



30 November 2017

Registrar of Senators' Interests

Department of the senate

SG.39 Parliament House

Canberra, ACT 2600

Dear Registrar,

Please find enclosed as follows:

1. Senator's signed statement in relation to Citizenship
2. Affidavit of Senator Gichuhi dated 4 April 2017 and exhibits filed in the High Court in **Re Day [No 2] [2017] HCA 14, 5 April 2017 C14/2016**
3. Affidavit of Senator Gichuhi dated 18 April 2017 and exhibits filed in the High Court in **Re Day [No 2] [2017] HCA 14, 5 April 2017 C14/2016**
4. Opinion of Professor Ghai dated 27 March 2017 filed in the above High Court proceedings
5. Letter from Kenyan High Commissioner Isaiya Kabira dated 12 April 2017

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'Lucy Gichuhi'.

Senator Lucy Gichuhi

Parliament House:

T: 02 6277 3060 | E: senator.gichuhi@aph.gov.au
Parliament House | PO Box 6000 | CANBERRA ACT 2600

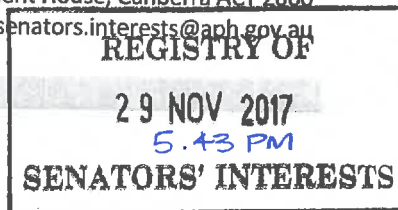
Commonwealth Electorate Office:

T: 08 8205 1050 | E: senator.gichuhi@aph.gov.au
Level 13, 100 King William Street | ADELAIDE SA 5000



Senator Lucy Gichuhi
Senator for South Australia





To the Registrar of Senators' Interests,

Statement in relation to citizenship – 45th Parliament

I declare that at the time I nominated for election in this 45th Parliament I was an Australian citizen.

Section 1—Senator's details

Surname: GICHUHI	
Other Names: LUCY MURINGO	State: SA

Section 2—Senator's birth and citizenship details

Place of birth: Nyeri District, Central Province, KENYA	Citizenship held at birth: United Kingdom (UK) and Colonies
Date of birth: 23 / 09 / 1962 Day Month Year	Date of Australian naturalisation: <i>(if not an Australian citizen by birth)</i> 17 / 07 / 2001 Day Month Year

Section 3(a)—Senator's parents' birth details

	Mother	Father
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approxi mately 1938	/ / Approxi mately 1934

Notes

- (1) The information which you are required to provide is contained in a resolution agreed to by the Senate on 13 November 2017
- (2) If there is insufficient space on this form for the information you are required to provide, you may attach additional pages for that purpose. An electronic file of this form is available on www.aph.gov.au/senators_interests.
- (3) Forward the original, signed copy of all pages of this statement to the Registrar of Senators' Interests, SG.39 Parliament House, Canberra ACT 2600

Lucy Muringo 29/11/2017

Section 3(b)—Senator’s grandparents’ birth details

	Maternal grandmother	Maternal grandfather
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approximately, 1888	/ / Approximately, 1870

	Paternal grandmother	Paternal grandfather
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approximately, 1910	/ / Approximately 1910 Day Month Year

Section 3(c)—other factors that may be relevant eg: adoption, IVF, or assumption of citizenship through marriage.

The matter of alleged dual citizenship concerning me was raised in and disposed of in **Re Day [No 2] [2017] HCA 14, 5 April 2017 C14/2016.**

The High Court had before it all relevant materials and dismissed the application of the Solicitors for Anne McEwen to pursue the matter. Affidavits filed by me in the said proceedings marked “A” & “B”, dated 4th April 2017 and 18th April 2017 respectively accompany this statement.

Handwritten signature

29/11/2017

Section 3(d)—Please list the steps you have taken to assure yourself you have not inherited citizenship of another country from a parent or grandparent.

I was assured that I have not inherited citizenship by virtue of the expert opinion filed in the High Court proceedings from a Constitutional Lawyer Professor Yash Pal Ghai, Professor Emeritus, University of Hong Kong dated 27 March 2017. The attached opinion marked "C" confirms that I ceased to be a UK citizen and became a citizen of Kenya on 12 December 1963 by virtue of section 1 (1) of the Kenya Constitution 1963 and the corresponding British Act – Kenya Independence Act 1963, (UK). My parents and grandparents ceased to be UK citizens in the same way.

I automatically ceased to be a Kenyan citizen under Section 97 (3) of the Kenya Constitution 1969, because of the acquisition of my Australian citizenship on 17 July 2001. I refer to paragraphs 17 & 28 and the conclusion of the constitutional expert's opinion.

I also visited the Kenyan Embassy in Canberra twice between April 2016 and May 2016, before my nomination on 30th May 2016, to investigate any possibility of dual citizenship and any steps which might be required to renounce the same. I attach a letter from the High Commissioner for Kenya, Isaiya Kabira marked "D" and dated 12 April 2017 confirming my visits and that I was not a Kenyan citizen at the time of my nomination, or since.

Section 4(a)—Foreign citizenship

Have you ever been a citizen of any country other than Australia?

- NO** — Proceed to Section 6
- YES** — List the countries that you have been a citizen of, and evidence of the date and manner in which your citizenship was renounced or otherwise came to an end.

Country	Manner of renunciation or other manner in which the foreign citizenship came to an end	Date	Evidence attached
United Kingdom (UK) and Colonies	I ceased to be a UK citizen and became a citizen of Kenya on 12 December 1963 by virtue of section 1 (1) of the Kenya Constitution 1963.	12/12/1963	Expert Opinion of Professor Ghai dated 27 March, 2017

[Handwritten signature]

29/11/2017

Country	Manner of renunciation or other manner in which the foreign citizenship came to an end	Date	Evidence attached
Kenya	<p>I ceased being a Kenyan Citizen by becoming an Australian citizen by virtue of Section 97 (3) of the Kenyan Constitution 1963.</p> <p>I also took all reasonable steps to confirm I had lost my Kenyan Citizenship when I attained Australian Citizenship in 2001 and It was not possible to renounce something I had already lost.</p>	<p>17/07/2001 (Naturalization)</p> <p>April 2016- May 2016 (Visits to Kenya High Commission)</p>	<p>Letter from Kenyan High Commissioner dated 12 April, 2017 & expert opinion of Professor Ghai dated 27 March, 2017</p>
<p>NB: Evidence of the date and manner in which your citizenship was renounced or otherwise came to an end <i>should</i> be attached to this form. Please date and initial each page of any attachment.</p>			

Section 4(b)—Foreign citizenship at time of nomination

On the date you nominated for election in this 45th Parliament were you a citizen of any country other than Australia?

- NO** — Proceed to Section 4(c)
- YES** — provide evidence of any steps you have taken to renounce the citizenship of the country prior to the date of nomination:

Country	Action	Date	Evidence attached
<p>NB: Evidence of the steps taken to renounce foreign citizenship prior to the date of nomination <i>should</i> be attached to this form. Please date and initial each page of any attachment.</p>			

Section 4(c)—Are you now a citizen of any country other than Australia?

- NO** — Proceed to Section 5
- YES** — provide evidence and details of steps taken to renounce citizenship:

Handwritten signature and date: 09/11/17

Country	Action	Date	Evidence attached

NB: Evidence of the steps taken to renounce foreign citizenship prior to the date of nomination **should be attached** to this form. Please date and initial each page of any attachment.

Section 5—Senator with foreign citizenship at nomination or now

Complete this section if you answered YES in section 4(b) or 4(c)


Basis on which the Member contends she or he is not disqualified under s 44(i)	Evidence attached
N/A	

Section 6—General declaration

I declare that I have completed this statement to the best of my knowledge and have attached all evidence relevant to my declarations.

Signed

Date

	29 / 11 / 2017 Day Month Year
---	--



"D"



**KENYA HIGH COMMISSION
CANBERRA**

12th April, 2017

**TO WHOM IT MAY CONCERN
RE: MRS LUCY GICHUHI**

This is to inform that Mrs Lucy Gichuhi, a Kenyan born Australian citizen visited the Kenya High Commission offices in Canberra prior to the last 2016 Federal elections in Australia.

During the visit, Mrs Gichuhi sought to know her status in regards to her Kenyan citizenship. Mrs Gichuhi was then informed that since she had not applied for dual citizenship following the promulgation of a new Kenyan Constitution in 2010, we did not recognise her as a Kenyan citizen.

We advised Mrs. Gichuhi that she still had her rights to Kenyan citizenship as outlined under Kenyan law. To date we have not received any application from Mrs Gichuhi, seeking dual citizenship.

As a country, we respect the decision of our citizens to take up citizenship of other nations. We also encourage those who may seek dual citizenship to follow the laid down procedures.

A handwritten signature in black ink, appearing to read 'Isaiya Kabira'.

**ISAIYA KABIRA
HIGH COMMISSIONER**

"A"

REGISTRY OF
05 DEC 2017
SENATORS' INTERESTS

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C14 OF 2016

Re Robert John Day
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

Affidavit of: Lucy Muringo Gichuhi

Address: [Redacted]
[Redacted]

10 Occupation: Lawyer

Date affirmed: 4/04/2017

I, Lucy Muringo Gichuhi [Redacted] in the
State of South Australia,

1. I make this affidavit based on my own knowledge and review of the documents referred to in this affidavit.
2. I am a member of the Family First Party, a political party registered under the Commonwealth Electoral Act 1918.
3. On 30 May 2016 I completed a Nomination of a Senator form AECEF059 for the 2016 Federal Election, as candidate endorsed by the Family First Party. Exhibited to this affidavit and marked LMG-1 is a copy of the 2 page Nomination of a Senator Form signed by me on 30 May 2016.
4. I am aware that the Attorney-General of the Commonwealth retained Professor Yash Pal Ghai as an expert in these proceedings. I have been shown a letter from the Australian Government Solicitor (AGS) to Professor Ghai dated 28 February 2017.
5. Included in that letter was a list of characteristics that Professor Ghai was asked to assume about me and my family, namely:
 - 5.1. I was born in Nyeri District Central Province Kenya on 23 September 1962.
 - 5.2. My father was born in Nyeri District Central Province Kenya in 1934.

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Signature of Adut Zita Deng Ng'or
ADUT ZITA DENG NG'OR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

- 5.3. My father was alive on 12 December 1963.
- 5.4. My mother was born in Nyeri District Central Province Kenya in 1938.
- 5.5. My mother was alive on 12 December 1963.
- 5.6. My father and mother became citizens of Kenya on 12 December 1963
- 5.7. My paternal grandfather was born in Nyeri District Central Province Kenya in 1900.
- 5.8 I became an Australian citizen by naturalisation on 17 July 2001.
- 5.9 I have never applied for Kenyan citizenship.

10 Exhibited to this affidavit and marked **LMG-2** is a copy of the letter from AGS to Professor Ghai dated 28 February 2017.

6. As regards the assumptions about me and my family that were contained in the letter from AGS to Professor Ghai dated 28 February 2017 and listed at paragraph 5 of this affidavit I say as follows:
- 6.1. As regards the assumption in para 5.1 exhibited to this affidavit and marked **LMG-[3]** is a copy of my birth certificate confirming the details of my birth.
- 6.2. As regards the assumption in para 5.2, my father is still alive and lives in Kenya. His date and place of birth can be confirmed from his Identity Card. If need be this document could be obtained from him.
- 20 6.3. As regards the assumption in para 5.3, my father is still alive and he was therefore alive on 12 December 1963.
- 6.4. As regards the assumption in para 5.4, my mother's details of date and place of birth could be obtained from her Identity Card. She is deceased, I am not sure if her identity card has been replaced by death certificate. She is therefore not available to give any evidence.
- 6.5. As regards the assumption in para 5.5, my mother did not die until 10th September 2013 and was therefore alive on 12 December 1963.
- 6.6. As regards the assumption in para 5.7, my paternal grandfather's documents could be obtained from Kenya's Registrar of Birth and Death, if need be.
- 30 6.7. As regards the assumption in para 5.8, exhibited to this affidavit and marked **LMG-[4]** is a copy of my citizenship certificate dated 17 July 2001.

[Handwritten signature]

[Handwritten signature]
ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

6.8. The assumption in paragraphs 5.9 is correct.


7. My father or my paternal grandfather were never envoys to Kenya at any time prior to the date of my birth or thereafter, I know this because my father's profession was a teacher before he retired and his father's profession was a farmer. To the best of my knowledge both men never had any other profession.

AFFIRMED at Adelaide in the State
of South Australia

Before me:



Solicitor



Deponent

ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

" LMC-1 "

I, ADUT ZITA NGOR, Commissioner for taking Affidavits in the Supreme Court of South Australia hereby certify that this is a true copy of the original document.

This 02 day of APRIL in 2014.

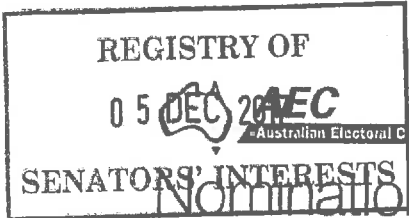
Signed:



ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

LMG-1

(2)



REGISTRY OF

05 DEC 2016 AEC

Australian Electoral Commission

SENATORS' INTERESTS

AEC EF059

Nomination of a Senator

Information on this form is collected under the provisions of the *Commonwealth Electoral Act 1918*
If completing by hand please write clearly and use BLOCK LETTERS and black or blue ink
Please read the notes on page 3 before completing this form

To the Australian Electoral Officer for the State/Territory of
South Australia

Candidate **2** of **2** *If applicable*

1. Your name(s) as they appear on the Commonwealth Electoral Roll
Family name **Gichuhi**
or, if not enrolled, the name(s) under which you are qualified to enrol
Given name(s) **Lucy M**

2. Given name(s) as you want them to appear on the ballot paper, if same as above, tick the box
 or **Lucy**

3. Do you have silent enrolment on the Commonwealth electoral roll?
 Yes ▶ You are not required to disclose your residential address ▶ Go to Question 4
 No ▶ Please complete your residential address details

[Redacted]
[Redacted] State [Redacted] Postcode [Redacted]
Do you authorise the AEC to release this address to the public? Yes No

4. Postal address
If same as residential address provided above, tick the box or
State [Redacted] Postcode [Redacted]
Do you authorise the AEC to release this address to the public? Yes No

5. Contact details
The nomination form will be displayed publicly at the declaration of nominations.
Which contact details do you authorise the AEC to release to the public? Please indicate by ticking either the Yes or No box on each line.
BH [Redacted] Yes No
AH () Yes No
Fax () Yes No
Mobile [Redacted] Yes No
Email [Redacted] Yes No

6. Occupation and Gender
Occupation **LAWYER** Gender **F**

7. I have been endorsed by a registered political party
 Yes ▶ Name of registered political party
Family First Party
 No ▶ I request that the word 'Independent' be printed on the ballot paper adjacent to my name Yes

8. I request my name be included in a Senate group Yes

Australian Electoral Commission 160516 EF059

LMA-1

170



AEOEF059

Nomination of a Senator

Candidate statement and declaration – Please read the statement on page 3 carefully before signing the nomination form.

