



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 19 OF 2013**  
**CONSOLIDATED WITH**  
**PETITION NO. 115 OF 2013**

**BETWEEN**

**KITUO CHA SHERIA ..... 1<sup>ST</sup> PETITIONER**  
**ABEBE DADI TULLU ..... 2<sup>ND</sup> PETITIONER**  
**AHMED BASHIR MOHAMED..... 3<sup>RD</sup> PETITIONER**  
**EUGENE BWIMANA ..... 4<sup>TH</sup> PETITIONER**  
**DACHASSA GALDI NURE ..... 5<sup>TH</sup> PETITIONER**  
**MUHIMA SEBIHENDO JOHN ..... 6<sup>TH</sup> PETITIONER**  
**MBUZUKONGIRA NZABONA ..... 7<sup>TH</sup> PETITIONER**  
**SAID ABDULLAHI ABUKAR ..... 8<sup>TH</sup> PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction and background**

1. The issue raised in these consolidated petitions concern the nature and extent of the rights and fundamental freedoms of refugees residing in urban areas in Kenya.

2. Kenya currently hosts an estimated 600,000 registered refugees and asylum seekers drawn from, among others, Somalia, Ethiopia, Eritrea, Sudan, Rwanda, Burundi and the DRC. Hence the refugee question in Kenya is not an idle one. It is inextricably linked to geopolitical factors within the Eastern Africa region dating back to the 1970's. The political coup in Uganda in the 1970's, the overthrow of the Siad Barre regime in the 1990's Somalia after a long civil war, the civil war in Sudan, the collapse of the Mengistu regime in Ethiopia after a long civil war, the 1994 Rwandan genocide and the decade long conflict in the Democratic Republic of Congo has led Kenya to accommodate refugees from all these countries.
3. The facts upon which the consolidated petitions are grounded are not in dispute. According to the founding affidavits, on 18<sup>th</sup> December 2012, the Government of Kenya through the Department of Refugee Affairs issued the following Press Release ("the Press Release");

**DEPARTMENT OF REFUGEE AFFAIRS PRESS RELEASE**

*The Government of Kenya has decided to stop reception, registration and close down all registration centres in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps.*

*All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to the refugee camps.*

**Signed**

**Ag. COMMISSIONER FOR REFUGEE AFFAIRS**

4. After the notice was issued and in order to give effect to the decision evidenced by the press release, the Permanent Secretary in charge of the Provincial Administration and Internal Security wrote to the Permanent Secretary Ministry of Special Programmes a letter dated 16<sup>th</sup> January 2013 as follows;

16<sup>th</sup> January 2013

Permanent Secretary

Ministry of Special Programmes

**NAIROBI**

Dear (Sir),

**RELOCATION OF URBAN REFUGEES TO OFFICIALLY DESIGNATE CAMPS**

*The government intends to move all refugees residing in Urban areas to the Dadaab and Kakuma Refugee Camps and ultimately to their home countries after the necessary arrangements are put in place.*

*The first phase which is targeting 18000 persons will commence on 21<sup>st</sup> January 2013. The security*

*officers will start by rounding the refugees and transporting them to Thika Municipal Stadium which will act as the holding ground as arrangement for moving them to the Camps are finalised. We do not intend to hold any of the refugees for more than two days at the stadium.*

*The purpose of this letter is to request you to extend humanitarian assistance both at the holding ground and during the transportation. This includes food, water, tents and health care.*

Yours

**(signed)**

**PERMANENT SECRETARY**

5. In addition to the above statement the Department of Refugee Affairs issued a letter dated 10<sup>th</sup> December 2012 addressed to its officers in charge of Refugee Offices in Dadaab, Kakuma, Mombasa, Malindi, Nakuru and Isiolo which stated as follows;

10<sup>th</sup> December 2012

[Officer In –Charge of

Various Refugee Camps]

*Following a series of grenade attacks in urban areas where many people were killed and many more injured, the government has decided to **stop registration of asylum seekers in urban areas with immediate effect.***

*All Asylum Seekers should be directed to Dadaab and Kakuma refugee camps for Reception, Registration and Refugee Status Determination, Issuance of Movement Passes for non-resettlement cases should also **stop immediately.***

*In addition, the government shall put in place necessary preparation to repatriate Somali refugees living in urban areas.*

*Please take necessary action accordingly.*

**Signed**

**COMMISSIONER FOR REFUGEE AFFAIRS**

6. On the same day, 10<sup>th</sup> January 2013, the Commissioner of Refugee Affairs addressed a letter to the Country Representative of the United Nation High Commissioner for Refugees (“UNHCR”) Branch Office – Kenya. The letter stated as follows;

10<sup>th</sup> January, 2013

The Country Representative

UNHCR Branch Office – Kenya

Raphta Road, Westlands

Nairobi

**RE: GUIDELINES ON RELOCATION OF URBAN REFUGEES TO THE CAMPS**

As you are aware, the government issued a directive to relocate all refugees living in urban areas to refugee camps. The directive also requires that non-governmental organisations transfer refugee programs to the refugee camps so as to avoid attracting refugees to urban areas.

Consequently, the government has set up a high level inter-ministerial committee to oversee and guide the relocation process. The Committee held a meeting on 9<sup>th</sup> January, 2013 and made the following recommendation:-

- i. The process of relocation will be co-ordinated by the Department of Refugee Affairs with UNHCR and other stakeholders. DRA and UNHCR were asked to come up with a program of action.
- ii. The program of relocation will be a quick impact project carried out through a "Rapid Results Initiative" (RRI) in 100 days.
- iii. The committee has approved opening of Kambios at Daadab Refugee Camp and Kaiobei Refugee Camp to host refugees relocated from urban areas.
- iv. UNHCR is requested to mobilize resources and work closely with the Department of Refugee Affairs on this matter. There is need to set a technical team to oversee the mobilization,
- v. UNHCR to stop funding of urban refugee programs but limit funding of urban refugee programs to process relocation, e.g., sensitization, transportation, transit assistance and reception at the camps. This is to ensure urban refugees do not undermine the government directives.
- vi. Department of Refugees Affairs' urban officers to remain open to coordinate relocation from different parts of the country.
- vii. Provincial Administration and the police to conduct continuous operations to support the relocation process.
- viii. That the relocation program to officially start on 21<sup>st</sup> January 2013.

The purpose of this letter is to inform you of the guidelines and ask for your cordial cooperation.

Thank you for your continued support,

**SIGNED**

**Ag. COMMISSIONER FOR REFUGEE AFFAIRS**

7. For purposes of this judgment, the Press Release and the communication I have set out above are collectively referred to as the "Government Directive."

