citizenship is a necessary precursor to exercising other fundamental rights and freedoms including political rights and right to vote amongst others.
67. Counsel further reiterated that the right to citizenship also denies Kenyan citizens married to refugees the fundamental right to family. That article 45(2) asserts that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. As such, the constitution does not impose other limits on the right and therefore, any law that prohibits an individual from acquiring citizenship under article 15 (1) is a concomitant violation of article 45.
68. On the potential remedies available to this court, counsel urged that this court ought to invoke a purposeful reading of the constitution and direct that the refugees married to Kenyan citizens who meet the criteria under the law are entitled, upon application, to have their applications for citizenship considered and processed within six months.

Submissions by the second interested party

69. The 2nd Interested party filed submissions dated 13.02.2025 citing the following issues for determination:
 - i. Whether section 11 of the Kenya Citizenship and Immigration Act is consistent with article 15(1) of the constitution.

- ii. Whether the refugee status granted under the Refugees Act (2021) is 'lawful residence' as provided for under the Kenya citizenship and Immigration Act? If the answer is in the affirmative, are then section 34 (2) of KCIA and the attendant Regulations 26 (1) and 27 discriminatory?
 - iii. What are the appropriate orders in the circumstances of the petition?
70. On the first issue, counsel submitted that section 11 of the Kenya Citizenship and Immigration Act, hereinafter, KCIA is inconsistent with article 15(1) and 45 of the constitution to the extent that it establishes an additional criterion for citizenship by marriage not prescribed under the supreme law. That this court has been called upon to fully interrogate the legal and administrative barriers that refugees and persons whose refugee status is yet to be conclusively determined are subject to. To that end, reliance was placed on the case of **Constitutional Petition No. E045 of 2022 Kenya National Commission on Human Rights & Others vs The Hon. Attorney General & Others** where the court held that"
- 'In examining the constitutionality or lack thereof of a statute, courts are also to bear in mind the general presumption that deems every Act of Parliament to be constitutional unless otherwise established'.
71. On the second issue, it was contended that the instant petition focuses on Kenya's international obligations particularly towards refugees and asylum seekers. That the matter calls into question the manner in which refugees'/asylum seekers are treated compared to other foreigners in different circumstances.

72. It was urged that the refugee status is lawful and yet the current state of affairs amount to discrimination which is contrary to the constitution and the Refugee Convention.
73. It was further urged that the respondent's application of KCIA and its attendant regulations, amount to direct discrimination. Further, reliance was placed on the Court of Appeal case in **Mohamed Abduba Dida vs Debate Media Limited & Another [2018] eKLR** while quoting with approval the decision in **Nyarangi & Others vs Attorney General [2008] KLR 688** the court noted the following with regards to various facets of discrimination: 'Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.'

Submissions by the 3rd interested party

74. The 3rd Interested party filed submissions dated 18.03.2025 submitting in regards to the following issues:
- i. Whether the Kenyan statutes create legal and administrative barriers for refugees and persons whose refugee status is yet to be conclusively determined and who are married to Kenyan citizens to be registered as Kenyan citizens?
 - ii. Whether a child born of a parent who is a Kenyan citizen and the other parent granted or seeking refugee status in Kenya is entitled to be Kenyan citizen by birth in Petition No. E011 of 2022?
75. On the first issue, it was submitted that section 11 of KCIA is a clear contradiction of article 15(1) of the constitution in so far as it is read, interpreted and applied by the respondents to impose residency as an

additional pre-requisites criterion for the attainment of citizenship by marriage.

76. It was urged that any law that is inconsistent to the constitution is void to the extent of the inconsistency. To support the foregoing, reliance was placed on the case of **Law Society of Kenya vs Attorney General & Another, Sup Ct Petition 4 of 2019; [2019] eKLR** where the court stated that ...in construing whether statutory provisions offend the constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the constitution’.
77. Additionally, it was argued that section 34 of KCIA only recognizes a permit or a pass as proof of lawful residence and not refugee status thereby placing additional hurdles and criteria on the refugees. That the same burden has been extended by the provisions of Regulation 26(4) of KCIA.
78. It was contended that in order to prove immigration status, refugees are expected to attach a permit or permanent residence or evidence of exemption. That to that end, the circumstances under which the refugees find themselves do not allow them entry visas for reasons that they entered into Kenya as asylum seekers who fled persecution.
79. That the means to access the Class M permit poses a serious administrative hurdle to refugees including the 2nd and 3rd petitioners for reasons that access to Form 25 of KCIA Regulations requires them to have clearance letter from the Department of refugee services, which clearance is issued on a discretionary basis. It was urged that the said provisions contradict section 12 of the Refugee Act which provides for the process for an asylum seeker acquiring refugee status upon approval of an application by the asylum seeker within the meaning of the Act.

80. On the second issue, counsel while relying inter alia on articles 12(1), 14(1), 53(2) of the constitution, section 29 of the Children Act, articles 3, 7, 8 of the UN Convention and Refugees Act, 2021 urged that the respondents have violated laws governing the refugee children as well as citizens not only in reference to the Kenyan laws but also in regards to the international laws. To buttress that proposition, reference was made in respect to the case of **Kituo Cha Sheria & Others vs The Attorney General** Petition No. 19 & 115 of 2013, where the court held that:

‘In summary, I have concluded that the Government Directive is a threat to the petitioners’ fundamental rights and freedoms including the freedom of movement, right to dignity and infringes on the right to fair and administrative action and is a threat to the non-refoulement principle incorporated by section 28 of the Refugees Act, 2006. It also violates the state responsibility to persons in vulnerable situations. I have also concluded that the policy intended to be implemented by the Government Directive cannot be justified under article 24’.

81. The court was similarly referred to the case of **Refugee Consortium of Kenya & Another vs The Attorney General & 3 Others** Petition No. 382 of 2014 where the court held that:

‘In my view, therefore, the petitioners have succeeded in showing that the implementation of the respondents’ Directive and press statement infringed upon the children’s rights to parental care, education and to be protected from neglect. The petitioners have also showed that, far from their best interests being considered to be of ‘paramount importance’, their interests were not considered at all’.