I, the candidate named above state that I am an Australian citizen by:

Birth Date of birth 23/09/62 Place of birth Kenya

Naturalisation Date citizenship granted 17/07/01

Other means Details

I am at least 18 years of age Yes No

I am an elector or qualified to be an elector Yes No


I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator (see page 3) Yes No

and I declare that:


- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator.
- I am not, and do not intend to be, a candidate in any other election to be held on the same day as the election to which the above nomination relates.
- I consent to act as a Senator for the State/Territory named above if elected.
- I wish my given name(s) to appear on the ballot paper in the form shown at Question 2 on previous page.

Signature of candidate  Date 30/05/16

AEC Use Only - Received AEO

AEO	Date	Time (24 hour)	Initials	Agent form received?
	02/06/16	11:50		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

AEO Signature		Sent to FAD
		03/06/16

Entered in ELMS	Date	Time (24 hour)	Initials
	06/06/16	18:45	

REGISTRY OF
05 DEC 2017
SENATORS' INTERESTS

LMG-2

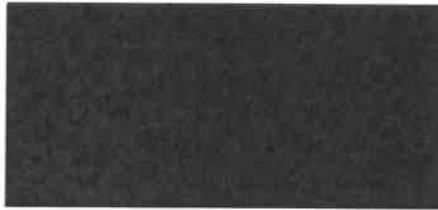


Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777 F 02 9581 7778 DX 444 Sydney
www.ags.gov.au

Our ref. 16008239

28 February 2017

Professor Yash Pal Ghai
C/- Katiba Institute



Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Dear Professor Ghai

Senate referral to the Court of Disputed Returns – Robert John Day – High Court of Australia proceedings C14 of 2016 – Brief for preparation of report

1. You have been engaged by the Commonwealth of Australia to prepare a report for use in proceedings in the High Court of Australia sitting as the Court of Disputed Returns.
2. The background to the proceedings is that on 7 November 2016, the Australian Senate resolved that certain questions about a vacancy in the representation of South Australia in the Senate, for the place for which Mr Robert John Day AO was returned following the Federal election in July 2016, should be referred to the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth) ("The Electoral Act").
3. The principal question referred to the Court is:
 - (a) whether, by reason of section 44(v) of the Constitution, ... there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned.
4. Section 44(v) of the *Commonwealth of Australia Constitution Act* ("the Constitution") relevantly provides that any person who:
 - has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than a member ending common with the other members in an incorporated company consisting of more than twenty-five persons;
 - shall be incapable of being chosen or sitting as a senator
5. A second question referred to the Court was:
 - (b) if the answer Question (a) is "yes", by what means and in what manner that vacancy should be filled.

"LMG-2"

I, ADUT ZITA NGOR, Commissioner for taking Affidavits in the Supreme Court of South Australia hereby certify that this is a true copy of the original document.

This 04 day of APRIL in 2017

Signed: 

ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

6. If the Court does answer question (a) "yes", one possibility is that the Court will direct that the vacancy should be filled by way of a special count. This may involve a re-count of the votes cast for the candidates for the 12 South Australian Senate seats at the 2016 election, but excluding votes cast for Mr Day.
7. The particular context for the questions that you are asked to address in your report is that a question may arise regarding the eligibility of one of the candidates who stood for the Senate in South Australia who was born in Kenya (Ms Lucy Gichuhi). The question of eligibility concerns section 44(1) of the Constitution, which relevantly provides that any person who:
- is under any acknowledgement of allegiance, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject of a citizen of a foreign power;
- shall be incapable of being chosen or sitting as a Senator....

Questions

8. Please address the following questions in your report:
- (1) As at the date of her birth, was Ms Gichuhi a citizen of the United Kingdom and Colonies or a British protected person within the meaning of the *British Nationality Act 1948* (UK)?
 - (2) As at the date of Kenyan independence on 12 December 1963, was Ms Gichuhi a citizen of the United Kingdom and Colonies or a British protected person within the meaning of section 1(1) of the 1963 Constitution of Kenya?
 - (3) Did Ms Gichuhi gain Kenyan citizenship upon the 1963 Constitution of Kenya coming into effect?
 - (4) If yes to (3), under what section of the 1963 Constitution of Kenya did she gain Kenyan citizenship?
 - (5) Did Ms Gichuhi lose any citizenship of the United Kingdom and Colonies (or alternatively, any status as a British protected person) by operation of the *Kenya Independence Act 1963* (UK)?
 - (6) Alternatively, if Ms Gichuhi was a dual citizen from 1963, would she, upon attaining 21 years in 1983, have ceased to be a citizen of Kenya unless she had renounced the other citizenship and taken the oath of allegiance?
 - (7) Did Ms Gichuhi, by operation of Kenyan law, automatically lose any Kenyan citizenship upon becoming an Australian citizen by naturalisation?
 - (8) Alternatively, would Ms Gichuhi have retained any Kenyan citizenship, despite acquiring Australian citizenship by naturalisation, unless she took steps to renounce her Kenyan citizenship?
 - (9) Between 2001 and when the 2010 Constitution of Kenya came into effect, were there any formal requirements that applied to renunciation of Kenyan citizenship?
 - (10) If yes to (9), what were those requirements?

- (11) Did Ms Gichuhi attain the status of a citizen by birth of Kenya by operation of subsection 14(2) of the 2010 Constitution of Kenya upon that constitution coming into effect?
- (12) If no to (11), if Ms Gichuhi had previously lost her Kenyan citizenship would she be required to re-apply if she wished to regain Kenyan citizenship?
- (13) If so, what requirements attach to re-applying for Kenyan citizenship, for example, under the *Kenya Citizenship and Immigration Act* (No 12 of 2011)?

Documents

9. You are briefed with the following materials for the purposes of preparing your report:

- 9.1 British Nationality Act 1948 (UK)
- 9.2 Kenya Independence Act 1963 (UK)
- 9.3 1963 Constitution of Kenya
- 9.4 1969 Constitution of Kenya (as enacted)
- 9.5 1969 Constitution of Kenya (as at 2008 rev ed)
- 9.6 2010 Constitution of Kenya
- 9.7 Kenya Citizenship and Immigration Act (No 12 of 2011)
- 9.8 *Bashir Mohamed Jama Abdi v Minister for Immigration* [2014] eKLR
- 9.9 *Sirat v. Abdirahman & Anor* (Election Petition number 15 of 2008)
- 9.10 Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT)
- 9.11 Harmonised Expert Witness Code of Conduct (See Annexure A to the Practice Note at 9.10)

10. We have included documents 9.4 and 9.5 because it appears from these documents that the relevant versions of Chapter VI of the Constitution did not change between 1969 and 2008. The 2008 version has been taken from the Kenya Law website which describes it as the "Previous Constitution". We presume that this is in the form as it stood immediately prior to enactment of the new Constitution of 2010. On that basis, it also appears that there were no changes to Chapter VI between 2008 and the enactment of the new Constitution. However, you should confirm for yourself the form of the provisions which applied to Ms Gichuhi at the time she became an Australian citizen through to the enactment of the new Constitution.

Assumptions

11. You are asked to make the following assumptions for the purpose of answering questions (1) – (13) in paragraph 8 of this brief.
12. Assume that Ms Gichuhi has the following characteristics:
 - 12.1. She was born in Nyeri District Central Province Kenya on 23 September 1962.
 - 12.2. Her father was born in Nyeri District Central Province Kenya in 1934.
 - 12.3. Her father was alive on 12 December 1963.
 - 12.4. Her mother was born in Nyeri District Central Province Kenya in 1938.
 - 12.5. Her mother was alive on 12 December 1963.
 - 12.6. Her father and mother became citizens of Kenya on 12 December 1963.
 - 12.7. Her paternal grandfather was born in Nyeri District Central Province Kenya in 1900.
 - 12.8. She became an Australian citizen by naturalisation on 17 July 2001.
 - 12.9. She has never taken formal steps to renounce her Kenyan citizenship.
 - 12.10. She has never applied for Kenyan citizenship.

Additional Observations

13. Please note that the following additional observations are provided by way of background assistance only, and you should not rely on the matters stated for the purposes of your advice without independently verifying those matters.

Dual citizenship under the 1963 Constitution

14. Prior to 1963, Kenya was British. As we understand, it was comprised of the Colony of Kenya (the interior lands) and the Protectorate of Kenya (a coastal strip plus islands technically leased from the Sultan of Zanzibar).
15. The *British Nationality Act 1948* (UK) appears to have provided for citizenship of the United Kingdom and Colonies by birth: s 4.
16. The status of persons connected with the Protectorate of Kenya (as distinct from the Colony) seems to have been that of a "British protected person", rather than a citizen.
17. Kenya did not obtain independence from Great Britain until 1963: Kenya *Independence Act 1963* (UK) and the 1963 Kenyan Constitution.
18. The 1963 Constitution provided that persons born in Kenya and having citizenship of the United Kingdom and Colonies or being a British protected person would become citizens of Kenya provided that a person would not become a citizen if neither parent was born in Kenya: s 1.
19. The *Kenya Independence Act 1963* (UK) provided that a person who obtained Kenyan citizenship upon independence would generally lose their British citizenship: s 2(2). There were exceptions to this based on whether the person's father or paternal grandfather was born in the UK or a colony/protectorate (other than Kenya).

20. The 1963 Constitution made provision in relation to dual citizenship. In particular, a person who held both Kenyan and another citizenship would, upon attaining 21 years cease to be a citizen of Kenya unless he or she had renounced the other citizenship and taken the oath of allegiance: s 12(1). See also s 97(1) of the pre-2010 Constitution.

Dual citizenship under the previous Constitution

21. In 2001, when you are asked to assume Ms G became an Australian citizen, subparagraph 97(3)(a) of the Kenyan Constitution then in force provided that:

97 ...

(3) A citizen of Kenya shall, subject to subsection (7), cease to be such a citizen if —

(a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Kenya by voluntary act (other than marriage)

...

(7) Provision may be made by or under an Act of Parliament for extending beyond the specified date the period in which a person may make a renunciation of citizenship, take an oath or make or register a declaration for the purposes of this section, and, if provision is so made, that person shall not cease to be a citizen of Kenya upon the specified date but shall cease to be a citizen upon the expiration of the extended period if he has not then made the renunciation, taken the oath or made or registered the declaration, as the case may be.

22. We have not identified whether any provision was made for the purposes of subsection (7) which may have relevance for the present matter.
23. The former Constitution was repealed with effect from 27 August 2010. The current Constitution of Kenya relevantly provides that:
14. Citizenship by birth
- (1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of the person is a citizen.
- (2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.
- ...
- (5) A person who is a Kenyan citizen by birth and who, on the effective date, has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.
- ...
16. Dual citizenship
- A citizen by birth does not lose citizenship by acquiring the citizenship of another country.
24. The "effective date", referred to in subsections (2) and (5) is defined in s 260 to mean the date the current Constitution of Kenya came into force (27 August 2010).

25. We also note that s 8 of the *Kenya Citizenship and Immigration Act* (No. 12 of 2011) provides as follows:
8. Dual citizenship
- (1) A citizen of Kenya by birth who acquires the citizenship of another country shall be entitled to retain the citizenship of Kenya subject to the provisions of this Act and the limitations, relating to dual citizenship, prescribed in the Constitution.
- (2) A dual citizen shall, subject to the limitations contained in the Constitution, be entitled to a passport and other travel documents and to such other rights as shall be the entitlement of citizens.
- (3) Every dual citizen shall disclose his or her other citizenship in the prescribed manner within three months of becoming a dual citizen.
- (4) A dual citizen who fails to disclose the dual citizenship in the prescribed manner commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.
- (5) A dual citizen who uses the dual citizenship to gain unfair advantage or to facilitate the commission of or to commit a criminal offence, commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.
- (6) A dual citizen who holds a Kenyan passport or other travel document and the passport or other travel document of another country shall use any of the passports or travel documents in the manner prescribed in the Regulations
- (7) A dual citizen shall owe allegiance and be subject to the laws of Kenya.
26. The terms of these provisions suggest that the new Constitution contemplates dual citizenship.
27. We also draw to your attention the following cases.
28. In *Bashir Mohamed Jama Abdi v Minister for Immigration* [2014] eKLR (Election Petition number 586 of 2012), Lenaola J (now a Justice of the Supreme Court of Kenya) sitting in the High Court of Kenya held that under the old Constitution, 'Kenya did not have any provision for dual citizenship and so upon acquiring the citizenship of the United Kingdom [the petitioner] automatically lost his Kenyan citizenship'.
29. In *Sirat v. Abdirahman & Anor* (Election Petition number 15 of 2008), Justice Kimaru of the High Court of Kenya made *obiter* observations on the point. That was a case that arose out of an election petition. The elected candidate sought to argue that the petition should be dismissed as the petitioner had lost his citizenship by taking out Australian citizenship. Remarks made by Kimaru J in the course of his decision seem to be to the effect that under the previous Constitution, dual citizenship was allowed for persons who were Kenyan citizens by birth and who had not renounced their Kenyan citizenship while acquiring their second citizenship.

Expert Witness Code of Conduct

30. In preparing your report please have regard to the Expert Evidence Practice Note (EPN-EXPT) and the Harmonised Expert Witness Code of Conduct (Code) which are applicable in the Federal Court of Australia. Copies of these documents are attached.

Contract for the Provision of Expert Advice

REGISTRY OF
05 DEC 2017
SENATORS' INTERESTS

LMG-2

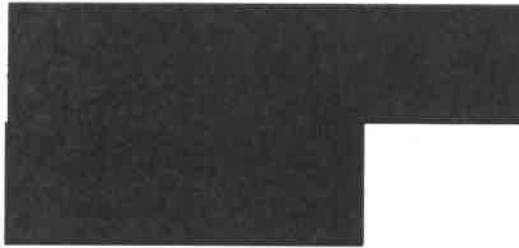
Australian Government Solicitor

Please carefully read these documents and ensure that your report complies with [3] to [5] of the Code.

Further Information

31. Please advise us if there is any further information that you require in order to prepare your report.

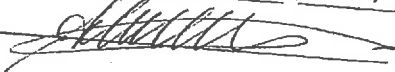
Yours sincerely



"LMA-3"

I, ADUT ZITA NGOR, Commissioner for taking
Affidavits in the Supreme Court of South Australia
hereby certify that this is a true copy of the original document

This 04 day of APRIL in 2017

Signed: 

ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

LMG-3

I, Daniello Cutufo, Commissioner for taking:
Affidavits in the Supreme Court of South Australia
hereby certify that this is a true copy of the original document

This 4th day of April in 2017.

