



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. E010 OF 2021**

**SALIM SULTAN LAKDWALA.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. **SALIM SULTAN LAKDWALA**, the Applicant, filed an application dated 14<sup>th</sup> January, 2020 pursuant to Articles 10, 12, 21, 25, 28, 29 and 49 26, 27 and 29 of the Constitution of Kenya, Section 33, 36, 36A, and 37 of the Criminal Procedure Code, Rules 2 and 3 of the Criminal Procedure seeking the following orders:

*a. That this application be certified urgent and service be dispensed with in the first instance.*

*b. That this court be pleased and issue an order directing the Inspector General of Police and or the Immigration police unit and or the Officer Commanding Kilimani Police Station and or any such other officer, agent and or servant of the 2<sup>nd</sup> Respondent in whose custody is SALIM SULTAN LAKDWALA to produce before this court within 12 hours and or any such other reasonable immediate time possible.*

*c. That upon production of the Applicant before court, the Applicant be granted extremely lenient Bail/ Bond terms; more specifically execution of a personal free bond and or any such terms that the Court may deem fit and the Applicant be released upon meeting the Bail/ Bond or any such terms granted by this Court.*

*d. The 2<sup>nd</sup> Respondent and or her agents' servants and other people working under him be restrained from arresting the Applicant and constraining him in any manner whatsoever under circumstances transactions and or particulars failing under the same circumstances transactions and or particulars that led to his present arrest and confinement without leave of the court.*

*e. Costs of this application be provided for.*

2. The Notice of Motion was supported by an affidavit deponed by **Kongani Udoto Kongani**, the Applicant's advocate who deposed that his client, the Applicant, was in custody at Kilimani Police Station having been arrested by the police on falsified claims that he is a Sportpesa Betting company agent which had been barred from further conducting business in Kenya

3. That the Applicant was arrested on 10<sup>th</sup> December 2020 around 9pm whilst entertaining himself and has never been produced before any court, neither has he ever been informed of his reason of arrest.

4. That the Applicant was then taken to Jomo Kenyatta International Airport cells where he spent 15 days, prior to being moved to Industrial area police, Nyayo house and then back to JKIA police cells for another 7 days.

5. Further, the Advocate averred that the Applicant is a business man running a personal business in Nairobi and has been in custody for more than 35 days which is plainly illegal.

6. The Applicant swore a further affidavit on 20<sup>th</sup> January 2021 stating that he is a businessman with a business at Luthuli Avenue, Nairobi, in the name and style of Base Buy and that since he was arrested he has never been produced in any court.

7. The Applicant further swore that he has been in custody for about 39 days and has been illegally treated by the police.
8. In response, the 2nd Respondent swore a replying affidavit dated 20<sup>th</sup> January 2021 stating that contrary to the allegations, the Applicant is lawfully in custody pursuant to a declaration by the Cabinet Secretary for Interior and Coordination of National Government awaiting his deportation.
9. That on 14<sup>th</sup> December 2020 the directorate received reliable information that there were several foreigners working at an unlicensed casino in Hurlingham and having acted on the information, a multi-agency security team comprising of officers from the Directorate of Immigration, the Betting Control and Licensing Board and National Police Service proceeded to the casino and found the Applicant working there.
10. That they discovered that the casino did not have a valid operating license and further to that the Applicant was found to be unlawfully present in the country as his passport had expired on 20<sup>th</sup> May 2020, he did not have a valid visa either and he was then declared a prohibited immigrant by the Cabinet Secretary in accordance with section 33(1) of the Kenya Citizenship and Immigration Act and held at Kilimani Police Station awaiting deportation.
11. That they purchased an air ticket for the Applicant but he was refused to board Kenya Airways flight KQ212 to Mumbai on grounds that he did not possess a valid passport to allow him to travel.
12. That they informed the Indian High Commission as evidenced by the letter dated 28<sup>th</sup> December 2020 and requested them to facilitate the Applicant with a travel document which has not been done to date.
13. The Application was canvassed by way of written submissions. It was urged by the Applicant that the Respondent violated his rights by denying him bail, and detaining him in custody, which amounted to absurdity, an illegality and breach of law or degeneration to lawlessness.
14. That he was not informed of the reason for his arrest until the Respondents filed a replying affidavit stating that he was a foreigner working in a certain casino whose company (unidentified) documents indicate that it had no licence and an alleged declaration classifying him as a prohibited immigrant, and, for his incarceration.
15. He faulted the Respondents for not taking him before any court or tribunal as contemplated by the constitution and argued that following the Respondent's averment that his passport had expired, being a foreigner, he was not a flight risk as he had no travel documents.
16. Acknowledging that the basis of the Respondents' case revolve upon section 33(1) (f) and 43 of the Kenya Citizenship and Immigration Act, 2011 (KCIA), he argued that their actions are not invisible to the law or free from the scrutiny of the constitution, and related legal tenets.
17. Arguing that the Respondents' action is an affront to justice, abusive and open disregard of the constitutional principles that they were expected to protect, he cited the case of *Oumarou Moumouni Ali Vs. Director General Kenya Citizens and Foreign Nationals Management Services & 3 others* [2020] eKLR where the court stated thus:-

