



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

JUDICIAL REVIEW NO. 6 OF 2017

ABDINASIR ADAN IBRAHIM & 5 OTHERS.....APPLICANTS

VERSUS

**CABINET SEC. MIN. OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT &
3 OTHERS..... RESPONDENTS**

RULING

This matter was commenced in Nairobi through a Chamber Summons dated and filed on 4th April 2017, under Order 53 rule 1(2) and (4) of the Civil Procedure Rules 2010, filed under certificate of urgency.

The application sought orders for grant of leave to the applicants to apply for orders of certiorari to quash the Public Order (curfew) Mandera (county) extension Order 2017, and also for an order of prohibition against Government officials, from interfering with the free movement of persons residing within the areas. Thirdly, it was also sought that the leave granted operates as a stay of the said curfew extension Order 2017.

When the matter was placed before the court in Nairobi, it was ordered to be forwarded to this Court on the 5th of April 2017. The file was however brought to the attention of this court on 28th of April 2017 and no explanation was given for the delay in transmitting the file to this court.

On considering the application in chambers, on the 28th of April 2017 this court granted leave to the applicants to commence Judicial Review proceedings for certiorari and prohibition as requested, but ordered that the request for stay orders be heard between the parties after service of application. This ruling relates to the request for stay of the extension of the curfew in Mandera.

The application was served, and the respondent filed a replying affidavit as well as grounds of opposition. The matter was then heard on 10th May 2017 through oral submissions of counsel for the parties.

Mr. Mohamed learned counsel for the applicants submitted that they were seeking conservatory orders of stay of the extension of curfew orders, which were initially issued on 27th October 2016, and extended on 28th December 2016. The extension of 28th March 2017 contested herein was the third extension.

Counsel submitted that the curfew orders violated the applicants' rights to freedom of movement and business, and it was necessary for this court to grant the stay orders sought, especially as the month of Ramadan was to commence on 26th May 2017. Counsel submitted that during that time of Ramadan Muslim prayers and activities would have to be carried out during hours of night as Mandera was largely a Muslim populated area. Counsel also argued that the residents of Mandera being mainly nomads and due to the heat in the area would have move livestock at night.

Counsel relied on a number of case authorities and submitted that the common thread of reasoning in the various decided cases was that curfew orders were meant to be a stop gap measure, not be a permanent feature as was now the case in Mandera County.

Counsel submitted further that the instrument imposing and extending the curfew had not been tabled before Parliament for consideration by the representatives of the people as required by law. Counsel concluded by stating that the last threat to security in the Mandera area was recorded on 23rd January 2017 which was some months back, and urged this court to grant the stay orders. Counsel emphasized that restriction orders should be tailored in a way which would accommodate the needs and the enjoyment of the rights of the people to practice their religious requirements.

Mr. Munene learned counsel for the respondents relied on the replying affidavit Col. Kaleli sworn on 9th May 2017, and the grounds of opposition. Counsel submitted that it was a mistake for counsel for the applicants to give the impression that this was a Constitutional application, while in truth it was a judicial review application.

Counsel also submitted that, though counsel for the applicants mentioned Ramadhan in submissions, the documents filed, that is, the Statement and Verifying Affidavit did not refer to Ramadhan. Counsel submitted further that according to the replying affidavit filed by the respondents, a number of security incidents had continued to be experienced in Mandera, and the Government was thus right in imposing the curfew orders to protect its citizens. Counsel submitted also that the request for stay should not be allowed because the stay orders, if granted, would render the main motion, yet to be filed, to be nugatory.

In response, Mr. Mohamed for the applicants submitted that the applicants had shown sufficient interest and had locus standi to come to court citing Constitutional Provisions in this judicial review matter. Counsel denied that granting the stay orders sought would render the main motion to be filed, as nugatory.

I have considered the matter, documents filed on both sides, the submissions of counsel and the authorities cited to me.

This is not a request for issuance of conservatory orders as stated by counsel for applicants in his submissions. It is a request for the grant of stay orders. The considerations for the issuance of conservatory orders by courts are different from those required for stay orders.- see the Supreme Court of Kenya v. Peter Munya –vs- Dickson Mwenda Githinji & others (2014) eKLR. Conservatory orders are public law remedies. They also relate to matters of public interest, while the considerations, for stay of execution orders are covered under Order 42 Rule 6 of the Civil Procedure Rules. Such considerations are clearly defined under the Civil Procedure Rules.

Having stated as above, I am of the view that the applicants have established a prima facie case with probability of success, as this court has already granted the applicants leave to commence judicial review proceedings. That in my view, demonstrates that the applicants have a prima facie case.

On whether the applicants will suffer substantial loss if the stay orders sought are not granted, my view is that with the facts placed before me at this preliminary stage, it cannot be said that the applicants will suffer substantial loss or prejudice if the stay orders sought are not granted. The court has to bear in mind that the curfew order was not directed against the applicants alone, or any group of people of whatever description or persuasion, as the curfew extension order was imposed in a geographical area where many people live. It cannot thus be said that the applicants alone will suffer substantial loss if the stay orders are not granted, as this court does not know the views of other thousands of people who are affected by the curfew extension orders. The cases cited by the counsel for the applicants such as Muslim for Human Rights –vs- Inspector General of Police & 2 others (2014) eKLR and Law Society of Kenya –vs- Inspector General National Police Service & 30 others (2015) eKLR are based on different facts, and were the final decisions after considering all the facts in the main motion, and are thus not relevant.

In my view, the main motion has to be filed first and then heard between the parties, so that all issues

arising therefrom can be considered and determined on the merits. In my view it is not appropriate at this preliminary stage, to grant the stay orders sought.

I thus decline to grant the stay orders sought. As the main application has not yet been filed, and I am not sure whether it will be filed, I grant costs of the proceedings for this request for stay orders to the respondents against the applicants.

Dated and delivered at Garissa this day of 24th May 2017

George Dulu

Presiding Judge