



Yassin v Attorney General & 2 others; Independent Policing Oversight Authority (IPOA) (Interested Party) (Petition E309 of 2022) [2022] KEHC 11524 (KLR) (Constitutional and Human Rights) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E309 OF 2022
HI ONG'UDI, J
AUGUST 2, 2022**

BETWEEN

HAJI MOHAMMED YASSIN APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF IMMIGRATION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY (IPOA) INTERESTED PARTY

RULING

1. This Ruling is premised on this Court's Orders dated 1st July 2022 premised on the Notice of Motion application dated 22nd June 2022. Following the grant of prayer (i), (ii), (iii) and (iv) as spelt out in the Notice of Motion application, this Court directed the parties to present their case on the following issue:

Why the applicant should be released from custody pending the hearing of the petition.

2. A brief background of the case reveals that the applicant's Notice of Motion application dated 22nd June 2022 is based on the grounds that:

a. The applicant was arrested on 14th June 2022 and subsequently detained at Anti-Terror Police Unit Cells (custody) next to Nairobi Area Traffic headquarters.



- b. The applicant's constitutional right to be produced in Court within 24 hours of arrest was infringed.
 - c. The police have continued to detain the applicant without any lawful basis.
 - d. The respondents' actions are unconstitutional, insensitive, cruel arbitrary and an abuse of the office.
 - e. The respondents' actions have caused anxiety and mental anguish on the part of the applicant and his family.
 - f. The respondents are intent on removing the applicant from this Court's jurisdiction.
 - g. It is in the best interest of justice that the prayers sought are granted.
 - h. The applicant is in poor state of health being 71 years old and ailing. He is diabetic, hypersensitive, with a condition related to high blood pressure.
3. The application was supported by the averments in Abdiaziz Yassin's affidavit of even date on behalf of the petitioner. The affidavit reiterated the contents of the grounds outlined above.
 4. Additionally he deposes that the applicant has eight children with his wife Zahra. Further, that the applicant owns property and is a director of Benl Development Limited duly registered in Kenya. He informs that the applicant owns a 10 -acre parcel of land L.R. No.7149/23 near Jomo Kenyatta International Airport at an estimated value of Ksh.1,000,000,000.
 5. He avers that the applicant's property has made him a target of interested parties who want to dispossess him by having him unlawfully deported. He deposes that the applicant has been in custody since his arrest.
 6. The application was additionally supported by Abdiaziz Yassin's supplementary affidavit dated 30th June 2022 in compliance with Justice Mrima's Court Orders issued on 1st July 2022.
 7. He deposes that the applicant's family reported to the police station that he was missing on 15th June 2022 but were not informed that he had been taken into police custody. He deposes that the applicant remained in custody and was not taken to Court for a period of 16 days.
 8. Due to the applicant's detainment it is stated that he has not been able to attend to his matter in Chief Magistrate's Court Criminal Case No.2462 of 2021 which the complainant withdrew. He informs furthermore that the applicant's passport was deposited at the Makadara Law Court's on the application of the Director of Public Prosecution as part of the bond terms.
 9. The applicant's case is further supported by his wife, Sahara Yassin Sheikh also known as Fatuma Zahra's supporting affidavit dated 4th July 2022. She informs that she got married to the applicant on 15th March 2004 and they have eight children. She has lived in Kenya since her marriage.
 10. She informs that the applicant is a businessman and an active politician in Somali. She states that the applicant has property and business in Kenya. He is a shareholder in BENL Development Limited which is on L.R. No 7149/23 situated in a prime property near the Jomo Kenyatta International Airport. She deposes that the petitioner has been seeking financiers to develop a business mall, mosque and hospital on the property.
 11. She deposes that the applicant has been engaged in a number of cases being Makadara Criminal Case No.1791 of 2021 Republic v Mohammed Yassin Ismael; Nairobi Misc Criminal Case No. E211 consolidated with Misc App No. E235; Chief Magistrate Case No.4586 of 2016 Boleyn Magic Wall



Panel Ltd v Haji Mohammed and Benl Development Ltd and Nairobi HCCR Misc No. E111 of 2022 Mohammed Yassim v Nordin Mohammed Haji & others. She states that the applicant was ordered to pay Ksh.18,122,842.22 after he lost the suit in Milimani CMCC No.4586 of 2016. She states that some individuals in Parliament are using the Court system to oppose the applicant.