***“ 27. The Respondents in exercise of their functions as state officers are bound by provisions of Article 10 of the Constitution thus the National Values and Principles of Governance which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. It is not for them to urge that they should be accorded the anatomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of the above, I find that the due process was not followed in the Petitioner's deportation. I find that it would be contrary to law, that the Respondents should have the Petitioner, who has been residing in Kenya for 10 years, a family man with Kenyan wife and 2 Kenyan children, doing business in this country and a consul of Niger and an employer of over 100 people be deported without being served with deportation order and being given an opportunity to be heard. This very act goes against the dictates of our constitution and International Law and should not be allowed at all.”***

18. A further argument was advanced that Article 47 of the constitution was contravened since the Applicant was not given a hearing. In that regard he emphasized what was stated in *High Court Petition No. 586 of 2012 between Bashir Mohamed Jame Abdi and Minister for Immigration & Others, where* Lenaola J (as he then was) held that:

***“By denying the subject Abdi Bashir Mohamed alias Cabdiqani Bashir Moxamed entry into Kenya and deporting him to the UK without a formal process or service on him with any written allegations, reasons or order/s and without according him a hearing, to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subject's constitutional rights of a citizen under Article 123, his fundamental rights and freedoms as to equal treatment and equal action/justice, to deprivation of the society and recognition of his family to a fair hearing under Articles, 27(1), 39, 45(1), 47 and 50(1) of the constitution.”***

19. In reply, the Respondents submitted that the Applicant, a foreigner, was found operating a casino and also conducting a business without a valid work permit. That had no valid documentation to allow him into the country, therefore, was declared a prohibited immigrant by the Cabinet Secretary of Interior and National Government in accordance with section 33(1) of the KCIA, and the deportation order and subsequent detention was to facilitate his lawful removal from the country.
20. That it was in the best interest of the republic that the Applicant remains in custody pending his removal from the country, Kenya being a sovereign State with the right to allow entry into Kenya of foreigners which is done in accordance to the law; and that the prayers of

bail/bond would go towards sanitizing an illegality which is the illegal presence of the Applicant in the country.

21. Following filing of the Application in court, the Applicant was produced in court virtually, therefore, prayer 1 and 2 were spent. That being the case issues for determination in this application are as follows:

**a. Whether the Applicant is entitled to bail?**

**b. Whether a restraining order should issue against the Respondents deterring them from arresting and constraining the Applicant in the circumstances that would amount to confinement without a court order?**

22. The purpose of bail/bond is to guarantee a person's attendance while on trial. Anticipatory bail is peculiar which is granted pending arrest. In such a case a person would be apprehensive of being arrested. In the instant matter, the Applicant's case is that he is being illegally held in custody and was never produced in a court of law or informed the reasons for his arrest. That position is contested by the Respondents stating that the Applicant's documents expired and he is therefore in the country illegally and it is because of lack of proper documentation by the Applicant that he is still in the country.

23. The Applicant was arrested on 14th December, 2020 and was indeed found to be without any valid travel and identification documents. The Applicant's passport expired in May 2020 and has not been renewed to date. There is therefore no justification for him being in the country, more than 6 months having lapsed after his passport expired. If the Applicant found there was a challenge in renewing his documentation before it expired, he would have then travelled back to his country, renewed his documentation then come back.

24. The 2<sup>nd</sup> Respondents invoked **Section 33(1) (f) of KCIA**, 2011 in the declaration dated 18<sup>th</sup> December 2020 marked as annexure, "AO2" to the replying affidavit deposed by Mr. Alfred Omanga, a principal Immigration Officer, a declaration that was made by the Cabinet Secretary pursuant to **Section 33 (1)(f) of KCIA** that provides as follow:-

**"33. Prohibited immigrants and inadmissible person:- (f) a person whose presence in or entry into Kenya is unlawful under any written law."**

25. From affidavit evidence availed, I find that the Applicant herein was unlawfully in the Country and further note that the Cabinet Secretary made the declaration subject to the constitution and related laws. However, the Applicant does not seem to have been informed of any reasons as to why he was arrested, why he was being deported, neither was he given a chance to be heard as provided by the Constitution and the statutes. From the reading of Statute, the Cabinet Secretary had powers to deport the Petitioner, but he ought to have been given a fair hearing and be informed of the charges against him as provided under **Article 50 of the Constitution of Kenya 2010**.

