REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCHRPET/E596/2025

CITATION: REFUGEE LEGAL NETWORKS AND REFUGEE CONSORTIUM OF KENYA AND 3 OTHERS VS COMMISSIONER OF REFUGEE AFFAIRS AND CABINET SECRETARY INTERIOR AND CORDINATION OF NATIONAL GOVT. AND 1 OTHERS

RULING

'

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E596 OF 2025

REFUGEE LEGAL NETWORKS.....1ST PETITIONER

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....2ND PETITIONER

REFUGEE CONSORTIUM OF KENYA.....3RD PETITIONER

KITUO CHA SHERIA.....4TH PETITIONER

SANCTUARY FOUNDATION.....5TH PETITIONER

VERSUS

COMMISSIONER FOR REFUGEE AFFAIRS.....1ST RESPONDENT

MINISTRY OF INTERIOR AND

NATIONAL ADMINISTRATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This is motion application seeking a conservatory order prohibiting the Commissioner for Refugee Affairs, the 1st respondent or any other person acting under its directions from implementing the directive issued on 31st July 2025, suspending registration of asylum seekers of Eriterian and Ethiopian nationalities and suspension of exemption applications of processing change of address and data transfer which allows refugees to reside outside designated areas pending the hearing and determination of this petition.
2. The application is premised on articles 21, 22, 23 and 165 of the Constitution and rules 1, 3, 4, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules). The application is supported by affidavits sworn by David Muthama and Dr. Benard Mogesa (CEO of the 2nd petitioner).
3. The petitioners state that on 31st July 2025 the 1st respondent issued a notice suspending registration of asylum seekers of Eritrean and Ethiopian nationalities. The notice further suspended application for exemption, processing changes of address and data transfer which allows refugees to reside outside their designated areas.
4. The petitioners contend that the directive discriminates against refugees and asylum seekers of Ethiopian and Eritrean origin living in Kenya on the basis of race. The directive has also an adverse effect on all refugees and asylum seekers in Kenya thus, undermining their ability to lawfully update their status and access rights guaranteed under the Constitution, the Refugees Act and international law.
5. It is the petitioner's position, that the directive which is in place for an indeterminate period does not align itself with the 1st respondent's powers stipulated under n sections 8(2) (p), 29(1) and 39 the Refugee Act and Regulation 4 of the Refugees (General) Regulation 2024. The directive violates the rights of all refugees and asylum seekers of Eritrean and Ethiopian nationalities guaranteed under articles 21 (3), 27 (1), (2); 28;39; 47 and 53 of the Constitution and sections 25, 29 and 30 of the Children Act.
6. The petitioners assert that the directive violates international law, including the Refugee Convention; the Organization of Africa Union Convention; International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
7. The petitioners posit that by suspending registration, individuals seeking asylum and refugee status will be denied lawful recognition exposing them to arbitrary arrest, detention or deportation. They also risk being returned either directly or indirectly to countries where they face persecution, armed conflict or serious human rights violations. They urge the court to intervene and prevent further violation of rights of these nationalities.
8. The petitioners assert that the directive is unlawful, unconstitutional and amounts to a violation of Kenya's obligation under domestic law, regional and international law. The directive contravenes the provisions of articles 10 (2), 27 and 47 of the Constitution; is incompatible with article 33 (1) of the convention Relating to the Status of Refugees and sections 7, 10, 11 and 18 of the Refugees Act.
9. According to the petitioners, many asylum seekers from the two countries have been adversely affected by the directive. Although they present themselves at the Kenyan border seeking protection, they are instead branded as victims of alleged human trafficking. They are apprehended and transported to police stations where they are placed in custody without any credible Refugee Status Determination (RSD) interviews being done. They are later repatriated or removed from the country without due process in violation of the principle of non-refoulment.

10. The petitioners state that the 1st respondent's mandate under sections 7 and 8 of the Refugees Act is subject to the Constitution as well as regional and international refugee legal frameworks. The directive violates the principle of non-refoulment and its blanket implementation unjustly deprives bona fide refugees and asylum seekers from the affected countries the right to individualized consideration of their specific circumstances.

