

MASTER OF LAWS: ADVANCED STUDIES IN INTERNATIONAL CHILDREN'S RIGHTS



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**STRATEGIC LITIGATION AS A TOOL TO ENFORCE THE RIGHT TO
NATIONALITY FOR CHILDREN OF KENYAN-REFUGEE UNIONS**



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EXECUTIVE SUMMARY

Kenya has been a safe haven for refugees since the 1990s and thus it is not a surprise that there are Kenyan-refugee unions and many children have been born as a result of these unions. Article 14 of the 2010 Constitution of Kenya, states that a person is a Kenyan by birth if either of their parents is a Kenyan even if they are not born in Kenya. The Convention on the Rights of the Child (CRC) Article 7 (1) provides that a child shall have the right to acquire a nationality and goes on in Article 8(1) to obligate states to ensure that the preservation of this right is respected. As a party to this Convention, Kenya is obligated to respect, protect and fulfil all rights set therein, including those set in Articles 7(1) and 8(1).

However, despite what the law dictates and despite its international obligations under the CRC, in the Kenyan refugee population, children born from these Kenyan-Refugee unions are registered as refugees and their bio-data is captured in the refugee database as opposed to the nationals' database. This is although they are Kenyans by virtue of one of their parents being Kenyans as set out in the law. As a result of being denied their right to acquire Kenyan nationality, their rights, namely, rights to non-discrimination, education, health, family and freedom of movement are blatantly being infringed upon. The denial of the right to acquire Kenyan nationality also places them at a high risk being stateless. Yet the provisions of Art 14 of the 2010 Constitution of Kenya and Article 7(1) of the CRC would deem it proper that these children acquire a right to nationality rather than being treated as refugees.

This study thus probes the right to acquire nationality for these children by looking into their rights which are being violated as a result of being denied Kenyan nationality. The study then investigates the impact that strategic litigation can have in the realization and protection of the right to acquire nationality for children born in Kenyan-refugee unions. Through a case study methodology to collect and analyse relevant data and based on an ongoing case in the High Court of Kenya and a prior case (the Nubian children's case) on nationality involving children who were also denied the right to acquire Kenyan nationality and were on the brink of being stateless, the study seeks to look into what impact strategic litigation would have on these children if the case were a success.

The study highlights that the failure of these children to acquire a nationality is a violation of the laws of Kenya and its international obligations under the CRC, which is not in their best interest. The study seeks to propose that strategic litigation can be a means to bring to light cases that affect children at large and when adequately applied it can achieve a greater impact for the good of children. However, several barriers hinder strategic litigation from achieving its core aims such as judicial delays, lack of human resources, lack of awareness, and lack of child participation. The study then makes recommendations on how the right to nationality can be realized for children of Kenyan-Refugee unions and whether strategic litigation is indeed an effective tool to realize this right so that these children can full enjoy their children's rights and are not placed at risk of being stateless.

OVERVIEW OF MAIN FINDINGS

First, this research has broadly set out the laws that pertain to the right to acquire a nationality internationally, regionally and in Kenya. In so doing, it has established that while laws pertaining to Kenyan nationality might seem clear cut on paper, their realizations remain farfetched. In practice, these laws are disregarded and the gaps that exist within the nationality laws places children at high risk of being statelessness. To further this risk of stateless is the fact that Kenyan does not have a Stateless Determination Procedure and has neither ratified any of the Conventions that deal with Statelessness

Second, this research has also established that lack of recognition or an effective nationality has grave impact on children and can hinder them from fully realizing their other children's rights and potential. For children of Kenyan-Refugee unions, the birth documentation they are given with the "Refugee" marking, which is different from the normal Birth documentation other children born in Kenya are given marks them different and the fact that they are in the refugee database has exposed them to discrimination when it comes to accessing their right to education, healthcare, enjoying family life and their freedom of movement.

Lastly, strategic litigation has become a widely used concept in the realization of various children's rights. However, it can take years for it to have an impact, or for its impact to be seen or not at all. This is due to the hurdles that stand on its own way. For cases involving children, such hurdles include issues to do with legal standing, their capacity to litigate and child participation, lack of legal representation, undue delay and costs in the case. In addition, once cases are decided and judgements issued, lack of political will further incapacitates its impact. This is conspicuous in the case of the Nubian children which was a strategic litigation case whose impact is yet to be fully realized in Kenya. Additionally, it is also evident that the Judiciary at large plays a crucial role in cases of strategic litigation and can hinder its progress. While the Kenyan courts shied away from looking the Nubian children's case in perhaps what could have been a landmark case on the right to acquire a nationality from a national court, they now have the opportunity to address this issue in the current petition before which involves children of Kenyan-Refugee unions. As such, all eyes are fixated on the outcome of this current case and what impact it will have on these children.

To conclude my findings, as a State party to the CRC, and having set in its constitution that the general rules of international law and further that any treaty or convention ratified by Kenya forms part of the laws, Kenya has an obligation to ensure that the right to acquire a nationality is fully realized for all children in its jurisdiction, in this case, children of Kenyan-Refugee unions.

LIST OF ABBREVIATIONS AND ACRONYMS

COK	The Constitution of Kenya
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ACPHR	The African Court of Human and People's Rights
AFHRC	The African Charter on Human and People's Rights
AU	African Union
CEDWA	The Convention on the Elimination of All Forms of Discrimination Against Women
CRPRD	The Convention on the Rights of Persons with Disabilities
CRC	United Nations Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECTHR	The European Court of Human Rights
EACJ	The East African Court of Justice
IACtHR	The Inter American Court of Human Rights
ICJ	The International Court of Justice
ICCPR	The International Covenant on Civil and Political Rights
KCPE	Kenya Certificate of Primary Education
NGO	Non-Governmental Organization
OAU	Organization of African Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

KEY WORDS

Nationality- Kenyan-Refugee unions -stateless-discrimination-strategic litigation

CHAPTER ONE: INTRODUCTION

1.1. Background

Kenya has been hosting a large number of refugees since the 1990s.¹ This is attributed largely to its international borders and the protracted conflict situations in the Great Lakes Region and the Horn of Africa where countries like Ethiopia, the Democratic Republic of Congo (DRC), South Sudan, and Somalia are situated. According to the United Nations High Commissioner for Refugees (UNHCR), as of October 2022, this number of refugees stood at 568,325 out of which 52 % are children.² But despite being tolerant of their presence within its borders, Kenya is nonetheless not a willing host.³ Most of these refugees have settled in the camps of Dadaab and Kakuma where they co-exist with local host Kenyan communities. It's no surprise then, there are Kenyan-refugee unions, and many children have been born as a result of these unions and who are currently subject to discrimination on this basis because they are unable to acquire their Kenyan nationality. Children born from Kenyan-refugee unions in this context refers to children who are born between a Kenyan national on the one hand and a refugee on the other.

When it comes to child protection within refugee settings, dimensions such as the search for durable solutions and ensuring non-discrimination exist.⁴ This means that any child protection system within a state must search for durable solutions for refugee children and take into account that the refugee situation was not meant to be permanent and that there are better ways to ensure that these children can live safely and rebuild their lives thus leading a life of dignity. Moreover, the child protection system should be accessible to all children under a state's jurisdiction without any form of discrimination.⁵ In Kenya, the laws meant to protect children within its jurisdiction are not applied effectively.

The Kenyan government does not give any guarantee to recognize children born between a Kenyan and a refugee⁶ which is in conflict with the legal provision in Article 14 (1) of Kenya's Constitution guaranteeing Kenyan nationality to any child whose parent is a Kenyan. This can be either the father or mother of the child. For these children, the failure of the government to uphold these provisions in the Constitution and to appropriately apply the laws that pertain to nationality as set in this Constitution read alongside the Kenya Citizenship and Immigration Act has jeopardized their right to Kenyan nationality. Nationality plays a big part in one's identity and further plays a great role in the realization of one's rights. Nationality is the genuine legal link that exists between an individual and the state.⁷

¹ Bartolomei, Linda, Eileen Pittaway, and Emma Elizabeth Pittaway. "Who Am I? Identity and citizenship in Kakuma refugee camp in northern Kenya." *development* 46 (2003): 87-93.

²UNHCR- United Nations High Commissioner for Refugees: Kenya Statistics Package, Registered Refugees and Asylum-seekers, 2022, <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2022/11/Kenya-Refugee-Population-Statistics-Package-31-October-2022.pdf> (Accessed 20 April 2023)

³ Bartolomei, Linda, Eileen Pittaway, and Emma Elizabeth Pittaway. "Who Am I? Identity and citizenship in Kakuma refugee camp in northern Kenya." *development* 46 (2003): 87-93.

⁴ UN High Commissioner for Refugees (UNHCR), *Bridging the Humanitarian-Development Divide for Refugee Children in Eastern Africa and the Great Lakes Region*, May 2018, available at: <https://www.refworld.org/docid/5b0ea89c4.html> (Accessed 29 May 2023)

⁵ Ibid

⁶ Kamau Muthoni, *Court to Rule on Status of Children born of Kenyans-Refugees Unions*, *Standard*, 16 November 2022, at 12.

⁷ Masabo, Juliana. "Stateless and rightless? An appraisal of standards and practices on prevention of statelessness and protection of stateless persons in Africa." In *The Routledge Handbook of African Law*, pp. 511-527. Routledge, 2021.

The International Court of Justice in the 1995 **Nottebohm case** expounded on this definition to mean the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments together with the existence of reciprocal rights and duties.⁸ Under international law, the term has been used interchangeably with citizenship with both being the legal bond between an individual and a state which confers rights to the individual while creating obligations between the individual and the state.⁹

In this paper, the two terms will be used interchangeably. The main oaths to citizenship are by blood, birth and naturalization.¹⁰ One can acquire nationality through *jus sanguinis* (by blood) resulting in having the same nationality as their parents or through *jus soli* (by birth) which means that they will have the nationality of the place where they are born.¹¹ Kenya as a party to the United Nations Convention on the Rights of the Child (CRC) further subscribes to the right to acquire a nationality under Article 7 and the obligation of the state to respect the right of the child to preserve their identity including nationality, name and family relations as set under Article 8.¹² Kenya also ratified the African Charter on the Rights and Welfare of the Child (ACRWC), which under Article 6 (4) obligates State Parties to ensure that their Constitutions recognize principles that will allow a child to acquire the nationality of the state they are born.¹³

1.2. Problem Statement

The right to acquire a nationality is the heart beat of a child's identity and allows them to enjoy a whole array of their children's rights, for instance;-

- a) The right to basic education,
- b) The right to access to healthcare,
- c) Freedom of movement, and
- d) The right to being free from any form of discrimination.

Ironically, in Kenya and contrary to what the law dictates, right from birth, these children born out of Kenyan-Refugee unions are not accorded their rights, and privileges like other children as guaranteed under the Kenyan, regional, and international laws, to which Kenya is a party.

After birth, these children are issued birth notification documents that bear a refugee agency stamp, and their details are entered into the refugee database.¹⁴

⁸ Ibid

⁹ Lugulu, Julie Ingrid. "Update on Kenya's implementation of the decision in the Nubian minors' case." *Kabarak Journal of Law and Ethics* 6.1 (2022): 205-216.

¹⁰ Sutton, Nikeeta Louise Joan. "Statelessness and the Rights of Children in Kenya and South Africa: A Human Rights Perspective." (2018).

¹¹ Van Waas, Laura. "International and regional safeguards to protect children from statelessness." *The world's stateless* (2017): 342-355

¹² Articles 7 and 8, CRC.

¹³ Article 6 (4) , ACRWC.

¹⁴ Kenya Editors' Guild(@KenyaEditors). The Plight of Children of Kenyan Refugee-Unions, Twitterspace, 19 January 2023, <https://twitter.com/i/spaces/11DxLnNDjXLGm> (Accessed 27 June 2023)

These actions in themselves 'marks' and/or 'tags' these children as refugees, thus giving them a disadvantage and hence even placing them at risk of becoming stateless.¹⁵ This can be by virtue that these children are born outside one parent's country or because that other parent cannot pass citizenship to them because of the nationality laws of the country they come from or that of asylum, or because of conflicting nationality laws.¹⁶ By recognizing these children as refugees instead of Kenyan nationals, they have been put at risk of statelessness. This may occur if the parent who is a refugee is repatriated back to their country of origin and they find their rights to nationality being challenged or the nationality of their children who were born in the country of asylum being challenged.

Such has been the case for instance of refugees returning from the DRC to Angola as they found it difficult in proving their nationality.¹⁷ Children of mixed Angolan and Congolese parentage were denied registration while Angolans who were refugees in DRC were denied citizenship despite nationality legislation granting citizenship of the DRC to a child with one Congolese parent.¹⁸ Similar is the situation that children born from Kenyan-refugee unions find themselves in, being denied citizenship despite the provisions that are set in the law. They enjoy their rights as refugees and not as Kenyan children and thus are denied the opportunity to fully enjoy their rights as Kenyan citizens even though under the Kenyan Constitution they are citizens of Kenya.¹⁹

This institutionalized discrimination has paved the way for a court case before the domestic courts. The petition, *Haki na Sheria Initiative v. Cabinet Secretary Ministry of Interior and Coordination of National Government & Others (AMM Case)*, *Petition No. E011 of 2022* was filed in the High Court of Kenya in Garissa seeking orders to compel the government to recognize children arising from Kenyan-refugee unions as Kenyan citizens by birth, to have them removed from the Refugee Database, and for the government to conduct proper birth registration for them and issue them with birth notifications that do not have any refugee markings. This is a strategic litigation case whose aim is to ensure that all children born between Kenyan nationals and refugees are accorded their right to nationality as set in the law.