82. It was therefore urged that the respondents ought to open a registry of births in the refugee camps in order to issue children such as AMM with birth notifications and birth certificates. In the end, this court was urged that the suit be allowed as prayed.

Respondents' submissions.

83. The respondent filed written submissions dated 23.05.2023 wherein the following issues were raised for consideration:
- i. Whether section 11 of the Kenya Citizenship and Immigration Act is inconsistent with or in contravention of article 15(1) and 45 of the constitution.
 - ii. Whether the petitioners' prayers ought to be granted.
84. It was urged that the petitioners misapprehended the provisions of both the constitution and the Section 11 of the Citizenship and Immigration Act as both laws clearly provide that the privilege of registration is not an absolute right and the applicants must come to terms with the fact that the office of the Director of Immigration Services has the power to reject or approve an application.
85. That in as much as the 2nd and 3rd petitioners simply allege to be married to Kenyan citizens, no evidence was adduced to support the same. Reliance was placed on the case of **Alice Wanjiru Ruhiu vs Messiac Assembly of Yahweh [2021] eKLR** where the old adage of he who alleges must prove was reiterated.
86. On the second issue, counsel urged that the petitioners are not entitled to the prayers sought and further, that this court does not have the authority to grant prayer (f) in the petition. That the foregoing was for the reason that it

is provided for in section 4 of the Kenya Citizenship and Immigration Act, that it is the duty of the Director of Citizenship and Immigration Services to regulate residency and control and regulate the entry and exit of persons at ports and points of entry and exit. To support the foregoing, reliance was placed on the case of **Abdikadir Salat Gedi vs Principal Registrar of Person & Another [2014] eKLR** where it was held that a mandamus order does not issue as a matter of course’.

87. On costs, Counsel urged that the present suit falls short of the requirement of being one brought in public interest as the 2nd and 3rd petitioners stand to gain or benefit as individuals in the event it is successful. Reliance to that end was placed on the case of **John Wekesa Khaoya vs Attorney General, High Court Petition No. 60 of 2012** where the court determined the parameters to guide the filing of suits in public interest as: the intended suit must be brought in good faith and must be in public interest and the suit should not be aimed at giving any personal gain to the applicant.
88. The respondents’ filed written submissions dated 23.11.2025 in respect to this petition regurgitating their previous submissions as filed in the Pet. No. E011 of 2022.

Experts’ opinion

89. The expert’s opinion generally which this court has factored in coming up with its judgment was centered on the implementation of article 15 (1) of the constitution which provides persons married to Kenyan citizens the right to register for citizenship after at least seven years of marriage. That it raises concerns that certain legislative provisions and administrative actions excludes refugee spouses of Kenyan citizen from enjoying that constitutional right by: either failing to recognize the refugee status determination as lawful

residency and/or making it difficult for refugees to attain residency status as compared to other foreign nationals by requesting inapplicable particulars like entry stamps that refugees would not ordinarily have.

90. It was urged that it is widely expected that decisions concerning citizenship fall squarely within a state's sovereign rights, but this doesn't mean that a state can eschew its obligations to combat discrimination. That state parties to the international instruments made commitments to eliminate discrimination and align their national practices or regulations with the objectives of those instruments.
91. That the issue of exclusion of refugees from the ability to acquire citizenship through marriage may also give rise to an element of de jure discrimination in two ways as follows: those with refugees' status and those with national spouses of refugees.
92. Dr. Abiy Ashenafi an expert in refugee affairs basically urged the court to find that it is the host state's responsibility to ensure that children born of a Kenyan and a refugee should be recognized as citizens and their freedom of movement enforced rather than impose forceful encampment. That such children are entitled to full benefits under international law just like children born of both Kenyan parents.

Amicus Curiae's Brief.

93. The Amicus, Global Strategic Litigation Council for Refugee Rights filed its brief dated 22-09-2022 through the firm of Ochieng Oginga urging that the Births and Death Registration Act 1972 establishes the system of compulsory registration of births in Kenya. That section 3(1) provides that there 'shall be a Principal Registrar of Births and Deaths. In light of the said Act, a child

acquires citizenship by birth as provided for under article 14 (1)(a) of the Kenyan constitution, if on the date of their birth their mother or father is a Kenya citizen; and ii) under the Kenyan law the Principal Registrar of Births and Deaths, assisted by her agents and appointees, is obliged to maintain a system for the compulsory registration of births.

94. While arguing that children born to Kenyan parent and refugee parent find themselves in precarious circumstances while living in Kenya, this court was invited to consider inter alia the case of **EWA & 2 Others vs Director of Immigration and Registration of Persons & Another [2018] eKLR** where the court held that:

“...it being common ground that the petitioners were born Kenyan citizens, hence, by operation of law, they are Kenyan citizens by birth. Such citizenship cannot be revoked or lost by the mere fact that a person had acquired citizenship of another country...”

95. That in reference to article 14 (1) of the constitution, the same applies to confer citizenship on children who have one Kenyan parent and one refugee or migrant parent, regardless of whether they are born in a refugee camp. For this reason, this court was urged to consider Kenya’s international law obligations to shed light on what is the proper and coherent interpretation to be given to article 14(1) of the constitution.

96. Additionally, it was urged that the Supreme Court in its restrictive interpretation obliges the courts to apply or take cognisance of international law in ways including the following: the extent that international law is relevant to a matter before the Kenyan courts and not in conflict with the constitution, primary legislation or judicial precedent; where there is no Kenyan law on the subject or in other words a lacuna that can be filled by

international law and; as an aid to the interpretation and/or clarification of a constitutional provision. To that end, reliance was placed on the case of *Mitu-Bell Welfare society vs Kenya Airports Authority & 2 Others*; Initiative for Strategic Litigation in Africa (Amicus Curiae) Petition No. 3 of 2018 [Supra] where it was held that:

“131 it is already clear that in our context, article 2(5) and (6) of the constitution embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The article is outward looking in that, it commits Kenya – the state, to conduct its international relations in accordance with its obligations under international law. In this sense, the article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under the customary international law and its undertakings under the treaties and convention, to which it is a party. Yet, reference to international law by a domestic constitution is evidence of its progressive nature”.

