REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 6 OF 2015

HAKI NA SHERIA INITIATIVE ..... PETITIONER

V E R S U S

1. THE INSPECTOR GENERAL OF POLICE..... 1ST RESPONDENT

2 THE MINISTER FOR INTERNAL SECURITY..... 2ND RESPONDENT

3. HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

4. THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS..... AMICUS CURIAE

RULING

THE APPLICATION AND RESPONSES THERETO

On 22nd May 2015, the petitioner Haki Na Sheria Initiative an NGO filed a Constitutional Petition in this court. They also filed a Notice of Motion. This ruling relates to the Notice of Motion.

The prayers in the Notice of Motion are as follows:-

1. That this application be certified as urgent and the same be heard exparte in the first instance.

2. That pending the hearing and determination this application, this hounourable court be pleased to issue conservatory orders restraining the 1st and 2nd respondents, officers, representatives, servants or their agents from continuing with or giving effect to or enforcing and or continuing to impose a curfew in Garissa, Wajir, Mandera and Tana River Counties pursuant to the curfew declared by the 1st and 2nd respondents.

3. That pending the hearing and determination of this petition, this hounourable court be pleased to issue conservatory orders restraining the 1st and 2nd respondents, officers, representatives, servants and or their agents from continuing with or giving effect to or enforcing and or continuing to impose a curfew in Garissa, Wajir, Mandera and Tana River Counties pursuant to the curfew declaration by the 1st and 2nd respondents.

4. That the costs of this application be in the cause.

When application was served, the Attorney General on behalf of the 1st, 2nd and 3rd respondent opposed the application by filing 9 grounds of opposition to the application. The Kenya National Commission on Human Rights, initially listed as 4th respondent did not file a response to the petition. They however filed documents seeking to be made an amicus curiae, which was agreed to by consent of all parties counsel.

BACKGROUND TO THE APPLICATION

The background to this application is that following an attack on Garissa University on 2nd April 2015 by terrorists leading to the loss of over 148 Kenyans, the Inspector General of Police declared a curfew in the Garissa, Wajir, Mandera, and Tana River Counties between the hours 6.30 Pm and 6.30 Am from 3rd April 2015 to 16th April 2015. The said curfew was however extended and as at the time the petition and application were filed in court it had been extended to 16th June 2015. The petitioner after addressing a letter to the Inspector General of Police giving 7 days notice decided to come to this court for the reliefs sought.

THE PETITIONER'S CASE

The petitioner was represented at the hearing of the application by Mr. Bashir and Mr. Jibril. The petitioner contended that the extension of the curfew violated or threatened to violate the constitutional rights of the residents of the four counties.

In support of the application, Mr. Bashir submitted that the curfew orders imposed by the 1st and 2nd respondents were neither Constitutional nor legal. As such the court should grant the conservatory orders sought in prayer 3. He relied on the case of ***CREAW & OTHERS -vs- A/G (2011) EA 84*** where the court stated that a party seeking conservatory orders only required to demonstrate a prima facie with likelihood of success and show that if the conservatory order was not granted there would be real danger that he/she would suffer prejudice as a result of the violation of the Constitution. He also relied on a case of ***Gitaru Peter Munyua –vs- Dickson Mwenda Kithinji and others Supreme Court Application No. 5 of 2015*** where the Supreme court stated that conservatory orders where public law reliefs meant to address the ordered function of public agencies and uphold the authority of the court in the public interest. Counsel submitted that the main issue here was that the rights of the citizens in the four Counties continued to be violated by the curfew order.

Counsel submitted further that continuation of the curfew was illegal and unconstitutional, and emphasized that the curfew order limited the movement of the residents of the counties between 6.30 Pm and 6.30 Am with gatherings of more than five people requiring authorization of the County Commander, which infringed Articles 27, 32, 39, and 238(b) of the constitution. Counsel submitted that though Article 24 of the Constitution allowed limitation of the exercise of Constitutional rights, such limitation could only be done within the law and what was acceptable in an open and democratic society. Counsel emphasized that a curfew was a colonial tool imposed as a communal punishment.

Counsel submitted also that the powers of the 1st and 2nd respondent to declare a curfew were derived from ***Section 8 of the Public Order Act*** (cap 56) which stated that no curfew order imposing a curfew for more than 10 consecutive hours of day light shall remain imposed for more than 3 days. A curfew imposing restrictions for less hours of daylight could not remain in force for not more than 7 days. According, to counsel, the law did not expect any curfew order to remain for more than 7 days. Counsel submitted that even the President under ***Article 52 and 138 of the Constitution*** could declare an emergency for only 14 days and any extension of the same had to be done with the approval of the National Assembly. Counsel relied on the case of ***Law Society of Kenya -vs- Inspector General and 4 others Malindi High Court petition No. 9 of 2014 (2015)Eklr*** where the court considered the law applicable on curfew orders and reasoned that a curfew was not meant to be a normal routine but a stop gap measure. Counsel thus asked this court to lift the curfew through the grant of conservatory orders before the hearing of the petition..