Strategic litigation is a global concept currently in use all over and is applied by people ranging from legal practitioners, activists and academic scholars.²⁰ The term strategic litigation has also been used interchangeably with impact litigation or public interest litigation.²¹ The Blacks' Law Dictionary defines public interest litigation as "the legal practice that advances social justice or other causes for the public

¹⁵ Haki na Sheria Initiative, *Biometric Purgatory: How the Double Registration of Vulnerable citizens in the UNHCR Database left them at risk of Statelessness*, 2021, <https://citizenshiprightsafrika.org/biometric-purgatory-how-the-double-registration-of-vulnerable-kenyan-citizens-in-the-unhcr-database-left-them-at-risk-of-statelessness/> (Accessed 23 June 2023)

¹⁶ European Network on Statelessness. *Policy Briefing: No Child should be Stateless: Ensuring the Right to a Nationality for Children in Migration in Europe*, 2020, <https://www.statelessness.eu/updates/publication/no-child-should-be-stateless-ensuring-right-nationality-children-migration> (Accessed 15 May 2023)

¹⁷ Manby, Bronwen. "Statelessness in Southern Africa." *Briefing paper for UNHCR Regional Conference on Statelessness in Southern Africa*. 2011.

¹⁸ Ibid

¹⁹ Kenya Editors' Guild(@KenyaEditors). *The Plight of Children of Kenyan Refugee-Unions*, Twitterspace, 19 January 2023, <https://twitter.com/i/spaces/1IDxLnNDjXLGm> (Accessed 27 June 2023)

²⁰ Ramsden, Michael, and Kris Gledhill. "Defining Strategic Litigation." *Civil justice quarterly* 4 (2019): 407.

²¹ Nolan, Aoife, and Ann Skelton. "'Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice." *Human Rights Law Review* 22, no. 4 (2022): ngac026.

good".²² In other instances, scholars have referenced it as Strategic human rights litigation.²³ The usage of the term can vary depending on countries. The term public interest litigation, for instance, is commonly referenced, in countries like the United States of America and India²⁴ as well as Kenya.²⁵ It involves selecting and filing cases in court with the hope that the outcome of the case will drive change in society.²⁶ As a form of litigation that is geared towards structural change and enhancement for the good of all, it is a growing practice in national, regional, and international courts. At the regional level, for instance, strategic litigation has been applied in the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR),²⁷ the African Court of Human and People's Rights (ACHPR), and the East African Court of Justice (EACJ). In the international arena, it has been employed by the International Court of Justice (ICJ).²⁸ In championing human rights including the rights of children, strategic litigation has been employed in a wide array of matters/ issues ranging from education, non-discrimination, disability rights, nationality, minority rights, and refugee rights. For example, there have been two notable strategic litigation cases dealing with the discrimination of pregnant learners: WAVES v Sierra Leone²⁹ and the Mwambipile Case.³⁰ Also, in the case of the Nubian children³¹ in Kenya which dealt with the right to acquire a nationality.

Strategic Litigation in Kenya gained popularity upon the promulgation of the Constitution of Kenya (COK), 2010³² and is now widely used as a tool for championing human rights and realizing change. In the Kenyan context, the words public interest litigation is used. For this study, the two terms will be used interchangeably.

Kenya developed a guide³³ to public interest litigation which sets out the objectives of public interest litigation as being: getting redress for clients, setting legal precedent, enforcing those legal protections that are already in place, and bringing about policy and statutory changes. The other objectives are to implement new rights or safeguards, promote access to justice, foster accountability as well as

²² Ramsden, Michael. "Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights." *European journal of international law* 33.2 (2022): 441–472.

²³ Ramsden, Michael, and Kris Gledhill. "Defining Strategic Litigation." *Civil justice quarterly* 4 (2019): 407.

²⁴ Ibid

²⁵ Handbook on Public Interest Litigation in Kenya (PIL), 2014, <https://kptj.or.ke/a-guide-to-public-interest-litigation-in-kenya/> (Accessed 20 April 2023)

²⁶ CRIN-Child Rights International Network, Children Rights: A Guide to Strategic Litigation, <https://www.a4id.org/wp-content/uploads/2016/04/Children%E2%80%99s-Rights-A-Guide-to-Strategic-Litigation.pdf> (Accessed 7 June 2023)

²⁷ Supra note 22 at 441–472.

²⁸ Ibid

²⁹ Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone, Suit ECW/CCJ/APP/22/18, ECOWAS Community Court of Justice (2019)

³⁰ Tike Mwambipile & Equality Now v The United Republic of Tanzania, Application 042/2020, African Court on Human and Peoples' Rights

³¹ Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011

³² Kinama, Emily. "Promoting Public Interest Litigation in Kenya to Protect Public Open Spaces." *E. Afr. LJ* (2019): 97.

³³ Ibid

documenting and remedying historical injustices, and raise awareness of civic education.³⁴ As at now, it is common ground that neither the COK together with the underpinning laws enacted to give full realization to its implementation and realization nor other national instruments that look into public matters attempt to define what amounts to the public interest or what constitutes public interest. This has been left to the unfettered discretion of the courts to interpret what is public interest.³⁵

Noting that the case is a strategic litigation case, begs the question, what is the impact of strategic litigation in protecting the rights of refugee children and to what extent can strategic litigation be used to protect the rights to identity, namely the right to nationality for children born from Kenyan-refugee unions so that they can have a full array of rights like other children in the country? In the same vein, one might ponder how this case was built and whether it should have been approached differently. This then raised the aspect of what strategic litigation encompasses that other tools do not capture.

1.3. Research Objectives

Consequently, this paper aims at exploring the state of children born from Kenyan-refugee unions, and the challenges they face as a result of being denied their rights to identity namely their right to acquire a nationality. This paper will interrogate what role strategic litigation plays in protecting children in Kenya and then narrow down to the current AMM case and how strategic litigation can contribute to effective the realization and protection of the right to acquire nationality for children born from Kenyan-refugee unions. Hence, the research aims to:-

1. Critically analyze the international, regional and national children's rights framework on the right to nationality.
2. Critically analyze the legal and administrative challenges faced in accessing and enjoying the right to identity namely their right to acquire the nationality of children from Kenyan-refugee unions.
3. Explore why strategic litigation is a suitable option to address the rights of children born in Kenyan-refugee unions while assessing the place of strategic litigation as a tool for advocating for children's rights born from such unions.

1.4. Research Questions

In line with the objectives outlined above, the main research question that is addressed in this dissertation is:

How can strategic litigation contribute to the effective realization and protection of the right to acquire nationality for children born of Kenyan-refugee unions in light of Kenya's obligations under the CRC?

In order to answer this main research question, the following sub-questions are at the basis of the consecutive chapters in this dissertation:

- i. What are the international, regional and national legal and instrumental frameworks that deal with the right to identity, namely the right to acquire a nationality?
- ii. What is the current state of children born in Kenyan-refugee unions?
- iii. How has strategic litigation on children's rights contributed to the effective protection of their right to identity, namely their right to acquire nationality in the past?
- iv. Based on the ongoing AMM case and public outcry, what impact is strategic litigation likely to have on children born from Kenyan-refugee unions in realizing their right to identity, namely their right to acquire nationality among other rights?

³⁴ Ibid

³⁵ Ingonga, Renson M. "Judicial Enforcement of Public Interest Litigation (PIL) Under the 2010 Constitution of Kenya." PhD diss., University of Nairobi, 2018.

1.5. Limitations of Research

Although cases of nationality in cases of mixed marriages have been explored and researched by various authors, they have not covered situations where refugees intermarry with local host communities and children are then born from those unions. In the Kenyan context, this is not well dealt with at the research level, and at practice levels, it is only now that non-governmental organizations (NGO) in the country are publicly advocating for the right to acquire nationality for these children.

There have been attempts to discuss the protracted cases of citizenship for some refugee groups who claim Kenyan citizenship, namely the Somali, but none has given attention to children begotten amongst refugees and Kenyan nationals. Despite this, this study will attempt to give a holistic picture of the nationality of these children and how strategic litigation is being adopted to assist them, and the likely impact it will have.

1.6. Research Methodology

This paper will adopt the doctrinal case study methodology to collect and analyze relevant data, relying on desktop and library research. It will include data sources ranging from court proceedings and petitions, published journal articles, textbooks, newspapers, reports, and internet material that pertain to strategic litigation and the impact it is likely to have on children who are born as a result of Kenyan-refugee unions.

This paper will critically analyze and look into the material that also addresses citizenship with a focus on children born from intermarriages between locals and refugees and will also involve communications and data from an officer from the Department of Refugee Services in Kenya who deals with the registration of refugees in Kenya.

1.7. Chapter Breakdown

Chapter One: This chapter outlines a brief statement of the problem, the objectives of the research, the methodology of the study, and the research outcomes of what the paper would hope to accomplish at the end of the study.

Chapter Two: This chapter sets out how nationality is anchored in law by delving into international and regional instruments to which Kenya is a state party or not.

Chapter Three: This chapter will look at the national laws of Kenya which deal with nationality and delve into the challenges faced by children of Kenyan-Refugee unions as a result of being denied their nationality. First, it will address the right to acquire a nationality. It will then briefly look into the right to family, education, freedom of movement, and the right to non-discrimination which are all affected as a consequence of the violation of their right to acquire a nationality. In this particular regard, it will make reference to the already decided case of the Nubian children where necessary, to highlight how denying children the opportunity to acquire a nationality can affect these other rights.

Chapter Four: This chapter will discuss the role that strategic litigation as a tool to in the realization of the rights of children and delve to its use in realizing the right to nationality. It will then highlight two strategic litigation cases on the right to nationality: the Nubian Children's Case and the ongoing case of AMM in the Kenyan Courts. It will then discuss the potential impact that the case will have on children born from Kenyan-refugee unions if it is a success.

Chapter Five: This chapter will conclude with the discourse of my research objectives while addressing my research question. It will also have my recommendations which I make on the realization of the right to nationality of children born from Kenyan-refugee unions.

CHAPTER TWO: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE RIGHT TO ACQUIRE A NATIONALITY

2.1. Introduction

This chapter analyzes the major international and regional legal frameworks that make provisions for the right to acquire a nationality to which Kenya is a party to by virtue of Article 2 (5) and 2(6) of the COK.

To begin with, the focus will be on analyzing the international legal framework; the highlights being the Universal Declaration of Human Rights (UDHR), the United Nations Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). At the regional level; the African Charter on Human and People's Rights (AFHRC), and the African Charter on the Rights and Welfare of the Child (ACRWC), are the two major legal instruments within the African region.

2.2. International Legal Framework

As a fundamental human right, the right to acquire a nationality is established in different legal international, and regional instruments. In Kenya, by virtue of Article 2 (6) of the Constitution, then any treaty or convention ratified by Kenya forms part of the law of Kenya. This illustrates why these instruments play a role within the Kenyan context and hence cannot be ignored when we analyze the issue as pertains to the right to acquire a nationality.

2.2.1. The Universal Declaration of Human Rights, 1948

The UDHR is the first international instrument to provide for the right to nationality and has codified this right as the cornerstone of modern human rights law.³⁶ Article 15, sets out that everyone has a right to a nationality. It goes further in the same article to make provision that nobody shall be arbitrarily deprived of their nationality nor denied their right to change their nationality.

The wording in these provisions might seem clear and quite obvious but was surrounded by concerns, fears, and apprehensions. In drafting Article 15, there was a fear that making a guarantee as to the right to nationality would restrain the powers a state has on such issues hence jeopardizing a state's sovereignty.³⁷ This is a good stepping stone for critically analyzing the right to acquire a nationality on account that the UDHR has no legally binding effect but is rather just a declaratory piece of manifestations of intent.³⁸

Although it is important to recognize that there are arguments that the UDHR has acquired the status of customary international law thus should be binding.³⁹ By virtue that not all of its provisions including Article 15 have been directly codified into binding instruments, has made it convincingly difficult to conclude that the UDHR is indeed totally a customary international law.⁴⁰ Nevertheless, some regional

³⁶ von Rütte, Barbara. "Beyond Sovereignty: The Right to Nationality in International Law." *The Human Right to Citizenship*. Brill Nijhoff, 2022. 87-211.

³⁷ Ibid

³⁸ Ibid.

³⁹ Hannum, Hurst. "The UDHR in national and international law." *Health and Human rights* (1998): 144-158.

⁴⁰ von Rütte, Barbara. "Beyond Sovereignty: The Right to Nationality in International Law." *The Human Right to Citizenship*. Brill Nijhoff, 2022. 87-211. Ibid

courts have in recent times asserted that Article 15 of the UDHR is part of customary international law, thus having a binding nature.⁴¹

But from reading Article 15, what it implies is that there is an expectation that no one should lack a nationality and in instances where they do not have such nationality, they should be able to acquire it. The UDHR despite its non-binding nature gave life to other international and regional instruments that set out the right to a nationality.

2.2.2. The Convention on the Rights of the Child, 1989

The CRC is the first international legal instrument that received universal support and ratification.⁴² Currently, the United States of America is the only country that is yet to ratify the CRC. Kenya ratified the CRC in 1990, making it among one of the first African countries to do so. This shows how keen Kenya was to ensure that children's rights in the country are respected and protected. Article 53 of Kenya's Constitution which specifically address the rights of all children within Kenya was inspired by the provisions of the CRC.