**Petitioners' Case**

8. Kituo cha Sheria ("Kituo") is a non-governmental organisation. It runs specific programmes designed to address the rights and welfare of refugees and asylum seekers within the Republic of Kenya. It has brought this case in the public interest. It moved the Court by a petition dated 21<sup>st</sup> January 2013 being **Petition No. 19 of 2013** seeking orders to quash the Government Directive and stop its implementation. It also seeks declarations that the Directive violates the rights and fundamental freedoms of refugees living in Kenya.

9. As the Government Directive was due to be implemented, Kituo moved the court for conservatory orders and on 23<sup>rd</sup> January 2013, I issued an order, **“prohibiting any state officer, public officer, agent of the government from implementing the decision evidenced by and/or contained in the Press Release dated 18<sup>th</sup> December 2012 pending further orders of the court.”** These orders remain in force pending the hearing and determination of the petition.
10. Kituo argued that the Government Directive did not indicate the rationale for taking such drastic measures against refugees residing in urban areas. That the policy did not take into account the various classes and categories of refugees resident in urban areas. These include refugees who are professionals or businesspeople, those who have married Kenyans, those residing with their families, those who need and require and are currently undergoing medical treatment that cannot be offered in the camps and those pursuing education.
11. Kituo founded its cause on the basis that the State violated **Article 47** of the Constitution which enjoins the State to take administrative action that is, **“expeditious, efficient, lawful, reasonable and procedurally fair.”** It avers that Government Directive to move all refugees in urban areas to refugee camps violates various provisions of the Constitution; **Article 28** which protects the right to dignity, **Article 39** which protects the right to movement and **Article 27** which prohibits arbitrary and discriminatory actions.
12. The petitioner also contends that the action taken by the State is a violation of Kenya’s international obligations under the **1951 United Nations Refugee Convention** (“**the 1951 Convention**”) which has been domesticated by the **Refugees Act, 2006 (No. 13 of 2006)** and **the International Convention on Civil and Political Rights (ICCPR)**.
13. The 2<sup>nd</sup> petition, **Petition No. 115 of 2013**, was filed by the 2<sup>nd</sup> to 8<sup>th</sup> petitioners in response to the Government Directive. The grounds upon which it is made are similar to those in the petition filed by Kituo. Each petitioner is a resident of Nairobi, has lived in the city for a substantial length of time and has, in the process, established himself or herself economically. Their children have found roots in the country by going to schools and colleges with other Kenyans. They also communicate in Kiswahili and English. Each petitioner has set out a summary of their circumstances which was not disputed by the respondent. I will summarise the circumstances of each petitioner as this is essential for understanding the conditions of refugees in Kenya. Such an understanding is necessary in making this determination.

### **The petitioners**

14. The 2<sup>nd</sup> petitioner is a male adult of Ethiopian origin. He came to Nairobi in 1989 while escaping from persecution from the authorities in his country of origin. He is registered by the UNHCR and also holds a Refugee Certificate issued by the Department of Refugee Affairs. He resides in Eastleigh, Nairobi with his wife and two children born in Kenya. His children school in Nairobi and have established friends and playmates. He does translation and interpretation of texts written in Ethiopian languages on a part time basis while his wife is jobless. The 2<sup>nd</sup> petitioner has three serious medical conditions, Diabetes, Hypertension and Asthma, that have put him in need of perpetual medication and as a result, he is on a health assistance scheme offered by a International Non-Governmental Organisation based in Nairobi. He states that owing to health status residence in the camp would aggravate his ill health.
15. The 3<sup>rd</sup> petitioner is a 32 year old male registered under UNHCR and has applied for recognition by the Department of Refugee Affairs. He entered Kenya in 2000 after fleeing Mogadishu,

Somalia and settled in Nairobi. Since his arrival in Kenya, he has never been to the camps or any other place. He resides in Eastleigh, Nairobi and is currently working as a shop attendant and a caretaker since his arrival. He had completed high school back in Somalia at the time of his flight. He stated that he is fully integrated in Nairobi. He learnt of the Government Directive when law enforcement officers started harassing refugees in Eastleigh, Nairobi. He avers that he cannot go to the camp owing to the insecurity. As a result of the Government Directive, he can no longer move freely or go to work for fear of being abused and harassed by law enforcement officers.

16. The 4<sup>th</sup> petitioner holds a UNHCR Mandate Certificate. He resides in Kayole Nairobi. He entered Kenya in 1994 after fleeing Rwanda. Since his arrival in Kenya he has never been to any camps or any other place. He is a teacher by profession and has been teaching French since his arrival. He learnt of the Government Directive through the media and from fellow refugees. He avers that he cannot go to the camp owing to the insecurity posed by Government agents from Rwanda. He is a Hutu whilst the Rwandese in Kakuma camp are largely Tutsi. Given the historically hostile relations between the two communities, relocating to the camp would make him an easy target by virtue of the fact that he served in the government during the genocide, he would be considered as having taken part in the genocide hence his revival community may want to revenge. He states that he has been receiving threats to his life and going to Kakuma camp will endanger his life.
17. The 5<sup>th</sup> petitioner is an asylum seeker of Ethiopian origin registered under the UNHCR Mandate. He is married with two children residing in Eastleigh, Nairobi. He is currently working as a casual labourer. He entered Kenya in 2006 after fleeing Ethiopia and settled in Nairobi. Since his arrival in Kenya, he has never been to the camps or any other place. His two children were born in Nairobi who are yet to start school. He believes that he would be easy target for agents of the Ethiopian Government given the proximity of the camp to Ethiopia.
18. The 6<sup>th</sup> petitioner gave oral evidence. He is aged 58 years and holds a UNHCR Mandate Certificate. He is also registered as an Alien. Together with his family, he fled the war in Congo and arrived in Nairobi in the year 2000. He lives with his family of four in Umoja, Nairobi. He is currently a bishop at a Church which he started in 2004. The church has approximately 300 people with membership drawing from both the Congolese and Kenyan communities. The church has been very instrumental in within the local community in reforming young people. His wife, also a refugee, is a business woman. She sells textiles popularly known as *Vitenge's* to make a living. She educates the children from the proceeds of her business and has built faithful customers from this business. Their children have all gone to school in Nairobi. One daughter passed her KCPE and was expected to join secondary school. Another daughter is now undertaking her 2<sup>nd</sup> year studies at a local University. His grand sons are in nursery and class one at a local Primary School. The petitioner's family has established itself in Nairobi and built a social network. The family has good relations with the locals and has created a family within the church. The petitioner testified that it would be extremely destabilizing to relocate them to the camp after building their lives in Nairobi for over ten years. His children have all studied and continue to study in Nairobi and relocating them to the camp will greatly interrupt their smooth learning. The petitioner is also apprehensive about going to the camp due to the trauma his family suffered while at Katumba Camp in Burundi before fleeing to Kenya. The brothers and parents to the petitioner's daughter in law were all killed at Katumba Camp and hence it would be insecure for them in the camp.
19. The 7<sup>th</sup> petitioner, a law lecturer by profession, came to Nairobi, Kenya in 2002 after escaping

