



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLICATION CASE NO. 10 OF 2017**

**ADBIFATAH HASSAN OMAR AND 29 OTHERS.....CONVICTS**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING**

After this court delivered its ruling on 25<sup>th</sup> April, 2017 in an application filed by the State, this matter was brought back to this court through a Notice of Motion, dated 3<sup>rd</sup> May 2016(it should be 2017) and filed on the same day, by Refugee Constitution of Kenya on behalf of the convicts. The Notice of Motion was filed under certificate of urgency, and sought the following orders:

- 1. That the application be certified as urgent and service dispensed with in the first instance.**
- 2. That pending the hearing and determination of this application, the Honorable court be pleased to order a stay for execution of the deportation orders pending filing of an appeal in the suit herein.**
- 3. That the costs of the application be in the cause.**

The application has grounds on the face of the Notice of Motion, which are as follows:

- 1. That the Presiding Garissa High Court Judge recommended through a ruling that the respondents should be deported back to Somalia through an order by the Cabinet Secretary for Immigration following a miscellaneous application filed by the prosecutor from the office of the Director of Public Prosecutions to quash a decision by the trial magistrate at Mwingi Law Courts.**
- 2. That the learned judge ruled that the magistrate's courts do not have powers to order a government institution, the Refugee Affairs Secretariat, to profile and determine refugee status for persons seeking asylum from other countries.**
- 3. That the learned Judge ruled that there is no notice or law that provides for a specific station in Dadaab where asylum seekers may be profiled and their refugee status determined.**
- 4. That the 29 refugees in this matter have remained in custody at the Mwingi Police Station, where they have been detained for 2 months under deplorable conditions, even after they were discharged from court.**

- 5. That among the 29 respondents are 13 minors who were discharged and are held in the same cells as the adults and in deplorable conditions. They have been getting sick and are in dire need of humanitarian assistance.**
- 6. That another 10 children below the age of 8 years who had not been charged in court due their ages have also been living in the deplorable police station cells with the adults.**
- 7. That all the 39 persons held at Mwingi Police Station are desperate and in dire need of humanitarian assistance. They need to access humanitarian assistance from the government institution Refugee Affairs Secretariat.**
- 8. That the court order stating that all the persons ought to be deported back to Somalia under the Cabinet Secretary's orders would bring about grave injustice to all them.**
- 9. That the orders sought herein are for stay of execution of the deportation orders pending ruling, hearing and determination of an appeal of this matter at the Court of Appeal.**
- 10. That the orders sought if granted will be in the best interests for the subjects.**

The application was filed with a supporting affidavit sworn by Loise Ndindi Nganga advocate for the convicts amplifying the grounds of the application.

In response to the application, the Republic filed an affidavit sworn on 10<sup>th</sup> May 2017 by Bonny Okemwa, Principal Prosecutions Counsel. It was deponed that leave to appeal had not been sought. The state also filed a Notice of preliminary objection citing section 7 of the Appellate Jurisdiction Act, rule 59 of the Court of Appeal Rules and Section 379 Criminal Procedure Code. The State also later filed an affidavit sworn on 16<sup>th</sup> May, 2017 by Chief Inspector Mathews Abich the OCS Mwingi Police Station.

In this affidavits it was deponed in the affidavit that on 28<sup>th</sup> April, 2017 the deponent received a High Court order from Garissa to the effect that 41 aliens be removed from Kenya to Somalia, and that after consultation with Senior Police Officers all the 41 aliens were removed to their home country Somalia through escort of assigned police officers on 4<sup>th</sup> May, 2017. That on reaching Liboi border, the 41 aliens were handed over to a Somali District Commissioner who rubberstamped the police orders and forwarding letter. The above were the movements filed in relation to the application.

The application initially came up for hearing in court on 10<sup>th</sup> May, 2017 when Ms. Nganga for the convicts submitted that two days previously, the aliens had disappeared from Mwingi Police Station and their whereabouts were unknown. Counsel informed the court that the disappearance of the aliens from the police station had caused them a lot of distress.

In response Mr. Okemwa for the State informed the court that the convict had already been removed from Kenya and handed over to the Somali Government at Doblely on 4<sup>th</sup> May, 2017. However, at that time the police had not filed their affidavit. As stated above they later did. Their affidavit confirmed the removal of the convicts to Somalia.

After the police filed their affidavit, Ms. Nganga learned counsel to the convicts submitted that the police did not comply with the court's orders recommending to the Cabinet Secretary to make a removal order, as there was no evidence that the Cabinet Secretary for Immigration made the removal orders or was even consulted before removal of the convicts. Counsel also complained that supposed forwarding letter for removal of the convicts to Somalia had not been brought to court. Counsel thus stated that clarification on this was required

I have considered this matter with anxiety.

Having considered the application and the revelations and arguments on both sides, I am of the view that

the Mwingi Police Station did not comply with this court's order, in terms of the steps required to be taken before removal of the convict to Somali. This is because; there is no indication that the Cabinet Secretary for Immigration made the removal order, or was aware of the removal of the convicts to Somalia.

It is also true that the removal of the convicts to Somalia without informing counsel for the convicts has caused a lot of distress, as the police knew that counsel was presuming legal action. However, the OCS Doble Somalia had already stamped for receipt of the 41 convicts. Currently therefore only the Somali Embassy is in a position to verify the authenticity of the stamp. They have not questioned the stamp used. This court is thus convinced that the convicts were handed over to the Somali Government Officials. I cannot thus order that they be brought back, as they are already in another jurisdiction.

The main prayer in the application is for stay for the execution of this court's orders pending the hearing of appeal. This request cannot succeed for two reasons.

The first reason is that the removal of the convicts to Somalia has already taken place. Granting stay of execution orders now will thus be issuing orders by the court in vain. Courts cannot act in vain, and this court will not act in vain.

Secondly, the orders sought to be stayed were issued by this court on 25<sup>th</sup> April 2017. By 18th May, 2017 when the counsel on both sides last made their submissions in court, no notice of appeal had been filed. Even today no notice of appeal has been. In my view therefore, there can be no justification or reason to issue the stay of execution orders sought, pending hearing of appeal under Section 356 of Criminal Procedure Code (Cap.75).

I thus dismiss the application and decline to the grant stay of execution orders sought.

**Dated and delivered at Garissa on 30<sup>th</sup> June, 2017.**

**GEORGE DULU**

**JUDGE**