Article 7(1) CRC provides that every child shall have the right to acquire a nationality.⁴³ This is very particular to the child as the whole convention is child-centered. In its application, Article 7 (1) does not exclusively grant a child the right to a nationality, instead, it accords the child the right to acquire a nationality.⁴⁴ The basis for having Article 7 is that it is meant to cushion the child from being rendered stateless and it also obliges a State party to take all the necessary measures that will ensure a child within its jurisdiction has a nationality.⁴⁵

The right to nationality includes the right to acquisition and retention of nationality.⁴⁶ It is the pathway for one to acquire nationality. Based on the CRC provisions, nationality is acquired during childhood and this has been interpreted to mean that nationality should be conferred at birth or as soon as possible after birth to a child who would otherwise be stateless.⁴⁷ In other words, the right to acquire nationality should be construed to mean that children have a right to nationality in their country of birth if they do not acquire another nationality.⁴⁸

If Article 7 is not carefully read, one might quickly infer the former application, which is wrong. States are required to ensure the implementation of this right among other rights listed in the same paragraph,

⁴¹ The Matter of Anundo Ochieng Anundo v. The United Republic of Tanzania , App. No. 012/2015, African Court on Human and Peoples' Rights, 22 August 2018

⁴² Doek, Jaap E. "THE CRC AND THE RIGHT TO ACQUIRE AND TO PRESERVE A NATIONALITY." *Refugee Survey Quarterly*, vol. 25, no. 3, 2006, pp. 26–32. JSTOR, <http://www.jstor.org/stable/45054107>. (Accessed 21 Apr. 2023)

⁴³ Article 7, CRC.

⁴⁴ Doek, Jaap E. "THE CRC AND THE RIGHT TO ACQUIRE AND TO PRESERVE A NATIONALITY." *Refugee Survey Quarterly*, vol. 25, no. 3, 2006, pp. 26–32. JSTOR, <http://www.jstor.org/stable/45054107>. (Accessed 21 Apr. 2023)

⁴⁵ Ibid

⁴⁶ Ganczer, Mónika. "The right to nationality as a human right." *Hungarian YB Int'l L. & Eur. L.* (2014): 15.

⁴⁷ UN High Commissioner for Refugees (UNHCR), *Statelessness and Citizenship in the East African Community*, September 2018, available at: <https://www.refworld.org/docid/5bee966d4.html> (Accessed 23 May 2023)

⁴⁸ Sebastian Kohn, Open Justice Initiative, *Publication: Children's Right to Nationality*, <https://www.justiceinitiative.org/publications/addressing-childrens-right-nationality> (Accessed 23 May 2023)

in accordance with their national laws and obligations under the relevant international instruments in this field, particularly where a child would otherwise be stateless.⁴⁹ The provisions set out in Article 7 do not mean that states have relinquished their liberty and freedom to regulate access to nationality at birth or during childhood.⁵⁰

It is also important to note that Article 7 of the CRC is closely intertwined with Article 8. While Article 7 guarantees the acquisition of *inter alia* a name and a nationality, Article 8, states undertake to respect the right of the child to preserve his or her identity, which includes, but is not limited to nationality, name and family relations. To be precise, Article 8 (1) obligates states to respect the rights of the child to preserve their identity as recognized by the law without unlawful interference. This includes nationality. Both articles apply to all children within the state party's jurisdiction and hence includes non-nationals, refugees, irregular migrant, or stateless children.⁵¹ Although Article 8 was about protection from enforced disappearances, there are those like Doek, a former CRC Committee member who favour its interpretation to be close to that set in the travaux préparatoires.⁵²

I support and side with these sentiments and in my view, also believe that Article 8 should be further interpreted to include children such as those born between refugees and nationals in the host country, who are denied their rightful nationality hence affecting their family and private life.

2.2.3. The International Covenant on Civil and Political Rights, 1966

The ICCPR was adopted in 1966 and Kenya became a state party in 1997. In showing its commitment to the ICCPR, Kenya domesticates the rights in the ICCPR in Chapter Four of its Bill of Rights which is set out in its Constitution.

The ICCPR, alongside its sister instrument the ICESCR, builds on the UDHR and has together been referenced as the International Bill of Human Rights.⁵³ Article 24 (3) sets out that every child has the right to acquire a nationality, and it is from this provision that Article 7 of the CRC was built, albeit with a slight difference in the wordings of the CRC being child-specific.⁵⁴ This requires a state to have set measures in place which can ensure that every child has a nationality when they are born.⁵⁵

The applicability of Article 24 (3) came to play recently in the case of *Denny Zhao v. the Netherlands*,⁵⁶ which concerned a boy whose nationality was registered as unknown by the Dutch civil registry. In looking at the communication before it, the Human Rights Committee noted that the impossibility for Denny to be listed as stateless or to even acquire a nationality prevented him from enjoying the right to acquire a nationality as set under Article 24 (3).⁵⁷ The essence of Article 24 is that it recognizes that

⁴⁹ Article 7 (2), CRC.

⁵⁰ Van Waas, Laura. "International and regional safeguards to protect children from statelessness." *The world's stateless* (2017): 342-355.

⁵¹ von Rütte, Barbara. "Beyond Sovereignty: The Right to Nationality in International Law." *The Human Right to Citizenship*. Brill Nijhoff, 2022. 87-211.

⁵² Ibid

⁵³ Ibid

⁵⁴ Vandenhoe, Wouter, Gamze Erdem Türkelli, and Sara Lembrechts. "NAME AND NATIONALITY." *Children's Rights*. Edward Elgar Publishing, 2019. 100-107.

⁵⁵ Ibid

⁵⁶ *Denny Zhao v. the Netherlands*, Human Rights Committee 19 October 2020, Communication No. 2918/2016.

⁵⁷ Ibid

children are particularly vulnerable and need special protection.⁵⁸ Thus a state is obliged under the ICCPR to put up measures that make it possible for a child born in their territory to acquire a nationality. Nonetheless, this article does not necessarily make it an obligation for States to give their nationality to every child born in their territory.⁵⁹ Notwithstanding, if we assess the above mentioned case of Denny Zhao, it is evident that the right to acquire a nationality requires the state to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born and that there should be no discrimination based on a ground such as a nationality status of one or both parents.⁶⁰

2.2.4. The Convention on the Elimination of All Forms of Discrimination against Women, 1979.

In 1979, the UN General Assembly adopted the CEDAW, and it entered into force as an international treaty in 1981. Kenya became a state party to CEDAW in 1984. The focus of Article 9 (2) is on making sure that women have an equal right to men in granting nationality to children. Other than this simple provision, CEDAW does not dwell much on the right to nationality.

Unlike the other legal international instruments mentioned that deal with nationality, CEDAW's reference to nationality is anchored on the notion of discrimination against women.⁶¹ CEDAW aims to ensure that women are not subjects of discrimination when it comes to passing nationality to their children. The lack of equality between women and men when it comes to transmitting nationality to their children creates a significant risk of statelessness for children.⁶² This article has been applied before in courts and regional bodies.

In 2018, the ACERWC in the case of *the African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Republic of Sudan*⁶³ referred to Article 9(2) and echoed the sentiments of the High Court of Botswana in the Unity Dow case that denying a child the opportunity to get nationality from their mother undermined both the mother and the child's right to confer and acquire nationality respectively thus was discriminatory and limited their rights and legal protection.⁶⁴ In the Unity Dow ruling the Court of Appeal upheld a woman's right to pass Botswanan citizenship to her children.⁶⁵ This case led to a subsequent amendment of the law to conform to the ruling.⁶⁶ In the Sudanese case, the issue was on whether the Republic of Sudan was in violation of ACRWC in particular, Article 3 on the right to non-discrimination, Article 4 on the best interest of the child, and Articles 6 (3) and 6 (4) the right to acquire nationality and on the obligation of preventing statelessness respectively.⁶⁷

⁵⁸ Para 93, Denny Zhao v. the Netherlands, Human Rights Committee 19 October 2020, Communication No. 2918/2016.

⁵⁹ Ibid para 8

⁶⁰ Human Rights Committee 19 October 2020, Communication No. 2918/2016, Para 95.

⁶¹ von Rütte, Barbara. "Defining the Right to Nationality: Rights and Obligations." *The Human Right to Citizenship*. Brill Nijhoff, 2022. 212-328.

⁶² Ibid

⁶³ Doc No 005/Com/001/2015 (31 May 2018)

⁶⁴ Attorney General v Unity Dow, The High Court of Botswana, 1991.

⁶⁵ Ibid

⁶⁶ Manby, Bronwen. "Statelessness in Southern Africa." *Briefing paper for UNHCR Regional Conference on Statelessness in Southern Africa*. 2011.

⁶⁷ Para 17, Doc No 005/Com/001/2015 (31 May 2018)

The other allegations were that the consequent violations of the aforementioned rights consequently resulted in the violation of the rights to equal protection of the law, to dignity and legal status, to have the cause heard, to education, and protection of family life as set under the African Charter on Human and People's Rights (Banjul Charter).⁶⁸ When assessing the case, the ACERWC brought in Article 9 (2) of the CEDAW on account of the discrimination that is existent in the laws of Sudan as it pertains to conferring.⁶⁹ The ACERWC then went on to advise Sudan to revise its laws which pertain to nationality.

2.2.5. The Convention on the Rights of Persons with Disabilities, 2007

The CRPD is the youngest of the core nine (9) core UN Human Rights treaties.⁷⁰ The CRPD was adopted in 2006 and entered into force in 2008. Kenya was among the countries who actively participated in the negotiations of the CRPD thus it is no surprise that it was among the first countries who ratified the treaty in 2008. The CRPD's wordings are a replica of those in the CRC as it concerns the right to acquire a nationality, but with the distinct feature that it is specific to children with disabilities.⁷¹ This article aims to ensure that children with disabilities are not discriminated against and can be able to acquire a nationality despite their disability.

2.3. Regional Legal Framework

2.3.1. The African Charter on Human and People's Rights, 1981

The then Organization of African Union (OAU) and whose current successor is the African Union adopted the African Charter on Human and People's Rights (the Banjul Charter) in 1981.⁷² The Banjul Charter has been ratified by fifty-four (54) African Union (AU) member states.⁷³ In 2003, a Protocol to the Banjul Charter known as the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) was adopted. Kenya became a state party to both in 1992 and 2010 respectively.

However, the Banjul Charter does not expressly provide for the right to acquire a nationality. Despite this, the African Commission on Human and People's Rights, formed under the charter, recognizes that nationality is a vital aspect of one's life as evidenced by the resolution it adopted in 2013 concerning the right to acquire a nationality.⁷⁴ In this resolution, the Commission expressed that:

*"...the right to a nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the Banjul Charter and is essential to the enjoyment of other fundamental rights and freedoms under the charter."*⁷⁵

⁶⁸ Article 3 (2); Article 5; Article 7; Article 11; and Article 18(1), Banjul Charter.

⁶⁹ Para 38, Doc No 005/Com/001/2015 (31 May 2018)

⁷⁰ von Rütte, Barbara. "Beyond Sovereignty: The Right to Nationality in International Law." *The Human Right to Citizenship*. Brill Nijhoff, 2022. 87-211.

⁷¹ Article 19 (2).

⁷² Murray, Rachel. *The African Charter on Human and Peoples' Rights: A Commentary*. Oxford University Press, 2019.

⁷³ "State Parties to the African Charter". The African Commission on Human and People's Rights (ACPHR), n.d., <https://achpr.au.int/en/states> (Accessed 21 April 2023)

⁷⁴ African Commission on Human and Peoples' Rights, 234: Resolution on the Right to Nationality, 23 April 2013.

⁷⁵ Para 84 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality", 2014.

2.3.2. The African Charter on the Rights and Welfare of the Child, 1990

Sourcing inspiration from the CRC, the African region in July 1990, adopted the ACRWC and it came into force in 1999.⁷⁶ This piece of legislation has an African Cultural fingerprint to it as it was born to address concerns that were considered specific and distinct to the African region such as apartheid and female genital mutilation.⁷⁷ Thus it goes further than the CRC in protecting the rights of the child. Kenya is a party to the ACRWC, having ratified it in 2001.

Article 6 (3) on nationality, spells out that a child has the right to acquire a nationality hence it borrows from wordings in Article 7(1) of the CRC. Moreover, it requires states to ensure that their constitutional legislations recognize principles that will allow children who would otherwise have no nationality but are born within their territories to acquire their nationality.⁷⁸ The ACERWC raised concerns that despite being enshrined in the ACRWC, the right to acquire a nationality and being a fundamental human right is one human right that is not being protected within the African region. Thus, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), adopted a general comment on the right to birth registration, name, and nationality.⁷⁹ This general Comment was prepared following the first decision from the ACERWC which concerned the nationality of children of Nubian descent who were born in Kenya.⁸⁰ The Nubian Children's case will be broadly analyzed in the coming chapters.

But it is in light of this case which remains one of the guiding cases affirming the right to nationality, the Committee saw the need to interpret what Article 6 generally was meant to protect.⁸¹ Thus if Article 6 (4) is to be realized, then the general principles that anchor children's rights: the best interest, non-discrimination, survival and development, and participation must be considered.⁸² General Comment No. 6 though not having a binding nature, is a good guiding tool on the applicability of Article 6 (4). In stating the importance of having a nationality, the ACERWC stated that lack of nationality makes it difficult for one to exercise and enjoy civic and political participation, freedom of movement, and participation in the formal economy and state protection when their human rights are threatened.⁸³

2.4. Conclusion

It is common ground and generally accented the right to nationality is inherent and implies a pathway for one to acquire nationality. Acquiring a nationality enables a child or an individual to enjoy their juridical

⁷⁶ Johnson, Afroz Kaviani, and Julia Sloth-Nielsen. "Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead." *African Human Rights Law Journal* 20.2 (2020): 643-666.

⁷⁷ Ibid

⁷⁸ Article 6 (4), ACRWC.

⁷⁹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality", 2014.

⁸⁰ Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011.

⁸¹The African Commission on Human and People's Rights, The Right to Nationality in Africa, <https://www.refworld.org/pdfid/54cb3c8f4.pdf>, (Accessed 21 April 2023)

⁸² Para 13 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality", 2014.