persecution in his home country of the Democratic Republic of Congo. He is a registered refugee under the UNHCR Mandate and resides in Nairobi. The petitioner enrolled for his Master of Laws degree in Nairobi and thereafter proceeded for his PhD studies in Germany. By virtue of his professional background, the petitioner's services can only be offered in an environment where there are law faculties hence confinement to the camp would suffocate his means of survival.

20. The 8<sup>th</sup> petitioner is aged 47 years and holds UNHCR Mandate Number. He is a refugee from Somalia and married with two children. His wife and children are in the Netherlands. The petitioner first arrived in Kenya in 1994 through Mombasa and settled at Benadir Refugee Camp. He left the camp with his sister and her children in 1997 after its closure. He then started engaging in business in Mombasa town where he bought a *Jua Kali* stall in Marikiti. He later started facing threats from some of his countrymen who wanted to forcefully obtain title documents relating to his property back in Somalia. Consequently, he fled to Malindi and left his cousin in charge of the business in Mombasa. In 2001 he came to Nairobi and has since been residing in Eastleigh. He lives with his sister and her six children. His sister holds UNHCR Mandate Number. All her six children were born in Kenya.
21. The petitioners in the ***Petition No. 115 of 2013*** reiterated the arguments made by Kituo and in their petition dated 18<sup>th</sup> February 2012, they also sought orders whose effect is to quash the Government Directive and stop its implementation.

### **Respondent's Case**

22. The respondent opposed the petition based on the affidavit of Ernest Ngetich, the Assistant Commissioner for Refugee Affairs working in the Department of Refugee Affairs sworn on 27<sup>th</sup> March 2013. Apart from raising legal issues and citing statutory provisions, the Assistant Commissioner confirmed that the Press Release issued was based on an inter-ministerial directive. He asserted that the Government Directive, which is administrative in nature, was made in strict compliance with statutory authority and was taken in the interest of promoting the welfare and protection of asylum seekers and refugees.
23. The respondent contended that the establishment of registration centres within urban areas was provisional and was informed by the need to document the refugees and asylum seekers within urban areas and that the registration aspect and the offering of related services was an incentive calculated to facilitate optimum turnout. In any event, the respondent argues, establishment of urban registration centres has no basis in the ***Refugees Act, 2006***.
24. The respondent stated that its policy was based on the realisation that most refugees in urban areas are not registered or were evading registration and that those who had been registered at the refugee camps and had been issued with time-restricted movement passes have not gone back to camps or renewed them thus violating the terms of issue. It also stated that most asylum seekers and refugees are suffering lawful arrests and prosecution because they are arrested outside the designated areas without movement passes and other travel documents. The respondent averred that most refugees and asylum seekers are holding UNHCR mandate certificates which are not recognised by statute as refugee identification documents or passes. To support its position, the respondent cited a report prepared under the auspices of UNHCR in January 2011 titled, ***“Navigating Nairobi; A review of the implementation of UNHCR’s urban refugee policy in Kenya’s capital city” (“Navigating Nairobi Report”)***.
25. The respondent's position is that the ***Refugees Act, 2006*** particularly ***section 17(f)*** and ***rule 35***

**of Refugees (Reception, Registration and Adjudication) Regulations** presupposes that all refugees and asylum seekers shall ordinarily reside in gazetted refugee camps. **Rule 17(f)** states thus; *“There shall be a refugee camp officer, for every refugee camp whose functions shall be to—(f) issue movement passes to refugees wishing to travel outside the camps.”* In order to leave the refugee camps, the refugee is required to apply to the Commissioner, through a refugee camp officer, for permission to travel outside the refugee camp. Such permission is time limited. Learned counsel for the respondent, Mr Moimbo, submitted that a strict application of **sections 16, 17 and 25(f)** of **the Act** reflects an encampment policy embraced by the State in the management of refugees and asylum seekers which restricts movement of refugees and asylum seekers within Kenya.

26. The respondent submitted that the policy it intends to implement is within the mandate of the Commissioner of Refugee Affairs and the Department of Refugee Affairs and as such any consultation with stakeholders was unnecessary was done out of courtesy. In any event, stakeholders were duly informed and information shared out with relevant partners on refugee affairs.
27. The respondent urged the court to dismiss the petition on the ground that to allow the petition would lead to an influx of refugees in urban areas which shall in turn pose administrative challenges to the Department of Refugee affairs thereby impacting on the well-being of the country as a whole.

### **Amicus Curiae**

28. In the course of the proceedings, I admitted the UNHCR and Katiba Institute (“Katiba”) represented by Mr Chigiti and Mr Waikwa respectively. They filed *amicus* briefs which dealt with international obligations and interpretation of the Constitution. Their learned counsel made substantial oral submissions to assist the court. I shall refer to their submissions in my analysis and determination where necessary.

### **Issues for Determination**

29. As I stated earlier in the judgment the main issue for determination is whether the Government Directive encapsulated in the Press Release and letter violate the Constitution. The provisions of the Bill of Rights cited by the petitioners include **Article 28** which protects the right to dignity, **Article 27** which prohibits discrimination and protects the right to equality, **Article 47** which entitles everyone to fair administrative action and **Article 39** which protects every person’s right to freedom of movement. It is important to emphasise that the Bill of Rights applies to all persons within our borders irrespective of how they came into the country.
30. In considering the nature and extent of these rights, the 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 contributes to good governance. **Article 259(1)** commands a purposive approach to interpretation of the Constitution. Purposive interpretation was explained by the Supreme Court of Canada in the case of ***R v Big M Drug Mart Limited*[1985] 1 SCR 295 at paras. 116, 117** as follows; *“[T]he proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. .... [T]his*



*analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ..... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ..... be placed in its proper linguistic, philosophic and historical contexts."*