12. She avers that the applicant is not in good health and has been receiving medical care from his doctor as a result. She deposes that owing to this and the need to give his children parental care and support, to be able to attend to his pending court cases he should be released. She in addition takes issue with the fact that the applicant was detained for several days and they even reported him missing before his whereabouts were revealed to the family. She avers that the whole process of repatriation is unconstitutional.

The respondents' case

13. The respondents in response filed their replying affidavit dated 29th June 2022 sworn by the 2nd respondent's legal officer, Jimmy Nyikuli.
14. He deposes that the 2nd respondent received adverse reports from the Director General National Intelligence Service on the applicant's nefarious activities in the country. In response the 2nd respondent wrote to the Cabinet Secretary for Interior and Coordination of National Security advising that the applicant be deported from the country. He informs that based on the Cabinet Secretary's declarations in line with section 33(1)(h) and 43(1) and 43(2) of the [Kenya Citizenship and Immigration Act, 2011](#), the applicant was arrested on June 14, 2022 and detained.
15. He deposes that the 2nd respondent on June 14, 2022 wrote to the Embassy of Djibouti in Nairobi requesting issuance of travel documents for the applicant to facilitate his removal from Kenya but the documents have not been issued to date. He avers that the Embassy of Djibouti has frustrated the 2nd respondent's efforts to comply with the Cabinet Secretary's Orders.
16. In light of this, he avers that the applicant is lawfully detained in compliance with section 43(1) (b) of the [Kenya Citizenship and Immigration Act, 2011](#). He however states that the 2nd respondent's efforts to expeditiously expedite the applicant's removal has been curtailed by the Embassy's refusal to issue the travel documents. He states that as a result the petition is being used an attempt to curtail the applicant's deportation hence waste of this court's time.

The applicant's written submissions

17. The firm of J.K. Bosek & Company Advocates on behalf of the applicant filed written submissions dated July 12, 2022.
18. On the issue as to whether the applicant should be released from police custody counsel submits that being held in custody without justifiable reasons is unconstitutional and denial of right to family, liberty and freedom of association. Moreover, that it is contrary to article 57 of [the Constitution](#) that protects the elderly. Counsel argues that the respondents have not demonstrated by adducing evidence the reasons why the applicant should continue to remain in custody. Neither have they adduced evidence to show that his release will be prejudicial to public order. Likewise, Counsel notes that the respondent has not shown that the applicant has a criminal record.
19. He submits that in view of the above the applicant has not been deemed to be a flight risk. Similarly, that the complainant in the Makadara Case following the intervention of the Muslim Elders in Kenya who paid the debt owed seeks to withdraw the case against the applicant. Counsel notes that this indicates the applicant's good standing in Kenya. He contends that if the applicant was guilty of the acts he is



- accused of, he would have chosen to leave quietly under the deportation order. Instead he chose to engage the legal process to continue staying in the country while catering for his family, business and pending court cases.
20. Counsel on the rights of the children submits that the applicant's family is entitled to their right under article 53 of *the Constitution*. He argues that while the applicant is in custody, he is unable to provide for the needs of the family. He notes in light of this that releasing the applicant would be in the best interest of the children.
 21. On the final issue, which is the health of the applicant, Counsel submits that the applicant is battling high blood pressure, diabetes and hypertension and so requires specialized treatment. As such his continued detention continues to deprive him of his right to access quality medical treatment.
 22. Counsel for the applicant, Dr. Khaminwa and Mr. Bosek, in addition to the written submissions, made oral submissions at the Court hearing held on July 20, 2022. Mr. Bosek submitted that the main contention in issue was whether the applicant ought to be released pending hearing of the petition. It is noted that the applicant has been in custody since June 14, 2022.
 23. Dr. Khaminwa submitted that the applicant is a 71 year old family man from Djibouti married to a Kenyan woman and they have eight children. Considering this he submitted that *the Constitution* recognizes and protects families and old members of society under article 43 and 57 of *the Constitution*. He moreover, noted that under both local and international law, the family is not supposed to suffer when one is being deported. He continued to note that no one gave the applicant an opportunity to explain himself yet he has not been convicted of any criminal offense. Counsel argued that the applicant should not be discriminated against.
 24. Mr. Bosek further submitted that one is only kept in custody if he/she is a criminal or is about to commit an offence. Counsel questioned the respondents' intention of retaining the applicant in custody for the extended period of time. In view of this Counsel argues that the respondents are not clear on the reason why they are detaining the applicant yet it is apparent there are people set on frustrating him. As such he submits that the state has not demonstrated the prejudice that will be suffered if the order sought is issued.
 25. Dr. Khaminwa concluded by submitting that in view of the fundamental rights and freedoms in the Bill of Rights the Cabinet Secretary's Orders in this matter are reviewable by this Court in light of the applicant's rights that have been violated.