⁸³ Ibid para 84

personality and respect for human dignity and aids the child in developing based on their identity from birth.⁸⁴

The right to acquire a nationality especially for children is safeguarded in international law as well as regional law in the African context. This is evident from the legal instruments described herein above which are not exhaustive but are the major ones. Some of these instruments have inspired the rights that have been enshrined in the national laws in Kenya, starting from the Constitution of Kenya, which is the supreme law of the land. By virtue that Kenya has ratified them and through Article 2 (6) of its Constitution recognized them as forming part of the laws in Kenya, must fulfil its obligations under them especially where the right to acquire a nationality is concerned.

⁸⁴ Human Rights Committee 19 October 2020, Communication No. 2918/2016, Para 103.

CHAPTER THREE- ACHIEVING THE RIGHT TO ACQUIRE A NATIONALITY FOR CHILDREN OF KENYAN-REFUGEE UNIONS UNDER THE NATIONAL LAWS OF KENYA

3.1. Introduction

This chapter will address the national laws of Kenya that address nationality. It will examine what the Constitution of Kenya (COK), 2010 provides when it comes to nationality and thereafter analyse the Kenya Citizenship and Immigration Act, 2011 which was formulated in furtherance of the provisions in the COK on nationality as well as the Children Act, 2022.

The chapter will then address the rights of children that are affected when the right to acquire nationality is infringed upon. It will draw inspiration from the case of the Nubian children to highlight how these other rights are affected while also referring to the challenges that children of Kenyan-refugee unions are facing.

3.2. The National Legal Framework

When interpreting the right to nationality as a human right, one must take into account that matters of nationality fall within the domestic jurisdiction of states.⁸⁵ Although human rights issues were removed from domestic jurisdiction, the right to a nationality as a human right is nevertheless pervaded by that nationality matters form part of the *domaine reservé*.⁸⁶

As a state, Kenya has a sovereign right to determine the conditions for the acquisition and loss of nationality.⁸⁷ Hence its national laws address nationality.

3.2.1. The Constitution of Kenya, 2010

At the national level, the COK was adopted in 2010, and it is the supreme law of the Republic.⁸⁸ Chapter three of the Constitution is dedicated to dealing with matters related to citizenship.

Under Article 13 (2), it sets out that one may become a citizen of Kenya through birth or registration. Article 14 outlines what it means to be a citizen by birth. To acquire citizenship by birth, you do not necessarily have to be born in Kenya so long as either your mother or father is a Kenyan citizen.⁸⁹ The provisions of Article 14 (1) dealing with this, thus states:

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

This also applies to any individual who was born to Kenyan parents in or outside Kenya before the provisions of this 2010 constitution came into effect.⁹⁰ Nevertheless, the constitution gives the Parliament of Kenya the discretion to effect legislation that limits this entitlement for descendants of Kenyan citizens born outside Kenya and provides:⁹¹

⁸⁵ Ganczer, Mónica. "The right to nationality as a human right." Hungarian YB Int'l L. & Eur. L. (2014): 15.

⁸⁶ Ibid.

⁸⁷ Song, Sarah. "Why Does the State Have the Right to Control Immigration?." Nomos 57 (2017): 3-50

⁸⁸ Article 2 (1), COK

⁸⁹ Article 14 (1), COK

⁹⁰ Article 14 (2), COK

⁹¹ Article 14 (3), COK

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

Further, it makes provisions for foundlings. Any child who appears to be less than 8 years and whose nationality or parents are unknown is presumed to be a Kenyan citizen by birth.⁹² A citizen by birth cannot lose their citizenship because Article 16 of the Constitution explicitly provides for dual citizenship. Certain categories of people qualify for citizenship by registration. First, any person who is married to a Kenyan citizen for a period of seven years may qualify for citizenship by registration.⁹³ Second, any person who has lawfully been residing in Kenya for a continuous period of at least seven years, qualifies for registration but they have to meet any conditions that prescribed by an Act of Parliament. The third category is a child who is adopted by a Kenyan citizen. In this regard, the Constitution states:

“A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.”

The Constitution encompasses a progressive Bill of Rights (Chapter Four) which is in line with international human rights standards.⁹⁴ In this Bill of Rights, a section is dedicated to all children,⁹⁵ and this in my view can be inferred to include refugee children, children seeking asylum, and stateless children just to mention a few. Due to the inclusion of ‘all children’, Kenya’s constitution has been deemed as representing the “gold standard.”⁹⁶ Article 53 (1) (a) expressly sets out that every child has a right to nationality right from birth. In furtherance of these provisions in the Constitution, the Kenya Citizenship and Immigration Act was adopted in 2011.

3.2.2. The Kenya Citizenship and Immigration Act, 2011

A year after the adoption of the Constitution, the Kenyan government, in its efforts to give effect and deeply cover all aspects that pertain to the issue of nationality, adopted the Kenya Citizenship and Immigration Act (Citizenship Act) in 2011. By dint of Section 6 of the Citizenship Act, a citizen by birth carries the same meaning as set under Article 14 and Clause 30 of the Kenyan Constitution.⁹⁷ The Citizenship Act also, under Section 7, gives effect to Article 14(3) of the COK, by setting out that any individual who is born outside Kenya is a citizen by birth if on the date that they are born, either their mother or father was or is a citizen by birth. Unlike the Constitution, the Citizenship Act is silent on whether Parliament has the discretion to limit this.

Similar to the Constitution, the Citizenship Act recognizes the presumption of citizenship by birth for foundlings who appear to be less than 8 years and whose parents and nationality are unknown.⁹⁸ But it goes further to provide that if the age of a child cannot be ascertained, then the children’s court will have

⁹² Article 14 (4), COK

⁹³ Article 15 (1), COK

⁹⁴ Muthui, Hilary M. Kenya’s Bill of Rights and Its Implications on Kenya’s Ability to Apply the International Bill of Rights. Diss. University of Nairobi, 2013.

⁹⁵ Article 53, COK

⁹⁶ UN High Commissioner for Refugees (UNHCR), Bridging the Humanitarian-Development Divide for Refugee Children in Eastern Africa and the Great Lakes Region, May 2018, <https://www.refworld.org/docid/5b0ea89c4.html> (Accessed 19 May 2023)

⁹⁷ Section 6, Kenyan Citizenship and Immigration Act

⁹⁸ Ibid section 9

to determine the child's age and nationality among other issues.⁹⁹ Consequently, the children's court have the discretion to order that that such a child is presumed a citizen and in turn direct that they be registered in the register of children presumed citizen by birth.¹⁰⁰ The act criminalizes any act of abandonment of a child by anyone if the intention is for Kenyan citizenship to be conferred upon the child.¹⁰¹ On paper, this seems very clear. However, there have been reported cases that when such children are being adopted, then the adoptive parents have had to pray that they be recognized as Kenyan citizens.¹⁰² Two things can be inferred from this: that the provision of presumption is being overlooked and hence not being implemented or that the cases to the children's court for orders that these children are recognized as citizens is done at a later stage than set in the law. This in itself increases the risk of statelessness for these children.

The Act unlike the Constitution, makes a mention of stateless persons. It states that any person who has no enforceable claim to citizenship in any state and has been living in Kenya since it 1963 is eligible to apply for citizenship by registration.¹⁰³ It is worthy to note that this in practice this has not been the case. Attached to this legibility are the conditions of adequate knowledge of Kiswahili or a local dialect, the intention to continue residing in Kenya, no conviction or imprisonment for three years or longer and an understanding of the rights and duties of a Kenyan citizen.¹⁰⁴ The provision had a time limit of five years from the date of commencement of the Act for such applications. Upon its expiration, the time limit was further extended for a period of three years because the targeted groups encountered administrative and outreach challenges in the process.¹⁰⁵ Besides, descendants of stateless persons who attain the age of majority may also apply for citizenship by registration. They must provide sufficient evidence of their parents being stateless, prove that they were born in Kenya where they have continuously lived since birth and that they do not hold passport or identification document of any other country, have adequate knowledge of Kiswahili or a local dialect, intend to continue residing in Kenya, understand the rights and duties of a citizen, and have not been sentenced to imprisonment for three years or longer.¹⁰⁶ These conditions that one has to fulfil in order for one to acquire Kenyan nationality leaves parents and in turn their children at risk of being stateless.

What's more, any individual who is considered a citizen is entitled to any document of registration or identification including a birth certificate.¹⁰⁷ Although a birth certificate does not denote proof of citizenship, it is nevertheless an important document that can aid in establishing citizenship.¹⁰⁸

⁹⁹ Section 9 (4), Kenyan Citizenship and Immigration Act

¹⁰⁰ Section 9 (6), Kenyan Citizenship and Immigration Act

¹⁰¹ Section 9 (7), Kenyan Citizenship and Immigration Act

¹⁰² Caroline Nalule, GLOBALCIT-Global Citizenship Observatory, Report on Citizenship law in Kenya, 2022, https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1 (Accessed 13 June 2023)

¹⁰³ Section 15, Kenyan Citizenship and Immigration Act

¹⁰⁴ Section 15 (1) (a), (b), (c), (d) , Kenyan Citizenship and Immigration Act

¹⁰⁵ Caroline Nalule, GLOBALCIT-Global Citizenship Observatory, Report on Citizenship law in Kenya, 2022, https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1 (Accessed 13 June 2023)

¹⁰⁶ Section 17, Kenyan Citizenship and Immigration Act

¹⁰⁷ Section 22 (1) (g) (i), Kenyan Citizenship and Immigration Act

¹⁰⁸ Lugulu, Julie Ingrid. "Update on Kenya's implementation of the decision in the Nubian minors' case." *Kabarak Journal of Law and Ethics* 6.1 (2022): 205-216

3.2.3. The Children Act, 2022

In 2022, Kenya enacted a new Children Act of 2022, repealing its old Children Act¹⁰⁹ which had been in place since 2001. The Children Act of 2022, has marked a new dawn for the country where children's rights are concerned as the new act gives effect to the provisions of the CRC and Article 53 of the COK by making it more expansive and progressive in realizing the rights of children.

In its Concluding Observations to Kenya, the CRC Committee recommended that Kenya take action to ensure that it harmonizes its Children Act with the provisions set under its Constitution.¹¹⁰ Section 7 (1) of the Children Act sets out that every child has a right to a nationality. This section applies to every child in Kenya and hence can be applied to argue for the right to nationality for all children in Kenya's jurisdiction. The act is still in its early phase so it is yet to be seen how this will be applied in the coming days but since it is meant to give effect to Article 53 of the Constitution,¹¹¹ and to give effect to the State's obligations in accordance to the general rules of international law, treaties and conventions ratified by Kenya,¹¹² it should be possible to use it as a basis to claim the right to nationality even for children at risk of being stateless. Through this section of the Children Act, Kenya recognizes the importance of a child having a nationality.

3.3. Effects of being denied the right to acquire a nationality for children born of Kenyan-Refugee Unions.

Having analysed the laws that deal with nationality in Kenya, it is prudent to look into the situation of children who are not able to enjoy their right to Kenyan nationality in light of their other children's rights which they are not able to enjoy and the risk of statelessness that comes from being denied this right to nationality.

But first, we must acknowledge that the road to acquiring nationality in Kenya per the laws above seems seamless. Yet, in reality, this right is a farfetched one. The challenges that affect the right to nationality in Kenya can be broadly categorized into two, namely, legal and administrative challenges.¹¹³ Administratively, the procedures of registration are out of reach for many people.¹¹⁴ This is also credited to the gaps that exist in registration, identification and citizenship procedures.¹¹⁵ The major ones being the discriminatory vetting process involved and the fact there is lack of awareness on issues to do with acquiring Kenyan citizenship. This has been pointed out by various National commissions in the country.¹¹⁶ For instance, these administrative challenges demonstrate that there are no adequate

¹⁰⁹ The Children Act, 2001, Laws of Kenya.

¹¹⁰ Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Kenya, CRC/C/KEN/CO/3-5 (2016), Para 7 and 8.

¹¹¹ Article 3, COK

¹¹² Article 3, COK

¹¹³ Sutton, Nikeeta Louise Joan. "Statelessness and the Rights of Children in Kenya and South Africa: A Human Rights Perspective." (2018).

¹¹⁴ Interview conducted on an officer from the Department of Refugee Services in Kenya, 23 May 2023.

¹¹⁵ CESF Consortium, Together We Can: The Roadmap to Address the COVID-19 Impact on Stateless People, https://files.institutesi.org/together_we_can_report_2021.pdf (Accessed 14 June 2023

¹¹⁶ Supra note 105

regulations that guide the vetting process that some ethnic groups in Kenya are subjected to.¹¹⁷ Where refugees are concerned, there might be local integration which is a durable solution and a means to citizenship for them, but in practice administrative hurdles and host communities stand in the way. An officer from the Department of Refugee Services notes that:

“Also, the perception that the host communities and government have on the refugee community is an obstacle to local integration and citizenship.”¹¹⁸

On the legal side, there are gaps in the law and these do not provide sufficient protection and safeguards in law to persons who are at risk of statelessness.¹¹⁹

3.3.1. Right to Non-discrimination

Alongside equality, non-discrimination is a fundamental basic, and general principle that guides the protection of human rights.¹²⁰ It is also one of the four general principles that underpin the CRC¹²¹ and has been prohibited when it comes to the acquisition of nationality.¹²² As a state party to the CRC, Kenya is under an obligation to ensure that this provision is respected, fulfilled and protected. The African Committee in its General Comment No. 6 on the ACRWC reiterates the sentiments in the CRC where it lists non-discrimination as one of the six key pillars that guide how Article 6 deals with nationality.¹²³

Discrimination should be understood to imply any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, or birth which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹²⁴

Under Article 7 of the UDHR, all persons are equal before the law and are entitled without any distinction to equal protection of the law.¹²⁵ The Bill of Rights enshrined in the COK under Article 27 (4) and (5) spells out that neither the state nor any person shall discriminate be it directly or indirectly based on any ground which includes race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹²⁶ Similar sentiments are

¹¹⁷ KNCHR-Kenya National Commission of Human Rights, *Out of the Shadows: Towards ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 2010.