Mr. Jibril on his part, submitted that under ***Article 160(1)*** of the Constitution, judicial authority was to be exercised by the courts subject the Constitution and the Law. Counsel submitted that as the curfew herein was in breach of the Constitution and law, this court was duty bound to uphold the law and Constitution. Counsel emphasized that the 1st respondent contravened even Section 8 of the Public Order Act which they relied upon to impose the curfew. Counsel emphasized that the facts in the case of ***Law Society of Kenya -vs- Inspector General*** (supra) were similar to the present one. Counsel submitted that the case herein was not frivolous but arguable. That the petitioners had locus standi to bring these proceedings and that public interest could not be protected through an illegality or a violation of the constitution.

Mr. Kamau for the amicus curiae submitted that they would make substantive submissions, during the hearing of the main petition. However in the meantime they supported the request for the grant of conservatory orders. Counsel emphasized that the curfew had created alarming ramifications on the enjoyment of several fundamental rights and freedoms for the people in the four counties including social and economic rights which were adversely affected by the curfew. The application could not be said to be premature as a mischief was already operational.

M/s Irari for the 1st, 2nd and 3rd respondents opposed the request for conservatory orders and relied on the grounds of opposition filed. Counsel submitted that granting the orders sought now would determine the whole petition at an interlocutory stage. Counsel felt that the main petition should be fixed for hearing.

She submitted further that the application was frivolous, premature and premised on mere apprehension and urged that the petitioner should have waited for the 16th June 2015 when the curfew was due to expire.

On the case of CREAW(supra) cited by the petitioners' counsel, counsel emphasized that the Judge therein stated that for conservatory order to be issued one had to establish a prima facie case with probability of success. It had also to be demonstrated how the petitioners would suffer if the orders sought were not granted. Counsel submitted that both social and religious functions would not be affected by the curfew. Counsel emphasized that the rights of movement and religion had limitations in the Constitution, and as such the limitation placed by the 1st and 2nd respondents through the curfew orders were justified due to the prevailing security situation. Counsel submitted further that the rights affected by the curfew were not just the rights of the petitioner, and that the general public interest was considered before issuing curfew orders. Counsel emphasized that public security and protection of right to life justified the limitations imposed through the curfew to resident in the four counties. Counsel submitted also that the petitioner had not proved any danger to their life and urged that they await the decision to be made by the 1st and 2nd respondent on extension of the curfew.

ANALYSIS

This is an application for conservatory orders. Two preliminary points arise. It has been argued by counsel for the respondent that the application is. Firstly, premature and secondly, that the applicant had no ***locus standi***. This position has been opposed strongly by the petitioner's counsel and counsel for the amicus curiae.

The argument that the application is premature is premised on the fact which is not disputed that the curfew was due to end on 16th of June 2015 and, if it was to continue, it would have to be extended. That argument in my view is misplaced. I agree with Mr. Kamau that a mischief had already been in operation and that such mischief requires to be addressed by the court if party comes to court as has happened in the present case. Besides, neither the parties, members of the public, not even this court can get involved in determining whether or not it will be entered. I find and hold that the application is not premature of frivolous.

On ***locus standi,*** counsel for the respondents has argued that there are many people in the four counties who will be affected if the orders sought are granted. That the applicant had not shown that they are part

of those people who are affected by the orders. In my view, there is no requirement that the petitioner in a constitutional petition should be given permission by members of the public before coming to court even if the orders sought will affect the public, or be directly affected by the violation challenged. The Constitution of Kenya 2010 widened the latitude of people who can come to court to pursue claims for violation of constitutional rights. All those who fall within the parameters of Article 22 of the constitution have locus standi to come to court. The said Article provides as follows:-

"22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill or rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by;-

(a) person acting on behalf of another person who cannot act in their own name;-

(b) a person acting as a member of, or in the interest of, a group or class of persons, (c) a person acting in the public interest, or

(d) an association or acting in the interest of one or more of its members."

The petitioner herein Haki Na Sheria Initiative was registered by the Ministry of Gender Children and Social Development as a self-help group or project. It was registered for Garissa District. Barre Adan Kerrow who signed the affidavit in support claims to be its coordinator in Garissa. There is no evidence before this court that such an institution does not exist or that the said person is not an official of the organization. The petitioner therefore can come to the constitutional court under Article 22(2) (b) and (c) above. Prima facie therefore, I find that the petitioner has locus standi to come to court, unless further evidence is here after provided to the contrary.