1. The petitioners maintain that the directive violates article 47 (2) of the Constitution and the Fair Administrative Action Act for failing to provide written reasons. Further, that article 33(2) of the Refugee Convention should be interpreted and applied with strict legal precision and individualized assessment since the provision allows exclusion from protection where there is a clear and credible evidence that a specific refugee/ asylum seeker poses a real threat to the national security of the host country or where the individual has been convicted in a final judgment for a particular serious crime.
2. The petitioners contend that any criminal acts allegedly committed by individual refugees or asylum seekers from the affected countries should be addressed through established criminal justice mechanisms in accordance with the law. They cite a situation where on 5th August 2025, the Magistrate's Court at Kapenguria, delivered a ruling in Criminal Case No. E041 of 2025 Republic vs Biniam Tesfalim & 103 others), a case involving 104 individuals of Eritrea and Ethiopia nationalities and directed that they should not be deported, removal or repatriated unless their refugee status had been assessed and formally communicated to them in writing in accordance with the provisions of the Refugees Act.
3. According to the petitioners, the human rights situation in the two countries remains dire as detailed in the Report of the Special Rapporteur on the situation of Human Rights in Eritrea dated 12th May 2025 and the Human Rights Watch World Report 2025. The situation underscores urgent need for host states to discharge their obligations under international refugee law and protect individuals fleeing their countries. The blanket directive does not have any mechanism for identifying or accommodating genuine asylum seekers. The petitioners maintain that the application has met the threshold for granting conservatory orders.
4. The petitioners rely on Black's Law Dictionary, 11th Edition and the decisions in *Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others* [2021] KEELRC 2306 (KLR); *Republic v Kenya Revenue Authority exparte Style Industries Limited* [2019] KEHC 11965 (KLR); *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR) and *Dry Associates Limited v Capital Markets Authority & another; Crown Berger (K) Ltd (Interested Party)* [2012] eKLR.
5. The petitioners again rely on the decisions in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR and *Gitirai Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] KESC 30 (KLR) for the contention that they have demonstrated a *prima facie* case with a likelihood of success; that public interest tilts in favour of granting conservatory orders and that the directive will occasion grave and irreparable harm to vulnerable refugees and asylum seekers.
6. The petitioners further cite article 23(2) (c) of the Constitution and rule 23 of the Mutunga Rules and the decision in *Azimio La Umoja One Coalition Party v President of Kenya & 9 others* [2023] KEHC 21602 (KLR) on the principles for granting conservatory orders.
7. The petitioners maintain that the petition raises an arguable case since the directive suspends registration of all asylum seekers from Eritrea and Ethiopia until further notice, implying that bona fide asylum seekers from the two nations risk being repatriated to their respective countries in violation of the principle of non-refoulment enshrined in section 29(1) of the Refugee Act and article 33(1) of the Convention Relating to the Status of Refugees.
8. The petitioners argue that while the respondents are concerned about criminal elements among applicants, the issue can be addressed through the Refugee Act particularly sections 14 and 15 of the Act and the Criminal Law.

9. The petitioners contend that if conservatory orders are not granted there is a continuing threat against persons from the two nations as demonstrated the by court proceedings from Kapenguria Magistrate's court. Unless this court intervenes, refugees from the two countries face an imminent risk of being unlawfully excluded from the asylum process exposing them to potential refoulement and violation of fundamental rights and freedoms which cannot be remedied by a favorable judgment. Public interest therefore favours granting the orders sought.

Respondents' case

1. The respondents have opposed the application through a replying affidavit sworn by Mwasaru Mercy. The respondents contend that the directive was issued pursuant to the 1st respondent's mandate under sections 7 and 8 of the Refugee Act; the directive is in line with international conventions and protocols to which Kenya is a signatory; regional practice and is not subject to public participation.
2. The respondents assert that there was no need to give reasons why the 1st respondent issued the directive and that the petition is premature because the petitioners did not ask for reasons in exercise of the right under the Constitution prior to filing this petition. The respondents also deny violating article 47 of the Constitution and the Fair Administrative Action Act.
3. The respondents take the view, that the principle of non-refoulment is not absolute since under article 33(2) of the United Nations 1951 Convention on Status of Refuges, each contracting state party reserves the right to apply such internal and administrative measures as it may deem necessary to refugees and asylum seekers in ensuring that the process is not violated by organized crime perpetrators.
4. The respondents assert that the directive was issued because the Department of Refugee Services had discovered that asylum seekers of Ethiopian and Eritrean nationalities misuse the asylum process while being trafficked and smuggled through the country to final destinations in South Africa and beyond. The respondents deny that the directive is discriminatory or is a blanket suspension of registration of refugees. The respondents take the position that the directive is applied on a case to case basis and, therefore, does not exclude genuine asylum seekers from the two countries.
5. The respondents maintain, based on the foregoing, that the petitioners have not met the threshold for granting conservatory orders. They urge the court to appreciate and balance national interest and security vis-a-vis the obligations under the international instruments for granting asylum seekers protection.
6. The respondents rely on the decisions in *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43; *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR; *Center for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (supra); among others to argue that the petitioners have not established a *prima facie* case.
7. The respondents maintain that that section 11 of the Refugee Act grants a person 30 days to register with an immigration officer as a refugee. In that regard, for purposes of granting conservatory orders, a *prima facie* case should be based on material facts or evidence that the respondents have failed to register genuine cases of refugees which the petitioners have not demonstrated.
8. The respondents argue that under section 4 of the Refugee Act, an applicant has to establish reasonable grounds for seeking refugee status and it is not a must that an applicant for refugee status be registered.
9. The respondents maintain that under article 33(2) of the Convention on the Status of Refugees, state parties reserve the right to apply such internal and administrative measures as may be necessary in ensuring that asylum process is not used by organized crime perpetrators. The letter dated 16th July 2025 shows that individual preliminary interviews and

assessments were done for each of the 107 individuals and the movement shows that there is another reason other than asylum seeking.