¹¹⁸ Interview conducted on an officer from the Department of Refugee Services in Kenya, 23 May 2023.

¹¹⁹ Sutton, Nikeeta Louise Joan. "Statelessness and the Rights of Children in Kenya and South Africa: A Human Rights Perspective." (2018).

¹²⁰ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, <https://www.refworld.org/docid/453883fa8.html> (Accessed 20 May 2023)

¹²¹Article 2, CRC

¹²² Forlati, Serena. "Nationality as a human right." *The Changing Role of Nationality in International Law*. Routledge, 2013. 34-52.

¹²³ Khabure, Sabina Beata. "A situation of statelessness in Kenya Are the laws in place and government mitigating actions, sufficient in protecting the children of Nubian descent." (2021).

¹²⁴ Para 7 of the UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, <https://www.refworld.org/docid/453883fa8.html> (Accessed 20 May 2023)

¹²⁵ Article 7, UDHR

¹²⁶ Article 27(4) and (5), COK

echoed in the Children's Act which adds local connection and residence as grounds for a child not to be discriminated against.¹²⁷

By having these provisions, it is envisioned that children will be cushioned from any form of discrimination even in the realm of them acquiring nationality. Yet, these are not a guarantee against discrimination and discrimination based on a ground like nationality is rife in countries across the world.¹²⁸ The Nubian children, for instance, faced institutionalized discrimination because of the rigorous and discriminatory vetting measures that the Kenyan government had put in place for granting them citizenship yet other Kenyans did not have to undergo such vetting measures.¹²⁹ An indication that despite the legal frameworks prohibiting discrimination, it is still there and is putting children at risk of being stateless and not being able to enjoy their other children rights. For children of Kenyan-Refugee unions, they are categorized as refugees and given birth documentation that have "Refugee" markings, yet their step siblings whom both parents are Kenyans are given birth documentation with no such bearings and are not allowed to exercise their rights such as the freedom of movement. Such is the case for instance, of AMM and his siblings, who were born between a Kenyan and a refugee yet their step siblings whose mother is Kenyan were not treated in the same way.¹³⁰

All the above provisions if read together mean that all children are equal before the law and should not be subject to any type of discrimination. Children born from Kenyan-refugee unions are also included in this. They should not be treated differently on the basis and circumstances of their birth and the situation of one parent who is a refugee.¹³¹ They should be accorded their human dignity and allowed to enjoy their rights as Kenyan nationals and not as refugees. It can hence be inferred that the categorization of children born from Kenyan-refugee unions as refugees and not Kenyan nationals is discriminatory based on the nature of their births and local connections. Moreover, due to being denied the right to Kenyan nationality, has led to these children being subjects of discrimination in realizing their right to education, health, freedom of movement and right to enjoy family life as discussed below.

3.3.2. Right to Education

Education is a stepping stone to other fundamental human rights.¹³² The right to education and its importance is emphasized in several international treaties and universal documents, for example, the Sustainable Development Goals (SDG),¹³³ as well as the national laws of Kenya starting with the

¹²⁷ Section 9, Children's Act

¹²⁸ UNICEF, Rights Denied, The Impact of Discrimination on Children, 2022, <https://www.unicef.org/media/130801/file/rights-denied-discrimination-children-EN.pdf>, (Accessed 23 June 2023)

¹²⁹ Khabure, Sabina Beata. "A situation of statelessness in Kenya Are the laws in place and government mitigating actions, sufficient in protecting the children of Nubian descent." (2021).

¹³⁰ Kamau Muthoni, Court to Rule on Status of Children born of Kenyans-Refugees Unions, Standard, 16 November 2022, at 12.

¹³¹ Haki na Sheria Initiative, Biometric Purgatory: How the Double Registration of Vulnerable citizens in the UNHCR Database left them at risk of Statelessness, 2021, <https://citizenshiprightsafrika.org/biometric-purgatory-how-the-double-registration-of-vulnerable-kenyan-citizens-in-the-unhcr-database-left-them-at-risk-of-statelessness/> (Accessed 23 June 2023)

¹³² UNESCO, The Right to Education, <https://www.unesco.org/en/right-education> (Accessed 20 May 2023)

¹³³ Vaghri, Ziba, Zoë Tessier, and Christian Whalen. "Refugee and asylum-seeking children: Interrupted child development and unfulfilled child rights." *Children* 6.11 (2019): 120.

constitution. The fundamental principles that underpin the right to education are the principles of non-discrimination, solidarity, equality of opportunity and treatment and universal access to education.¹³⁴ The CRC requires States Parties to ensure that primary education is compulsory and available free to all on an equal opportunity basis.¹³⁵ In tandem with these provisions of the CRC, the COK under Article 53 (1) (b), the Children Act under Section 13 (1), and the Basic Education Act, 2013 under Section 28 (1) all make provision for basic education for every child in Kenya.¹³⁶ Whereas the Kenyan government has adopted the shared space model to have both refugee children and children who are Kenyan nationals attend the same schools in the camps, children of Kenyan nationality opt to enrol in nearby government schools and not camp schools.¹³⁷ Children of Kenyan-refugee unions do not have that luxury for the reason that they are considered refugees and not Kenyan nationals hence their movements are restricted to the camps. A similar situation faced the Nubian children who because of being denied their right to Kenyan nationality, had limited access to education.¹³⁸

The quality of education in camp based schools is lower as the schools they attend are constrained when it comes to both physical and human resources.¹³⁹ All these are prime examples of what being denied their right to Kenyan nationality is costing them. However, would these children be recognized as Kenyan nationals, just like the other children who opt to veer out of the camps and attend nearby government schools which are better, then they would also be able to move out of the camps and access education at a similar level to other children.

3.3.3. Right to Healthcare

The right to healthcare is a universal human right.¹⁴⁰ It is part of a child's human rights and enables them to lead a life of dignity. Essential elements to the realization of the right to health are availability, accessibility, acceptability, quality, participation, and accountability.¹⁴¹

The COK under Article 43 (1) (a) stipulates that every person has a right to the highest attainable standard of health, which includes the right.¹⁴² It goes on further to specifically provide the right to basic healthcare for children under Article 53 (1) (c).¹⁴³ The Children Act in Article 16(1) also prescribes the highest attainable standard of healthcare for children under Article 43 of Kenya's Constitution.¹⁴⁴ All this

¹³⁴ Khabure, Sabina Beata. "A situation of statelessness in Kenya Are the laws in place and government mitigating actions, sufficient in protecting the children of Nubian descent." (2021).

¹³⁵ Article 28 (1) (a), CRC

¹³⁶ Article 53 (1) (b) COK; Section 13 (1) Children Act; and Section 28 (1) Basic Education Act.

¹³⁷ Dryden-Peterson, Sarah, et al. "Inclusion of refugees in national education systems." UNESDOC Digital Library (2018).

¹³⁸ Nubian Children's Case

¹³⁹ Dryden-Peterson, Sarah, et al. "Inclusion of refugees in national education systems." UNESDOC Digital Library (2018).

¹⁴⁰ Kingston, Lindsey N., Elizabeth F. Cohen, and Christopher P. Morley. "Debate: Limitations on universality: the" right to health" and the necessity of legal nationality." BMC International Health and Human Rights 10.1 (2010): 1-12.

¹⁴¹ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 31, The Right to Health, June 2008, No. 31, available at: <https://www.refworld.org/docid/48625a742.html> (Accessed 22 May 2023)

¹⁴² Article 43 (1) (b), COK

¹⁴³ Article 53 (1) (c), COK

¹⁴⁴ Article 16 (1), COK

is set in law, but the reality of realizing this right is different. While having a nationality does not necessarily guarantee that one will enjoy access to healthcare, issues surrounding one's nationality or lack of nationality can affect one's right to health, including, access to the highest attainable standard of health.¹⁴⁵ Generally, the health needs of vulnerable groups are elusive.¹⁴⁶

Refugees in Kenya experience challenges when it comes to accessing healthcare whether they are in the rural camp complexes or urban areas.¹⁴⁷ This will include a lack of access to healthcare services and having minimal access to this healthcare. Children who are considered refugees or asylum seekers their physical health is normally negatively affected by, living conditions, lack of clean, water sources, and limited access to medical services.¹⁴⁸ This is most severe for those who live within the confines of refugee camps. Thus, for children of Kenyan-refugee unions, they are bound to be faced with similar challenges yet were they to be considered as Kenyan nationals, such would not be the case. This does not mean that Kenyan nationals do not face some challenges as well when it comes to accessing healthcare, but not to a greater extent than those who are considered refugees. Likewise, the Nubian children, who like children of Kenyan-refugee unions were being denied Kenyan citizenship, found themselves having minimal access to healthcare services in comparison with other communities because of this unconfirmed status in Kenya.¹⁴⁹ Children of Kenyan-refugee unions currently have minimal access to healthcare.¹⁵⁰

3.3.4. Freedom of Movement

Under Article 8 of the COK, everyone is entitled to the freedom of movement, and further, Kenyan nationals are allowed to enter, remain in or reside anywhere in Kenya.¹⁵¹ This includes children. However, this right does not extend to refugees as they are not allowed to move within Kenya as freely as Kenyan nationals.

The new Refugees Act, 2022, in Kenya which came into being in 2022 and is still being implemented provides that refugees should reside in designated areas.¹⁵² The act refrains from referring to the areas where refugees reside as camps, but it can be implied that the term refers to the current refugee camps where they reside in. To be able to move out of these camps, then a refugee is required to obtain a movement pass from the Commissioner for Refugee Affairs.¹⁵³ This does not shift from the provisions

¹⁴⁵ Kingston, Lindsey N., Elizabeth F. Cohen, and Christopher P. Morley. "Debate: Limitations on universality: the right to health" and the necessity of legal nationality." *BMC International Health and Human Rights* 10.1 (2010): 1-12.

¹⁴⁶ Bhabha, Jacqueline. "Arendt's children: do today's migrant children have a right to have rights?." *Hum. RTs. Q.* 31 (2009): 410.

¹⁴⁷ Jemutai, Julie, et al. "A situation analysis of access to refugee health services in Kenya: Gaps and recommendations-A literature review." Centre for Health Economics, University of York Working Papers 178cherp (2021).

¹⁴⁸ Vaghri, Ziba, Zoë Tessier, and Christian Whalen. "Refugee and asylum-seeking children: Interrupted child development and unfulfilled child rights." *Children* 6.11 (2019): 120.

¹⁴⁹ Nubian Children's Case

¹⁵⁰ Kenya Editors' Guild(@KenyaEditors). The Plight of Children of Kenyan Refugee-Unions, Twitterspace, 19 January 2023, <https://twitter.com/i/spaces/11DxLnNDjXLGm> (Accessed 27 June 2023)

¹⁵¹ Article 8, COK

¹⁵² Section 31, Refugee Act

¹⁵³ Section 8 (1) (o) , Refugee Act

of the former Refugee Act, of 2006. The movement passes are known to be issued to refugees travelling for specific reasons such as higher education, medical treatment, resettlement, trade or business requirements, or the escape from major security threats in the camp.¹⁵⁴ The challenge is these applications for the movement passes normally take time to be processed and can be turned down. The overall number of movement passes issued to refugees within Kenyan camps is low and further, despite these movement passes being free, they are often withheld because of a bias against different nationalities and some were only given after bribes.¹⁵⁵

It is thus evident that for children born from Kenyan-refugee unions, their categorization as refugees instead of nationals will prevent them from enjoying their right to freely move within Kenya because they cannot leave the camps without first obtaining the movement pass. It is imperative to note that were they rightly accorded their nationality; they would be free to move outside the confines of the camp without needing a movement pass. The denial to freely move within Kenya may interfere with their right to enjoy family life.

3.3.5. Right to enjoy family life

A family plays a vital role in the growth and well-being of a child.¹⁵⁶ The deprivation of nationality may result in a violation of the right to respect for private and family life.¹⁵⁷ While family ties and life are significant facets in every society worldwide, for refugees that family life is often faced with threats to its survival and existence.¹⁵⁸

Article 45 of the COK considers the family as the natural and fundamental unit of society and the necessary basis of social order deserving recognition and state protection.¹⁵⁹ Yet, on most occasions, it is the state infringing upon this right. Children can find themselves in situations where they are unable to establish family relations because they are not able to, leave the camps. By being confined to the camps for the reason that they are categorized as refugees, children of Kenyan-refugee unions are separated from their other Kenyan family members who do not reside in the camp but actually reside in different parts of the country and therefore they are unable to establish family bonds and cannot fully enjoy the right to family.

3.4. Conclusion

To this end, pursuant to Article 14 (1) of the COK, children of Kenyan-refugee unions are Kenyans by birth and thus are entitled to all rights that are granted to Kenyan nationals under the law. Yet, they are discriminated both in law and practice by reason that they are categorized as refugees, they only enjoy rights in Kenya as refugees.

When a child's right to acquire a nationality is infringed, like in the case of children of Kenyan-refugee unions, then this consequentially leads to the violation of their socio-economic rights, which are: rights

¹⁵⁴ Lindley, Anna. "Between a protracted and a crisis situation: Policy responses to Somali refugees in Kenya." *Refugee Survey Quarterly* 30.4 (2011): 14-49.

¹⁵⁵ Utsch, Lorin. "Protracted Refugee Situations in Kenyan Refugee Camps." *Ballard Brief*. August 2020, <https://ballardbrief.byu.edu/issue-briefs/protracted-refugee-situations-in-kenyan-refugee-camps> (Accessed 20 May 2023).

¹⁵⁶ Preamble, CRC

¹⁵⁷ Ganczer, Mónika. "The right to nationality as a human right." *Hungarian YB Int'l L. & Eur. L.* (2014): 15.