31. In addition to the aforesaid, **Article 20(3)** provides that a court, in applying the Bill of Rights shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. **Article 20(4)** obliges the court, in interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. The provisions that protect these rights must also be infused with the values and principles of governance articulated in **Article 10**. These values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
32. Equally important is the fact that the law governing refugees is regulated by International Law. Under **Article 2(5)** and **(6)** the general rules of international law and any treaty or convention ratified by Kenya form part of the law of Kenya under the Constitution.
33. **Article 19(1)** reminds us that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Equally important is that under **Article 19(3)(a)** the petitioners are entitled to enforce any other rights recognised or conferred by law, except to the extent that they are inconsistent with the Bill of rights. The petitioners are therefore entitled to assert the rights conferred by International law, which is part of Kenya's law by dint of **Article 2(5)** and **(6)**.
34. Refugees are a special category of persons who are, by virtue of their situation, considered vulnerable. **Article 21(3)** therefore imposes specific obligations on the State in relation to vulnerable persons. It provides that, "*All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.*"
35. It is against the background of these broad principles that this matter must be determined. The two issues for consideration are as follows;
  - i. Whether the petitioners have established violation of their rights and fundamental freedoms or rights and fundamental freedoms of refugees; and
  - ii. If so, whether such violation can be justified under **Article 24** of the Constitution.

#### **Whether the petitioners have established a violation of their rights**

36. All parties are agreed on the law governing refugees particularly the application of international refugee law to the subject matter of this case.

### **International and statutory provisions**

37. Before I deal with the specific facts of this case, it is important to understand the status of refugees in Kenya. Kenya is a signatory to a host of Conventions and treaties dealing with refugees and their protection. These include the following;

- a. The **1951 Convention Relating to the Status of Refugees (“1951 Convention”)**,
- b. The **1967 Protocol relating to the Status of Refugees**
- c. The **1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“AU Convention”)**.

38. 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”)**. Thus, Kenya is under an obligation to ensure that the basic human rights of every person in its territory are met; every person includes the refugees.

39. **Section 3** of the **Refugees Act, 2006** provides for a statutory refugee and a prima facie refugee. It states;

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

*(a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or*

*(b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.*

*(2) A person shall be a prima facie refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of this country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*

40. This statutory definition is adopted from the **1951 Convention**. As the definition illustrates, refugees fall within the category of vulnerable persons recognized by **Article 20(3)** of the Constitution. Persons in the position of the 2<sup>nd</sup> to 8<sup>th</sup> petitioners are refugees due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. They or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion (See **Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23 para 28**). They are also vulnerable due to lack of means, support systems of family and friends and by the very fact of being in a foreign land where hostility is never very far.

41. A person does not automatically become a refugee upon entry into Kenya. He or she must apply for registration to be recognised as such. Under **section 11(1)** of the Act, “Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in

terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, within thirty days after his entry into Kenya.” **Section 4** of **the Act** excludes certain persons from being considered refugees. It provides as follows;

(1) A person shall not be a refugee for the purposes of this Act if such person has –

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument to which Kenya is a party and which has been drawn up to make provisions in respect of such crimes;

(b) has committed a serious non-political crime outside Kenya prior to the person’s arrival and admission to Kenya as a refugee;

(c) has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union;

(d) having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution.

42. A recognised refugee has a range of rights. **Section 16** of the **Refugees Act, 2006** (“**the Act**”) which provides that every recognised refugee and every member of his family living in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party and shall be subject to all the laws in force in Kenya. Under **section 14** of **the Act**, every refugee shall be issued with a refugee identity card or pass in the prescribed form and is permitted to remain in Kenya in accordance with the provisions of **the Act**. **Section 15** extends these rights to members of the family of a refugee. Refugees are also entitled to the protections of the Constitution and the Bill of Rights.

43. One of the fundamental principles in international refugee protection is the obligation of *non-refoulement* to be found in **Article 33(1)** of the **1951 Convention** which provides as follows;

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

44. **Article 2(3)** of the **AU Convention** provides that, ‘No person shall be subjected by a Member State to measures...which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened....’ States are prohibited from removing, deporting or repatriating refugees from where they are to the States of origin without following due process. This principle is so fundamental that it is considered a customary law norm. It is considered the cornerstone of international refugee protection (see **Encyclopedia of Public International Law Max Planck Institute for Comparative Public Law and International Law, Amsterdam, New York, 1985**), vol. 8, p. 456).

45. The *non-refoulement* principle is incorporated in **section 18** of **the Act** which states as follows;

*18. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where-*

*(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or*

*(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.*

46. Other international instruments with majority state recognition and which have also forbidden *refoulement* include **Article 13** of **ICCPR** and **Article 3** of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**.

#### **Whether Constitution and the law violated**

47. Does the Government Directive violate the provisions of the Constitution and the law" I will now turn to the Government Directive and consider whether it meets the standards of refugee protection afforded by the Constitution, international law and the **Refugees Act, 2006**.

48. The Press Release and the letters set out the implementation of a policy of relocation and encampment of all the refugees resident in urban areas. The policy is intended to be implemented through the following means;

- a. Stopping registration of asylum seekers and refugees in urban areas by closing all registration centres.
- b. Directing all refugees and asylum seekers to move back to refugee camps.
- c. Directing UNHCR and other agencies to stop providing assistance and direct services to urban refugees and other asylum seekers.

#### **Freedom of movement and the relocation and encampment**

49. According to the letter dated 16<sup>th</sup> January 2013, the operation was to be carried out as a security operation, *"targeting 18000 persons .... Rounding the refugees and transporting them to Thika Municipal Stadium ..."* The manner of carrying out the Government Directive threatens the freedom of movement of refugees.

50. The respondent argued that the asylum seekers and refugees do not enjoy, in the absolute sense, the freedom of movement contemplated by **Article 39** of the Constitution which reads as follows;

#### **Freedom of movement and residence.**

39. (1) *Every person has the right to freedom of movement.*

(2) *Every person has the right to leave Kenya.*

(3) *Every citizen has the right to enter, remain in and reside anywhere in Kenya.*

51. I agree with Mr Waikwa, learned counsel for Katiba, that freedom of movement guaranteed under **Article 39** of the Constitution ought be read together with **Article 26** of the **1951 Refugee Convention** in order to give effect the rights of refugees. **Article 26** provides thus; “*Each contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.*” This provision is manifested in **section 16** of **the Act** and is not inconsistent with the **Article 39** of the Constitution.