10. The respondents maintain that the directive is a temporary suspension under article 33(2) of the Convention and does not bar registration of refugees from the two countries but specific cases of genuine applicants are considered on individualized basis. The respondents urge the court to decline the invitation to issue conservatory orders as it will affect the internal administrative mechanisms for preventing criminality.

Determination

1. I have considered the application, the response and arguments by parties. The petitioners have sought a conservatory order restraining implementation of the directive issued by the 1st respondent on 31st July 2025, suspending registration of asylum seekers from Ethiopian and Eritrean nationalities and any related applications such applications for change of address and data transfer allowing refugees to live outside designated areas and registration of ONWARD MOVERS, pending the hearing and determination of this petition.
2. The petitioners argue that the directive violates not only the Constitution and the law, but also that it was issued outside the 1st respondent's; is discriminatory and violates rights and fundamental freedoms of refugees and asylum seekers from the affected countries.
3. The respondents have opposed the application, arguing that the petitioners have not established a prima facie case and that the application does not meet the threshold for granting conservatory orders. According to the respondents, the impugned directive does not suspend the whole process of registering refugees and asylum seekers, but that each application will be considered on its own merit. The respondents maintain, therefore, that the directive does not violate the Constitution, the law or rights and fundamental freedom of refugees and asylum seekers.
4. The main issue for consideration in this application, is whether the court should grant the conservatory order sought. In determining the issue, the court is not at this stage, required to make a definite and conclusive finding of fact or law as doing so would prejudice the hearing of the main petition. As Musinga J (as he then was) stated in *Centre for Rights Education and Awareness (CREAW) & 7 others* (supra), when considering an application for conservatory orders, the court should not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order is only required to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
5. In *Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others* -Eldoret Petition No. 11 of 2012, it was held that:

[W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.

1. In *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR, the Court again stated:

Conservatory orders…are not ordinary civil law remedies but are remedies provided for under the Constitution, the

Doc IDENTITY: 40383092473825015496222340 68 Tracking Number: OO77FT2025

Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

1. The above position was reinforced by the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others* (supra) where it stated:

Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(See also *Board of Management of Uhuru Secondary School v City County Director of Education and 2 Others* [2015])

This court will therefore apply the above principles and avoid the temptation of determining the substantive issues raised in this petition at this stage in the present ruling.

1. In considering whether or not to grant conservatory order in this application, the court should also take into account the principle of proportionality. As Ojwang, AJ (as he then was) observed in *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, in responding to prayers, the court should always opt for the lower rather than the higher risk of injustice.
2. The first issue for determination is whether the petitioners have established a prima facie case for purposes of granting conservatory orders. A prima facie case, it has always been stated, is not one that must succeed at the hearing of the main case; but it is also not a case which is frivolous. In other words, a party has to show that his case discloses or raises an arguable issue and, in this case, an arguable constitutional issue.
3. In this petition, the issues the petitioners intend to argue at the hearing, include whether the directive is constitutional and lawful; whether the 1st respondent acted within his mandate; whether the directive violates or threatens to violate fundamental rights and freedoms in the Bill of Rights, including article 47 of the Constitution and the Fair Administrative Actions Act and whether the directive is discriminatory for targeting persons of particular nationalities and not others.
4. The petitioners have pointed out with reasonable precision the rights and fundamental freedoms in the Bill of Rights which they alleged have been denied, violated or infringed or are even threatened thereby falling within the ambit of article 23 as read with article 165(3) of the Constitution. The petitioners have not only contended that the 1st respondent has acted outside the mandate of that office, but also that the directive violates the right to fair administrative action guaranteed under Article 47 of the Constitution and the Fair Administrative Action Act; is discriminatory and, therefore, violates or contravenes the Constitution; the law and fundamental rights and freedoms.
5. In *Peter Kyalo v Alfred Mutua & 6 others* [2018] eKLR, the court observed that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is not necessarily undeserving of conservatory orders under article 23(2)(c) of the Constitution as long as he brings himself within the ambit of the provisions of article 23 of the Constitution. The issues raised by the petitioners in this petition, in my view, fall within the

purview of article 23 of the Constitution.