¹⁵⁸ Edwards, Alice. "Human rights, refugees, and the right 'to enjoy' asylum." *International Journal of Refugee Law* 17.2 (2005): 293-330.

¹⁵⁹ Article 45 (1), COK

to education, health care, family life, and freedom of movement. In addition, because of their categorization, they are bound to be subjects of discrimination. Furthermore, such violation puts them at risk of being stateless. In the Kenyan context, this risk of statelessness is also exacerbated by the gaps that exist in the laws and in the registration, identification and citizenship procedures.

CHAPTER FOUR: ADVANCEMENT OF THE RIGHT TO NATIONALITY FOR CHILDREN BORN IN KENYAN- REFUGEE UNIONS THROUGH STRATEGIC LITIGATION

4.1. Introduction

Strategic litigation is used in many jurisdictions and entails more than bringing a case before a judge.¹⁶⁰ Through strategic litigation, it is possible to have discourse amongst all key actors on ways that policy can be formulated and how to redress injustices that have persisted for years. This method is also now being used to advance child rights. In the African region, child rights strategic litigation cases have emerged in jurisdictions whose constitutions are codified such as South Africa, Kenya, Uganda and Zimbabwe.¹⁶¹

This chapter will analyze how strategic litigation is used as a tool to advance children's rights, the barriers that hinder the potential of strategic litigation in enforcing children's rights, and how it has been used to enforce the right to nationality in Kenya. It will look at Kenya in light of its obligations under the CRC. Specifically, it will analyze the AMM case, currently before the High Court of Kenya, which relates to the question of nationality in Kenya and draws inspiration from the Nubian case.

The motivation is to project what the likely impact a ruling in favour of the petitioners in the AMM case would have when it comes to the question of nationality for children born from Kenyan-refugee unions.

4.2. Strategic Litigation as a Tool to Advance Children's Rights

The use of strategic litigation is also used in children's rights and has been given a child specific dimension and approach to it. It has been used internationally, regionally, and domestically to advance and advocate for children's rights. For instance, strategic litigation was successfully used to advocate for the rights of pregnant learners in Sierra Leone.¹⁶² It was further used to advocate for childhood statelessness in the Dominican Republic.¹⁶³ It is common ground that having a child rights mechanism is a leeway for addressing rights violations against children and ensuring that they attain access to justice.¹⁶⁴ This is in tandem with Article 48, of the COK. Thus, where strategic litigation is employed as a tool for enforcing children's rights, then a child rights approach must be taken in the cases.

Generally, the advancement of strategic litigation in child rights is credited to legal practitioners, organizations and National Human Rights and Institutions (NHRI) with a specific focus and bias on child rights.¹⁶⁵ In such cases, a determination has to be made as to who the parties to and in the suit are. The litigants range from a child to an adult, such as a parent, guardian, curator/guardian ad litem who expressly acts on behalf of the child or children with a broader aim than merely meeting the needs of

¹⁶⁰ CRIN-Child Rights International Network, Children Rights: A Guide to Strategic Litigation, <https://www.a4id.org/wp-content/uploads/2016/04/Children%E2%80%99s-Rights-A-Guide-to-Strategic-Litigation.pdf> (Accessed 7 June 2023)

¹⁶¹ Nolan, Aoife, and Ann Skelton. "'Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice." *Human Rights Law Review* 22, no. 4 (2022): ngac026.

¹⁶² *Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone*, Suit ECW/CCJ/APP/22/18, ECOWAS Community Court of Justice (2019)

¹⁶³ *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrHR), 8 September 2005

¹⁶⁴ *Ibid*

¹⁶⁵ Nolan, Aoife, and Ann Skelton. "'Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice." *Human Rights Law Review* 22, no. 4 (2022): ngac026.

the individual child, or human rights or a civil a society acting on behalf of children in the child-specific public interest or the interests of children generally.¹⁶⁶ It is important to bear in mind that a case may start with only the interests of an individual but an amicus or a third party may steer the case to become a Strategic litigation case. Whereas this might be in good faith to ensure that all children whose rights are being violated are redressed, such change might affect the timeline of the case by prolonging it and changing the nature of the case into a more sensitive one.

In addition, there has to be a consideration as to the process that led up to the case, how the case has been shaped by child rights during the process, the remedies that are granted and the outcome of the case.¹⁶⁷ The other factors that one might want to consider when bringing a strategic litigation case on behalf of children are: whether the legal issue relates to a broader social problem, would a court decision have a widespread effect, the potential for media coverage and whether the media and public would understand the case, are there other means through which the goal can be accomplished, and whether the courts are independent.¹⁶⁸

4.3. Barriers to Strategic Litigation in Enforcing Rights of Children

By and large, for children, strategic litigation can be an exciting and rewarding journey. However, it can also be a long, involved and even painful process and it may also prove difficult for children to be taken seriously in court.¹⁶⁹ One key barrier for children when it comes to strategic litigation and strategic litigation, in general, is the issue of locus standi or legal standing. This refers to the right of appearance in a court of justice or before a legislative body as defined in the Black's Law Dictionary.¹⁷⁰

Most commonwealth countries require that the person who is initiating the claim must have a direct and substantial interest in the matter and that only direct victims can bring the claim.¹⁷¹ Such strict rules of standing were a hindrance to the institution of strategic litigation cases.¹⁷² In recent times, countries such as the US, India, South Africa and Kenya have expanded their rules of standing.¹⁷³ In India, for instance, the Indian Supreme Court redefined the strict application of the rules of standing by holding that a third party could petition in matters where they were not directly affected.¹⁷⁴

¹⁶⁶ *Ibid*

¹⁶⁷ Lambe, Shauneen, and Aoife Nolan. "Children's Rights Strategic Litigation Toolkit." Shauneen Lambe & Aoife Nolan. 'Children's Rights Strategic Litigation Toolkit'(Edinburgh: CYPCS, 2022).

¹⁶⁸ CRIN-Child Rights International Network, Children Rights: A Guide to Strategic Litigation, <https://www.a4id.org/wp-content/uploads/2016/04/Children%E2%80%99s-Rights-A-Guide-to-Strategic-Litigation.pdf> (Accessed 7 June 2023)

¹⁶⁹ Goldstone, James A., and Erika Dailey. "Strategic Litigation Impacts Insights from Global Experience." (2018).

¹⁷⁰ Black's Law Dictionary (6th edn, 2)1990

¹⁷¹ African Child Policy Forum (ACPF), 'Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa', (2020), available at: Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa.pdf | Powered by Box.

¹⁷² Open Society Foundations. "Limitations and Risks of Strategic Litigation." Advancing Public Health through Strategic Litigation: Lessons from Five Countries, Open Society Foundations, 2016, pp. 21–24. JSTOR, <http://www.jstor.org/stable/resrep29302.8>. Accessed 29 June 2023.

¹⁷³ Handbook on Public Interest Litigation in Kenya (PIL), 2014, <https://kptj.or.ke/a-guide-to-public-interest-litigation-in-kenya/> (Accessed 20 April 2023)

¹⁷⁴ *Ibid*

The question as to whether children can litigate in their own name is a challenge too. The presumption in law is that children do not have the capacity to litigate. In many jurisdictions and international courts or tribunals, children are not allowed to institute proceedings. These countries operate on the basis that children below a certain age cannot litigate, and where their age allows them to do so, their capacity will still be limited because they still have to be assisted by their parents.¹⁷⁵ Whereas the technics such as the use of curator ad litem, guardian ad litem or tutor have been devised to deal with the issue of legal standing,¹⁷⁶ such undermines the right of the child to participate.

Child participation which is a principle that underpins the CRC remains an overlooked principle. In strategic litigation cases that involve children, their voices are often not heard because they are not given the opportunity to participate in the proceedings. Child participation allows children to display best their abilities by expressing their ideas, and viewpoints and having their problems solved, suitable to their age and bio-psychological levels of development.¹⁷⁷ The lack of this participation also stems from the fact that children are not aware of their rights and that these types of cases are filed on their behalf. Another issue pertains to the limited applicability of the legal child rights framework in these cases.¹⁷⁸ Where legal practitioners refer to the child rights framework, they majorly focus on the best interest¹⁷⁹ and right to be heard¹⁸⁰ principles.

The lack of legal representation and reliance on pro-bono services hinders the effectiveness of Strategic litigation. Advocates shy away from taking up cases that pertain to children's rights as they deem them not lucrative enough. In cases where they are forced to take up these matters, they do not invest as much time as in their other cases unless they deem a case as high profile and one which will boost their careers. Lawyers can abandon cases halfway through as they prefer paying clients.¹⁸¹ Kenya for instance adopted rules which allow advocates to provide pro-bono services.¹⁸² Whereas this is a good initiative that makes it possible for access to justice to be realized even in strategic litigation cases, this is usually done voluntarily. Furthermore, it is not specified how and to what extent such pro-bono services are to be offered. In order for strategic litigation cases to realize their aims, when it comes to child rights, then there is a need to regulate pro-bono services¹⁸³ to ensure that the legal representation children get out of it is of good quality and is effective.

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷Sanganyi, Noah MO. "Enhancing Children's Participation and the Enforcement of their Rights: The Kenyan Experience." In *The United Nations Convention on the Rights of the Child*, pp. 767-776. Brill Nijhoff, 2017.

¹⁷⁸ African Child Policy Forum (ACPF), 'Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa', (2020), available at: [Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa.pdf](#) | Powered by Box.

¹⁷⁹ Article 3 (1), CRC

¹⁸⁰ Article 12, CRC

¹⁸¹ Goldstone, James A., and Erika Dailey. "Strategic Litigation Impacts Insights from Global Experience." (2018).

¹⁸² Latham & Watkins LLP, Pro Bono Institute, Pro bono Institute Practices & Opportunities in Kenya, <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya-2.pdf> (Accessed 20 April 2023)

¹⁸³ Ibid

Justice delayed, is justice denied. Undue delay in strategic litigation cases alongside corruption has been cited as a barrier to the effective realization of justice in strategic litigation cases.¹⁸⁴ According to a report by the Open Society Justice Initiative, strategic litigation cases in Kenya are riddled by corrupt courts this in essence does not make strategic litigation a good driver of action.¹⁸⁵ If the judiciary is also not willing to attend to such cases, then they can stall.

Furthermore, the cost of litigation is a barrier to accessing justice for children in these cases. There is the danger of the courts imposing costs against a party who files a strategic litigation case and loses as costs follow events. In its training manual on strategic litigation, the African Child Policy Forum advocates for free access to cases involving children as well as a legal environment where litigators are protected from cost orders in children's rights cases.¹⁸⁶

It should also not be overlooked that there are instances where governments can request to settle out of court. While this might yield positive results, there are chances that such settlements might not result in change for the individual or the public domain at large. For instance, in the Netherlands, in the case of Denny Zhao, the state initially offered a remedy of compensation for the violation of his right to acquire a nationality that he could not enjoy in the amount of €3000, and to compensate him for costs relating to the proceedings brought before the HRC. He rejected this offer and opted to proceed case because he wanted a clearer acknowledgement of the rights violations, a guarantee that he would obtain Dutch citizenship and a guarantee of non-repetition.¹⁸⁷

4.4. Strategic Litigation in Enforcing the Right to Nationality in Kenya

First, in Kenya, the term PIL is used in reference to strategic litigation cases. With the adoption of the Constitution in 2010, Kenya transitioned into a democratic society which recognizes the value of human rights and dignity, equality, freedom, the rule of law and social justice.¹⁸⁸ Its adoption redefined the concept of PIL in Kenya whose potential was being affected by the heavy locus standi requirements needed to initiate a case, political intimidation, heavy costs of litigation and an ineffective and executive-minded judiciary.¹⁸⁹

Currently, pursuant to the provisions of the Kenyan Constitution, a strategic litigation case can be instituted by any person in a court of law if they are acting in the public interest.¹⁹⁰ The Kenyan Constitution allows any persons with or without direct interests to approach the courts.¹⁹¹ This means

¹⁸⁴ Goldstone, James A., and Erika Dailey. "Strategic Litigation Impacts Insights from Global Experience." (2018).

¹⁸⁵ Ibid

¹⁸⁶ African Child Policy Forum (ACPF), 'Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa', (2020), available at: Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa.pdf | Powered by Box.

¹⁸⁷ Ann Skelton, Access to justice and remedy for Denny Zhao, one of the Netherlands' 13 000 'unknown' children, Case Note 2021/8, <https://www.childrensrightsobservatory.org/case-notes/casenote2021-8> (Accessed 8 June 2023).

¹⁸⁸ Public Interest Litigation Strategy, <http://downloads.lsk.or.ke/downloads/downloads/Public%20Interest%20Litigation%20Strategy.pdf>

¹⁸⁹ Ingonga, Renson M. "Judicial Enforcement of Public Interest Litigation (PIL) Under the 2010 Constitution of Kenya." PhD diss., University of Nairobi, 2018.

¹⁹⁰ Article 22 (2) (c) of the Kenyan Constitution.

¹⁹¹ Handbook on Public Interest Litigation in Kenya (PIL), 2014, <https://kptj.or.ke/a-guide-to-public-interest-litigation-in-kenya/>

that an applicant in a case does not have to prove that they have some interest or personal gain in the case, but rather all they need to show is that they are bringing the case because it will have an impact on the general public. Once it is established that a case is in the public interest, then withdrawing such as case is not easy. The threshold to withdraw such as case is higher.¹⁹² Furthermore, the Kenyan Constitution sets out that no fee should be charged for commencing such cases, and goes on to allow organizations or individuals with the court leave to appear as the friend of the court, and also sets out that there are minimal formalities for proceedings.¹⁹³ These requirements were also set in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Direction Rules, 2013 (the Mutunga Rules) which were formulated by the Chief Justice and which apply to strategic litigation cases. They however do not mention the no fee charges requirement.¹⁹⁴ When it comes to the cost of suits, courts maintain the discretion on how to award them.¹⁹⁵ One objective of the rules was to ensure that all persons including the poor, illiterate, marginalized and vulnerable groups could access justice. Vulnerable groups as described in the Kenyan Constitution includes children. The Mutunga Rules extend to the Bill of Rights in the Constitution and are thus applicable to the realization of the rights set in Article 53 which also includes the right of a child to nationality.