Signed: _____

C No 320990

REPUBLIC OF KENYA

CERTIFICATE OF BIRTH

Birth in the <u>NYERI</u>		District in the <u>CENTRAL</u>		Province	
No.	<u>3105441</u>	<u>1998</u>	Where Born	<u>Kirimukuyu</u>	Name
					<u>Lucy Muringo</u>
Date of Birth	<u>23rd Sept. 1962</u>	Sex	<u>female</u>	Name and Surname of Father	<u>Justus Weru Githungo</u>
Name and Maiden Name of Mother	<u>Agnes Njeri Kaiganaine</u>				
Signature, Description and Residence of Informant	<u>sgd. self</u>				
Signature of Registering Officer	<u>MILLICENT ONUNGA</u>	Date of Registration	<u>20-8-98</u>		
Baptismal Name if added or altered after Registration of Birth					

Certified to be a true copy of a return/an entry in the Register of Births in the District above mentioned.

Given under the seal of the Principal Registrar on the 20th day of August 1998

This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein without any or other proof of such entry.

Typed by: (SNK)

Auth. 4358/CA of 20-8-98

Checked by: ([Signature])

CA. 2282/A of 20-8-98

FEE PAID: Fifty Shillings

LMG - 4

I, ADUT ZITA NGOR, Commissioner for taking Affidavits in the Supreme Court of South Australia hereby certify that this is a true copy of the original document.

This 04 day of APRIL in 2017.

Signed:



ADUT ZITA DENG NGOR
A Commissioner for taking Affidavits
in the Supreme Court of South Australia

I, Daniella Cutufia, Commissioner for taking Affidavits in the Supreme Court of South Australia hereby certify that this is a true copy of the original document

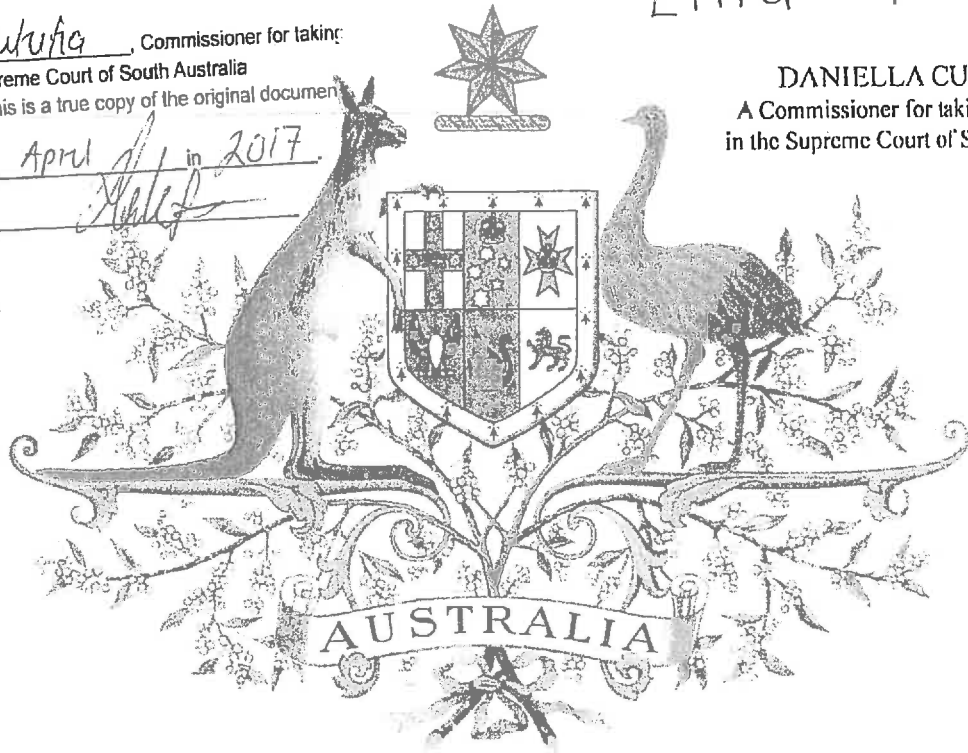
This 4th day of April in 2017.

Signed: _____

Page 1 of 2

LMG-4

DANIELLA CUTUFIA
A Commissioner for taking Affidavits
in the Supreme Court of South Australia



COMMONWEALTH OF AUSTRALIA
Australian Citizenship Act 1948


Certificate of Australian Citizenship

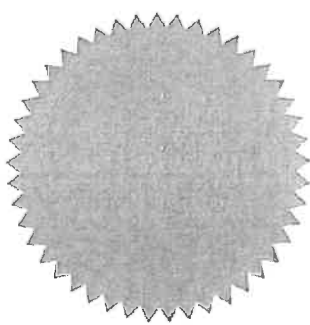
LUCY MURINGO GICHUHI
born on 23rd September 1962

having applied for a Certificate of Australian Citizenship, having satisfied the conditions prescribed by the Australian Citizenship Act 1948 for the grant of such a Certificate and having undertaken to fulfil the responsibilities of a citizen,

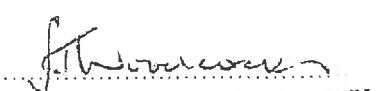
I, the Minister for Immigration and Multicultural Affairs, grant this Certificate of Australian Citizenship to the abovenamed applicant who is an Australian citizen on and after 17 July 2001.

*Issued by the authority
of the Minister
for Immigration and
Multicultural Affairs*


**MINISTER
FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS**



No. 00200500522


MAYOR, CITY OF CAMPBELLTOWN

REGISTRY OF

05 DEC 2017

SENATORS' INTERESTS

CHILDREN INCLUDED IN CERTIFICATE

The names of the following children who have not attained the age of sixteen years and of whom the grantee of this Certificate is a responsible parent have been included in this Certificate.

NAME OF CHILD

DATE OF BIRTH



I, Barbara Cutler, Commissioner for taking Affidavits in the Supreme Court of South Australia hereby certify that this is a true copy of the original document.

This 4th day of April in 2017.

Signed: [Signature]

page 2 of 2

[Signature]
MINISTER
FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

REGISTRY OF
05 DEC 2017
SENATORS' INTERESTS

"B"

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C14 OF 2016

Re Robert John Day
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

Affidavit of: Lucy Muringo Gichuhi

Address: [Redacted]
[Redacted]

10 Occupation: Lawyer
Date affirmed: 18 April 2017

I, Lucy Muringo Gichuhi [Redacted] in the
State of South Australia, Lawyer, declare and affirm as follows:

1. I make this affidavit based on my own knowledge and review of the documents referred to in this affidavit.
2. I refer to paragraph 6.2 of my affidavit affirmed on 4 April 2017. Exhibited to this affidavit and marked **LMG-4** is a copy of my father's Kenyan Identity Card. My father has the original of this card and I obtained a copy of an electronic image of the card from my brother in Kenya.
- 20 3. I refer to paragraph 6.4 of my affidavit affirmed on 4 April 2017. Exhibited to this affidavit and marked **LMG-5** is a copy of my mother's Kenyan Identity Card. My father has the original of this card and I obtained a copy of an electronic image of the card from my brother in Kenya.
4. I refer to paragraph 6.7 of my affidavit affirmed on 4 April 2017. Exhibited to this affidavit and marked **LMG-6** is a copy of my paternal grandfather's Kenyan Identity Card. My father has a copy of this card and I obtained a copy of an electronic image of the copy of the card from my brother in Kenya.

18/4/17
SAMANTHA SISOMPHOU
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

Filed on behalf of the Attorney-General of the Commonwealth by:	Date of this document: 18 April 2017
Australian Government Solicitor Level 42, 19 Martin Place SYDNEY NSW 2000 DX 444 Sydney	Contact: Simon Daley / Brooke Griffin File ref: 16008239 Telephone: 02 9581 7490/ 02 9581 7746 E-mail: simon.daley@ags.gov.au / brooke.griffin@ags.gov.au Facsimile: 02 9581 7650

5. Exhibit LMG-6 shows my paternal grandfather's place of birth as "Gichuthiini". Gichuthiini is a village or "sub-location" in Kirimukuyu location. Kirimukuyu location is in the Nyeri District of Central Province.

6. Exhibited to this affidavit and marked **LMG-7** is a copy of my paternal grandfather's certificate of death. My father has the original of this certificate and I obtained a copy of an electronic image of the certificate from my brother in Kenya.

10 7. Exhibited to this affidavit and marked **LMG-8** is a copy of the permit for burial for my paternal grandfather. My father has the original of this permit and I obtained a copy of an electronic image of the permit from my brother in Kenya.

8. Exhibited to this affidavit and marked **LMG-9** is a copy of my mother's certificate of death. My father has the original of this certificate and I obtained a copy of an electronic image of the certificate from my brother in Kenya.

9. Exhibited to this affidavit and marked **LMG-10** is a copy of the permit for burial for my mother. My father has the original of this permit and I obtained a copy of an electronic image of the permit from my brother in Kenya.

20 10. In the period April – June 2016, I was in Canberra undertaking an internship. While in Canberra, I attended the Kenyan High Commission on two separate occasions in preparation for my intended nomination for election to the Senate. I cannot now recall the precise dates of my attendance at the Kenyan High Commission. On both those occasions I met with His Excellency Isaiya Kabira, the Kenyan High Commissioner to Australia and the Immigration Officer at the High Commission. During the course of my first meeting, I said to the High Commissioner words to the effect:

"What is the status of my Kenyan citizenship?"

30 11. In response, either the High Commissioner or the Immigration Officer informed me that I was no longer a Kenyan citizen and the High Commissioner said words to the effect:

"You automatically lost your Kenyan citizenship when you became an Australian citizen.

Kenya does not recognise you as a Kenyan citizen."

12. I then said to the High Commissioner words to the effect:

"Is there anything I have to do or any document I have to sign to renounce my Kenyan citizenship?"

13. The Kenyan High Commissioner responded in words to the effect:

"There is nothing for you to do and no document you are required to sign because you are not a Kenyan citizen."

18-4-17



SAMANTHA SISOMPHOU

A Commissioner for taking Affidavits in
the Supreme Court of South Australia



14. I then asked the High Commissioner in words to the effect:

"What do I show people to verify what you are telling me about my citizenship status?"

15. The High Commissioner responded in words to the effect:

"Should anybody ask we can give them a letter to confirm that you are not a Kenyan citizen."

16. Exhibited to this affidavit and marked **LMG-11** is a copy of a letter dated 12 April 2017 provided to me by the High Commissioner.

17. Exhibited to this affidavit and marked **LMG-12** is a copy the front page of my Australian passport and a page showing a Single Journey Visa in 2008 for the Republic of Kenya.

10

18. I further refer to paragraph 5.7 of my affidavit affirmed on 4 April 2017 which I now seek to correct. In that paragraph I mistakenly deposed that my paternal grandfather was born in 1900. Based on the terms of LMG-6, I now realise that my paternal grandfather was born in 1910.

AFFIRMED at Adelaide in the State
of South Australia


Lucy Muringo Gichuhi

Before me:



18.4.17

SAMANTHA SISOMPHOU
A Commissioner for taking Affidavits in
the Supreme Court of South Australia




Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

10

CERTIFICATE OF EXHIBIT LMG-4

I certify that the copy the Kenyan Identity Card to which this certificate is attached is the exhibit LMG-4 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

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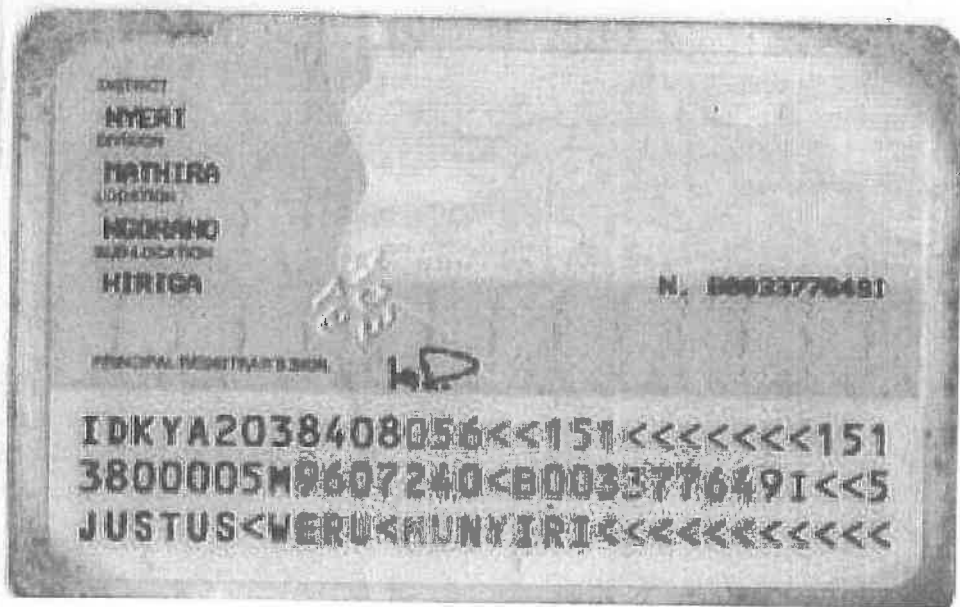
18.4.17 Lawyer
SAMANTHA SISOMPHOU
Commissioner for taking Affidavits in
Supreme Court of South Australia

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LMG-4



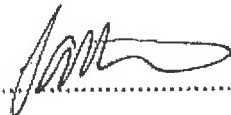
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

10

CERTIFICATE OF EXHIBIT LMG-5

I certify that the copy the Kenyan Identity Card to which this certificate is attached is the exhibit LMG-5 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

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.....
18.4.17 SAMANTHA SISOMPHOU Lawyer
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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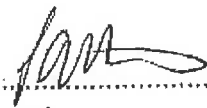
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

10

CERTIFICATE OF EXHIBIT LMG-6

I certify that the copy the Kenyan Identity Card to which this certificate is attached is the exhibit LMG-6 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

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.....
18.4.17
SAMANTHA SISOMPHI
Lawyer
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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JAMHURI YA
KENYA
KITAMBULISHO



REPUBLIC OF
KENYA
IDENTITY CARD

(ISSUED UNDER CAP 107 LAWS OF KENYA)

MAHALI NA SIKU YA KUZALIWA / PLACE AND DATE OF BIRTH

GICHUTHA INT. 26/2/1978

KUTUMIKA KUTOKA /
VALIDITY FROM

26/2/79

MPAKA /
TO

26/2/89

WILAYA / DISTRICT

KERICHTI DISTRICT

MTAA / LOCATION

Karimukh

KIJIJI / SUB LOCATION

GACHUICHO

3188851

SABHI/SIGNATURE OF HOLDER

Munyiri

19/11/74 (07)

MUME MK2

ALAMA YA KIDOLE GUMBA (KUSHOTO)
LEFT THUMB PRINT



JINA/NAME

ROBERT

Munyiri Muganda

SABHI YA MWANDIKISHAJI
SIGNATURE OF REGISTRATION OFFICER

Robert
REGISTRATION OFFICER

MAHALI PA KUTOLEWA/PLACE OF ISSUE

Robert

NUMBER
3188851

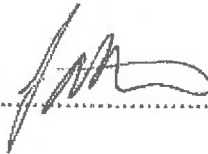
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

10

CERTIFICATE OF EXHIBIT LMG-7

I certify that the copy of the certificate of death to which this certificate is attached is the exhibit LMG-7 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

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Lawyer

18.4.17

SAMANTHA SISOMPHOU

A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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REPUBLIC OF KENYA

B No 719346

CERTIFICATE OF DEATH

Province

CENTRAL

District in the

Robert Manyiri Mugumo

NYERI

Death in the

Entry No. 310105095 / 2007

Name and Surname of Deceased

Sex Male

Age 91 yrs

Occupation Farmer

Date of Death

27th Nov. 2007

Place of Death

Gachuiro Nyeri

Residence

Gachuiro Nyeri

Cause of Death

Pneumonia

Name and Description of Informant

SON

Name of Registering Officer

J.O. NYENGA

Date of Registration

30.11.2007

S.K. KABUHI

District Assistant Registrar

I, Registrar for NYERI District, hereby certify that this certificate is complete from and return to the Register of Deaths in the District.