The respondents' submissions

26. The respondents did not file written submissions but their Counsel, Miss Wamuyu presented their case orally during the hearing on July 20, 2022. Miss Wamuyu submits that the deportation order is based on section 43(1) of the *Kenya Citizenship & Immigration Act* since the applicant is a prohibited immigrant. Counsel submits that in such cases the immigrant is held in police custody lawfully until the suit is determined. She informs that the applicant has not been deported and still in custody due to this court's orders that stayed the deportation order.
27. She further submits that it has not been demonstrated that the applicant's rights have been violated. Counsel emphasized that there is a difference between an accused person and a person in a waiting facility. In view of this she noted that as per the Cabinet Secretary's Order the applicant was deemed to be an illegal immigrant and hence held in custody. To support this position Counsel relied on article 51 of *the Constitution*. Additionally, she submitted that the applicant has been taken care of while in custody and his rights have not been infringed.



Analysis and Determination

28. Having perused the pleadings and parties submissions, it is my considered view that the only issue for determination is whether the applicant has met the threshold for granting the order sought.
29. The applicant has brought this application against the respondents for his continued detention in police custody with the view of deporting him out of Kenya to Djibouti. He seeks to have the respondents directed to release him from custody pending determination of his case.
30. The court in the case of *Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto* [2017] eKLR while discussing the threshold for grant of such an order opined as follows:

“A mandatory injunction is different from a prohibitory injunction in the sense that while an in prohibitory injunction the applicant must, as was stated in the celebrated case of *Giella vs Cassman Brown & Co. Ltd (1973) EA 358*, establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.

21. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

22. In the case of *Nation Media Group & 2 others vs John HarunMwau* [2014] eKLR, the court of appeal said:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

31. In the same way, the Court in the case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] eKLR, speaking on the factors to consider held as follows:

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is



ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

32. Guided by the cited authorities, it is clear that for such an application to be successful a party must demonstrate the existence of extraordinary circumstances that justify grant of such an order. Moreover, the court is to be guided by the prevailing prejudice to be suffered by either party where such an order is granted.
33. In principle, states are free to exercise their territorial sovereignty in regulating the entry, residency, and departure of people from its territory. The right to freedom of movement and freedom to choose one’s residence is applicable not only to nationals of the country concerned, but also to everyone lawfully within the territory of that nation.
34. The *Kenya Citizenship and Immigration Act*, 2011 provides for matters relating to citizenship; issuance of travel documents; immigration and for connected purposes. Section 2 of the Act defines deportation as:

“deportation” as the action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act.

35. Correctly, section 43 of the Act provides the power for removal of persons unlawfully in Kenya as follows:

Power to remove persons unlawfully present in Kenya

- (1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.
- (2) A person against whom an order has been made under this section shall—
 - (a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or
 - (b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.
- (3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to *the Constitution* and related laws.



36. It is clear from the above reading that one of the procedures sanctioned by the Law is that the 2nd respondent can employ the removal of the cited persons and further detain one in police custody pending deportation. While this is well noted it is imperative to note that the High Court retains supervisory jurisdiction under article 165 of *the Constitution* to determine whether actions purporting to limit a person’s fundamental rights and freedoms are lawfully done. I stress so because all actions sanctioned by state organs must conform to the precepts of *the Constitution*. This is the acid test for actions purported to be undertaken under the Law including retaining illegal immigrants in custody before their deportation from the Kenyan territory.
37. The procedure for removal and deportation of illegal persons is not novel. This court has on numerous occasions reviewed decisions undertaken by the Immigration Department to ascertain whether the due process as provided in *the Constitution* has been adhered to. A case in point is that of *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR where the Court stated as follows in paragraph 27:
- “...The requirement in removing an alien from a state’s territory, as provided under the above conventions and in accordance with the constitutional provisions contained in Article 47, is that such removal should be ‘in accordance with the law’, that due process should be followed. This, I believe, is also the essence of the decision in the case of Samuel Murial Mohochi –vs- The Attorney General of Uganda, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process.”
38. It is clear from the foregoing that following due process under the law before deporting an individual is paramount in our democratic state and the legal system. It follows accordingly that a decision taken contrary will warrant special circumstances under which this court has to consider in grant of the sought order.
39. In the instant case, it is not in dispute that the respondents have the statutory mandate to detain an illegal person in the Kenyan territory. In the circumstance of this case however I find that the applicant has demonstrated that there are special and exceptional circumstances that warrant grant of the order sought.
40. My finding is based on the fact that the applicant through the material placed before this court has demonstrated that he is a family man with a wife and children that are Kenyan nationals and he owns a company registered under the *Companies Act*. In addition, as per the applicant’s wife’s affidavit his health condition has been proved.
41. On the flipside it is unquestionable that the applicant has been in custody since June 14, 2022 without any explanation or justification from the respondents other than the applicant being a prohibited immigrant. I take issue with this exercise of discretion albeit it’s statutory sanction. This is because the action must comply with the constitutional principles for the process to be given a clear bill of health. There is evidence of the family reporting the applicant’s disappearance yet the family was not informed of his arrest at that time. This clearly indicates that the applicant was not presented before court in the manner dictated under article 49(f) of *the Constitution*.