6. The petitioners have sought orders in the nature of conservatory relief which are orders in rem, meant to advance the obligation of every person to respect, uphold and defend the Constitution as mandated in article 3(1) of the Constitution. It follows, therefore, that the respondents' argument that since the 1st respondent acted within the law, adverse conservatory orders should not be issued against since the 1st respondent is discharging his lawful mandate, is not persuasive. This is because conservatory orders are granted to preserve the substratum of the petition and, therefore, where it is contended that there is a threat to violate the Constitution and fundamental rights and freedoms in the Bill of Rights at any stage in the course an action under challenge, the action may be the proper subject of a conservatory order as long as the impugned action is consequential to the proceeding before court and the court is satisfied that the constitutional threshold for granting conservatory orders have been met.
7. It is the finding of this court, that considering the issues raised in the petition and without attempting to make definitive findings over the petition, the petitioners have disclosed arguable issues for consideration at the trial. In short, it cannot be said that the issues raised in the petition are frivolous or unarguable.
8. The Petitioners having demonstrated an arguable (prima facie) case, the next question is whether there is real danger that prejudice will be suffered as a result of the violation or threatened violation of the Constitution; the law and rights and fundamental freedoms, if conservatory orders are not granted. In *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others* [2014] eKLR, while dealing with what amounts to real danger, the court stated that:

The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

1. In this application, the court is called upon to determine whether there is real danger so that by the time the petition is determined, some of the issues raised will have been rendered superfluous by the impugned directive. The petitioners argue that refugees from the affected countries will have been locked out from consideration as refugees and asylum seekers should the court finally find the directive to have been unconstitutional and unlawful.
2. According to the petitioners, the directive was issued outside the mandate of the 1st respondent; violates the principle of non-refoulment in section 29(1) of the Refugee Act and article 33(1) of the Convention Relating to the Status of Refugees and is in force for indeterminate period.
3. Section 8(1) of the Refugee Act establishes the 1st respondent office while sub section (2) delineates the functions of that office. The petitioners argue that 1st respondent had no mandate to issue the impugned directive.
4. Section 29(1) of the Refugee Act on the other hand, provides that 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—
5. the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
6. 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.

Sub section (2) states that the benefit of subsection (1) may not, however, be claimed by a refugee or asylum seeker whom there are reasonable grounds for him or her being regarded as a danger to the

national security of Kenya.

1. Going by the petitioners' contention, it would seem that the arguments such as whether the impugned directive is anchored in law or is in violation of the Constitution, domestic and international law, are not frivolous. This court cannot state with certainty at this stage that the directive is lawful or does not violate constitutional provisions and fundamental freedoms. It is, however, contended that since some of the issues for determination in this petition revolve around the mandate of the 1st respondent to issue the directive, unless the directive is suspended the substratum of the petition will cease to exist by the time the court determines the petition.
2. It is the view of this court, that since one of the issues raised for determination is whether the directive was properly issued and whether it violates the Constitution and the Bill of rights, this court has to interrogate the 1st respondent's mandate to undertake the action complained of and determine not only the constitutionality but also legality of thereof.
3. Taking into account the nature of the competing claims in this petition against the background of the public cause, the court has to focus on the public interest and good governance which favour compliance with the Constitution and the law. If the impugned directive were to remain in force as the court considers the matter, the substratum of the petition would be substantially lost since violation of either the Constitution, the law and or rights and fundamental freedoms would continue and any orders the court might make at the end after hearing the petition, may well be merely academic since violation of the Constitution, the law or rights and fundamental freedoms cannot be reversed once they occur.
4. In the circumstances, therefore, all factors considered and without deciding with finality the issues raised in this petition, the court is of the view, and finds, that it is in the public interest and the interest of justice that conservatory orders be granted.
5. Consequently, the application is allowed.

A conservatory order is hereby issued prohibiting the Commissioner for Refugee Affairs, (the 1st respondent) or any other person acting under his instructions and or directions from implementing the directive issued and dated 31st July 2025, suspending registration of asylum seekers of Eritrean and Ethiopian nationalities; suspension of exemption applications for processing change of address and data transfer which allows refugees to reside outside designated areas and suspension of registration of ONWARD MOVERS, pending the hearing and determination of this petition.

Costs of the application shall be in the petition.

Dated and delivered at Nairobi this 18th Day of November 2025

E C MWITA

JUDGE

'

SIGNED BY: HON. JUSTICE E.C. MWITA

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT

Doc IDENTITY: 40383092473825015496222340 68 Tracking Number: OO77FT2025

Doc IDENTITY: 40383092473825015496222340 68 Tracking Number: OO77FT2025