District Assistant Registrar

Given under the Seal of the Principal Civil Registrar on the 16th day of January 2003

This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the Seal of the Principal Civil Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.

NYI/C.A. 4155 of 16.1.2003

GPK 5499-550 BKE-4/2002

LMG-7

Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

10

CERTIFICATE OF EXHIBIT LMG-8

I certify that the copy of the permit for burial to which this certificate is attached is the exhibit LMG-8 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

20


.....

Lawyer

18.4.17

SAMANTHA SISOMPHOU

A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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Form D2

REPUBLIC OF KENYA
THE BIRTHS AND DEATHS REGISTRATION ACT
(Cap. 149)

ORIGINAL

Serial A No 112659 PERMIT FOR BURIAL

Handwritten notes on the left margin: "25-11-2001", "GACHUIRO", "MUGUMU".

1. NAME OF DECEASED: ROBERT MUMFIRI MUGUMU
First name Other name Family's or husband's (surname or other) name

2. SEX: Male Female 3. AGE 9-11-1 4. DATE OF DEATH 25-11-2001
Years in Months or Days Day month year

5. USUAL RESIDENCE: GACHUIRO NNEBI
Sub-location or Estate and Town District

13. DATE: 25-11-2001 14. REGISTRATION ASSISTANT FOR: GACHUIRO SUB LOC 15. NAME AND SIGNATURE: Mugumu
Day month year (Name and location)

PERMIT ISSUED TO (Name) James Mugumu ID No. 3578983 SIGNATURE [Signature]
Note: To obtain a death certificate, present this permit to the District Registrar of Deaths upon the death of the deceased.

10
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

CERTIFICATE OF EXHIBIT LMG-9

20 I certify that the copy of the certificate of death to which this certificate is attached is
the exhibit LMG-9 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18
April 2017 before me:

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.....

Lawyer

18.4.17

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SAMANTHA SISOMPHOU
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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REPUBLIC OF KENYA

CERTIFICATE OF DEATH

0047943

Death in the LIMBURU District in the CENTRAL Province	
Entry No. 0661302022	Name and Surname of Deceased Agnes Njorai Wera
Sex Female	Age 73 Occupation Farmer
Date of Death 10/09/2013	Place of Death P.O. P.O. Kibuyu Esip. Residence Karatina
Cause of Death Cardiopulmonary arrest due to congestive cardiac failure due to severe anemia/hypertension due to cerebrovascular accident	
Name and Description of Informant Agnes Wera	Name of Registering Officer J. Doreka Date of Registration 27/09/2013

I, **S. N. Mwangi** District Registrar for **LIMBURU** District, hereby certify that this certificate is compiled from an entry/return in the Register of Deaths in the District.

C.A./DB/7138 of 19/12/2013

Given under the Seal of the Director of Civil Registration on the **19th** day of **December**, 20 **13**

[Signature]
District/Assistant Registrar

This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the Seal of the Director of Civil Registration shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C14 OF 2016

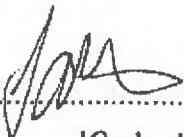
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

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CERTIFICATE OF EXHIBIT LMG-10

I certify that the copy of the permit for burial to which this certificate is attached is the exhibit LMG-10 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on 18 April 2017 before me:

20


.....
18.4.17 Lawyer
SAMANTHA SISOMPHOU
A Commissioner for taking Affidavits in
the Supreme Court of South Australia
South Australia

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DA

REPUBLIC OF KENYA

FORM D1

THE BIRTHS AND DEATHS REGISTRATION ACT
(Cap. 108)

PERMIT FOR BURIAL

Serial No. DA **214426** IP Number **78878**

1. NAME OF DECEASED **AGNES NJERI WERU**
First Name Middle Name Father's or husband's name

2. IDENTIFICATION / PASSPORT NUMBER **3377151**

3. SEX: Male Female 4. AGE **73 YRS** 5. DATE OF DEATH **10/9/2013**
Year's Month's Days Day Month Year

6. USUAL RESIDENCE **KARATINA NYERI**
Sub-location or estate and locality District

After making due inquiry as to cause of the death of the above named deceased person, I hereby authorize the interment of the body

18. DATE **10/9/2013**
Day Month Year

P.C.E.A KIKUYU HOSPITAL
19. REGISTRATION ASSISTANT FOR
DICKSON KIKUYU MSP

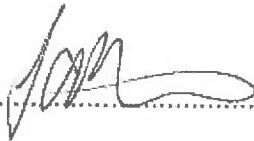
20. SIGNATURE **[Signature]**

PERMIT ISSUED TO (NAME) **JUSTUS WERU MUMIRI** ID No **3377649** SIGNATURE **[Signature]**

10
Re Robert John Day AO
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

CERTIFICATE OF EXHIBIT LMG-11

20
I certify that the copy of letter dated 12 April 2017 to which this certificate is attached
is the exhibit LMG-11 referred to in the affidavit of Lucy Muringo Gichuhi affirmed on
18 April 2017 before me:

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.....

18.4.17

Lawyer

30
SAMANTHA SISOMPHOU
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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**KENYA HIGH COMMISSION
CANBERRA**

12th April, 2017

**TO WHOM IT MAY CONCERN
RE: MRS LUCY GICHUHI**

This is to inform that Mrs Lucy Gichuhi, a Kenyan born Australian citizen visited the Kenya High Commission offices in Canberra prior to the last 2016 Federal elections in Australia.

During the visit, Mrs Gichuhi sought to know her status in regards to her Kenyan citizenship. Mrs Gichuhi was then informed that since she had not applied for dual citizenship following the promulgation of a new Kenyan Constitution in 2010, we did not recognise her as a Kenyan citizen.

We advised Mrs. Gichuhi that she still had her rights to Kenyan citizenship as outlined under Kenyan law. To date we have not received any application from Mrs Gichuhi, seeking dual citizenship.

As a country, we respect the decision of our citizens to take up citizenship of other nations. We also encourage those who may seek dual citizenship to follow the laid down procedures.

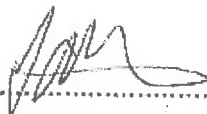
A handwritten signature in black ink, appearing to read 'Isaiya Kabira'.

ISAIYA KABIRA
HIGH COMMISSIONER

10 **Re Robert John Day AO**
Reference under s 376
Commonwealth Electoral Act 1918 (Cth)

CERTIFICATE OF EXHIBIT LMG-12

20 I certify that the copy of the front page of Ms Gichuhi's Australian passport to which
this certificate is attached is the exhibit LMG-12 referred to in the affidavit of Lucy
Muringo Gichuhi affirmed on 18 April 2017 before me:


.....

18.4.17

Lawyer

30 **SAMANTHA SISOMPHOU**
A Commissioner for taking Affidavits in
the Supreme Court of South Australia

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"C"

REGISTRY OF

05 DEC 2017

SENATORS' INTERESTS

Yash Pal Ghai

Professor Emeritus, University of Hong Kong

Opinion to the AGS on the question of Kenya citizenship

1. I acknowledge that I have read and complied with the Expert Evidence Practice Notes (GPN-EXPT): General Practice Note 25 October 2016 and Harmonised Expert Witness Code of Conduct and have considered myself bound by them.
2. I have considered all the evidence and documentation that I consider necessary for this Opinion.
3. My Opinion is based entirely on my knowledge and analysis, the result of many years of the study of Kenya's constitutional law. I have taught Kenyan law for many years in East Africa and abroad, and have published some books and many articles on Kenyan law. From Jan 2000 to April 2004, I chaired the Constitution of Kenya Review Commission, and from 2002 to April 2004 I chaired also the National Constitutional Conference (somewhat like a constituent assembly). As a result, I have a good knowledge of the 2010 Constitution of Kenya, which includes the current constitutional provisions on citizenship. Many years ago I wrote jointly with the late Professor Patrick McAuslan) a constitutional history of Kenya, including the independence constitution of 1963. Its provisions on citizenship are germane to the issue on citizenship in the Opinion. I was an informal adviser to the chair of the committee that developed the law on citizenship based on the chapter on citizenship in the 2010 Constitution.
4. I have studied carefully my terms of reference. The principle objective is to determine whether Ms Lucy Gichuhi qualifies to be a member of the Australian Senate. She is an Australian citizen now but was a Kenyan citizen once. The issue, as I understand it, is *"whether she is under any acknowledgment of allegiance, or adherence to a foreign power, or is a subject or citizen or entitled to the rights or privileges of a subject of a foreign power"*.
5. I have been given a list of questions to answer. I now turn to my answers, in the order in which the questions were presented to me.

Question No. 1: As at the date of her birth, was Ms Gichuhi a citizen of the United Kingdom and Colonies or a British Protected person within the meaning of the British Nationality Act 1948 (UK)?

6. This issue is governed by section 4 of the British Nationality Act 1948. It says that anyone born within a colony shall be a citizen of the United Kingdom and Colonies unless her father was an envoy there and was not a citizen of the UK and Colonies, or was an enemy alien. Ms Gichuhi was born on 23rd September 1962, after the enactment of the Act. She was born in the colonial part of Kenya as opposed to the protectorate part and therefore qualified as a citizen of the United Kingdom and Colonies, not a British protected person. I am not aware whether her father's status disqualified her, but it does seem highly unlikely.



Firstly both he and his father were born in Kenya so would not have been envoys to Kenya, and, indeed her father became a citizen of Kenya on December 12th 1963, which would have been by virtue of his holding citizenship of the UK and Colonies. Secondly Kenya certainly was not under alien control.

Question No. 2: As at the date of Kenyan independence on 12 December 1963, was Miss Gichuhi a citizen of the United Kingdom and Colonies or a British protected person within the meaning of section 1(1) of the 1963 Constitution of Kenya?

7. Section 1 (1) of the Kenya Constitution of 1963 says that “Every person who, having been born in Kenya, is on 11 December 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12 December 1963 unless neither of his or her parents was born in Kenya”. Ms Gichuhi was a citizen of the United Kingdom and Colonies on December 11th by virtue of section 4 of the British Nationality Act 1948, as stated above. On December 1963 she ceased to be such a citizen, as stated in response to Question 5.

Question 3: Did Ms Gichuhi gain Kenyan citizenship upon the 1963 Constitution of Kenya coming into effect?

8. Yes, she would have done so under section 1(1) of the Kenya Constitution of 1963. It read, “Every person who, having been born in Kenya, is on 11th December 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12th December 1963: Provided that a person shall not become a citizen by virtue of this subsection if neither of his parents was born in Kenya”.
9. My understanding is that Ms Gichuhi was born in that part of Kenya that was a colony and was thus, as stated in response to the first question, a citizen of the United Kingdom and Colonies by virtue of section 4 of the British Nationality Act 1948. The proviso in s. 1(1) of the Constitution of Kenya 1963 did not apply to her as both of her parents were in fact born in Kenya. It should be noted that there was no qualification to this section on the basis of the age of the person. Everyone, adult or child, who fitted the criteria of s. 1(1) became a citizen with the dawn of 12th December 1963. This is to be contrasted with the situation of those who fell within the proviso to s. 1(1): they were given a choice as to citizenship, and that choice had to be exercised in a particular way and by a particular time (see s. 2(1) and—for the date by which application had to be made— s. 2(5)). In the case of those under 21 on 12th December, applications could be made by their parents or guardians. But they had the possibility to reverse that decision after attaining the age of 21, but before they reached 23 (s. 12(2) read with s12(6)). No such provision applied to those who, like Ms Gichuhi, fell squarely within the head clause of s. 1(1).

Question 4: If yes to (3), under what section of the 1963 Constitution of Kenya did she gain Kenyan citizenship?

10. Section 1(1): see my answer to the previous question.

Question 5 : Did Ms Gichuhi lose any citizenship of the United Kingdom and Colonies (or alternatively, any status as a British protected person) by operation of the Kenya Independence Act 1963 (UK).

11. Section 2(2) of the Kenya Independence Act states, "Save as provided in section 3 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and Colonies shall cease to be such a citizen if on that date he becomes a citizen of Kenya".
12. Since Ms Gichuhi became a Kenyan citizen on 12th December 1963 in accordance with section 1(1) of the Kenya Constitution 1963, she would have ceased to hold citizenship of the United Kingdom and Colonies on that date.
13. Section 3 of the Act includes a list of categories of Kenyan citizens who would continue to retain their British citizenship despite becoming a Kenyan citizen. None of the categories affects Ms Gichuhi. For the sake of greater clarity: the only one of these exceptions that might appear to affect her is in s. 3(2): "a person shall not cease to be a citizen of the United Kingdom and Colonies under section 2(2) of this Act if he, his father or his father's father- (a) was born in the United Kingdom or in a colony". Her father and grandfather were born in a colony, namely Kenya. But sub-section (1) of that section provided that any reference to a colony in sub-section (2) did not include Kenya.

Question No. 6: Alternatively, if Ms Gichuhi was a dual citizen from 1963, would she, upon attaining 21 years in 1983, have ceased to be a citizen of Kenya unless she had renounced the other citizenship and taken the oath of allegiance?