Thus, in the Kenyan context, when it comes to the rights of children, a plain reading of Article 22 of the Kenyan Constitution implies that they have the capacity to litigate. This would consequently mean that they could bring a PIL claim and litigate before the courts. However, a look at how cases are initiated in Kenya shows that they are normally instituted on their behalf. On the question of nationality, the Kenyan courts shied off from determining the Nubian Children's case, which would have perhaps been a landmark strategic litigation case by a domestic court and created jurisprudence with a significant bearing when it comes to the right to a nationality. This would have set a good ground of argument and persuasion for the current ongoing case on the issue of nationality as it is before the High Court, a court of concurrent jurisdiction.

The Nubian Children's case was first filed before the High Court of Kenya in 2003 but was frustrated by administrative obstacles, and went before five different judges yet it still failed to proceed and all correspondence to the Chief Justice of Kenya entreating him to intervene for directions on the case went unanswered.¹⁹⁶ The domestic courts in Kenya now have the opportunity to assess a case that correlates to the Nubian case and make a determination on the question of nationality.

To show how strategic litigation has been used to advocate for the right to nationality of children in Kenya, reference must be made to the Nubian children's case which was the first case that emanated from the ACERWC and it remains to be jurisprudence in this area. This section will discuss the Nubian children's case vi-a-vis the AMM case.

¹⁹² Handbook on Public Interest Litigation in Kenya (PIL), 2014, <https://kptj.or.ke/a-guide-to-public-interest-litigation-in-kenya/>

¹⁹³ Article 22 (3) of the Constitution of Kenya, 2010.

¹⁹⁴ Ingonga, Renson M. "Judicial Enforcement of Public Interest Litigation (Pil) Under the 2010 Constitution of Kenya." PhD diss., University of Nairobi, 2018.

¹⁹⁵ Ingonga, Renson M. "Judicial Enforcement of Public Interest Litigation (Pil) Under the 2010 Constitution of Kenya." PhD diss., University of Nairobi, 2018.

¹⁹⁶ Songa, Andrew. "Addressing statelessness in Kenya through a confluence of litigation, transitional justice, and community activism: reflecting on the cases of the Nubian, Makonde and Shona communities." *African Human Rights Yearbook* 5 (2021): 253-276.

4.5. The Nubian Children's Case

4.5.1. Facts of the Case

The Nubian community originated from the Nuba Mountains of Central Sudan and came to Kenya as part of the King Rifle Army-the colonial forces in East Africa- during Britain's colonial era in Kenya.¹⁹⁷ Their request to the British to be repatriated back to Sudan was denied¹⁹⁸ and they were thus forced to remain in Kenya when it attained its independence in 1963. They have since lived in Kenya for over 100 years. The Kenyan government refused to recognize them as citizens on the basis that their right to apply for citizenship had ceased when Britain's colonial era in Kenya ended.¹⁹⁹

This forced the Nubian community to seek redress from the High Court in Kenya. The case before the Kenyan High Court was a strategic litigation case but was filed in 2003 when the courts applied strict rules of standing in such cases that involved public interest.²⁰⁰ The Nubians were actually required to obtain 100,000 affidavits just to ascertain on whose behalf the case was filed.²⁰¹ A clear indication that legal standing can be a hindrance to strategic litigation. This coupled with the fact that the case was placed before five different judges who cited lack of merit in the case and, unanswered correspondences by the Chief Justice on how the case should be handled deterred the progress of the case.²⁰² As a result, in 2009, a communication was filed before the ACERWC by the Institute for Human Rights and Development in Africa based and the Open Society Initiative on behalf of the Nubian children. The ACERWC admitted the case despite local remedies not being exhausted. The ACERWC opined that an unduly prolonged domestic remedy cannot be considered to fall within the ambit of available, effective, and sufficient local remedy.²⁰³

In their communication to the ACERWC, the applicants alleged that lack of valid identity documents meant that the Nubians could not register their children's birth. They also alleged denying the Nubians ID's affected their prospects of proving their Kenyan nationality once they attain the age of majority. Further they alleged that a vetting process that applies to children of Nubian descent is extremely arduous, unreasonable, and de facto discriminatory. Their children having no nationality meant that they could not enjoy their children's rights such as the right to an education, the right to healthcare and the right not to be discriminated against.

¹⁹⁷ de Smedt, Johan Victor Adriaan. *The Nubis of Kibera: a social history of the Nubians and Kibera slums*. Diss. Leiden University, 2011.

¹⁹⁸ Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011.

¹⁹⁹ Fokala, Elvis. "Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians." (2021).

²⁰⁰ Ingonga, Renson M. "Judicial Enforcement of Public Interest Litigation (PIL) Under the 2010 Constitution of Kenya." PhD diss., University of Nairobi, 2018

²⁰¹ Songa, Andrew. "Addressing statelessness in Kenya through a confluence of litigation, transitional justice, and community activism: reflecting on the cases of the Nubian, Makonde and Shona communities." *African Human Rights Yearbook* 5 (2021): 253-276.

²⁰² Ibid

²⁰³ Supra note 196 at para 32

4.5.2. Alleged Violation of Rights

The Applicants alleged the Kenyan government was in violation of the Nubian children's right to birth registration and right to acquire a nationality as set under Articles 6 (2), (3), and (4) of the ACRWC alongside their right not to be discriminated as set under Article 3, ACRWC. That these consequent violations resulted in them not enjoying the right to equal access to education under Article 11(3), ACRWC, and the right to equal access to health under Article 14, ACRWC.

4.5.3. Findings

The ACERWC concluded that by denying these children nationality and failing to prevent them from being stateless, the Kenyan government was in violation of Article 6 (2), (3) (4) of the ACRWC. The ACERWC of the child also found that the vetting process the Nubians went through to access Kenyan citizenship was discriminatory and violated Article 3, ACRWC. Consequently, this affected their right to education under Article 11(3) because they had less access to educational facilities which prevented them from accessing free and compulsory primary education. It also violated their to access healthcare under Article 14 (2) (b), (c), ACRWC, because the services they got were less as compared to children from other communities.

The ACERWC then went on to make recommendations to Kenya, a key recommendation being to take all necessary administrative, legislative, and other measures to ensure that Nubian children, who would otherwise be stateless acquire Kenyan nationality.²⁰⁴ The other recommendations were for Kenya to take steps to implement its birth registration system in a non-discriminatory manner to ensure that the Nubian children are registered immediately at birth²⁰⁵, to adopt plans to ensure the fulfilment of the highest attainable standard of health and the highest attainable standard of education²⁰⁶ and for them and to report back to the ACERWC on the steps it had taken to implement its recommendations.²⁰⁷

4.5.4. Impact of the Case in the Realization of the Right to Nationality in Kenya for the Nubian Children

Upon the promulgation of the Kenyan Constitution in 2010, it was expected that the Nubian community would become the 43rd tribe in Kenya. This is a presumption because there has never been any evidence of their official listing as a community in Kenya other than a letter predating this constitution which entailed a promise from the then Minister of Planning to the Nubian elders that they would be listed as a tribe.²⁰⁸ Yet for other communities such as the Makonde who were also stateless in Kenya, there have been Gazette Notices on their recognition. Even in terms of classification of tribes in Kenya, the Nubian community are still categorized as "other".²⁰⁹

Consequently, as a result of the case filed before the ACERWC, the Kenyan government took steps to improve birth registration. It put up a window period for the Nubians to register for citizenships and this

²⁰⁴ Para 69 (1) of the Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011.

²⁰⁵ Ibid para 69 (3)

²⁰⁶ Ibid para 69 (4)

²⁰⁷ Ibid para 69 (5)

²⁰⁸ Para 33 of the Report on the Public Petition No. 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community, 2021.

²⁰⁹ Ibid para 32

was set to last up until 2019 August.²¹⁰ Poor and ineffective birth registration is one key factor that has been linked to causing childhood statelessness.²¹¹ In Kenya, while the birth Certificate is not an entitlement to citizenship, it makes acquiring citizenship easier. The importance of registering the births of Nubian children is that the birth certificate makes it easier for their nationality to be recognized once they attain the age of majority.²¹²

Despite these efforts, the realization of the right to nationality for the Nubian children is still at risk as they are still fighting for official recognition over eleven years after the recommendations of the ACERWC. This is evidenced by the concerns raised by the CRC committee that children of Nubian descent aged between 8-18 are yet to obtain Kenyan nationality²¹³ and the Petition filed before the Parliament of Kenya in 2021 where one of the key issues was the fact that despite being bonafide citizens of Kenya, the Nubians continue to face discrimination regarding the legitimacy of their citizenry²¹⁴. The parents of Nubian children still face a rigorous vetting process in their efforts to support their claim to Kenyan Nationality and to acquire Kenyan IDs. Consequently, they are still unable to register their children at birth hence the Nubian children are still missing out on education, healthcare, and other social services.²¹⁵ Moreover, when it comes to a right such as education, the few Nubian children who are able to access this right to education are unable to enjoy it on an equal basis as other Kenyan children. This is evident in national examinations like the Kenya Certificate of Primary Education (KCPE) which requires one to possess a Birth Certificate before they can register for it.²¹⁶ The Nubian children who lack access to this vital document are blocked from registering for the exam and their prospects of higher education diminished.

The parliament of Kenya's Departmental Committee on Administration and National Security in assessing the petition made recommendations before the Parliament of Kenya. It was recommended that the Cabinet Secretary for Interior and Coordination of National Government initiate the process of recognizing the Nubian.²¹⁷ In addition, the vetting process of the Nubian is transparent and non-discriminatory.²¹⁸ These steps are yet to be taken. It is important to also note that the ACERWC has a

²¹⁰ Para 57 of the Report on the 29th Session of the African Committee of Experts on the Rights and Welfare of the Child, 2017.

²¹¹ Peter Rodrigues and Jill Stein, The prevention of child statelessness at birth: a multilevel perspective, The United Nations Convention of the Right of the Child (eds. Liefgaard and Sloth-Nielsen), Leiden/ Boston, Brill Nijhof: 2017, 390-413.

²¹² Caroline Nalule, GLOBALCIT-Global Citizenship Observatory, Report on Citizenship law in Kenya, 2022, https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1

(Accessed 13 June 2023)

²¹³ Para 29 (d) of the Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Kenya, CRC/C/KEN/CO/3-5 (2016).

²¹⁴ Report on the Public Petition No. 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community, 2021.

²¹⁵ Para 16 of the Report on the Public Petition No. 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community, 2021.

²¹⁶ Muimi, Antoinette Moseka. "Generational statelessness and rights A case of children from the Nubian community in Kenya." (2021).

²¹⁷ Para 36 (i) of the Report on the Public Petition No. 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community, 2021.

²¹⁸ Supra note 223 at 36 (ii)

follow-up procedure which allows them to conduct follow-up missions and requires that States report back to it on the cause of action it is taking to implement its recommendations, failure to which it can request the AU to intervene.²¹⁹ There is no evidence that this case has been referred to the AU despite the decision still not being fully implemented by Kenya. However, at one point, the ACERWC in Concluding Recommendations to Kenya noted with concern and regret that Kenya was yet to fully implement its decision and that there were still huge implementation gaps in the implementation of its decision as the situation of the Nubian children remained the same.²²⁰

It is therefore evident from this case, that despite a successful outcome in a strategic litigation case on nationality, years might go without the case fully being implemented or its impact fully being felt.

4.6. Analysis of the Ongoing AMM Case

Having analyzed the criteria that qualify a case to be termed as a strategic litigation case, the ongoing AMM case in Kenya fits the bill of a strategic litigation case. The AMM case is similar to the Nubian case in that both deal with the pertinent issue of nationality and the effects its denial can have on children. In both cases, the lack of recognition as Kenyan citizens affected their other children's rights. The difference comes in, in that the Nubian case was about a group who has actually stateless, while the AMM case involves children who are wrongly categorized as refugees and are at risk of statelessness. The key qualifiers are the parties to the case and the aims of the case which are not just about an individual child but all children as well as the public interest.

4.6.1. Facts of the Case

The case has been lodged by Haki na Sheria Initiative, a non-governmental organization registered and based in Kenya dedicated to ending the discrimination and promoting the rights of marginalized communities in Northern Kenya. They have petitioned the High Court in Garissa County in Kenya on behalf of AMM, a minor who was born to a Kenyan father and a refugee mother, and other persons who are in similar circumstances such as AMM and the public interest.²²¹

In the petition, they aver that AMM was born to a Kenyan father and a Kenyan mother in the refugee camp where he has since been living with his mother. AMM was issued with a Birth Notification bearing a Refugee Agency stamp and consequently his particulars were entered in the Refugee Database. His Birth Certificate was marked "Refugee". A similar fate has befallen his 4 siblings who were also born to his refugee mother and Kenyan father. Besides these four siblings, AMM has other half-siblings born to his Kenyan father and a different mother who is Kenyan. His half-siblings by virtue of having both parents as Kenyans were issued with unmarked Birth Notifications and Birth Certificates. The attempts by AMM and his siblings to access similar birth notifications and birth certificates that do not have the "Refugee" bearing is hampered by the fact that they are not allowed travel outside the refugee camp. As a result, AMM, his siblings and other children in similar circumstances cannot move out of the camp and face challenges in accessing medical treatment, and school and they are also unable to visit their Kenyan family who live outside the camp. His half-siblings from his Kenyan father and their Kenyan mother do not face similar hurdles. By virtue of the law, AMM, his siblings and other children in similar

²¹⁹ Section XXII, the ACERWC, Guidelines for Consideration of Communications and Monitoring Implementation of Decisions.