52. In international law, the freedom of movement can be found in **Article 12** of the **ICCPR** which provides as follows;

#### **Article 12**

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.*

53. **Article 12** of the **African Charter** deals with the freedoms on movement on the following terms;

#### **Article 12**

1. *Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*

2. *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*

3. *Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.*

4. *A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.*

5. *The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.*

54. Commenting on the implication of **Article 12** of the **ICCPR**, the Human Rights Committee in its **General Comment No. 27** adopted at the sixty-seventh session of the Human Rights Committee on 2<sup>nd</sup> November 1999, notes as follows:

[1] *Liberty of movement is an indispensable condition for the free development of a person. It interacts*

*with several other rights enshrined in the Covenant...*

*[4] Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3 .....*

55. The Committee further noted at Para. 11 as follows, *"Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (order public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant..."* What is clear from this commentary is that the freedom of movement is not absolute and may be reasonably limited in accordance with the standards that are necessary in an open and democratic society.

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

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 Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya. Such a right is readily available to refugees by reason of application of the **1951 Convention** and application of **Article 19(3)(b)** of the Constitution which states that, *"The rights and fundamental freedoms in the Bill of Rights – (b) do not exclude other rights and fundamental freedom not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter."* It follows therefore that any limitations to these rights cannot be arbitrary and must comply with the standards set out in **Article 24**.

58. Learned counsel for the respondent, Mr Moimbo submitted that under **section 17(f)** of **the Act**, all refugees and asylum seekers shall ordinarily reside in the camps, therefore the State was acting in accordance with **the Act** in so far as it took steps to ensure all refugees and asylum seekers were taken into designated camps. **Section 17** of **the Act** reads as follows;

17. *There shall be a refugee camp officer, for every refugee camp whose functions shall be to-*

- (a) manage the refugee camp;
- (b) receive and register all asylum seekers and submit to the Committee all applications for the determination of their refugee status;
- (c) ensure refugees in the camps are issued with refugee identity cards or refugee identification passes;
- (d) manage the camps in an environmentally and hygienically sound manner;
- (e) co-ordinate the provision of overall security, protection and assistance for refugees in the camp;
- (f) issue movement passes to refugees wishing to travel outside the camp; and
- (g) protect and assist vulnerable groups, women and children;
- (h) ensure treatment of all asylum seekers and refugees in compliance with national law.

59. I think the argument made on behalf of the respondent cannot stand scrutiny as **section 17 of the Act** is merely facilitative in the sense that it sets out the responsibilities of a refugee camp officer. It does not require that all refugees and asylum seekers to ordinarily reside in camps nor does it preclude the State from providing refugee services in urban centres. I find and hold that Government Directive which targets refugees and asylum seekers in urban centres is a threat to their right to movement enshrined in **Article 26** of the **1951 Convention** as read with **section 16 of the Act**.

60. The application of the policy of closure of registration centres in urban centres has deleterious effects of the rights and fundamental of urban refugees in several ways. New arrivals have nowhere to report their intention to apply for asylum or seek refugee status and if they do, the process is burdensome taking into account the vulnerability. Those whose identification documents have expired or are about to expire are put to great costs and expense to have the same renewed at peril to their livelihoods. Undocumented refugees and asylum seekers are left exposed to police harassment, extortion, arbitrary arrest and eventual prosecution for being in the country illegally. Undocumented refugees and asylum seekers within urban set ups cannot access humanitarian services from organisations that provide humanitarian services which require identification as a pre-requisite for qualification of services. Some undocumented refugee children are denied access to public services such as schools and hospitals.

### **Right to fair administrative action**

61. The breach of the other rights of the petitioners is a consequence of the implementation of the Government Directive. The respondent admitted that the Government Directive was an administrative decision made in strict compliance with **the Act**. I have no doubt that under the provision of **the Act**, the office of the Commissioner of Refugees is entitled to make decisions on administrative matters concerning refugees in Kenya set out in **section 6 and 7 of the Act**. But such decisions must meet constitutional standards. **Article 47** provides that, **“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”** It is the duty of the court to interrogate the policy and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values in the Constitution to declare that policy inconsistent with the Constitution. As was stated by court in **Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248**; **“The Constitution**

*requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”*

62. Every person who acquires refugee status under our law is entitled to be treated as such. The Government Directive in this respect, being a blanket directive, is inconsistent with the provisions of **the Act** and international law. It amounts to taking away accrued or acquired rights without due process of the law. Some of the individual petitioners have demonstrated that they hold valid refugee identity cards and or had applied for renewal of the same. The policy of relocation and encampment adopted by respondent also fails to take into account families with children, those on medical treatment like the 2<sup>nd</sup> petitioner who is in Nairobi in order to access medical treatment and the specific fact situation of the individual refugee. In order to be considered a refugee, each applicant is assessed individually and therefore a process that seeks to deny such a person the rights accrued to him or her by failing to take into account the individual circumstances cannot be reasonable or fair. I find and hold that a blanket government directive which has no regard for individual circumstances of the urban refugee is arbitrary and discriminative.
63. The policy also has an effect on other fundamental rights and freedoms of the petitioners such as the right to work enshrined in various international human rights instruments such as the **UDHR** (Article 23), the **ICCPR** (Article 6) and the **African Charter** (Article 15) and also a recognised right in the **1951 Convention**. For instance, the 7<sup>th</sup> petitioner is a law lecturer in Nairobi. He is living a dignified life minimising dependence on the State and his encampment would obviously lead to loss of his livelihood, his right to work and consequently his right to dignity.
64. Some of the petitioners, like the 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> petitioners have also demonstrated that they are likely to face persecution in those camps owing to their ethnic affiliation. Mr Muhima, the 6<sup>th</sup> petitioner, narrated his special circumstances as a Banyamulenge. He has a well-founded fear of persecution due to his ethnicity. His relatives were killed in a refugee camp in Gatumba and the threat of going back to a refugee camp brings back haunting memories. The government directive does not take into account this fact and exposes him to likely persecution.
65. A policy that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable and a breach of **Article 47(1)**. Further to the point I have made, I also hold that the Government Directive is not fair and reasonable within the meaning of **Article 47(1)** in so far as it does not provide for application of due process in adjudicating the rights of persons with refugee status. I am particularly concerned about the situation alluded to by the 5<sup>th</sup> petitioner, who testified that although he had applied for renewal of his refugee identity card, the State had not taken any steps to facilitate the renewal of his identity card by providing registration centres within urban areas. In fact, the affirmative policy of the government has been to close down such registration centres in urban areas in order to force urban refugees into camps. Such a policy undermines the protections and the rights of refugees living in urban areas by surreptitiously imposing a policy of encampment thus denying them an opportunity to renew identity papers.