14. As I have shown in relation to Question 5, Ms Gichuhi was not a dual citizen, as her British citizenship was terminated by British law, namely the Kenya Independence Act 1963.
15. Incidentally, the issue of dual nationality was debated in the Lancaster House conferences and other stages in the constitution making process. The enthusiasm for dual nationality was on the part of the Europeans particularly. They lost on this point.¹ In the Second Reading in the House of Lords on the Kenyan Independence Bill, the Minister of State for Commonwealth Relations and for the Colonies (The Duke of Devonshire) made several observations that indicate that those who became Kenyans would cease to be citizens of the United Kingdom and Colonies. For example:

In particular, it will be seen that the Kenya Constitution, like the Constitutions of Tanganyika and Uganda, and of many other Commonwealth countries, will not permit dual citizenship except for a limited and transitional period.

16. And he observed of the structure of the Bill that one section was "defining categories of persons who, even though they may become Kenya citizens, do not thereby have their

¹ As is made clear by Maxon, Robert M (2011) *Kenya's Independence Constitution: Constitution Making and the End of Empire* ((Fairleigh Dickinson University Press) at p. 229.

United Kingdom citizenship taken away from them.” These were the exceptions to the rule, none of which, as commented in response to the preceding question, applied to Ms Gichuhi.

Question No. 7: Did Ms Gichuhi, by operation of Kenyan law, automatically lose any Kenyan citizenship upon becoming an Australian citizen by naturalisation?

17. Miss Gichuhi became a national of Australia on 17th July 2001 (by which time she would have been 39 years old or thereabouts). And by that time Kenya had adopted a new constitution, in 1969. Under both the independence constitution and the 1969 constitution, a Kenyan who acquired a foreign citizenship automatically lost her Kenyan citizenship. The provision of the 1969 constitution, which applies to Miss Gichuhi’s adoption of a foreign citizenship, states (in section 97 (3)) that “A citizen of Kenya shall, subject to subsection (7) of this section, cease to be a citizen if—
 - (a) having attained the age of 21 years, he acquires the citizenship of some other country than Kenya by voluntary act (other than marriage)..”
18. There was no requirement of a declaration of the renunciation of the Kenyan citizenship. The mere act of having adopted citizenship of another country was sufficient to lose Kenyan citizenship. This rule also applied in the 1963 Constitution.
19. At this point it is necessary to deal with the few cases that seem to have addressed this issue. There appear to be no cases before the adoption of the current, 2010, Constitution, and the only three cases that are relevant are first instance, High Court decisions. Two of them involve aspects of s. 97 of the 1969 Constitution that have not been quoted hitherto:
 - (2) A person who -
 - (a) has attained the age of twenty-one years before 12th December, 1963; and
 - (b) becomes a citizen of Kenya on that day by virtue of section 87; and (c) is immediately after that day also a citizen of some country other than Kenya, shall subject to subsection (7), cease to be a citizen of Kenya upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Kenya by virtue of section 87 (2), made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.
 - (3) A citizen of Kenya shall, subject to subsection (7), cease to be such a citizen if -
 - (a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Kenya by voluntary act (other than marriage); or
 - (b) having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Kenya and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as way be prescribed by or under an Act of Parliament.
 - (7) Provision may be made by or under an Act of Parliament for extending beyond the specified date the period in which any person may make a renunciation of

citizenship, take an oath or make or register a declaration for the purposes of this section, and, if such provision is made, that person shall not cease to be a citizen of Kenya upon the specified date but shall cease to be a citizen upon the expiration of the extended period if he has not then made the renunciation. taken the oath or made or registered the declaration, as the case may be.

20. The first case is *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 others* [2010] eKLR Election Petition 15 of 2008 (<http://kenyalaw.org/caselaw/cases/view/64237>). The respondent challenged the petitioner's election petition on the basis that the petitioner was not a Kenyan because he had voluntarily taken Australian citizenship. The respondent was unable to satisfy the court that these were the facts. However, the court (Justice Kimaru) also held that ,

Even assuming that the petitioner had indeed acquired Australian citizenship, there is nothing in the constitution that specifically prohibits the petitioner from acquiring such citizenship while at the same time retaining his Kenyan citizenship provided that Australian law allows for its citizens to acquire and have dual nationality. There is only one exception; this is where the petitioner specifically renounces his citizenship of Kenya and acquires citizenship of another country that does not allow dual citizenship.

21. This observation, which in my respectful view was erroneous, was based on the Judge's reading of s. 97 (1) and (7). He says that,

My reading of Section 88, 90, 92, 93, 94, 95 and 97 of the Constitution leads me to the conclusion that the said Sections of the Law prohibited persons of a particular category who are citizens of other countries at the time Kenya attained independence. It does not apply to citizen of Kenya who acquired citizenship by virtue of their birth from acquiring citizenship of another country after attaining twenty-one years of age.

With respect this ignores s. 97(3)(a) which almost certainly would have covered the petitioner had his Australian citizenship been established. (In the less likely event that he had acquired that unproven Australian citizenship before the age of 21 he would have been able to make a decision when he reached that age but would have "ceased to be [a Kenyan]" if he had failed to renounce the other citizenship.

22. The judge's remarks are thus not only *obiter*, but wrong. The case does not seem to have gone on appeal to the Court of Appeal still less to the Supreme Court. However, it is my considered opinion that if this case, or any other raising the same issue, were to be appealed to these courts and the case was properly argued, the appellate court would be informed by the clear words of s. 97(3)(a) and hold that a person who had voluntarily, and while of full age, successfully applied for citizenship of another country had *ipso facto* lost Kenyan citizenship.
23. The second case is *Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration & another* [2015] eKLR Constitutional and Human Rights Division Petition

No. 251 of 2014 (<http://kenyalaw.org/caselaw/cases/view/113178/>). The facts were squarely on s. 97 (3)(b): the petitioner became a Kenyan citizen in 1968 when his parents also did, in exercise of the right under the 1963 Constitution s. 2. It seems that he never renounced his previous British nationality. Thus he reached the age of 21 with two nationalities.

24. Justice Lenaola held that because he had not renounced his other citizenship by “the date on which he attains the age of twenty-three years” he was no longer a Kenyan. Unfortunately, even this distinguished judge, according to the online version of the report, referred to the wrong sub-section. He relied upon s. 97(3), but this applies only to those who acquired another citizenship after the age of 21. Those who reached the age of 21 holding two citizenships were governed by s. 97(1) which had to be read with s. 97(6) for the definition of “specified date” by which renunciation should have taken place, and says that it means “in relation to a person to whom subsection (1) of this section refers, the date on which he attains the age of twenty-three years”.
25. However, in my view, this case is of assistance because of Justice Lenaola’s understanding of the phrase “cease to be [a citizen]”. This expression occurs in section 97(1), 97(2)(b) and 97(3) (the last being relevant in the current case). Justice Lenaola treats this, entirely correctly, as being something that happens automatically, in the *Pattni* case by failure to renounce another citizenship by a certain date. No renunciation of Kenyan citizenship is required; it is lost as a consequence of the voluntary act of acquiring another citizenship or by failure to renounce another citizenship jointly held, by a certain date.
26. The third decision is also by Justice Lenaola: *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others* [2014] eKLR Petition 586 of 2012 (<http://kenyalaw.org/caselaw/cases/view/95390/>). The citizenship issue was again whether the subject of the petition was a Kenyan citizen, having successfully applied for UK citizenship in 2002. Thus the situation was again governed by s. 97(3)(a) of the 1969 Constitution. Unfortunately, again the learned Judge does not appear to have cited this provision, but he stated very clearly that:

25. Prior to the Promulgation of the Constitution on 27/8/2010, Kenya did not have any provision for dual citizenship and so upon acquiring the citizenship of the United Kingdom (*by falsely pretending that he had been born in Somalia*), Abdi automatically lost his Kenyan citizenship....

27. Again there is no indication available that either of Justice Lenaola’s decisions have been appealed, but it is my confident and considered view that, if appealed, they would both have been upheld so far as concerns his conclusions on issues of citizenship.

Question 8: Alternatively, would Ms Gichuhi have retained any Kenyan citizenship, despite acquiring Australian citizenship by naturalisation, unless she took steps to renounce her Kenyan citizenship?

28. As I have indicated above, there was no requirement of renouncing Kenya citizenship. A Kenyan citizen acquiring another citizenship automatically lost her Kenyan citizenship.

Question 9: Between 2001 and when the 2010 Constitution of Kenya came into effect, were there any formal requirements that applied to renunciation of Kenyan citizenship?

29. If renunciation of Kenyan citizenship was an issue, there was a procedure. This was laid down in the former Kenya Citizenship Act (Cap. 170) s. 6. As indicated above, there were no such requirements applicable to the case of Ms Gichuhi.

Question 10: If yes to (9), what were those requirements?

30. For situations in which such renunciation was possible or required, the Kenya Citizenship Act provided for “a declaration in the prescribed manner of renunciation of citizenship of Kenya”. Such a declaration could be made only by someone who was a citizen of another country, and if such a declaration was not made the Kenyan citizenship would have ceased automatically according to the provisions of s. 97 of the Constitution (as was clear from s. 6(2) of the Act).

Question 11: Did Ms Gichuhi attain the status of a citizen by birth of Kenya by operation of subsection 14(2) of the 2010 Constitution of Kenya upon that constitution coming into effect?

31. I think not. Ms Gichuhi was born as a citizen of the UK and colonies and some time afterwards became a Kenyan citizen on Kenya’s independence. Article 14(2) would be redundant in a case like hers, because she was regarded as a citizen due to her birth to her parents, and fitted squarely within Article 14(1). The principal purpose of Article 14(2) was to put people who had been born of a Kenyan mother on the same footing as someone who had been born of a Kenyan father. It was not intended to force upon persons citizenship that they had had but had voluntarily forgone by taking another citizenship.
32. The latter point is supported by Article 14 (5) “A person who is a Kenyan citizenship by birth and who has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship”. Should Miss Gichuhi wish to re-acquire Kenyan citizenship, she would be able to do so under this provision. If she (and others) had recovered their lost citizenship by virtue of Article 14(2), clause (5) would have been redundant.
33. Incidentally, in the *Abdi* case (the third case discussed earlier), Justice Lenaola quoted Article 14(1) and (2) and went on to make the statement in his para. 25 quoted in my response to Question 7. In other words, he did not treat Art. 14(2) as reinstating the lost citizenship. He later said,
27. ... whereas the Petitioner has framed his Petition as if Abdi is entitled to citizenship *jus sanguinis*, that is not the legal position because he, voluntarily, applied for the citizenship of another Country, (the United Kingdom) and thereby lost his Kenyan citizenship as a matter of law.

Question 12: If no to (11), if Ms Gichuhi had previously lost her Kenyan citizenship would she be required to re-apply if she wished to regain Kenyan citizenship?

34. Yes, she would have to apply, as indicated in the previous paragraph, under Article 14(5). Again, that is made clear by Justice Lenaola in *Abdi*, where he completed his para. 25 by saying “and he could only regain it through an application to do so, under Article 14(5) of the Constitution”.

Question 13: If so, what requirements attach to re-applying for Kenyan citizenship, for example, under the Kenya Citizenship and Immigration Act (No 12 of 2011)?

35. There are no additional requirements in the Act for regaining Kenyan citizenship, as discussed above. In other words, there is a constitutional right to the regaining of citizenship in these circumstances. There is, however, a procedure to be followed: according to s. 10 of the Act, a person entitled “ may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship”. The application must be accompanied with (a) proof of applicant’s previous Kenyan citizenship; and (b) proof of citizenship of the other country.
36. To underline the point that there is no automatic regaining of Kenyan citizenship on the part of someone who has voluntarily acquired another, I refer to Justice Lenaola in *Abdi*. He quoted from the current Kenya Citizenship and Immigration Act:
- (1) A person who was a citizen of Kenya by birth and who ceased to be a citizen of Kenya because he or she acquired the citizenship of another country may apply in the prescribed manner, to the Cabinet Secretary to regain Kenyan citizenship.
 - (2) The application under subsection (1) shall be accompanied by
 - (a) proof of applicant’s previous Kenyan citizenship;
 - (b) proof of citizenship of the other country;
 - (3) Upon receipt of an application made under subsection (1), the Cabinet Secretary shall cause the application to be registered and keep a record of such application.
 - (4) The Cabinet Secretary shall after registering an application, issue a certificate in a prescribed form to the applicant.
 - (5) The Cabinet Secretary may issue an extract of the register to the applicant and such further extracts to such third parties as shall be entitled upon application and payment of such fees as may be prescribed.
37. With great respect, when he went on to say (at the end of para. 27 quoted earlier) “He could only therefore regain it by the procedure above and not as a matter of right” he erred slightly. The Constitution and the Act are clear that it is a matter of right; the necessity to follow a procedure does not derogate from the right. However, he was clearly correct to say that without following the procedure the right could not be fulfilled.

38. In conclusion, it is my considered and firm view that Ms Gichuhi (i) became at birth a citizen of the United Kingdom and Colonies, (ii) became automatically upon Kenya's attainment of independence a citizen of Kenya and lost her previous citizenship, (iii) again automatically lost her Kenyan citizenship when she was granted Australian citizenship as the result of her voluntary application as an adult and (iv) cannot regain Kenyan citizenship without applying according to the procedure under the Kenya Citizenship and Immigration Act, albeit she has a right not only to apply but to regain that citizenship provided she supplies the information required in that Act.



Yash Pal Ghai

27 March 2017

Nairobi



**KENYA HIGH COMMISSION
CANBERRA**

12th April, 2017

**TO WHOM IT MAY CONCERN
RE: MRS LUCY GICHUHI**

This is to inform that Mrs Lucy Gichuhi, a Kenyan born Australian citizen visited the Kenya High Commission offices in Canberra prior to the last 2016 Federal elections in Australia.

During the visit, Mrs Gichuhi sought to know her status in regards to her Kenyan citizenship. Mrs Gichuhi was then informed that since she had not applied for dual citizenship following the promulgation of a new Kenyan Constitution in 2010, we did not recognise her as a Kenyan citizen.

We advised Mrs. Gichuhi that she still had her rights to Kenyan citizenship as outlined under Kenyan law. To date we have not received any application from Mrs Gichuhi, seeking dual citizenship.

As a country, we respect the decision of our citizens to take up citizenship of other nations. We also encourage those who may seek dual citizenship to follow the laid down procedures.

A handwritten signature in blue ink, appearing to read 'Isaiya Kabira'.