97. That international laws require that where there are inconsistencies between it and the domestic law or practice, the latter must be altered to meet the standards that are imposed by its substantive guarantees. To that end, international law requires a state to bring unlawful practices and policies to an end if they violate international law.
98. On prohibition on the arbitrary deprivation of nationality, counsel urged that the right to nationality is recognized both in treaties and as part of customary international law as a fundamental right. That the same is provided for under article 15 of the Universal Declaration of Human rights, (UDHR) and similarly, under article 5 of the African Commission on Human Rights, where it was held that a claim to citizenship or nationality is protected as a ‘legal

status'. That the African court on Human and Peoples' rights has recognized the customary status of the right to nationality as was held in the case of **Anundo Ochieng' Naudo vs United Republic of Tanzania, 2018** and further, in the case of **The Nubian community in Kenya vs The Republic of Kenya, 28 Feb, 2015**, where the African Commission found that a discriminatory deprivation of nationality was prohibited by articles 2,3 and 5 of ACHPR.

99. This court was urged that a state's discretion to determine who qualifies for the purposes of acquiring its nationality is restricted by her obligation to prevent statelessness. That in as much as Kenya is not a party to the Convention Relating to the Status of Stateless Persons 1954 and the 1961 Convention on the Reduction of Statelessness, the same codify Kenya's obligations as a matter of customary international law.
100. That recent actions and statements by Kenya indicate the requisite state practice and opinion juris on the part of Kenyan Government and case in point, in December, 2020, the then president Uhuru Kenyatta announced a land mark decision to grant citizenship to 1670 stateless Shona and 1300 stateless persons of Rwandan descent who qualified under the law as Kenyan citizens. Further, on 30.01.2023, the government of Kenya formally recognized the Pemba as an ethnic community through a gazette notice. That the forgoing shows evident steps by the Government of Kenya in resolving statelessness.
101. On the best interest of a child, this court was urged to recognize article 43 of the CRC and the general comments of the Committee. That the committee has emphasized that the child's 'best interests' under article 3 UNCRC is a threefold concept namely: a substantive right; a fundamental interpretive legal principle and a rule of procedure.

102. That nationality is of particular importance in assessing the best interests of any child. Amicus drew this court's attention to the fact that under article 7 and 8 of the UNCRC, the same recognize the right of any child to be registered and acquire a nationality, and to preserve their identity including their nationality. To that end, reliance was placed on the case of *ZH (Tanzania vs Secretary of state for the Home Department)* [2011] 2 AC 166 and *In R (Johnsons) vs SSHD* [2017] AC 365 where Baroness Hale DPSC stressed the link between citizenship and social identity thus observing that:

“[27]. However, our attention was also drawn to General Comment No. 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccepted and Separated Children Outside their Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members (para 85). At para 86, the committee observed: “Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the state or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests' considerations.”

103. Further to the above, that the right to nationality serves as a gateway to the enjoyment of other rights guaranteed by domestic and international law. That deprivation of nationality has the potential to infringe upon a number of binding civil, political, economic and social rights.

104. In respect to Pet E001 of 2023, the amicus curiae submitted that Articles 12 and 16 (1) of the UDHR, article 10(1) of the ICESCR and articles 17(1) and 23(1) of the ICCPR provide for the right to family and family unity. It was averred that five points flow from a state's obligations under these provisions to wit: that the covenants oblige a state to take affirmative measures to encourage family life and family unity with those efforts judged to a 'reasonable' standard; that a state shall not place 'impermissible' obstacles in the way of an individual's enjoyment of rights conferred by the covenants; the duty to act reasonably requires that state's practices must be based on rational or substantive considerations, failing which they may contravene the prohibition on arbitrary interference with rights under the covenant in article 17(2) of the ICCPR and; state's obligations in respect of the right to family life are bound up with the principle of non-discrimination.
105. According to the learned counsel the covenants ensure and guarantee non-discriminatory access to the rights provided by those instruments and case in point being article 2 of the UDHR and ACHPR which prohibit discrimination on the basis of inter alia, national or social origin...birth or other status. To that end, the amicus curiae urged that article 7 of the Refugee convention imposes a mandatory obligation on Kenya to accord refugees the same treatment as is accorded to other no-refugee migrants.

Analysis and determination.

106. I have considered the consolidated petitions, responses thereof and the submissions by all the parties involved, together with the submissions by the amicus curiae and the experts' filed affidavits. Issues that germinate for determination are;

- 1) Whether a child born of a Kenyan citizen and anon Kenyan citizen who is a refugee automatically acquires Kenyan citizenship by birth.
- 2) Whether failure by the third respondent to establish an office for births and deaths in refugee camps amounts to denial of citizenship documents and fair administrative Action.
- 3) Whether a refugee married to a Kenyan citizen as a spouse is entitled to apply and acquire Kenyan citizenship after the expiry of 7 years from the date of entry of marriage.
- 4) Whether Sections 11 and 34 of the Kenya Citizenship and Immigration Act contravenes Article 15(1) and (2) of the constitution.
- 5) Whether the reliefs sought can issue.

Whether a child born of a Kenyan citizen parent and anon Kenyan citizen parent who is a refugee automatically acquires Kenyan citizenship by birth.

107. As succinctly captured in the holy book (Bible), a child is a gift and a blessing from God. There is no doubt, during conception, a child is never consulted on whether to be conceived, when to be born and where to be born. As an innocent creature upon birth, he or she cannot be blamed or discriminated against on account of the parent's mistake or status at the point of delivery. Whether born in a refugee camp or not, his rights must be protected.
108. Due to the vulnerability of children, there is a myriad of local and international legal provisions that protect them inter alia; National constitutions, statutes, conventions and treaties all geared towards protecting the right of a child. A classic operation of the law protecting the right of a child in Kenya is Article 53(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the

children. This position was espoused and best captured in the case of **Refugee Consortium of Kenya & another v Attorney General & 2 others**, petition No.382 of 2014 (*supra*) where the court held that;

“The most important principle when dealing with the rights of children is that of the “best interests of the child...”