42. The respondents have annexed documents to the replying affidavit showing that indeed there is deportation order issued against the petitioner/applicant. I have taken note of paragraph 5 of the replying affidavit by Jimmy Nyikuli where he avers:
- “That the 2nd respondent received adverse report from the Director General National Intelligence Service touching on the nefarious activities of the petitioner in the country that were contrary to national interest. (The report can be availed to court in camera).
43. No one is disputing that an adverse, report against the petitioner /applicant may have been received by Jimmy Nyikuli, who deponed of his willingness to avail the report to the court in camera.
44. Mrima J who has handled this matter from its inception gave directions for production of the petitioner/applicant and the said “adverse report.” The record shows that he petitioner/applicant was produced on July 1, 2022. Mrima J had even organized for a court where the matter would be heard in camera, for the “adverse report” to be availed. It was never to be.
45. To date the “adverse report” has not been availed to the court as directed. The court is not in picture of knowing what the applicant is accused of having done. The applicant also claims not to be in the know as to what wrong /wrongs he committed. The reason why the “adverse report” is important is that it is the basis of the deportation order which is being challenged by the applicant through this petition.
46. Alongside what I have referred to above I refer to a letter annexed to the supplementary affidavit by Abdi Aziiz Yassin sworn on June 30, 2022. The said letter is dated June 24, 2022 from the Djibout Embassy in Kenya Ref. No. Djibembke/mia/046/2022. The said Embassy is raising genuine concerns about the prolonged detention of the petitioner/applicant. There is no evidence of the said letter addressed to the Ministry of Foreign Affairs Kenya having been responded to.
47. It is not enough to state that the 2nd respondent received an adverse report from the Director General National Intelligence Service. There was no presentation of facts to help this Court make an informed judgment on the severity of the claimed facts. Moreover, it must be shown that the respondents never granted the applicant an opportunity to be heard and present his case before the adverse decision against him was made. Doing so would have been in line with article 47 of *the Constitution*. None of this is demonstrated. Such evidence would have disclosed that the respondents followed the due process while according the applicant his rights as recognized in our Constitution and international conventions.
48. Without a justification for the respondents continued detention of the applicant and in light of these facts and a demonstration of the prejudice to be occasioned if the applicant is released, I am convinced that the balance of inconvenience as it stands is in the favour of the applicant all factors considered.
49. However in view of the fact that the deportation order is still in force if released from police custody the applicant will still have to be under the supervision of the 2nd and 3rd respondents to ensure he complies with the law as his matter awaits hearing and determination.
50. My find is that the petitioner/applicant has met the threshold for the prayer for release from custody as sought.
1. Pending the hearing and determination of the petition herein the petitioner shall be released from police custody at the ATPU facility on the following conditions;
 - i. The petition herein must be disposed off within 65 days from now due to the impending High Court vacation.



- ii. The petition to be disposed by way of written submission within 30 days. The petitioner to have the first 15 days from today.
- iii. Mention on September 19, 2022 for highlighting of the submissions.
- iv. The petitioner/applicant to report every Monday without jail to the officer in charge Anti-Terror Police Unit next to Nairobi Area Traffic Headquarter. If he misses to report on any one Monday the Court should be informed for purposes of revoking the order.

Orders accordingly.

DELIVERED, VIRTUALLY DATED AND SIGNED THIS 2ND DAY OF AUGUST 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