**ISAIYA KABIRA
HIGH COMMISSIONER**

From: Kiriga, Caroline (Sen L. Gichuhi)
Sent: Monday, 4 June 2018 1:08 PM
To: Senators Interests (SEN)
Cc: Mudri, Mark (Sen L. Gichuhi); Gichuhi, Lucy (Senator)
Subject: Citizenship Registry- Senator Lucy Gichuhi
Attachments: Citizenship Form - Lucy Gichuhi (2).pdf; Transcript Re Day [19].pdf

REGISTRY OF
04 JUN 2018
SENATORS' INTERESTS

Dear Registrar,

Please find attached Citizenship form for Sen Gichuhi with additional information on page 2 of 5, section 3c.

The additional statement reads as follows:

“Transcript of the hearing on 19 April, 2017 (2017 HCA Trans 086) is also attached”.

Please also find attached transcript of the hearing as supporting documentation.

Please acknowledge receipt of this email as well.

Kind Regards,
Caroline

Caroline Kiriga

Deputy Chief of Staff

Office of Senator Lucy Gichuhi

t. 08 8205 1050 m. 0424 290 027

e. caroline.kiriga@aph.gov.au



The information contained within this email may be confidential and/or subject to parliamentary privilege and/or otherwise legally privileged. If you are not the intended recipient, access to it is unauthorised and any disclosure, copying, distribution or action taken or omitted to be taken in reliance on it is prohibited and may be unlawful.



REGISTRY OF
04 JUN 2018
SENATORS' INTERESTS

To the Registrar of Senators' Interests,

Statement in relation to citizenship – 45th Parliament

I declare that at the time I nominated for election in this 45th Parliament I was an Australian citizen.

Section 1—Senator's details

Surname: GICHUHI	
Other Names: LUCY MURINGO	State: SA

Section 2—Senator's birth and citizenship details

Place of birth: Nyeri District, Central Province, KENYA	Citizenship held at birth: United Kingdom (UK) and Colonies
Date of birth: 23 / 09 / 1962 Day Month Year	Date of Australian naturalisation: <i>(if not an Australian citizen by birth)</i> 17 / 07 / 2001 Day Month Year

Section 3(a)—Senator's parents' birth details

	Mother	Father
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approximately 1938	/ / Approximately 1934

Notes

- (1) The information which you are required to provide is contained in a resolution agreed to by the Senate on 13 November 2017
- (2) If there is insufficient space on this form for the information you are required to provide, you may attach additional pages for that purpose. An electronic file of this form is available on www.aph.gov.au/senators_interests.
- (3) Forward the original, signed copy of all pages of this statement to the Registrar of Senators' Interests, SG.39 Parliament House, Canberra ACT 2600

Handwritten signature and date: 29/11/2017

Section 3(b)—Senator’s grandparents’ birth details

	Maternal grandmother	Maternal grandfather
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approximately 1888	/ / Approximately 1870

	Paternal grandmother	Paternal grandfather
Place of birth:	Nyeri District, Central Province, KENYA	Nyeri District, Central Province, KENYA
Date of birth:	/ / Approximately 1910	/ / Approximately 1910 Day Month Year

Section 3(c)—other factors that may be relevant eg: adoption, IVF, or assumption of citizenship through marriage.

The matter of alleged dual citizenship concerning me was raised in and disposed of in **Re Day [No 2] [2017] HCA 14, 5 April 2017 C14/2016. Transcript of the hearing on 19 April, 2017 (2017 HCA Trans 086) is also attached.**

The High Court had before it all relevant materials and dismissed the application of the Solicitors for Anne McEwen to pursue the matter. Affidavits filed by me in the said proceedings marked “A” & “B”, dated 4th April 2017 and 18th April 2017 respectively accompany this statement.

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29/11/2017

Section 3(d)—Please list the steps you have taken to assure yourself you have not inherited citizenship of another country from a parent or grandparent.

I was assured that I have not inherited citizenship by virtue of the expert opinion filed in the High Court proceedings from a Constitutional Lawyer Professor Yash Pal Ghai, Professor Emeritus, University of Hong Kong dated 27 March 2017. The attached opinion marked “C” confirms that I ceased to be a UK citizen and became a citizen of Kenya on 12 December 1963 by virtue of section 1 (1) of the Kenya Constitution 1963 and the corresponding British Act – Kenya Independence Act 1963, (UK). My parents and grandparents ceased to be UK citizens in the same way.

I automatically ceased to be a Kenyan citizen under Section 97 (3) of the Kenya *Constitution 1969*, because of the acquisition of my Australian citizenship on 17 July 2001. I refer to paragraphs 17 & 28 and the conclusion of the constitutional expert’s opinion.

I also visited the Kenyan Embassy in Canberra twice between April 2016 and May 2016, before my nomination on 30th May 2016, to investigate any possibility of dual citizenship and any steps which might be required to renounce the same. I attach a letter from the High Commissioner for Kenya, Isaiya Kabira marked “D” and dated 12 April 2017 confirming my visits and that I was not a Kenyan citizen at the time of my nomination, or since.

Section 4(a)—Foreign citizenship

Have you ever been a citizen of any country other than Australia?

- NO** — Proceed to Section 6
- YES** — List the countries that you have been a citizen of, and evidence of the date and manner in which your citizenship was renounced or otherwise came to an end.

Country	Manner of renunciation or other manner in which the foreign citizenship came to an end	Date	Evidence attached
United Kingdom (UK) and Colonies	I ceased to be a UK citizen and became a citizen of Kenya on 12 December 1963 by virtue of section 1 (1) of the Kenya Constitution 1963.	12/12/1963	Expert Opinion of Professor Ghai dated 27 March, 2017

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29/11/2017

Country	Manner of renunciation or other manner in which the foreign citizenship came to an end	Date	Evidence attached
Kenya	<p>I ceased being a Kenyan Citizen by becoming an Australian citizen by virtue of Section 97 (3) of the Kenyan Constitution 1963.</p> <p>I also took all reasonable steps to confirm I had lost my Kenyan Citizenship when I attained Australian Citizenship in 2001 and It was not possible to renounce something I had already lost.</p>	<p>17/07/2001 (Naturalization)</p> <p>April 2016- May 2016 (Visits to Kenya High Commission)</p>	<p>Letter from Kenyan High Commissioner dated 12 April, 2017 & expert opinion of Professor Ghai dated 27 March, 2017</p>
<p>NB: Evidence of the date and manner in which your citizenship was renounced or otherwise came to an end should be attached to this form. Please date and initial each page of any attachment.</p>			

Section 4(b)—Foreign citizenship at time of nomination

On the date you nominated for election in this 45th Parliament were you a citizen of any country other than Australia?

- NO** — Proceed to Section 4(c)
- YES** — provide evidence of any steps you have taken to renounce the citizenship of the country prior to the date of nomination:

Country	Action	Date	Evidence attached
<p>NB: Evidence of the steps taken to renounce foreign citizenship prior to the date of nomination should be attached to this form. Please date and initial each page of any attachment.</p>			

Section 4(c)—Are you now a citizen of any country other than Australia?

- NO** — Proceed to Section 5
- YES** — provide evidence and details of steps taken to renounce citizenship:

[Handwritten signature] . 29/11/17

Country	Action	Date	Evidence attached

NB: Evidence of the steps taken to renounce foreign citizenship prior to the date of nomination **should** be attached to this form. Please date and initial each page of any attachment.

Section 5—Senator with foreign citizenship at nomination or now

Complete this section if you answered YES in section 4(b) or 4(c)


Basis on which the Member contends she or he is not disqualified under s 44(i)	Evidence attached
N/A	

Section 6—General declaration

I declare that I have completed this statement to the best of my knowledge and have attached all evidence relevant to my declarations.

Signed

Date

	29 / 11 / 2017 <small>Day Month Year</small>
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[2017] HCA Trans 086

IN THE HIGH COURT OF AUSTRALIA

SITTING AS THE COURT OF
DISPUTED RETURNS

Office of the Registry
Canberra

No C14 of 2016

Between -

IN THE MATTER OF QUESTIONS
REFERRED TO THE COURT OF
DISPUTED RETURNS PURSUANT TO
SECTION 376 OF THE
COMMONWEALTH ELECTORAL ACT
1918 (CTH) CONCERNING
MR ROBERT JOHN DAY AO

NETTLE J
GORDON J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON WEDNESDAY, 19 APRIL 2017, AT 9.33 AM

Copyright in the High Court of Australia

MR S.P. DONAGHUE, QC, Solicitor-General of the Commonwealth of Australia: May it please the Court, I appear with **MR B.K. LIM**, for the Commonwealth Attorney-General. (instructed by Australian Government Solicitor)

5

MR J.K. KIRK, SC: May it please the Court, I appear with my learned friend, **MS S. GORY**, for Ms Anne McEwen. (instructed by SBA Law)

10 **MR J.L. WHITINGTON**: If the Court pleases, I appear for Mr Day. (instructed by Griffins Lawyers)

NETTLE J: Mr Solicitor.

15 **MR DONAGHUE**: Your Honours, I move on the summons filed by the Commonwealth Attorney-General on 13 April 2017 and read the affidavit of Martyn Hagan, sworn on 13 April 2017 in support of that summons. The effect of the summons, your Honour, is that we seek an order that the Court declare that Lucy Muringo Gichuhi is duly elected as a senator for the State of South Australia for the place for which Robert John Day was returned. I do not seek to add to what we have said in writing in support of that.

20

NETTLE J: Thank you. Mr Kirk, do you have anything to say?

25 **MR KIRK**: Yes, your Honours. Very late last night we sought to provide to the Registrar some written submissions. We apologise for the lateness of them. They were due to events moving on and to the need to obtain instructions before we filed those submissions. Can I seek leave to hand up in Court the original of those submissions?

30 **NETTLE J**: To what effect are they, Mr Kirk?

35 **MR KIRK**: The submissions are to the effect that Ms McEwen opposes the order sought by the Attorney in relation to Ms Gichuhi being duly elected on the basis – not because of any issue with the count or so forth, but that a material question arises as to the citizenship of Ms Gichuhi, namely, whether she retained Kenyan citizenship as a matter of Kenyan law despite having taken up Australian citizenship in July 2001 and, further, if she did so retain Kenyan citizenship whether she took any steps and, if so, what steps, to renounce that citizenship, and if she did take such steps whether that constituted reasonable steps for the purposes of section 44(i) as explained by members of this Court in *Sykes v Cleary*.

40

45 **NETTLE J**: Mr Kirk, this is an issue which, as it were, has been around for some time in the course of directions hearing following – from January this year, has it not?

MR KIRK: Well, the issue was raised by the Attorney in their written submissions to the Full Court first filed on 6 January of this year, but the Attorney's position has been – and we have respectfully agreed with that position – that unless and until, first, the Full Court had resolved the questions that were before the Full Court and then, secondly, any special count if ordered – which, of course, it was ordered – took place and then, thirdly, if and only if Ms Gichuhi was found to be the person who would be returned if Mr Day was ineligible then and only then would the issue of Ms Gichuhi's eligibility arise.

That was reflected in paragraph 24 of the written submissions that the Attorney put on on, I think, 6 April. We have agreed and followed that position. We were provided, as I think the Attorney may have indicated on the last occasion, with an expert report which the Commonwealth had been obtaining in the meantime. We obtained that report I think on about 28 March or thereabouts.

After the Full Court handed down its decision on 5 April, two weeks ago, we have expeditiously moved to obtain another expert report in response to the Commonwealth's report. We have obtained a draft report last night. We anticipate that we should be able to have a final report by the end of today.

The effect of that report will be to disagree in part with the report raised – or provided, I should say – by the Commonwealth to us and depart in material part - in particular, one part of the Commonwealth's expert's report takes account of a particular decision of the Kenyan High Court, relevantly a single judge of the Superior Court of Record of Kenya, and says that that decision is inconsistent with Ms Gichuhi having renounced her citizenship as an automatic effect of having taken up Australian citizenship. But the Commonwealth's expert, Professor Ghai, indicates that he considers that that decision is wrong and would not be followed in Kenya, and to be fair he refers to a couple of other submissions which he says are in tension with that submission.

The draft report provided by the expert retained by Ms McEwen disagrees with that conclusion and says that, in fact, the better view is that that decision of the judge of the Kenyan High Court is correct. That being if that is right, then Ms Gichuhi would still have had Kenyan citizenship post-July 2001 and there is no other event which might have led to her having lost it, an issue would then arise about reasonable steps, as I have already indicated.

So it is in those circumstances that it is only in fact today, or at least post the Full Court's decision two weeks ago on 5 April, that this issue truly arises and prior to that it would have been entirely hypothetical.

NETTLE J: It arose two weeks ago on 27 March, I take it?

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MR KIRK: No, the Full Court handed down its decision, your Honour, on 5 April, two weeks ago. The Commonwealth in the meantime had been obtaining its expert report, which was provided to us I think on 28 March, so that is about three weeks ago. It is in those circumstances that the issue arises.

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NETTLE J: Is there any reason that it has taken so long to bring it on?

MR KIRK: Well, in our respectful submission, it has not taken so long in the sense that, as I have outlined, the issue only really arose today, taking account of the fact that the special count conducted by the Electoral Commission was only done last Thursday, so the day before Good Friday. So here we are some six days later - and it was only, as of that day, Thursday last week, that subject to this Court's orders and views, of course, it was confirmed that Ms Gichuhi would be the person who would be taking up the spot that was not filled by Mr Day, and it is in that light that, as I have respectfully put, it is only today that this issue truly arises.

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It is also reasonable, in our respectful submission, for us to have awaited the Commonwealth's expert report before seeking to put it in issue. The Commonwealth was good enough to put the draft questions to us, consistent with the Federal Court practice note which the parties have been following, and we agreed a form of questions that should go to that expert and we awaited that report, which was received on 28 March. As it happens, however, and in light of our own expert advice we do not accept one part of the conclusion of that report.

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Now, there is one other important issue that is relevant here, in our respectful submission. The order that the Attorney seeks, consistently with past practice in the *Wood Case* in 1998 and in *Sue v Hill* and, indeed, in the recent West Australian case of *Culleton*, is an order that Ms Gichuhi is "duly elected as a senator for the State of South Australia".

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Now, the language of "duly elected" is taken from section 360(1)(vi) of the *Commonwealth Electoral Act*, being one of the powers of the Court of Disputed Returns. In our respectful submission, if and insofar as a real question arises about the eligibility of Ms Gichuhi, then it could not be said, and would not properly be included in a Court order, a statement that she had been duly elected because if there is an issue here, and if that issue is a good issue, she would not be capable of being chosen pursuant to section 44 of the Constitution.

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140 There is then a further point which emerges from that. If the Court were to make the order sought by the Commonwealth Attorney today, and without further consideration of this issue, first, it leaves one issue unresolved in relation to filling the twelfth spot for the State of South Australia in the Senate and that could conceivably lead to further litigation - - -

145 **GORDON J:** I do not understand that submission. Would you put that again?

MR KIRK: Yes, your Honour.