109. The above position is replicated under Section 8 (1)(a) of the Children Act 2022 which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. Similar position is captured in Article 3 of the UN Convention on the rights of the child and Article 4 of the African charter on the rights and welfare of the child.
110. From the above provisions, it is apparent that the best interests of a child by virtue of his or her fragility or vulnerability, is jealously protected by both local and international legal instruments and any slight violation thereof is an affront to society as a matter of public interest.
111. Before this court is a petition packaged in both personal and representative capacity. The petitioner herein “Haki Na sharia” has brought this suit pursuant to Article 22(2) of the constitution representing the plight of many children born within refugee camps within Kenya but who are born of parents who are Kenyan citizens married to spouses who are refugees. A classic example identified as party to this case is the child named as AMM whose father is alleged to be a Kenyan citizen but his mother is a refugee hence denied birth registration documents similar to those given to the rest of the children whose parents are both Kenyan citizens.

112. It was contended that children such as AMM have their birth certificates issued by the 3rd respondent endorsed with a stamp indicating 'refugee' thus making it difficult for them to freely move around and even miss various opportunities which Kenyan children get like a national ID card upon reaching the age of majority hence denying them employment opportunities requiring Kenyan citizens to apply.
113. That in the case of AMM, he has a sibling (step brother) by the name MMM whom he is sharing a father with but whose mother is a Kenyan. That MMM is recognized as a Kenyan citizen enjoying all rights and privileges of a Kenyan citizen while AMM born in Kenya is confined in the refugee camp as a refugee yet his father is a Kenyan citizen.
114. The law governing citizenship in Kenya is anchored in Articles 13, 14 and 15 of the constitution.
115. For avoidance of doubt, I wish to reproduce the three provisions as hereunder;

13. Retention and acquisition of citizenship

- (1) Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.
- (2) Citizenship may be acquired by birth or registration.
- (3) Citizenship is not lost through marriage or the dissolution of marriage.

14. Citizenship by birth

- (1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya.

(4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

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

15. Citizenship by registration

(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.

(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.

(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.

(5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is

entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.

116. From the above provisions, what is critical for consideration is Article 14(1) which recognizes that a person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen. From this wording, nationality (citizenship) automatically accrue by virtue of being born of at least one Kenyan parent whether born within Kenya or outside Kenya. Nationality or for that matter citizenship is a birth right and an inalienable right that cannot be taken away by anybody whimsically or capriciously. See Article 15 of the universal Declaration of Human Rights which provides that; "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"
117. To withhold citizenship or deny somebody his nationality is to deprive him or her the right to so many opportunities e.g specific employment which requires Kenyan nationals, need to have national ID card, passport or voter's card which are critical documents. See **petition No.352 of 2016 between EWA and 2 others v Director Immigration and Registration of persons & another (Supra)** where the court stated that;
- "The determination of the citizenship is basic element for obliging a state to protect citizens of that state and let them enjoy certain constitutional rights related to the juridical fact of citizenship, i.e the active and passive right to vote or right to be issued with identification documents etc."

118. Indeed, Article 12(1)(b) of the constitution does underpin entitlements of a Kenyan citizen to pass port and any document of registration or identification issued by the state to citizens. In view of the wording of Article 14(1) above quoted, it is clear without an iota of doubt that a child born in Kenya and one of his parents is a Kenyan citizen and the other parent a refugee or whose status and or eligibility as a refugee is in the process of being determined is a Kenyan citizen fully entitled to all benefits accruing to any other Kenyan including issuance of necessary registration and identification documents e.g birth certificates. The state is therefore under obligation to protect and enforce that right. In fact, the right once established should not be subjected to any other unreasonable obstacles to curtail its enjoyment.
119. One of the most contested aspect curtailing this right is the stamping of the birth certificates to such children bearing the word refugee or IRC. I must however emphasize that all that is required as precursor to registration and subsequent issuance of a birth certificate, is for the affected parents to make necessary application and upon the registration officers being satisfied that one of the parents of the child in question is a Kenyan citizen, issue the requisite birth certificate without stamping it with a stamp marking indicating 'REFUGEE' OR 'IRC'. To put a stamp impression bearing a mark 'refugee' is to water down or dilute the significance and legality of the document. It will amount to discrimination of Kenyan children born of a refugee and a Kenyan citizen as opposed to those born of both parents being Kenyan citizens hence contravening Article 14(1) and 27(4). It also amounts to giving by one hand and taking away by the other.
120. As regards to the case of AMM having his acknowledgment of notification of birth(annextureHNB1) allegedly stamped as 'IRC' while MMM's birth certificate had no such stamp, the 3rd respondent argued that the birth

certificate of AMM did not bear the mark 'REFUGEE and that even if it did which is not, it was because of the requirement that a birth certificate must bear the name of or the place where the child is born. With due respect, the word 'REFUGEE cannot connote an institution or place of birth. A perusal of AMM's birth notification is bearing IRC a refugee agency while MMM's birth certificate does not bear such stamp marking. The Place of birth in the instant case should have been Hagadera without the word 'REFUGEE" or 'IRC' appearing in the birth certificate or birth notification.

121. The petitioners claimed that AMM was born of a Kenyan father known as Mahat Maulid Bashir bearing Kenyan national ID card No.300829 and arefugee mother one Fatuma Hussein Refugee card No. A3263944. However, from the aforesaid acknowledgment of birth notification, the father of AMM who is the applicant is indicated as Mahat Maulid of ID No. A3263944 which No. is similar to that of Fatuma. It is curious to note that the two parents are sharing a common refugee card Number. With that description of Mahat submitting that he was the holder of that refugee card, it puts him in a class of being a refugee and not a Kenyan. Why didn't he submit the Kenyan ID card No. and or copy. From these pleadings, there is nothing attached to show that Mahat Maulid the alleged father to AMM was or is a Kenyan.
122. It is trite that he who alleges must prove. See **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another (2005)1EA 334** where the court of appeal held that; As a general proposition under Section 107 of the evidence Act, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In the absence of any proof that any of AMM's parents was Kenyan, AMM cannot qualify rightfully to be a Kenyan under Article 14 (1) of the constitution.