### **Right to dignity**

66. The inherent dignity of all people is a core value under recognized in the Constitution. It is a guaranteed right under **Article 28** and it constitutes the basis and the inspiration for the



recognition that is given to other more specific protections that are afforded by the Bill of Rights. In **S v Makwanyane and Another [1995] ZACC 3 para 144** Chaskalson P said the following, “*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights .... . By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*” In the same case, para 328, O’Regan J said the following, “*The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.*”

67. This right to dignity is underpinned by other international human rights instruments. The **UDHR** recognises this right in its preamble in the following words; “*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*” **Article 1** of the **UDHR** goes on provides that, “*All human beings are born free and equal in dignity and rights ...*” **Article 5** of **The African Charter** similarly provides as follows; “*Every individual shall have the right to the respect of the dignity inherent in a human being.*”
68. The petitioners and other refugees have established roots in the country and are productive residents and if the policy is implemented they will be uprooted from their homes and neighbourhoods in what is intended to be a security operation. Mr Masitsa, learned counsel for the petitioners, asked the court to consider the case and put weight on the fact that human dignity has to be understood against the backdrop of appreciating the vulnerability of refugees and the suffering they have endured, the trauma and insecurity associated with persecution and flight, the need and struggle to be independent and the need to provide for themselves and their families and the struggle to establish normalcy in a foreign county. I agree with this submission. Weighed against exposure to arbitrary administrative action and abuse of their person in the host country, refugees who have established some normalcy and residence in urban areas will have their dignity violated in the event the directives are to be effected. Family, work, neighbours, and school all contribute to the dignity of the individual. The manner in which the Government Directive is to be carried out undermines human dignity. I therefore find and hold that the Government Directive threatens to violate the right to human dignity under **Article 28**.
69. Earlier in this judgment I have stated that due to their position, refugees are considered vulnerable. That the State can direct organisations and other bodies not to provide assistance to urban refugees is directly inconsistent with its special responsibility towards vulnerable persons under **Article 21(3)** quite apart from undermining the right to dignity and I so find.

### **Principle of non-refoulement**

70. The petitioners have pleaded their case on the basis that the implementation of the Government Directive is a breach of the principle of *non-refoulement*. As I have stated elsewhere in this judgment, this principle is the cornerstone of refugee protection and has gained the status of international customary law.
71. As a peremptory norm of international law it is part of, “*the general rules of international law*” which are part of the law of Kenya under **Article 2(5)** of the Constitution. Although the phrase “*the general rules of international law*” used in **Article 2(5)** is similar to the phrase “*general principles*” found in **Article 38(1)** of the **Statute of the International Court of Justice** which

defines the sources on international law, its reference to customary international law is obscured by the phraseology used in the Constitution. However, the drafting history from the previous drafts constitutions prepared by the Constitution of Kenya Review Commission (CKRC) and the National Constitution Conference (Bomas) from which the Constitution is derived shows the intent of **Article 2(5)** is to incorporate customary international law as part of the law of Kenya and therefore “*general rules of international law*” means customary international law. Apart from the fact that the principle of *non-refoulement* applies as part of international customary law, it is now crystallised in **section 18** of *the Act*.

72. Mr Ongoya, learned counsel for the 1<sup>st</sup> petitioner, submitted that the letter dated 16<sup>th</sup> January 2013 is prima facie evidence that the State intends to pursue a policy of *refoulement*. The letter expressly states, “*The Government intends to move all refugees residing in Urban areas to the Daadab and Kakuma Refugee Camps and ultimately to their home countries after necessary arrangements are put in place.*” In my view, the implementation of the overall policy of relocation and encampment as evidenced in the letters particularly in regard to the imposition of conditions created by the implementation of Government Directive may violate the State international refugee protection obligations. Furthermore, aggressive pursuit of such a policy may have the effect of constructively repatriating urban refugees back to the countries from which they had fled.
73. As I have found the petitioners before the court have all shown that they have established roots and significant connections with local communities, the implementation of the policy may well lead to a situation that forces some of the petitioners to leave the country for fear of proceeding to camps or being exposed to conditions that affect their welfare negatively. The 5<sup>th</sup> petitioner testified that he feared proceeding to camp because he would be subjected to the same persecution that he was subjected to in Eastern Congo. This evidence was not challenged and I am convinced that sending him and his family to the camp through the means adopted by the State would effectively force him to leave the country in circumstances that may expose him the very same threats he was fleeing. This state of affairs in relation to him and others in like situations undermines the principle of *non-refoulement*. It is therefore the duty of the court in such circumstances to see that the breach does not materialise by granting appropriate relief.
74. The respondent has made it very clear that it does not intend to violate the *non-refoulement* principle. While I accept this position, violation of the principle may be indirect and may be the unintended consequence of a policy that does not, on its face, violate the principle. The African Human Rights Commission in ***Institute for Human Rights and Development in Africa (on behalf of Sierra Leone refugees in Guinea)/Guinea (Communication No. 249/2002)*** recognised that certain acts of a host state can lead to indirect *refoulement* of refugees. In the case, a radio announcement by the President of Guinea that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps led to widespread discriminatory acts targeting Sierra Leonean refugees. As a result, many refugees were forced to flee back to Sierra Leone. The Commission held that such a situation created in the host state that makes the dangerous option of returning/fleeing to their country as the only option was a violation of the principle of *non-refoulement*.
75. The proposed implementation of the Government Directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to **Article 47(1)**. Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government Directive

threatens to violate the fundamental principle of *non-refoulement*

**Whether the Government Directive can be justified under Article 24**

76. Having found that the Government Directive threatens to violate the fundamental rights and freedoms of refugees, the next level inquiry is whether the violation is justified under **Article 24**. **Article 24(1)** provides as follows;

24. (1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

(a) *the nature of the right or fundamental freedom;*

(b) *the importance of the purpose of the limitation;*

(c) *the nature and extent of the limitation;*

(d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

(e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

77. Under **Article 24 (3)** the State bears the burden of justifying that the directive to relocate and encamp urban refugees is in harmony with the limitation clause. That burden is expressed as follows, *“The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article has been satisfied.”*

78. The Supreme Court of Canada in **R v Oakes [1986]1 SCR 103** dealt with limitations of fundamental rights and freedoms in the **Canadian Charter of Rights and Freedoms**. Those provisions are similar to those contained in **Article 24(1)** of our Constitution. The court stated, at page 136, stated as follows; *“A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution ... The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.”*