150 **GORDON J:** If the order was made there would be – the twelfth spot would be filled.

155 **MR KIRK:** Yes, but the issue in relation to Ms Gichuhi’s citizenship and possible question about eligibility would not have been determined by the Court and so a question - - -

GORDON J: There would be nothing preventing you filing a petition if you were so minded.

160 **MR KIRK:** Well, there may be, and that leads to the further consequential point I was going to make. I do not know if your Honours have a copy of the *Commonwealth Electoral Act* to hand.

NETTLE J: Which section?

165 **MR KIRK:** Section 340 to begin with. Sorry, not section 340 – section 355 - I apologise, your Honours – of the Act. So this is within Part XXII, Court of Disputed Returns. Section 355(e), setting out the requirements for a petition disputing an election indicates there is a 40-day
170 limitation period, relevantly:

(i) if the polling day for the election in dispute is not the polling day for any other election—the return of the writ for the election -

175 Sub (ii) does not seem relevant and does not change things materially. Sub (iii) is irrelevant.

180 Now, on the face of it, on a simple textual reading, the return of the writ here occurred a long time ago and the order sought from the Court is not a new return or new writ, it is a declaration pursuant to section 360. Now, obviously there could be a purposive argument to say that, well, one would read that purposively so as not to shut out a potential petition but at

the least there is some room for real doubt about that question. There is a further related difficulty arising from section 368 which provides that:

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All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way -

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obviously designed to promote finality in relation to these issues. Now, if this Court makes, as the Commonwealth Attorney seeks, an order that Ms Gichuhi has been duly elected, on its face that would seem to resolve all issues as to eligibility, and it might be said – again one can see counter arguments – but it might be said that it would be calling into question that decision of this Court if one were to say, well, in fact she was not duly elected because she was never eligible to be chosen because of a section 44(i) problem under the Constitution.

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In those circumstances, the way which is least likely to cause ongoing delay and further litigation of a range of questions which perhaps do not need to be decided is simply within this proceeding to deal with the issue relating to Ms Gichuhi. As to how it arises within the jurisdiction of this Court in this matter, as your Honours well appreciate, this is a section 376 referral of five questions from the Senate.

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The second question, question (b), was if the answer to question (a) is yes relating to a vacancy by what means and in what manner should that vacancy – sorry, that vacancy should be filled; and then question (d) flowing from that is, of course, what directions and other orders if any should the Court make in order to hear and finally dispose of this reference.

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Now, as I indicated earlier, as happened in *Wood* and in *Sue v Hill*, where that naturally leads in the ordinary course is to an order by the Court by declaration pursuant to section 360 saying, well, this particular candidate is duly elected. But if an issue arises as to their eligibility then it cannot – that declaration could not, in our respectful submission, properly be made because a question arises as to whether they are duly elected.

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In that sense, because a consequence of the reference is filling any vacancy, that encompasses, in our respectful submission, an issue such as this as to eligibility to be chosen of the person who, on a special count, would otherwise take the position. One could test that by saying if an obvious question arose about someone like Ms Gichuhi, so it was obvious that they had dual citizenship and it had never been renounced or that they did not have Australian citizenship and a document could be handed up from the Bar table which showed that, then the Court would not make an order that she or he was duly elected. The fact that the issue may not be obvious, the fact that it may depend on reconciliation of expert evidence as to Kenyan law does not alter the principle, in our respectful submission.

230 So for all those reasons an issue does arise in relation to
Ms Gichuhi's citizenship. We respectfully submit that means the
declaration sought cannot at this stage properly be made and should not be
made but that a process should be set in train to quickly and expeditiously
235 seek to resolve this issue. In terms of resolving it, there are two broad
issues, as I indicated. One is strictly an issue of fact, namely, Kenyan law,
and whether or not Ms Gichuhi continued to hold Kenyan citizenship after
July 2001. The second issue is the "reasonable steps" question which is a
matter of Australian law.

240 Now, that has a pure factual component as to what steps Ms Gichuhi
took. Although that is purely factual, I do not think in the end there is going
to be much dispute about that. There is then a characterisation question as
to whether the steps that she took satisfy the "reasonable steps"
245 qualification that at least six members of the Court I think in *Sykes v Cleary*
identified, namely, that if you take reasonable steps to renounce whether or
not it is ultimately effective for the purpose of foreign law does not
matter - - -

GORDON J: What is your view on that aspect of the matter?

250 **MR KIRK:** Our submission would be that the steps taken by Ms Gichuhi
were not such as to meet that test; they were not reasonable steps to
renounce.

255 **GORDON J:** That is the final position?

MR KIRK: Yes.

260 **NETTLE J:** So where are you up to in preparation of this case? Are you
now in a position to file a document which sets out your case and your
evidence in support of it, or can you be within a day or two?

MR KIRK: Yes.

265 **NETTLE J:** What would one get at that point from you?

MR KIRK: Sorry, your Honour?

270 **NETTLE J:** What would one get from you at that point? What do you
contemplate?

MR KIRK: Yes, an expert report from another expert in Kenyan law
relating to the issue as to whether she retained citizenship. As to the
"reasonable steps" point, we were provided last week and then at

275 one o'clock again yesterday with two affidavits of Ms Gichuhi as to the
steps she took. Whilst we may want to investigate that a little further, I do
not anticipate any significant dispute about what Ms Gichuhi has said on
affidavit, so that would go before the Court and then it becomes an issue, as
I said, as to characterisation of whether or not that would constitute
280 reasonable steps within the - - -

GORDON J: The way you put it, if the answer to the second question was
against you, you would lose.

285 **MR KIRK:** If the answer to the – well, if the answer to – we could lose at
either point.

GORDON J: Well, my point is one could put to one side the question of
Kenyan law, one could just look at the affidavit and work out whether or
290 not it was reasonable steps or not.

MR KIRK: Yes. Yes, one could do that. I would add this, that in *Sykes v*
Cleary there was a division in the Court as to application of the “reasonable
steps” test. His Honour Justice Deane put it slightly differently, but it
295 perhaps amounts to much the same thing. But his Honour Justice Deane,
who was dissenting on other grounds, in any event, and her Honour
Justice Gaudron, took the view that the second and third respondents in
Sykes v Cleary, a Swiss citizen and a Greek citizen, had taken reasonable
steps to renounce, whereas the other members of the Court took the view
300 that they had not.

So, the manner in which this test is applied itself may raise
significant questions as to the operation of this qualification to section 44(i)
of the Constitution and we would respectfully submit that that is actually a
305 matter appropriate for the Full Bench, or perhaps the full Full Bench of this
Court because of its significance and because of the fact that there has been
no other case since *Sykes v Cleary*, in this Court at least, dealing with that
“reasonable steps” point and it is a matter of great importance, obviously, to
Members of Parliament.

310 **NETTLE J:** So you want to argue about the correct interpretation of *Sykes v*
Cleary insofar as it bears on reasonable steps?

MR KIRK: It is not that we would seek to dispute *Sykes v Cleary*, but we
315 would submit that *Sykes v Cleary* in the majority judgment establishes a
very strict – or let me just say strict – approach to reasonable steps, and so if
a step of formal renunciation is available and not taken, in general that
would mean reasonable steps had not been taken. But we recognise that, as
the plurality said in *Sykes v Cleary*, every case has to be judged in its
320 particular circumstances. Here, the particular circumstances are not

identical to *Sykes v Cleary*. There were particular steps taken by Ms Gichuhi and we acknowledge that an argument can and will be put that what she did did constitute reasonable steps.

325 **NETTLE J:** Well, the argument would be put first by you that it did not constitute it, presumably.

MR KIRK: Correct. Yes, your Honour.

330 **NETTLE J:** You are in a position to put that now?

MR KIRK: Well, if needs be, your Honour, yes.

335 **NETTLE J:** Very well, thank you. Mr Whittington, I assume you do not have any interest in this, or do you?

340 **MR WHITTINGTON:** I should announce for your Honour Justice Nettle's benefit, I also act for Ms Gichuhi, so naturally we support the Solicitor-General's motion, the summons, so I do have an interest with respect to Ms Gichuhi.

NETTLE J: Yes, thank you.

345 **MR WHITTINGTON:** My friend has identified that separate affidavits have been sworn by her deposing to the steps she has taken to determine the citizenship issue. So, if my friend was to pursue the course that he seeks to pursue, I think that we would seek an order - and, indeed, I think he seeks the order that she be joined to the proceeding so that she can lead additional evidence if required to address the "reasonable steps" matter.

350 **NETTLE J:** Yes. All right.

MR WHITTINGTON: If the Court pleases.

355 **NETTLE J:** Mr Solicitor, what do you say about this foreshadowed application?

360 **MR DONAGHUE:** Your Honours, our submission is that while it is true that the matter did not crystallise in a way that would give rise to a justiciable controversy until the special count last Thursday, it has long been both foreseeable and foreseen that in the event that the Full Court concluded that Mr Day was incapable of being chosen that his replacement on a special count would be likely to be Ms Gichuhi.

365 In those circumstances, our submission is that in the event that Ms McEwen wished to contend that if the special count generated that

370 result then she should not be declared to be elected there has been at least
three months available to Ms McEwen in order to assemble the evidence
and arguments upon which that proposition would be advanced. There was
not just the issue being flagged as a potential issue in the
Attorney-General's submissions on 6 January, but your Honour
Justice Gordon expressly on 17 January said – I quote your Honour:

375 I want to know precisely if there is a dispute what the dispute is -

So that was nearly three months ago and it was not, in our submission,
necessary for our friends to await the expert report that the Commonwealth
sought and obtained, although it is plain from our friend's submissions in
paragraph 10 that they did wait. Their submission in paragraph 10 opened
380 with the words "Following receipt of the report they sought their own
expert advice". So there was – until 28 March it seems that our friends did
not seek to progress the factual inquiries.

385 **NETTLE J:** May I just ask, Mr Solicitor, why it is that the
Commonwealth obtained expert evidence. Was it, as it were, in anticipation
of a case being put of the kind that is now alleged?

390 **MR DONAGHUE:** Yes. We agree with Mr Kirk to the extent that we
recognise that it is at least arguable that it would be difficult, if not
impossible, to challenge a declaration of the Court that Ms Gichuhi was
duly elected. We accept that if this argument is to be made it would
appropriately be made in answering question (d) of the reference and
because we took that position we wish to be in a position in the event that
the issue was thrown up and to satisfy ourselves that the Attorney-General
395 should be seeking the declaration that I have sought in the summons that
was moved on this morning.

400 Having obtained the expert report, we did satisfy ourselves that it
was appropriate to move for that order and so that is what we have done
and, in our submission, if the contrary position was to be put, while it could
have arisen in a way that required the determination of the Court until
recently, the fact of the matter is that the Court today has no evidence other
than the evidence that was before the Court on the reference which includes
405 Ms Gichuhi's declaration that she became an Australian citizen on 17 July
2001 and that she was eligible to be elected as a senator, that being the
same – it is in, if your Honours need to find it, on page 324 of the book that
was before the Full Court, the Court book, on the main reference and it
contained a declaration that:

410 I am qualified under the Constitution and laws of the Commonwealth
to be elected as a Senator.

415 So that is the same evidence that is normally available to support someone
being declared to be a senator and there is nothing, notwithstanding the
length of time that the issue has been raised, before the Court now to
suggest that that is not in fact the true position.

420 By analogy with the position in the ordinary procedure in the Court
of Disputed Returns a petitioner who wants to dispute an election is
required by section 355(aa) to set out with particularity the facts necessary
to identify the matters on which the petitioner relies in justifying the grant
of relief and, in our submission, that simply has not happened.

425 Indeed, it was only when Mr Kirk just then in his oral submissions
gave some indication as to the content of the draft expert report that we
have had any notice at all as to the basis upon which it is said that
Ms Gichuhi is not eligible to be elected. The issue in dispute appears to be
based, not just upon divergent opinions about a decision – one decision
430 amongst a number discussed by the Commonwealth’s expert in the case of
Sirat, but not only is that one decision that is criticised by our expert but it
is an obiter – the relevant part of the judgment is obiter, as our expert points
out.

435 So there is a dispute about an obiter observation of a single judge in
the context where the relevant constitutional provision is not discussed in
that judgment in question and just as a matter of plain language is very
clear. So that the provision that is in question in the relevant version of the
Kenyan Constitution, which is the version that was in force when - the 1969
Constitution when Ms Gichuhi became an Australian citizen, said in
440 section 97(3):

A citizen of Kenya shall, subject to subsection (7) –

445 which is irrelevant:

cease to be such a citizen if-

450 (a) having attained the age of twenty-one years, he acquires the
citizenship of some country other than Kenya by voluntary act
(other than marriage) -

455 Plainly Ms Gichuhi did acquire the citizenship of another country by
voluntary act after attaining the age of 21 years and so we respectfully
contend that on the material presently available it is difficult to see how
there is an issue. If our friends wish to put that matter more squarely in
issue, they should have done so by evidence before now.

460 The other matter, your Honours, is that, as has been mentioned by
my learned friends, Ms Gichuhi has sworn two affidavits. The second of
those affidavits deals directly with the question of whether or not reasonable
steps have been taken to renounce Kenyan citizenship and one of the
exhibits to that affidavit is a letter from the Kenyan High Commission
provided quite recently on 12 April which states, among other things, that
465 Ms Gichuhi was informed by the High Commission that she was not
regarded as a Kenyan citizen. I am paraphrasing, but that is the substance
of it.

470 If your Honours were minded to address that particular factual issue
as a discrete issue then it presently seems to us that the only relevant
evidence is that second affidavit of Ms Gichuhi and that is a very confined
factual debate indeed. But our primary submission is that, given the history
of the matter, your Honours should make the declaration sought.

475 **NETTLE J:** Thank you. The Court will adjourn briefly to consider the
application.

480 **AT 10.01 AM SHORT ADJOURNMENT**

UPON RESUMING AT 10.08 AM:

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490 **NETTLE J:** On 5 April 2017, this Court held that there is a vacancy in the
representation of South Australia in the Senate for the place for which
Robert John Day AO was returned at the general election in July 2016. The
Court ordered that the vacancy should be filled by applying the provisions
of section 273(27) of the *Commonwealth Electoral Act 1918* (Cth) by
analogy by filling the vacancy by a special count of the ballot papers and
that a single Justice should make any further directions and orders necessary
495 finally to dispose of the reference.

500 On 11 April 2017, her Honour Justice Gordon gave directions for the
Australian Electoral Officer for the State of South Australia to cause to be
undertaken a special count in accordance with the schedule of directions
appended to the order.