²²⁰ Para 12 of the Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Kenya 1st Periodic Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

²²¹ Susan Muhindi, Where do they Belong? Citizenship puzzle for Refugee Children. Star, 16 November 2022, <https://www.the-star.co.ke/news/2022-11-16-where-do-they-belong-citizenship-puzzle-for-refugee-children/> (Accessed 13 June 2023).

circumstances are Kenyans, but due to legal and administrative challenges as explained in the previous chapter stand in the way of them getting effective nationality.

Thus it is Haki na Sheria's contention that marking AMM and children in similar circumstances as refugees denies them the opportunity to enjoy their rights to movements, family life and access to socio-economic rights such as healthcare, education and housing. In addition, being recognized as refugees in the database strips them of their Kenyan citizenship at birth and exposes them to statelessness.

4.6.2. Alleged violation of rights

By virtue of the COK, cases in the public interest which allege a violation of any human right are lodged at the High Court.²²² It is on this basis that the petitioners lodged their claim where they allege that the right to identity and citizenship for AMM and other children born from Kenyan-refugee unions is being violated. They base this on Article 4 (2) of Kenya's Constitution. In laying a legal basis for these allegations, they also cite Article 14 of the UDHR, Article 7 of the CRC and Article 6 of the ACRWC. This then leads to the violation of the rights to freedom of movement,²²³ socio-economic rights such as housing, education, healthcare, food²²⁴ and lastly, the rights to family life²²⁵ and best interest.²²⁶ They also allege that the right not to be subjected to any form of discrimination and degrading treatment is being violated. The reliance for this is in the COK²²⁷ and they place the legal foundation of this to international human rights instruments.²²⁸

Hence they are seeking redress from the High Court in the nature of a declaratory order all children born from Kenyan-refugee unions be declared as de jure Kenyans. This would be in line with the provisions of Article 14(1) of the COK and it will enable them to enjoy other rights. In line with this, the petitioners are also seeking to have the courts declare that the differential treatment these children are subjected to as compared to those born in instances where both parents are Kenyan nationals is discriminatory. They also want the courts to compel the required respondents to carry out a proper birth registration process and issue all children born from Kenyan-refugee unions proper birth notification documents that have no refugee markings on them and consequently have them removed from the refugee database.

4.6.3. What impact a successful strategic litigation of the AMM case is likely to have on children born from Kenyan-Refugee unions

The impact that a Strategic litigation case can have can be unpredictable, unclear, paradoxical, occasionally perverse and difficult to measure²²⁹ but one can correlate with already existing jurisprudence. The impact that a Strategic litigation case is expected to have can be categorized into three: material impact, instrumental impact and non-material impact.²³⁰ The material impact is for individual petitioners and affected communities and it can include compensation. On the other hand, instrumental impact prompts direct and indirect changes in policy, law jurisprudence and institutions.

²²² Articles 22(1), 23 (1) and 165 165 (3) (b), COK

²²³ Articles 29 and 30, COK

²²⁴ Article 43, COK

²²⁵ Article 43, COK

²²⁶ Article 53 (2), COK

²²⁷ Articles 10, 27, 28 and 53, COK

²²⁸ Haki na Sheria make reference to Article 7, UDHR; Article 26, ICCPR; and Article 2, ACERWC in their petition.

²²⁹ Goldstone, James A., and Erika Dailey. "Strategic Litigation Impacts: Insights from Global Experience." (2018).

²³⁰ Ibid

Non-material impact entails indirect shifts in attitudes, behaviours, discourse and community empowerment.

A successful finding and holding in favour of the Petitioners would set a new dawn for children born from Kenyan-refugee unions because it inches them closer to realizing their children's rights. A reading of the filed petition in the AMM case shows a similarity and direct bearing when compared the Nubian children's case as both, nationality and what its denial means for children is a key issue. Whereas the Nubian Children's case was not decided upon by a domestic court, the case can be used to assess what likely impact a ruling that favours the Petitioners in the AMM case can have for children born from Kenyan-Refugee unions. The Nubian children's case is the most comprehensive case on the right to nationality that has been issued by an organ of the African Union²³¹ and is a case referred to when it comes to matters of nationality. Based on this and the current AMM case also being Kenyan, it is possible to infer and project what effect a ruling in favour of the Petitioners in the AMM case can have.

To begin with, a holding and finding in favour of the Petitioners in the AMM case would mean that children born from Kenyan-refugee unions would be *de jure* Kenyans *ex debito justitiae* hence their risk of being stateless is quashed. The government would have to take action to ensure that such a judgment is actually implemented. This sets them even until they attain the age of majority where they can easily obtain a National Identification card, which is a *prima facie* proof of citizenship once they attain age of majority. In the Nubian Children's case for instance, the recommendation by the ACERWC of the child was that the Kenyan government move to take measures that guarantee children of Nubian descent the acquisition of Kenyan nationality and proof of such nationality at birth.²³² This is still a work in progress for the Kenyan Government as evidenced by the concern raised by the CRC committee that children of Nubian descent aged between 8-18 are yet to obtain Kenyan nationality²³³ and the Petition filed before the Parliament of Kenya in 2021 where one of the key issues was the fact that despite being bona-fide citizens of Kenya, the Nubians continue to face discrimination regarding the legitimacy of their citizenry.²³⁴ Due to the decision by the ACERWC, the government has made some strides to try and meet the ACERWC recommendations. It has tried to improve birth registration for children of Nubian descent and it put up a window period for stateless persons such as the Nubians to register for citizenships and this was set to last up until 2019 August.²³⁵

In addition, such recognition as Kenyans will mean that children of Kenyan -Refugee unions will compel the concerned bodies to be issued them with birth documentation that is similar to those of other Kenyans with no bearing of "refugee" and hence they will be removed from the refugee database. This will require the Department of Refugee Services to ensure such removal is carried out and that the Civil Registration Department in Kenya then issues these children with documents similar to other Kenyans

²³¹ Fokala, Elvis, and Lilian Chenwi. "Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African children's committee." *African Journal of Legal Studies* 6.2-3 (2014): 357-373.

²³² Para 69 (1) of the Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011

²³³ Para 29 (d) of the Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Kenya, *CRC/C/KEN/CO/3-5* (2016).

²³⁴ Report on the Public Petition No. 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community, 2021.

²³⁵ Para 57 of the Report on the 29th Session of the African Committee of Experts on the Rights and Welfare of the Child, 2017.

which have no "Refugee" bearing. What might hinder this is lack of political will and a disregard for the court orders. It has become a worrying trend in Kenya that the government constantly defies court orders.²³⁶

In conclusion, they will be able to enjoy their rights as Kenyan children and not as refugees thus will be able to move out of the confines of the camp without any restrictions and will get to enjoy their right to family life as well as having access to better healthcare, quality education and alongside other socio-economic rights. The recognition as Kenyan nationals will prevent them from being treated differently as compared to other children who are recognized as Kenyans.

4.7. Conclusion

From the above analysis, it is evident that strategic litigation was borne with the aim of access to justice and achieving social change which is in tandem with the Article 48 of the COK. However, it's potential in children rights can be impacted in many ways. In the Nubian children' case, for instance, the first obstacle they encountered in the High Court of Kenya was the issue of legal standing. This coupled with a judiciary that was not willing to act delayed and stalled the case forcing them to seek redress elsewhere. In the current AMM case involving children of Kenyan-refugee unions, the case was filed in November 2022 but six months down the line, it is still pending in the courts while the rights of these children continue to be violated.

In realizing the right to nationality, strategic litigation has seen governments move to adhere to fulfil court orders and recommendations by legal bodies but not fully. Whereas a decision might be issued, it might take years for such decisions to be fully implemented or for its impact to be seen such as in the case of the Nubian Children. Further, it is evident as is inferred from the Nubian children's case that strategic litigation is not a stand-alone concept and if it is to effectively achieve its envisioned goal, then the political will in a country also matters. These implementation gaps that exist hinder strategic litigation from achieving its full potential. This shows that strategic litigation can push governments to an extent to act on rights violation although it can take time.

Kenya's High Court has the opportunity to decide on a case which can be a *locus classicus* on matters that pertain to the right to nationality for children depending on its outcome. This particular case might also give rise to cases of refugees seeking nationality in Kenya. This right to nationality has to be given sufficient attention by all parties involved if children are to enjoy all other of their rights as guaranteed by the law.

²³⁶ Sam Kiplagat, Pain of Increasing Non-Compliance with Court Orders, Business Daily, 25 March 2020, www.businessdailyafrica.com/bd/data-hub/pain-of-increasing-non-compliance-with-court-orders-2285070

(Accessed 23 June 2023)

CHAPTER FIVE- CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The end goal and objective of this chapter is to conclude the research undertaken. It will thus recount the conclusions in the previous chapters, highlight the main findings and then set out recommendations that can be put in place to ensure that children born from Kenyan-refugee unions acquire a nationality and are protected from the risk of statelessness so that they can fully realize all their children rights.

5.2. Conclusion

The research has demonstrated that disregarding the right to a nationality for children gravely impacts their enjoyment of other children rights such as education, right to health, right to enjoy family life and freedom of movement, and puts them at high risk of being stateless.

In the current case of children of Kenyan-Refugee unions, despite the explicit provisions set in Kenyan laws that guarantees these children the right to acquire Kenyan nationality, lack of effective implementation of these laws as well as gaps in these laws prevents the effective realization of this right. While the law might be well crafted to make provision for this right to nationality, in practice, the application of the law is different and might not be adequately applied. This difference in law and practice when it comes to nationality laws also puts these children of Kenyan-Refugee unions at high risk of being stateless.

Moreover, notwithstanding that the laws prohibit discrimination in any form, institutionalized discrimination is also a fundamental barrier to their realization of the right to nationality for these children and consequentially affects the realization of their other children's rights. In this instance, Kenya, in spite of having obligations under the CRC to ensure that this right to non-discrimination and right to acquire a nationality is respected, protected and fulfilled and its Constitution recognizing that any treaty or convention ratified by Kenya forms part of the law of Kenya, has failed to ensure that the measures it has set out to ensure that the right to acquire a nationality for children is realized and that such is done on a non-discriminatory basis.

This is evident by the already decided case of the Nubian Children, which at the domestic level was never heard because of unwillingness of Kenyan judges, forcing the Nubian children to seek redress at the regional level and who years later are still fighting for official recognition and right to non-discrimination even after it was recommended to the Kenyan government to put up measures to ensure that they are recognized in Kenya and that their right to non-discrimination is respected. The current case before the High Court in Kenya which also alleges discrimination and violation of the right to nationality is another indicator that the discrimination remains to be a big challenge in the realization of the right to nationality for children.

All this casts doubt as to whether the government of Kenya is living up to its obligations in the international legal domain, in this regard, the CRC which sets out obligations on states to respect ,protect and fulfil all rights therein including Article 7 which speaks on nationality. The right to nationality must be sufficiently addressed since it is at the heart of these children realizing the other rights and not being rendered stateless and without an identity. State parties can fail in these obligations. There is a gap when it comes to state obligation in implementing laws as well as when it comes to enforcing court decisions and recommendations from other regional and international bodies when it pertains to the relation of the right to nationality.

To realize this right to acquire nationality for children of Kenyan-Refugee unions and other children generally who lack effective nationality, strategic litigation is a good concept to employ. Its use has gained popularity globally and has been used to champion for various children's rights. But its impact

can take years to fully be realized. Thus a lot is at stake for children of Kenyan-refugee unions pending the outcome of the current decision before the High Court of Kenya being that the case is a strategic litigation case. A ruling in their favour will demonstrate the effect that strategic litigation can have in achieving a social good. However, being that strategic litigation has its fair challenges and benefits in equal measure. There is likelihood that its impact might take years before it is felt but will in the long run be.

5.3. Recommendations

In that regard, the following the following recommendations are made:

i. Constitutional Petitions

That the Kenyan courts should be entreated through Constitutional Petitions to provide a remedy in terms of a favourable finding and holding that where children sired by one refugee parent and one Kenyan parent, the Kenyan parent automatically transmits citizenship to the child. The court should make a finding that declaring such children as refugees is an affront to the provisions of the constitution that one is a Kenyan if either of their parents is Kenyan and also prohibits discrimination. Further, the Government of Kenya be compelled to put in place measures of ensuring such children attain Kenyan recognition as citizens.

ii. Address the risks of Statelessness

The risk of statelessness for children of Kenyan-Refugee unions should finally implore the government to set-up a Stateless Determination Procedure. During the HLS in 2019, Kenya promised to establish this procedure but it is yet to do so. Furthermore, internationally, there are two Conventions that deal with statelessness, the 1954 Convention Relating to the Status of Stateless persons and the 1961 Convention on the Reduction of Statelessness. It is high time Kenya adopts these conventions.

iii. Fulfill its obligation under the CRC

Based on its obligation of respect, protect and fulfil as set in the CRC, and its laws that address citizenship, the Kenyan government should consider recognizing children of Kenyan-Refugee unions. This should be considered regardless of the current case before the High Court of Kenya.

iv. Law Reform and Policy Formulation

The time limit for citizenship by registration for those who are stateless should be removed in entirety. In addition, there is need for a policy and national action plan that specifically address the right nationality for these children.

v. Use of Strategic litigation and alongside other tools.

It is evident that at times the impact of strategic litigation can take years to be felt hence it should be considered alongside other tools to achieve the social change being advocated for. Pending the determination of the strategic litigation case of AMM by the High Court, the NGO's should try lobbying government or the ministerial bodies concerned to make law reforms. This should be done alongside lobbying at the policy levels as this can push the involved ministry to propose bills or changes in law that address the issue of nationality.

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