79. In **Samuel Manamela & Another v The Director-General of Justice CCT 25/99**, the Constitutional Court of South Africa, in considering the limitation clause which is in *parimateria* to **Article 24**, cautioned against using the factors set out therein as a laundry list. The exercise, it noted, should be approached substantively by balancing the rights and limitations against the values underlying the Constitution and the Bill of Rights. The Court stated as follows; *“It should*

*be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. .... Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting.”*

80. This approach and reasoning was adopted and applied in the case of **Randu Nzai Ruwa and 2 others v Internal Security Minister and another** Mombasa HC Misc. No. 468 of 2010 [2012] eKLR. In that case the Court found the banning of the Mombasa Republican Council violated the provisions of the Bill of Rights. The court went further to consider whether the ban was justified. It stated as follows, “[55] Although the State is not required to give a detailed account of its action it must do more than to merely assert that the action has met the threshold set by the Constitution. It must place some evidence before court that will enable the court make a judicial assessment. If that evidence is classified or sensitive then it can be received behind closed doors. The European Court of Human Rights, sitting as a Grand Chamber in the case of *Socialist Party and others v Turkey* (case No. 20/1997/804/1007) said this about the manner a court should carry out such a scrutiny, “With regard to the first issue the Court reiterates that when it carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. In so doing, the Court has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts.”[Emphasis mine] I agree with the approach taken **Randu Nzai Ruwa and 2 others v Internal Security Minister and another** (Supra).
81. According to the deposition of Edwin K. Ngetich, at paragraph 10, the Government Directive was, “*taken in the interest of promoting the welfare and protection of asylum and refugees.*” The question then to be interrogated is how a policy of relocation and encampment proposed to be implemented in the manner set out in the letter dated 16<sup>th</sup> January 2013 meets the test of **Article 24**. Here, I will add that the burden of justifying the limitation lies on the State to prove that the restriction is in harmony with the limitation clause set out under the Article. This was also expressed in the **Randu Nzai Ruwa case (supra)**; “[50] *There are arguments made as to why it makes sense to rest the burden with the state. One is that: “The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirement of this Article has been satisfied.”*”
82. How would relocation and encampment promote the welfare of the urban refugees like the petitioners who have settled in urban areas, are employed or have business, have children in schools and are undergoing medical treatment" The petitioners are persons who are independent and are in fact contributing to the economy. The implementation of the policy of relocation and encampment is clearly detrimental to the welfare of urban refugees. The State has not provided any evidence to show that the overall welfare of refugees will be promoted by implementation of the

impugned directive.

83. Under **Article 24(1)(e)** there must be a relation between the limitation and its purposes and whether there are less restrictive means to achieve this purpose. Could the protections and promotion of the welfare of refugees be achieved by less restrictive means other than sending all urban refugees irrespective of their individual circumstances to camps" Are there less restrictive administrative interventions that can be undertaken by the Department of Refugee Affairs to eliminate the administrative challenges it anticipates in processing refugees and asylum seekers in urban centres" Unfortunately the court way not given the opportunity by way of evidence to interrogate this issue and satisfy itself that the constitutional threshold has been met.
84. My consideration of the evidence suggests that there is another rationale for the policy of relocation and encampment, it is to be found in the letter dated 10<sup>th</sup> December 2012 from the Commissioner of Refugee Affairs to its staff. Commissioner noted that, "*Following a series of grenade attacks in urban areas where many people were killed and many more injured, the government has decided to **stop registration of asylum seekers in urban areas with immediate effect.***" In another undated press statement from the Department of Refugee Affairs annexed to the 1<sup>st</sup> amicus curiae's submission as Appendix B, it is stated that, "***It is in this public domain that many people have been killed and several more injured in grenade attacks in our streets, churches, buses and in business places. Due to this unbearable and uncontrollable threat to national security, the government has decided to put in place a structured encampment policy.***"
85. The documents clearly show that the rationale for the policy of relocation and encampment is more the issue of national security than the promotion of the welfare of all the refugees. My finding is buttressed by the fact that the operation is to be implemented as security operation by, "*security officers rounding the refugees and transporting them to Thika Municipal Stadium.*" Any limitation based on national security considerations is not excluded from consideration under **Article 24** as **Randu Nzai Ruwa and Others v Minister, Internal Security and Another (Supra)** demonstrates. The court stated as follows; "[53] *The position of the State is that it invoked the provisions of POCA in the interest of national security. It is appreciated that the executive arm of the Government is charged with the responsibility of ensuring national security (Chapter 14 of the Constitution). That arm of Government is therefore the best suited to make decisions in respect of matters of national security. What it says about national security must ordinarily be believed. And in these matters it must be given some margin of appreciation. Where, however, there is a complaint raised as in this petition, that national security has been wrongfully invoked to take away a fundamental rights the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. If these were not so, then the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw! (We have paraphrased the words of H.W.R Wade and C.F. Forsyth used in another context). The need for the State to demonstrate satisfaction of the limitation clause is therefore not only constitutional but in line with public policy.*"
86. It is correct to state that the rights enjoyed by the refugees under the **1951 Convention** are not absolute and they are expected to abide by the national law. The rights also go with responsibilities such as abiding by national legislation. **Article 33(2)** of the **1951 Convention** states that, "*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime,*

*constitutes a danger to the community of that country.*" This is also crystallised in **sections 4 and 16 of the Act**. Thus, one's refugee status does not provide immunity from prosecution or other legal sanctions that the State is entitled to pursue.

87. Where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person's presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say, that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of person known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared.
88. The State has not demonstrated that the proliferation of the refugees in urban areas is the main source of insecurity. Furthermore, confining some of the persons of independent means, those who are employed or carry on their business to refugee camps does not serve to solve the insecurity problem. While national security is important and should not be compromised, the measures taken to safeguard the same must bear a relationship with the policy to be implemented. Security concerns must now be viewed from the constitutional lens and in this regard there is nothing to justify the use security operation to violate the rights of urban based refugees.
89. I find and hold that the respondent has not demonstrated a rational connection between the purpose of the policy and the limitation to the petitioners' fundamental rights. There is no evidence to show that the best way to protect and promote the welfare of refugees is through a blanket policy of relocation and encampment.
90. Before I finalise this part of the judgment, I think it is proper to address the fears expressed by State, in its submissions, in the following stark terms;
- a. *Kenya urban centers will be laden with a number of illegal immigrants who are "keeping house." Opening up the centers will give refugees an alternative to refugee camps as refugee registration centers; these centers will be preferred registration points. This means that several refugees without travel and identification documents will flock urban centers and the spiral effect will be immeasurable. The salient questions that this court ought to consider will include; who will accommodate them" Where will they be accommodated" Who will pay the upkeep costs" Whose social amenities will they use" How will they be identified, before formalization" Will we create mini-camps" Will it cause a humanitarian crisis"*
  - b. *Person who have committed international crimes, as contemplated by Article 1(4) and (5) of the 1969 Refugee Convention might easily find their way to urban centres;*
  - c. *Decentralising refugee registration will have huge cost implications; in terms of human resource, office space, general refugee support and management that have been mitigated by offering centralized services to refugees at the refugee camps.*
91. As I have stated before these fears are not borne out by any evidence placed before the Court. The **Refugees Act, 2006** provides adequate policy space to deal with the refugees consistent