123. Why should a child who is born by a Kenyan parent and a refugee be treated differently from those born by parents who are both Kenyans yet the constitution recognizes them as Kenyan children with equal rights and entitled to equal opportunities? Such differential treatment is discriminatory hence unconstitutional and should be shunned by the state.
124. In a nut shell, the 3rd respondent is cautioned against stamping birth certificates of children born in Kenya and whose either parent is a Kenyan with the words 'REFUGEE' OR 'IRC' as the case may be. Equally, such children being Kenyans their names should not be entered in the UNHCR /GOK Refugee data base because they are not refugees. To classify them as refugees would amount to rendering them stateless persons yet their nationality is Kenyan. Besides, they do not qualify to be refugees in accordance with the definition of the word refugee under Section 3 of the refugee Act.
125. It is incumbent upon the state to make laws or rules that safeguard and protect the rights of a child for their own safety and peace. See the case of **MWK & another v Attorney General & 3 others (2017)e KLR** where the court stated that children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties.
- Whether failure by the third respondent to establish an office for births and deaths in refugee camps amounts to denial of citizenship documents and fair administrative Action**
126. The petitioners raised concern over the absence of the births and deaths registration office within the refugee camps area or its environs to facilitate easy and quick registration and issuance of birth registration documents. The

3rd respondent urged that her office has an arrangement to visit the refugee camps once in a month for purposes of registration of births and deaths.

127. Although Article 47 of the constitution provides for fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, each case should be determined on its merits. I am alive to the fact that creation of offices at county or sub-county level is an administrative issue which is pegged on other factors like availability of financial and human resources. A court of law cannot compel a given department to open an office in any part of the country. Failure to open a births and deaths registration office in Dadaab does not amount to discrimination as there are several sub-counties in Kenya without such office. However, depending on the traffic of the applicants or need at the refugee camps, the 3rd respondent should consider opening an office there to improve on efficiency and expeditious delivery of services in line with Article 47. To that extent, the prayer sought in the circumstances cannot issue.

Whether a refugee married to a Kenyan citizen as a spouse is entitled to apply and acquire Kenyan citizenship after the expiry of 7 years from the date of entry of marriage.

128. This court has been urged to make a declaration that refugees including persons having refugees' status or persons who have sought refugee status but their refugee eligibility has not been conclusively determined but married for over 7 years to Kenyan citizens are entitled to Kenyan citizenship by marriage on complying with article 15(1) of the constitution and are entitled to all rights, privileges and benefits granted by law. The petitioners and interested parties are of the view that no other law will take away what the supreme law has provided.

129. On the other hand, the respondents are of the view that the requirement under the constitution is not exhaustive as there are other requirements under the operative statute(KCIA) in particular Sections 11 and 34 which imposes extra conditions not mentioned in the constitution.
130. The petitioners contended that the requirement that the applicant proves residency in Kenya for over 7 years through production of a pass or work permit is not a constitutional requirement hence a contravention of Article 15(1) of the constitution. The petitioners and the i/parties in the alternative argued that being in Kenya lawfully as a refugee while married to a Kenyan citizen for 7 years is sufficient proof of residency under Section 34 of the KCIA hence note 4 of the form 28 of the KCIA should be amended in such a way as to recognize the contemplated residency under Section 34.
131. In response, the respondents took the position that the affected parties should meet the necessary requirements and then apply for consideration.
132. But before delving into the core of the contestation, it is important to note that Kenya is a signatory to a host of Conventions and treaties dealing with refugees and their protection. These include the following;
- i. The 1951 Convention Relating to the Status of Refugees ("1951 Convention"),
 - ii. The 1967 Protocol relating to the Status of Refugees
 - iii. The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("AU Convention").
133. In addition, Kenya is signatory to a number of international legal instruments covering international human rights law including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political

Rights and the African Charter on Human and Peoples' Rights ("The African Charter").

134. The above therefore stipulates that Kenya is under obligation to ensure that the basic human rights of every person within her territory is met.

135. Closer home, Section 3 of the Refugees Act, 2021 provides for a who a refugee is. It states;

(1) A person shall be a refugee for purposes of this Act if such person:

- a) being outside of his or her country of nationality and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is in Kenya and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or country of nationality or the country of habitual residence;
- b) not having a nationality and being outside the country of his or her former habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is in Kenya and is unable or, owing to such fear, unwilling to return to the country of his or her habitual residence;
- c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his or her country of origin or nationality is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or

- d) the person is a member of a class of persons declared under subsection (2) to be refugees.

136. From the above, it is thus clear that a person does not automatically become a refugee upon entering Kenya. At least one of the above reasons must have occurred to the person for him /her to be considered a refugee.
137. The petitioners have urged that the respondents have impeded the attainment of citizenship rights by marriage and means to the documents that are integral to the grant of citizenship by the 2nd and 3rd petitioners and all other persons similar to them. Due to the foregoing, the constitutionality of section 11 and 34(2) of Kenya Citizenship and Immigration Act vis a vis article 15(1) and 4 (1) of the constitution has been questioned.
138. Their argument was hinged on the fact that the drafters of the constitution advertently established citizenship by marriage separate from citizenship by residency thus giving an inkling as to the importance of the institution of marriage as the basis for formalization of the family which is recognized as the fundamental unit of society.
139. At this juncture, I must emphasise that considering the nature and extent of the rights sought herein, this Court is obliged by **Article 259(1)** to interpret the Constitution 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 in recognition of good governance. [See the Supreme Court of Canada in the case of **R vs Big M Drug Mart Limited** [1985] 1 SCR 295 at paras. 116, 117].
140. Article 15(1) of the Constitution provides as follows:

1. A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.
2. A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.
3. A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.
4. Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.
5. This article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date.

141. From the above, my understanding of the provisions of article 15 which deals with citizenship by registration, and specifically to the petitioners herein, it is not enough that a person has been lawfully resident in Kenya for a continuous period of at least seven years but also that he/she must satisfy the conditions prescribed by an Act of Parliament and after compliance, the person thus may apply to be registered as a citizen.