26. The position taken in the above-mentioned case was recently restated by Justice G. V. Odunga, in the **Republic v. Minister of State for Immigration of Persons exparte C. O. (2013) eKLR** where the learned Judge under paragraph 33 of the Judgment stated:-

**"To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly, the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tee with branches in illegality, irrationality, impropriety of procedure (the three "1's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."**

27. The fact of the Cabinet Secretary having used discretion bestowed upon him by Statute without a court order does not mean that illegal immigrants ought to be in the country. The Applicant is not a citizen of Kenya but of India and he does not have even the very documents that would allow him entry or stay in the country. I therefore find that the Applicant is illegally in the country and it has not been demonstrated if he made any attempt to renew his travel documents before the expiry, neither did he seek asylum at the Indian High Commission, but, still went ahead to work and live in Kenya illegally even after his documents had expired for more than 6 months.

28. In **Mohammed Ibrahim Naz vs. Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & Another [2013] eKLR: MumbiNgugi, J** that:

**"...the right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law. While Article 39(1) and (2) with regard to freedom of movement and the right to leave Kenya are guaranteed to all persons, the right to enter, remain and reside anywhere in Kenya is the preserve of citizens. Thus, in my view, the petitioner, who has of his own volition come back from his country of origin, Pakistan, after being deported from Kenya, and been denied entry into Kenya at the airport, cannot demand that he be allowed entry and, upon denial thereof, allege violation of his right under Article 39 or the provisions of the international conventions cited above. 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."**

29. On the issue of the Applicant working condition, it is indeed evidenced that the Applicant herein did not have a valid work permit and therefore did not have any authority whatsoever to be working in a casino or even owning a business in Luthuli Avenue as deponed by his Advocate. The Applicant was therefore working for gain illegally in Kenya.

30. On the issue as to whether the Applicant is illegally in custody and should be granted bail. I find that the Applicant was arrested and taken to Kilimani Police Station and the Cabinet Secretary declared him an illegal immigrant on the 18<sup>th</sup> December 2020. The 2<sup>nd</sup> Respondent booked a flight on Kenya Airways for his departure for the 25<sup>th</sup> December 2020 but he was refused to board due to lack of proper travel documents.

31. The Applicant has since been detained at Kilimani Police Station without being produced in court or being informed of his reasons for arrest. As aforesaid, the Applicant was produced in court after his advocate filed this application and this court ordered for the status quo to be maintained awaiting filing of submissions by both parties.

32. In seeking bail the Applicant states that he is not a flight risk since he has no documentation. It has already been proven that the Applicant is in the country illegally. This means that he should not otherwise be here let alone be allowed to work in the Republic of Kenya. Granting the Applicant bail, will be sanitizing his illegal stay in the country.

33. Under **Article 49(1)(h)** The Constitution of Kenya, a person charged with a criminal offence has the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. It provides thus:

***“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.”***

34. Under the guidelines.... the general principles which apply to questions of granting or denying bail or bond are also set out and these include; - **the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.**

35. The Constitution however does not define what constitutes “compelling reasons”. **Section 123A** of the **Criminal Procedure Code** provides thus:

***“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding Section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular –***

***(a) The nature or seriousness of the offences;***

***(b) The character, antecedents, associations and***

***Community ties of the accused persons;***

***(c) The defendant’s record in respect of the fulfilment of obligations under previous grants of bail; and***

***(d) The strength of the evidence of his having committed the offence.***

***(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-***

***(a) Has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;***

***(b) Should be kept in custody for his own protection.”***

36. In **Grace Kananu Namulo –vs- Republic [2018] eKLR** Odunga, J held thus:

***“17. I associate myself with the view expressed by Muriithi, J in Kelly Kases Bunjika vs Republic that:***

***“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”***

37. That was the position in **Republic vs William Mwangi Wa Mwangi [2014] eKLR** where Muriithi, J held that:

***“It is now settled that in the event that the State is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail... It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to be believed that he is likely to abscond if released on bail.”***

38. I am fully aware that Bail is the Applicant's constitutional right under Article 49 of the Constitution. The Applicant has no documentation at all which is a serious risk in itself. Granting the Applicant bail without any source of income as the Casino he was working in or the business that he owns should not in the first place be owned by him, may turn out to be a big disaster. Apart from the businesses mentioned herein, there is no evidence that the Applicant herein has any ties in Kenya thus making his accountability difficult.

39. From the foregoing, I find that the Applicant herein does not have any substantial grounds for grant of bail/bond since there are no valid identity documentation to identify the Applicant in case of anything. Issuance of travel documents to the Applicant by the Indian High Commission would have been advisable.

40. The upshot of the above is that the Application fails for lack of merit, accordingly, it is dismissed.

*Dated, signed and delivered this 15<sup>th</sup> day of February, 2021.*

*L.N. MUTENDE*

*JUDGE*