with the Constitution. For example those who are accused of international crimes are excluded for consideration as refugees and would be subject to prosecution under the **International Crimes Act**. As some of the petitioners have shown, not all refugees are a burden to the State. The concern about the welfare of refugees is negated by the directive that UNHCR and other agencies to stop providing assistance and direct services to refugees and other asylum seekers. It is such a directive that will in fact cause a humanitarian crisis.

92. I agree with the respondent that the implementation of policy that takes into account the special circumstances of urban refugees has cost implications but I add that there will always be a costs involved in ensuring that the Constitution is complied with. The cost and burdens association with deepening constitutional values does not lessen the obligation of the State to, “**observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.**” Every State organ is called upon to be creative within its means in order that every person enjoys, “**the fundamental rights and freedoms in the Bill of rights to the greatest possible extent.**” I would adopt the sentiments expressed in the **S v Jaipal 2005 (4) SA 581 (CC)** (see paragraphs [55] and [56]) where the Constitutional Court of South Africa, speaking about the right to a fair trial, held the view that, “*Few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs. In view of South Africa’s history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not always be adequate. However, as far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularizing a lame acceptance that things do not work as they ought to, and that one should simply get used to it. Naturally the relevant authorities must attempt to see to it that facilities are provided as far as possible. Furthermore, all those concerned with and involved in the administration of justice including administrative officials, judges, magistrates, assessors and prosecutors must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances. Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations.*”
93. For the reasons I have set out above I find and hold that the Government Directive cannot be justified in terms of **Article 24** of the Constitution.

### **Conclusion and relief**

94. 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 18** of the **Refugees Act, 2006**. It is also violates the State responsibility to persons in a vulnerable situations. I have also concluded that the policy intended to be implemented by the Government Directive cannot be justified under **Article 24**.
95. The next issue is what reliefs to issue" The petitioners have urged over 16 prayers which are declaratory and aim to quash the implementation of the Government Directives. **Article 23(3)** empowers this court to grant appropriate relief in the circumstances as to vindicate the petitioners’ rights. In this case, the directive leading to encampment of urban based refugees has not been carried out by reason of the fact that the court issued conservatory orders at the commencement of these proceedings.
96. The kind of relief appropriate in the circumstances will safeguard the individual rights of the

petitioners while at the same time allowing the State and its agencies including the Refugee Department and other stakeholders to develop and implement policies that are consistent with the values of the Constitution. It is surprising that the respondent could argue consultation with stakeholders was unnecessary and indeed out of courtesy. Such an attitude is contrary to the national values and principles of governance set out in **Article 10** of the Constitution. I find and hold that there is a legal obligation to consult the public in making and implementing public policy affecting refugees. The values of transparency, good governance and public participation mean that public and stakeholder engagement can no longer be wished away.

97. The respondent fears that if the petition allowed, *“the effect shall be an influx of an extravagant and uncontrolled number of refugees and asylum seekers in urban areas which shall in turn pose administrative challenges to the Department of Refugee Affairs thereby impacting on the well being of the country as a whole.”* This fear, I believe is unfounded, as the Constitution and our laws contain sufficient tools to deal with refugees. It is the duty of the State to come up with a system of registration of refugees that is consistent with the principles and values of the Constitution as I have endeavoured to outline in this judgment. The State has a wide scope to design and implement policies that respect the tenets of the Constitution and it must now go back to the drawing board.
98. Para 23 of the ***Navigating Nairobi Report*** relied upon by the respondent states that, *“Finally the growing presence of exiled communities in Nairobi is symptomatic of a schism within the Kenyan Administration on the issue of refugees. While some parts of the government (most notably those concerned with nations security) continue to espouse the notion that refugees must be confined to Dadaab and Kakuma, other parts (especially DRA) have broadly agreed to the notion that a refugee presence in Nairobi is both legitimate and inevitable.”* This judgment offer the State an opportunity to mend this schism within the framework provided by the Constitution.
99. I wish to apologise to the parties for the delay in the delivery of this judgment as I was assigned to hear election petitions at the Machakos High Court. I also thank all the counsel who appeared in this matter for their detailed and erudite submissions, oral and written.

## **Disposition**

100. In light of the findings I have made in this judgment, I now grant the following reliefs:
- a. I declare the Government Directive, contained in the Press Release and correspondence dated the 18<sup>th</sup> December 2012 and 16<sup>th</sup> January 2013 respectively, threatens the rights and fundamental freedoms of the petitioners and other refugees residing in urban areas and is a violation of the freedom of movement under **Article 39**, right to dignity under **Article 28** and the right to fair and administrative action under **Article 47(1)** and violates the State’s responsibility towards persons in vulnerable situations contrary to **Article 21(3)**.
  - b. I declare that proposed implementation of the Government Directive, contained in the Press Release and correspondence dated the 18<sup>th</sup> December 201 and 16<sup>th</sup> January 2013 respectively, is a threat to the *non-refoulment* principle contained in **section 18** of the ***Refugees Act, 2006***.
  - c. The Government Directive, contained in the Press Releases and correspondence dated the 18<sup>th</sup> December 2012 and 16<sup>th</sup> January 2013 respectively, be and is hereby quashed.
  - d. There shall be no order as to costs.

**DATED and DELIVERED at NAIROBI** this 26<sup>th</sup> day of July 2013



**D.S. MAJANJA**

**JUDGE**

Mr Masista, Advocate with Ms Githumbi, Advocate instructed by Kituo Cha Sheria [***Petition No. 19 of 2013***]

Mr Ongoya instructed by Ongoya and Wambola Advocates for the 2<sup>nd</sup> – 7<sup>th</sup> petitioners [***Petition No. 115 of 2013***]

Mr Moimbo, Litigation Counsel, instructed by the State Law Office, for the respondent.

Mr Chigiti instructed by Chigiti and Chigiti Advocates for the UNHCR

Mr Waikwa instructed by Katiba Institute



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