142. In the instant case, the 2nd petitioner swore that she does not claim citizenship rights by the mere fact of being in Kenya for many years and neither does she claim conferment of rights pursuant to Article 15(2) of the constitution. That she has satisfied the preconditions as set out in article 15(1) of the constitution

and section 11 of the KCIA. She averred that she is a holder of Refugee Identity Card No. 732412 and that she has been married to one Abshir Abdullahi Ibrahim, a Kenyan citizen holder of National Identification Card No. 24446680 for more than 18 years. She annexed a copy of her Refugee Identity Card and her husband's identity card together with a marriage certificate. She further urged that the union was registered on 22.05.2005 and they have been blessed with four children.

143. As such, it is not disputed that the 2nd petitioner has fulfilled the requirement under the aforesaid Article (15) (1). It follows that the applicant is therefore eligible to apply to be registered as a citizen of Kenya. However, Section 11 of the Kenya Citizenship and Immigration Act No 12 of 2011, a legislation enacted pursuant to Article 18 of the Constitution, stipulates that:

A person who has been married to a citizen of Kenya for a period of at least seven years shall be entitled, on application, in the prescribed manner to be registered as a citizen of Kenya, if—

- (a) the marriage was solemnized under a system of law recognized in Kenya, whether solemnized in Kenya or outside Kenya;
- (b) the applicant has not been declared a prohibited immigrant under this Act or any other law;
- (c) the applicant has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;
- (d) the marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and
- (e) the marriage was subsisting at the time of the application.

144. It is however clear that once a person shows that she/he has been married to a citizen of Kenya for a period of at least seven years, he/she is entitled, on application, in the prescribed manner to be registered as a citizen. The law does not state that such a person shall on application be automatically registered as a citizen since under the said section there are circumstances under which such a person may not be registered as a citizen.
145. It is my finding that Article 15(1) of the constitution is not exhaustive nor a guarantee on its own for one to be guaranteed registration as a citizen. That is why sub-article 2 subjects the application to further conditions as may be imposed by an Act of parliament. In my view, it is not enough for one to acquire citizenship automatically upon completion of 7 years in marriage pursuant to Article 15 (1) of the Constitution.

Whether Sections 11 and 34 of the Kenya Citizenship and Immigration Act contravenes Article 15(1) and (2) of the constitution.

146. Having found that the registration of a person as a citizen by virtue of being married to a Kenyan citizen is not absolute but is subject to the conditions stipulated under section 11 of the said Act, I will seek to interrogate whether section 11 of the Kenya Citizenship and Immigration Act No 12 of 2011, is unconstitutional to the extent that it is contra article 15(1). It is trite that every law has in its favour the presumption of constitutionality and to justify its nullification, there must be a clear and unequivocal breach of the Constitution and not a doubtful and argumentative one.
147. The supreme court in the case of **Law Society of Kenya v Attorney General & another (Supra)** outlined principles to be considered when addressing the question of unconstitutionality of statutes as follows;

“At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution. That is why in *Hamdarddawa Khana v Union of India and Others* 1960 AIR 554 it was stated thus;

“Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

38. In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 26 of 2014 [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. We thus observed as follows:

“In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

148. A statute or a part thereof will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provision(s) of the fundamental law. In this case, it is important to note that article 15(4) of the constitution and eventually article 18 provide that Parliament shall enact a legislation to bring into effect provisions of article 15. The legislation referred to in the circumstances is the Kenya Citizenship and Immigration Act No 12 of 2011. The objective of Article 15(2) giving parliament power to legislate on the subject was to achieve finer control safety measures to sieve genuine

applicants from those not deserving. That is why Article 15 (1) was not couched in mandatory terms.

149. If the drafters of the constitution intended Article 15(1) to be sufficient, sub-article 2 would not have introduced the issue of legislation with the power to impose further conditions. Thus to that end, it is my holding that section 11 of the Kenya Citizenship and Immigration Act No 12 of 2011 is not unconstitutional the same being a creature of the constitution itself.
150. On whether section 34(2) of KCIA and its Regulations violate the constitution for creating an unconstitutional and discriminatory scheme of acquisition of citizenship by foreign nationals, the petitioners argued that KCIA and its regulations violate the requirement under section 28 of the Refugees Act which stipulates that refugees be given the same rights and privileges as other foreign nationals residing in Kenya. That failing to recognize the Refugee Identity Card as evidence of lawful residence is a prima facie violation of section 28.
151. That requiring refugees to obtain a dependant's pass or work permit to have their legal status recognized as lawful residents does not give them the same rights as other foreigners who are expressly recognized as lawful residents by virtue of sections 34(2) and (3) (f) of the KCIA, which contemplates documents readily available to them.
152. Section 34 (2) of the KCIA stipulates that:
- Residence
(1) a person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass.
(2) Subject to the provisions of this section, the presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise

authorized under this Act, be unlawful, unless that person is in possession of a valid work permit or a valid residence permit or a valid pass.

(3) This section shall not apply to—

- (a) the accredited representative to Kenya of the government of any Commonwealth country, and the spouse and any child of that representative;
- (b) the accredited envoy to Kenya of a foreign sovereign state, and the spouse and any child of that envoy;
- (c) a person upon whom the immunities and privileges set in the laws relating to Privileges and Immunities have been conferred under these laws, and the spouses and any children or other dependants of that person;
- (d) the accredited diplomatic or consular staff of the persons referred to in paragraphs (a) and (b), and the spouses and any children of the accredited diplomatic or consular staff;
- (e) the official staff of the persons referred to in paragraphs (a) and (b), and the spouses and any children of the official staff;
- (f) the domestic staff of the persons referred to in paragraph (a), (b) and (c), and the spouses and any children of the domestic staff;

153. On the other hand, section 2 of KCIA defines the following terms to mean:

- i. “permanent resident” means a person who has acquired permanent residence status under section 38 and has not subsequently lost that status;
- ii. “permanent residence” means a status granted to a person under section 37;

154. The foregoing notwithstanding, article 2(5) and (6) provides that the general rules of international law and any treaty or convention ratified by Kenya form part of the law of Kenya under the Constitution. [See the *Mitu-Bell* (supra).

