



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E005 OF 2020

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF HABEAS CORPUS

AND

IN THE MATTER OF: ARTICLES 27, 29, 39, 47 AND 49 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF: DISAPPEARANCE OF ALBERTO MARCHESI FROM MOI INTERNATIONAL AIRPORT MOMBASA

BETWEEN

COMMISSION FOR HUMAN RIGHTS & JUSTICE.....APPLICANT

VERSUS

KIPKOECH SANG IMMIGRATION OFFICER (PROSECUTOR) COAST

REGION MOMBASA.....RESPONDENT

RULING

1. The Applicant herein has moved the court by way of Notice of Motion dated 18/11/2020 seeking orders that:

**a. Spent**

**b. An order of Habeas Corpus directing the Respondent Kipkoech Sang to produce Alberto Marchesi Italian National Passport number YA8138777 in court.**

**c. costs of this application be provided for**

2. The application is premised on the affidavit sworn on 18/11/2020 by **Mr. Julius Ogot** who is the Applicant's Executive Director. The deponent avers that on 2/11/2020 they received a complaint that an Italian national by the name of **Alberto Marchesi** had been denied entry into Kenya upon his arrival from Italy on 29/10/2020, and the denial was done without affording him the right to be heard. In the Applicant's view, that amounted to violation of his fundamental rights and freedom granulated under the Constitution and other international charter and conventions on human rights.

3. The Applicant states that they moved to court to protect and prevent the threatened violation of the Constitution by the Respondent. However, upon service of pleadings on the Respondent, he filed an affidavit to the effect that the said foreigner **Alberto Marchesi** had been interrogated at Moi International Airport, but he was never arrested and/or deported back to his country of origin. Therefore, owing to the fact that the last person to be with the said foreigner was the Respondent, it was only just and fair that he be compelled to produce him in court.

## The Response

4. The respondent opposed the Application vide Replying Affidavit sworn on 20/11/2020. The deponent avers that the instant Application is an abuse of the Court process to the extent that the Applicant has already filed Constitutional Petition No. E8 of 2020, wherein they acknowledge that **Alberto Marchesi** was returned to Italy upon being denied entry into Kenya.

5. The deponent further avers that they received adverse intelligence information against Alberto Marchesi of Italian Passport No. YA813877. Consequently, **Mr. Alberto Marchesi** was placed on a watch list pursuant to Section 33(1) (b) of the Kenya Citizenship and Immigration Act 2011.

6. The deponent further avers that on 29/10/2020, when the said **Alberto Marchesi** flew into the country aboard Ethiopian Airline Flight No. ET322 and upon presenting his passport at the immigration counter, he was flagged as being an undesirable immigrant pursuant to Section 33(1) (b) of the Kenya Citizenship and Immigration Act 2011, and on being interrogated, he declined to answer any questions on his activities in the country. Therefore, since he did not hold a resident permit and/or a work permit allowing him to engage in any business in the country, he was denied entry into the country in accordance to Section 33(5) of the Kenya Citizenship and Immigration Act, 2011, where entry of a prohibited immigrant or undesirable person into Kenya is unlawful whether or not he or she is in possession of any document allowing him/her entry or transit through Kenya.

7. It is the Respondent's case that in Affidavit sworn on 6/11/2020, the Applicant's Executive Director one **Julius Ogot** produced an annexure marked JOO1, which is a complaint letter from Alberto Marchesi and from the said letter it is evident that Alberto Marchesi safely returned to Italy after being refused entry into the country. Consequently, the Application before Court is an abuse of the Court process and wrought with lies and deliberate misrepresentations to hoodwink this Court into granting the orders sought.

8. The Applicant in response to the Respondent Replying Affidavit filed a Further Affidavit sworn on 26/11/2020. The deponent deposes that what necessitated the present Application was the Respondent's averments on oath that one **Alberto Marchesi** was never arrested and/or deported back to Italy, a fact that the Respondent knew was false. Consequently, now that the Respondent has admitted to deporting the foreigner Alberto Marchesi without following due process of law, then the Respondent herein ought to show cause why he lied to this Court under oath knowing that was contemptuous and an offence punishable under law.

## The Determination

9. I have carefully considered the Application, the rival affidavits and submissions. In my view, it is common ground that one **Alberto Marchesi** an Italian national was denied entry in the country and currently he is in Italy.

10. It is noteworthy that the right to an order for habeas corpus is absolute and cannot be limited. Article 25 (d) of the Constitution provides:

**Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

**(d) the right to an order of habeas corpus.**

11. The requirement before an order of habeas corpus order is issued is proof that the subject of an application has to be in some form of custody within the jurisdiction of a Court. The issue of custody is very crucial before the order of habeas corpus is issued. In **Mariam Mohamed & Another vs. Commissioner of Police & Another [2007] eKLR**, Ojwang' J. (as he then was) considered an application for habeas corpus in which the subject was admittedly taken out of jurisdiction of the Kenyan courts and held:

**“It is evident that, voluntarily or involuntarily, the Respondents have placed themselves in a position in which it is no longer within their power to produce the subject before this Court. This Court, within the concept of habeas corpus, will be unable to make orders for the production of the subject, because such an order would be in vain. It is a fundamental principle applicable in the judicial settlement of disputes, that a court of law is not to make an order in vain. Courts' orders are focussed, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the Respondents are, at this moment, not in control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of habeas corpus. It follows that the Applicants' Chamber Summons of 18th October 2007 is either overtaken by events, or would have to remain in abeyance, until the Subject is physically in the custody of the Respondents.”**

12. The inquiry as at today reveals that the subject of the instant Application is in Italy, after being denied entry into the country. How he arrived in Italy after being denied entry is not an issue for determination in this ruling. With that background laid down, there is no person to produce before this Court. Be that as it may, it is evident that at the filing of the instant Application, the Applicant was well aware of the fact that **Mr. Alberto Marchesi** was not in custody and within the jurisdiction of this Court. That fact did not prevent the Applicant from instituting the present cause.

13. This Court has inherent power in order to meet the ends of justice or to prevent the abuse of the process of the Court. These inherent powers are saved in Section 3A of the Civil Procedure Act. In the circumstances, I find and hold that the instant Application is an abuse of the Court process.

14. Accordingly, I find that the order of habeas corpus is not available in the instant application. The same is dismissed. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JUNE, 2021**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Mkan for Applicant

Ms. Kiti for Respondent

Ms. Peris Court Assistant