Upon the matter coming on again for hearing this morning, counsel
for Ms McEwen has moved *ore tenus* for directions to enable his client
further time in which to advance a claim that she does not accept that

505 Ms Gichuhi was qualified to be chosen, and to enable her to obtain expert
evidence to support her contention that Ms Gichuhi was not so qualified,
because Ms Gichuhi was at the relevant time a citizen of Kenya and
Ms Gichuhi had failed to take reasonable steps to renounce her Kenyan
citizenship.

510 It should be observed at once that this is an issue to which counsel
for Ms McEwen has referred from time to time on previous occasions over
the last three months as the matter has come from time to time before
her Honour Justice Gordon for directions; most recently on 11 April 2017
515 when it was dealt with on the basis that, if anything further were to be made
of the point, Ms McEwen would make her application to establish
Ms Gichuhi's lack of qualification by no later than last Thursday, 13 April
2017.

520 Notwithstanding that clear direction, nothing further was said of this
matter until this morning and even now there is not a petition or a summons
or affidavit to found such an application. It is put on the basis that it is an
issue which should now, for the first time, be dealt with in the proceeding at
present before the Court.

525 In circumstances where Ms McEwen has been ventilating the issue
of Ms Gichuhi's citizenship qualification since January this year and has
been given repeated adequate opportunities to make an appropriate
application to contest Ms Gichuhi's citizenship qualification, or at least to
arm herself with material necessary to do so, but has failed to do so, the
530 Court is not disposed to grant further time.

On the basis of the material now before the Court it is plain that
Ms Gichuhi was not disqualified from being elected within the meaning of
section 44 of the Constitution by reason of her citizenship. Accordingly,
535 counsel's oral application for further directions of the kind sought is
rejected.

MR KIRK: Your Honour, I, with great respect, must respectfully seek to
draw to attention some facts which are, in our respectful submission, not
540 consistent with what your Honour has just summarised.

NETTLE J: Yes.

MR KIRK: Before your Honour Justice Gordon last week in the
545 transcript, HCATrans 085 of 2017, at pages 6 to 7, line 220, after there had
been some discussion of the matter, my learned junior said:

Your Honour, we can advise the Court if there is an issue by
Thursday, if that would be convenient.

550

NETTLE J: Yes.

MR KIRK: Justice Gordon said:

555

Well done.

MS GORY: Thank you.

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HER HONOUR: Well done. That is great assistance. All right, you let us know by Thursday, otherwise the matter will be listed for 9.30 on Wednesday morning.

NETTLE J: Yes.

565

MR KIRK: Ms Gory said:

Yes.

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HER HONOUR: If something has arisen on Thursday then I can make directions in chambers. Is there any objection to that course?

NETTLE J: Yes.

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MR KIRK: An email was subsequently received from Ms Carolyn Rogers, the Senior Registrar of the Court, to my solicitor that afternoon on Tuesday last week indicating that any such matter should be drawn to the Court's attention by midday on Thursday and that was done. At 11.58 am an email was sent to Ms Rogers by my instructing solicitor saying:

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Dear Ms Rogers,

585

There will be an issue relating to the matter referred to in paragraph 24 of the submissions filed on 6 April on behalf of the Attorney-General, subject to the result of factual and legal enquiries that are being undertaken as a matter of urgency.

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That email was received because my instructing solicitor received a call from Ms Rogers shortly thereafter seeking to clarify the matter. In those circumstances, with very great respect, it is not correct to say that no application has been made to the Court. It is not correct to say that we have not complied with Court directions. We have done so.

595

No indication was given, nor were directions sought by the Attorney for filing of some particular process. We thought we had done all that was required by that email and had indicated that urgent factual and legal

inquiries were being undertaken. In those circumstances, in our very respectful submission, it is not procedurally fair to my client to strike out this application or decline to hear it on the basis of failure to comply with opportunities given when an opportunity was given last week and taken.

600

NETTLE J: Well, there is no application as yet.

MR KIRK: No, but all that we understood we needed to do in response to the email from Ms Rogers was notify by email. What Ms Rogers said was: “Please confirm by 12 noon on” – sorry, that is not right. Ms Rogers said:

605

I note that counsel for Ms McEwen was directed at the hearing to notify the Court whether or not there will be an issue relating to the matter referred to in paragraph 24 of the submissions filed on 6 April on behalf of the Attorney-General. Written notification should be sent by email to myself, Deputy Registrar Musolino - - -

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NETTLE J: You have made that point. Email was sent.

MR KIRK: But what Ms Rogers indicated was that it should be done by email, and that we have done. So it was my client’s reasonable understanding, in our respectful submission, that all that needed to be done had been done.

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NETTLE J: So you have made your application, you say?

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MR KIRK: Yes.

NETTLE J: All right. That means we are in a position to deal with it?

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MR KIRK: Well, as I have indicated this morning, we have sought an expert report, we will be in a position to finalise it - - -

NETTLE J: That is the point, Mr Kirk. I mean, you are still seeking expert reports three months after the issue was first ventilated, as it were, putting off on each occasion a final resolution of this matter to an even later point in time than that which is already unacceptable.

630

MR KIRK: As the learned Solicitor-General put this morning, no justiciable controversy arose about this till last Thursday.

635

NETTLE J: But you had every opportunity of anticipating that it would arise and to arm yourself with the material to dispute Ms Gichuhi’s qualification should the issue arise, as it did.

640

MR KIRK: All that we would be speaking about at most is a delay of – till next week, till next week.

645 **NETTLE J:** Just address yourself to the point. You did not arm yourself or, indeed, undertake any steps to do so in the three months the issue has been alive since January of this year.

650 **MR KIRK:** Well, with respect, that is not right either, your Honour, in that the Commonwealth Attorney, through his Solicitor, sought our agreement to questions to go to the expert they had retained and there was some discussion and the questions were agreed. It was not until about three weeks ago, on 28 March, that we received that report.

655 After this Court handed down its full judgment two weeks ago on Wednesday, 5 April, steps were immediately put in place to obtain a counter expert report in circumstances where, as the Solicitor-General has put, no justiciable controversy about the point arose until last Thursday. We are in a position to file that report by the close of business today. That is - - -

660 **NETTLE J:** But you do not need to, do you? If you win on the second point, or lose on the second point, you lose?

665 **MR KIRK:** Yes, we can lose – we would have to win on both points. We would have to win on both points.

NETTLE J: So it is enough to dispose of this application, were it to be attended to, to go into whether the steps which were taken were reasonable?

670 **MR KIRK:** Yes, the two issues overlap to the extent of – in terms of assessing whether or not steps were reasonable one has to have an understanding of what could be done under Kenyan law to renounce. That would not be likely to be very controversial, I do not think. It is a matter of forms and statutory provisions. That is pretty simple. But I should also add
675 in relation to reasonable steps, we only received Ms Gichuhi’s first affidavit on Thursday of last week, her second affidavit at 1.00 pm yesterday which put, shall we say, in starker contrast, the issue of reasonable steps. Until we received - - -

680 **NETTLE J:** Why should she have to put an affidavit in before you put in yours on the basis of which you contest her qualifications? It is back to front.

685 **MR KIRK:** Perhaps so, but as the Attorney has said, we have known the issue has been coming if Ms Gichuhi was to be elected.

NETTLE J: Well, it was odds on that she would be.

690 **MR KIRK:** Sorry, your Honour, I missed that.

NETTLE J: Once Mr Day was found to be unqualified, it was odds on that Ms Gichuhi would be elected.

695 **MR KIRK:** Yes, I would not cavil with that, your Honour. It was odds on, but not certain.

NETTLE J: You could not have got money on it, or if you could, the odds would have been completely unacceptable.

700 **MR KIRK:** I do not know, your Honour. I do not know what the odds would have been. But I agree it would have been odds on but we did not know until Thursday of last week this was what would happen.

705 **GORDON J:** There are two problems. One is the “odds on” problem. The second is that on a number of occasions the Attorney-General, either through the Solicitor or through Mr Williams, has informed the Court that the Commonwealth had made inquiries and satisfied themselves that she was eligible. So you have known that that has been their view.

710 **MR KIRK:** No, I do not - - -

GORDON J: Mr Williams raised it last Thursday. I mean, there has been no dispute whatsoever about the way in which the Commonwealth were going to deal with it. The questions were agreed. The expert’s report was provided.

715 **MR KIRK:** The expert report was provided three weeks ago. As to Mr Williams or the Solicitor saying the Commonwealth’s view, it was not, I think, until last Thursday that the Commonwealth positively expressed a view to this Court that they had satisfied themselves, that being the first time the issue arose. It was on that occasion that Ms Gory engaged in the exchange I have referred to and, indeed, in paragraph 24 of the submissions the Commonwealth put in on 6 April they themselves said the issue has not yet arisen for consideration by the Court and will not arise unless and until

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725 the report of the special count contemplated is such as to make it necessary.

So it was not, with respect, the position of the Commonwealth until last Thursday – or last – in fact, even last Tuesday it was not the final result because last Tuesday they were relying on these submissions of 6 April indicating that it had not yet arisen. So where the Commonwealth was –

730 was saying it had not yet arisen - - -

GORDON J: I think there is a distinction between “hasn’t yet arisen” and “view about eligibility”, Mr Kirk.

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MR KIRK: It may be, but we did not get the report from the Attorney’s expert until 28 March which was - - -

GORDON J: That is not last week, though. That is my point.

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MR KIRK: No.

GORDON J: My point is you have had it. That was their view since 28 March. It is weeks ago.

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MR KIRK: It is about three weeks ago. The Full Court’s decision was a week thereafter, which was two weeks ago, and we have moved expeditiously since to seek to obtain an expert report which can be filed today. All that we are talking about, as I have respectfully put, is a delay of about a week or so where, in our respectful submission, a real question arises about eligibility of Ms Gichuhi and the order of this Court, if made in terms sought by the Attorney, would kill the issue or quite possibly kill the issue dead in the way the Solicitor-General has said this morning, without a hearing on the merits.

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NETTLE J: Mr Kirk, do you remain of the view that if the issue were to be dealt with it would appropriately be dealt with by a Full Court in Canberra rather than by the two of us?

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MR KIRK: Well, we would obviously take whatever – for and for argument - - -

NETTLE J: I am interested in your submission.

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MR KIRK: - - - we can get, your Honour. But accepting that the issue as – we could, of course, if the Court was to determine the Kenyan law question, we could lose at that point in which case you do not have to worry about reasonable steps. If we cannot establish she maintained dual citizenship, it is the end of the argument. We do not get to the “reasonable steps” point.

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NETTLE J: But you have the fact question too. Yes, I see. You will have the affidavit today, you say?

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MR KIRK: Yes, because it is only if she retained Kenyan citizenship that the issue – the reasonable steps to renounce it arise.

NETTLE J: Yes.

780 **MR KIRK:** So we could lose at that point. But if the “reasonable steps”
issue does arise because we win on the Kenyan question, namely she
retained dual citizenship, then yes, it is our primary submission that that is
appropriately a matter dealt with by the Full Bench of this Court on the
785 *v Cleary* 25 years ago and it is a matter of importance. It is a matter of great
importance.

NETTLE J: Yes.

790 **MR KIRK:** Unless I can assist your Honours.

NETTLE J: No, thank you, Mr Kirk.

795 Counsel for Ms McEwen has rightly drawn to the Court’s attention
that what I have said thus far is erroneous in relation to what occurred at the
last directions hearing and in particular as to what was said as to the way in
which Ms McEwen would proceed if she sought to contest the citizenship
qualification of Ms Gichuhi.

800 I have said that the matter was left upon the basis that, if
Ms McEwen were to make an application contesting Ms Gichuhi’s
citizenship qualification, she would do so by no later than last Thursday.
Counsel for Ms McEwen rightly points out to the Court that in truth the
805 matter was left upon the basis that, if the question of Ms Gichuhi’s
citizenship qualification were to be put in issue, Ms McEwen would give
notice to the Registry by no later than Thursday; and, in fact, she did so.

810 Thus, inasmuch as what I have said thus far suggests that
Ms McEwen has failed to comply with any directions given in the course of
hearings it is incorrect. It remains, nonetheless, to consider whether in
circumstances where the issue of Ms Gichuhi’s citizenship qualification has
been active in the sense of under contemplation since January of this year,
and where in circumstances it would have been open to Ms McEwen to
obtain and thus arm herself with expert material necessary to support the
815 foreshadowed contention that Ms Gichuhi lacks the citizenship qualification
necessary for election, but has failed to do so, it is appropriate for the Court
in a matter of this kind, which has been ongoing now for some considerable
time, to grant still further time to enable Ms McEwen to do so.

820 This application for further time in one sense raises an issue of
significance in that it may be – but I do not necessarily say that it is so –
that, were the Court to make a declaration of the kind now sought by the
Attorney-General, the matter would thereafter be foreclosed in the sense
that it would not be open to Ms McEwen to contest the electability of

825 Ms Gichuhi on the basis of her citizenship qualification. Thus, if the
declaration is now made, it may do some prejudice to Ms McEwen in that
sense.

830 On the other hand, the filling of the vacancy created by the
determination that Mr Day was not qualified for election at the last general
election is a matter of high public importance and it is necessary in the
public interest that the issue be resolved and the vacancy thus created by his
incapacity be filled so as to create certainty as soon as is reasonably
practicable.

835 In circumstances where it has been open to Ms McEwen to arm
herself with material necessary to advance a contention, which it is agreed
by counsel it was odds on would become necessary, at least since the
determination of this Court that Mr Day was not qualified, the Court is not
840 disposed to grant additional time to Ms McEwen in which to arm herself
with material necessary to propound an application of the kind
foreshadowed.

845 As the Solicitor-General points out in opposing the application, it is
indeed even only now, for the first time in the course of counsel for
Ms McEwen's oral application, that any particularity at all has been lent to
the foreshadowed application. Until now, it has rested solely in terms of
generalities as to what or what might not be the citizenship qualification of
Ms Gichuhi.

850 There has been nothing at all since at least January of this year
precluding Ms McEwen from formulating the basis of her application, or
from assembling expert material with which to support it. The fact that the
Commonwealth chose to delay the preparation of expert material which it
855 collected in order to satisfy itself that it was appropriate to submit that
Ms Gichuhi should be declared elected is not to the point. If an application
were to be made by Ms McEwen to contest Ms Gichuhi's qualification, then
it was incumbent upon Ms McEwen to arm herself within a reasonable time
with material with which to do so; and she has not.

860 For those reasons, accepting the qualifications pointed out by
counsel for Ms McEwen, the Court is not disposed to grant further time and
for that reason, counsel for Ms McEwen's application is refused.

865 **MR KIRK:** May it please the Court.

NETTLE J: Are there any further directions or orders sought, lady and
gentlemen?

870 **MR DONAGHUE:** No, your Honour.

NETTLE J: Adjourn sine die.

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AT 10.33 AM THE MATTER WAS ADJOURNED