155. Section 28 of the Refugees Act No. 10 of 2021 provide for rights and duties of refugees and asylum seekers in Kenya as follows:

Rights of and obligations of Refugees

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

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

(b) all the laws in force in Kenya.

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

(3) The Cabinet Secretary may, by notice in the Gazette, designate places and areas in Kenya to be transit centres for purposes of temporarily accommodating refugees.

(4) Subject to this Act, refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to, and issuance of, the required documentation at both levels of Government.

(5) Subject to the laws applicable and taking into special consideration the special circumstances of refugees, a refugee recognized under this Act shall have the right to engage individually or in a group, in gainful employment or enterprise or to practice a profession or trade where he holds qualifications recognized by competent authorities in Kenya. (6) A refugee and an asylum seeker shall have

the right to identification and civil registration documents and such documents shall be sufficient to identify a refugee or asylum seeker for the purposes of access to rights and services under this Act and any other applicable law.

(7) Without prejudice to the generality of the foregoing, and subject to the special circumstances of refugees, the Refugee Identity Card shall at a minimum have a similar status to the Foreign National Registration Certificate issued under section 56 (2) of the Kenya Citizenship and Immigration Act (Cap. 170) for the purposes of accessing the rights and fulfilling obligations under this law.

(8) A person from a Partner State of the East African Community who has been recognised as a refugee under this Act may opt to voluntarily give up his or her refugee status for the purposes of enjoying any of the benefits due to him or her under the Treaty for the Establishment of the East African Community, the Protocol for the Establishment of the East African Community Common Market, and any other relevant written law.

156. From the above, it is my understanding that at least the refugees and asylum seekers are recognized as residents by virtue of being lawfully present in Kenya and shall be entitled to the rights as enumerated in the said section above in conformity with other international instruments related to refugees and asylum seekers. Case in point, article 27 of the Refugee Convention, 1951 states that:

“The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.”

157. Further, the Court of Appeal in the case of **Attorney General vs Kituo Cha Sheria & 7 Others [2017] eKLR** stated that:

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

We think that the learned judge properly directed himself first, on the distinction in Article 39 between citizens and non-citizens with regard to the right of entry and residence and second, on the Constitution’s own declaration that the rights enumerated in the Bill of Rights are not exhaustive, do not exclude and, less, still extinguish, such other rights, not inconsistent with the Constitution, that may be provided by law. Given that by dint of Article 2(6) of the Constitution treaties and conventions ratified by Kenya form part of the law of Kenya under the Constitution, the learned judge cannot be faulted for holding, as he did, that the 1951 Refugee Convention, does recognize at Article 26 the right of refugees to choose their place of residence and to freely

move within the receiving state but subject to any regulations applicable to aliens generally in the same circumstances. That provision is domesticated in Section 168 of the Refugee Act and is also reflected in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) which, in language that eliminates any distinction between citizens and non-citizens, captures freedom of movement as follows;

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public) public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country”

158. Further, the Court of Appeal in the case of *Attorney General vs Kituo Cha Sheria & 7 Others* (supra) stated that:

“55. The Bill of Rights in the Constitution of Kenya, guarantees fundamental rights to all persons within the borders of Kenya, including refugees...”

159. From the submission of the petitioners, they have adopted a two pronged approach. One that confronts Section 34(2) of KCIA which introduces extra condition of proof of residence which is not a requirement under Article 15(1) of the constitution and the second one, recognition of refugees as being residents by virtue of being lawfully present for over 7 years. If we take the second approach, then section 34 of KCIA cannot be unconstitutional.

160. In this case, the petitioners have argued that section 34 of KCIA only recognizes a permit or a pass as proof of lawful residence but in the case of refugees, obtaining such proof is almost impossible. The problem therefore is not perse lack of proof of residence but rather the unfavourable and unreasonable demand for the documents to be attached which excludes those that the refugees possess. The fact that some other class of foreigners are favoured by those conditions than the other, is not good ground to declare Section 34 unconstitutional as it's a creature of the constitution which allowed parliament to come up with other conditions for acquisition of citizenship.
161. However, to the extent that refugees who qualify for citizenship by virtue of marriage as per the constitution are excluded yet entitled, I recommend that parliament amends section 34 of KCIA and the attendant regulations to accommodate the documents issued to refugees as valid or necessary documents to prove residency for acquisition of citizenship on account of marriage.
162. In view of the above holding, the 5th respondent the Attorney General is hereby directed within one year from the date of this judgment to prepare and present an amendment to parliament to accommodate and recognize the documents issued to recognized refugees as lawful asylum seekers for purposes of acquisition of Kenyan citizenship through marriage under Article 15(1) of the constitution.
163. In default of the proposed amendment, the director immigration and or the relevant departments concern in processing citizenship under Article 15(1) of the constitution shall exempt the applicants from producing proof of residence documents as currently provided under Section 34 (2) of KCIA and the attendant regulations and instead allow the documentation issued to such

applicants as lawful refugees and who for over a period of 7 years have been married to a Kenyan spouse.

164. Turning into the specific concern by the 2nd and 3rd petitioners, there is no dispute that they have been married to Kenyan citizens for over 7 years. However, they did not prove that they had made the requisite application as per the law as currently provided albeit the impugned challenges. For that reason, this court cannot bypass the requirement to make a mandamus order as sought directing issuance of citizenship on account of marriage.

Whether the reliefs sought can issue

165. The petitioners sought several reliefs among them declaration of unconstitutionality of certain statutory provisions and also mandamus orders. Having considered the petition and the responses thereof plus submissions by both counsel, the court has been able to find as follows:

- 1) That children born of a Kenyan citizen married to a non-Kenya(refugee) automatically acquire Kenyan citizenship.
- 2) That a child born out of a relationship referred to in (1) above is upon application by his parents entitled to the issuance of birth certificate and or other necessary registration or identification documents just like any other child whose parents are both Kenyans.
- 3) That identification documents stated in (2) above shall not be stamped with any stamp with the mark "REFUGEE" OR "IRC" or in the name of any other refugee related agency.
- 4) That the particulars of the children born out of the marriage relationship stated above shall not be entered in the UNHCR/GOK data base as refugees.

- 5) That by stamping registration and identification documents of a child born of a parent who is a refugee and a Kenyan citizen with a stamp marked 'REFUGEE' as opposed to similar documents issued to his siblings (step brother or sister) born of the same father who is a Kenyan and a Kenyan mother is discriminatory.
- 6) That the child named AMM did not prove that his father was a Kenyan hence not a Kenyan by birth.
- 7) That the 3rd respondent is under obligation upon application by the affected persons to issue new birth certificates without the mark or word 'REFUGEE' OR 'IRC' or any other refugee related agency's name to those children already issued with such certificates bearing those names
- 8) That the 3rd respondent's failure to open an office for births and deaths at the refugee camps is not unconstitutional as the court has no capacity to order for one to be opened as that is an administrative action by the relevant department subject to availability of resources.
- 9) That a refugee married to a Kenyan citizen for over a period of 7 years is entitled to apply for citizenship pursuant to Article 15 (1) of the constitution
- 10) That Sections 11 and 34 of the Kenya Citizenship and Immigration Act are not unconstitutional but the AG is advised to prefer an amendment to section 34 (2) to parliament to amend Section 34(2) and the attendant regulations of the KCIA so as to include recognized identification documents issued to refugees for purposes of applying for citizenship under Article 15(1) of the constitution
- 11) That in default of compliance with finding number (10) above, the Director Immigration and all concern departments involved in

processing citizenship applications under Article 15(1) of the constitution, to exempt the affected applicants from producing the documents required currently under section 34(2) and the attendant regulations and instead admit identification documents legally issued to refugees as lawful asylum seekers in Kenya.

12) That the 2nd and 3rd petitioners in Petition No. e001 of 2023, did not establish that they had applied for registration as citizens under Article 15(1) of the constitution.

13) As to costs this being a public interest litigation, each party shall bear own costs.

166. Having specified the reliefs granted in summary, the orders I find suitable to grant are that;

- a) A declaration be and is hereby issued declaring that all children arising from unions between a Kenyan and a refugee or person seeking refugee status are Kenyans by birth pursuant to Article 14(1) of the constitution and are entitled to all rights, privileges and benefits granted by law.
- b) A declaration be and is hereby issued declaring that the actions of the respondents in stamping the birth notifications with Refugees Agencies' Stamp like International Rescue Committee (IRC) or marking certificates of birth "Refugee" on the face thereof for children arising out of the unions between refugees and Kenyan citizens and subsequently entry of their particulars on to the Kenya/UNHCR Refugee Database is in contravention of Articles 14 (1) and 27 of the Constitution.
- c) A declaration be and is hereby issued declaring that the respondents' indifference and differential treatment of the children arising out of unions between Kenyan citizens and refugee visa vis

those that have both parents as Kenyans is discriminatory and degrading contrary to Articles 10, 27, 28, and 53 of the Constitution.

- d) A declaration be and is hereby issued declaring that the respondents' designation of the children arising out of the union between Kenyan citizens and refugees as refugees through the issuance of birth notifications or certificates of birth that bear refugee agencies' stamp such as the International Rescue Committee (IRC) or marked "refugee" respectively accordingly leading to their encampment and restricting their rights to movement is unconstitutional thus contravening Article 29 and 39 of the Constitution.
- e) A declaration be and is hereby issued that the respondents' forceful containment of children arising out of the union between Kenyan citizens and refugees in the refugee camps resulting in denial of the access to better quality of the health care, housing, education, food, water, sanitation and other economic rights is unconstitutional and inconsistent with the provisions of Article 43 and 53 of the Constitution.
- f) A declaration be and is hereby issued declaring that the respondents' unjustified separation of children arising out of unions between refugees and Kenyan citizens from their Kenyan families contravenes Article 45 of the Constitution on the protection of family as the basic social unit.
- g) A mandamus order be and is hereby issued directing the 3rd respondent to conduct proper birth registration and issue all children arising from the unions between a Kenyan and a refugee parent with appropriate and rightful birth notification less the

refugee agencies' stamp and certificates of birth that do not feature any "refugee" markings in the face thereof.

- h) A mandamus order be and is hereby issued directing the respondents to remove all children arising from unions between a Kenyan and a refugee from the Refugee Database.
- i) A declaration be and is hereby issued that all spouses of Kenyan citizens including persons having refugee status and persons who have sought refugee status but their refugee eligibility has not been conclusively determined are entitled to Kenyan citizenship by marriage on complying with Article 15 (1) of the Constitution and are entitled to all rights, privileges and benefits granted by law.
- j) A declaration be and is hereby issued declaring that refugee status granted after refugee status determination is lawful residence under the National and International laws governing Kenya.
- k) A declaration be and is hereby issued that the legislative and administrative hurdles placed against refugee spouses of Kenyan citizens based on interpretation and application of Section 11 of Kenya Citizenship and Immigration Act about the grant of citizenship by marriage are unfavourable and unfair and therefore threaten the right to fair administrative action pursuant to Article 47 of the Constitution.
- l) That a mandamus order be and is hereby issued directing that the Attorney General within one year from the date of this judgment do prefer an amendment to sections 11 and 34 (2) of KCIA to parliament to amend the said sections so as to include recognized identification documents of residence issued to refugees for purposes of applying for citizenship under Article 15(1) of the constitution

- m) That in default of compliance with finding number (l) above, the Director Immigration and all concern departments in processing citizenship applications under Article 15(1) of the constitution, to exempt the affected applicants from producing the documents required currently under section 34(2) and the attendant regulations and instead admit identification documents legally issued to refugees as lawful asylum seekers in Kenya.
- n) That this being a public interest litigation, each party shall bear own costs.

Dated, signed and delivered virtually this 17 day of July 2025


.....
J. N. ONYIEGO
JUDGE