The main issue is about the powers of the 1st and 2nd respondents with regard to the imposition of the curfew and extension thereon. None of the parties has shown me the official notice of the curfew. The petitioner has only exhibited a letter addressed by them to the Inspector General of Police dated 15th May 2015 requesting the lifting of the curfew within 7 days and in default they will take court action. They have also annexed a news article from the Standard newspaper which appears to be from the internet, stating that the Interior Cabinet Secretary Nkaiserry had extended the curfew in Gariss, Wajir Mandera and Tana River Counties which reads as follows:-

"Through a special gazette notice dated 15th May 2015 Cabinet Secretary stated;- This Order (curfew) shall apply during the hours of darkness – period between 6.30 Pm and 6.30 Am for a period of one month. Under the curfew order no gathering or procession should have more than 5 persons without authorization of the County Commander he said. The order also bans possession, carrying or display in public of offensive weapons by any person who has no reason or legal reason to have such weapons".

All parties do not however deny the existence of the curfew. I observe that the law under which the curfew was imposed was not stated in the above extract. However from documents filed and submissions, it is not disputed that the curfew was imposed under Section 8 of the Public Order Act, which reads as follows:-

8 (1). The Commissioner of Police or a Provincial Commissioner may if he considers it necessary in the interest of public order, so to do by order (herein after referred to as a curfew order) direct that, within such area (being in the case of a Provincial Commissioner, within his Province) and during such hours as may be specified in the

curfew order, every person, or as the case may be, every member of any class or person specified in the curfew order shall, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew order, remain indoors in the

premises at which he normally reside or at such other premises as may be authorized by or under the curfew order.

(2)(a) It shall be a condition of every permit granted under sub section (1) of this section the holder thereof shall at all times and acting under the authority thereof during under the darkness carry a light visible at a distance of twenty five feet.

(b) Subject to paragraph (a) of this sub section, a permit under sub section (1) of this section may be granted subject to such conditions, to be specified in the permit, as the authority or person granting it may think fit.

(3) A curfew order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby and shall come into force on such day or a day after the making thereof, as may be specified therein and shall remain in force for the period specified therein or until earlier rescinded by the same authority or the Minister as herein after provided.

Provided that no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than 3 days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than 7 days.

(4) Every curfew order shall forthwith on being made be reported to the Minister and the Minister may if he thinks fit vary or rescind the curfew order.

(5) The variation or recission of a curfew order shall be published in like manner as that provided in subsection (3) of this section for the publication of a curfew order.

(6) Any person who contravenes any of the provisions of a curfew orders or any of the terms or conditions of a permit granted to him under (1) of this section shall be guilty of an offence liable to a fine not exceeding 1,000/= or to imprisonment for a term not exceeding 3 months or to both such fines and imprisonment.

(7) ……

(8) ……

It is clear therefore that the Inspector General of Police 1st respondent with the concurrence of the Minister second respondent has powers to impose a curfew. It has been argued that the curfew is patently illegal because it has been in operation for a period of more than the maximum of 7 days permitted by the statute. It has also been argued that since the curfew affects enjoyment of fundamental rights under the constitution, it is unconstitutional. At this preliminary stage, I am not required to make a substantive decision on the merits of the arguments.

The curfew order is very specific. It refers to the hours 6.30 Pm to 6.30 am. It is for a period of more than 7 days. Section 8 of the Public Order Act, in my view limits the period of the curfew to a maximum of seven (7) days, only when the said curfew covers hours of daylight. None of the parties counsel has addressed me on the meaning of daylight. My own perusal of the Public Order Act has revealed that hours of daylight is defined under section 2 of the Act as follows:-

"hours of daylight" means the time between half past six in the morning and half past six in the evening.

The present curfew therefore does not cover the hours of daylight. I am thus not persuaded at this preliminary stage that it cannot last for a maximum of only seven(7) days.

The case of Law Society of Kenya –vs- Inspector General and others (supra) relied upon by counsel for the petitioner is premised on the subject curfew therein covering hours of daylight. The curfew herein does not cover hours of daylight. That case is thus not applicable.

In considering an application such as the present, the cocurt has to determine whether the applicant has a prima facie case with probability of success. Secondly, whether the applicant or people whose rights he is pursuing will suffer damage due to violation of the constitution if the conservatory orders sought are not granted. If the court is in doubt, it will determine the matter to balance the public and private interest.

I have found that the petitioner has a prima facie case. Considering the facts and evidence placed before me at this preliminary stage, I am not convinced that the applicant or those for whom he is pursuing their rights will suffer damage if the conservatory orders sought are not granted as a result of a constitutional violation. Though I cannot say for certain whether the curfew was extended beyond 16th June 2015, I will decline to grant the conservatory orders sought.

DETERMINATION

In view of my findings above, I find that though the petitioner has locus standi, and has a prima facie case, they have not shown that they will suffer damage, due to violation of their constitutional rights, if the conservatory orders sought are not granted. The application is thus dismissed. I thus decline to grant the conservatory orders sought. Costs of the application will be determined in the main petition.

Dated and delivered at Garissa this 22nd day of June 2015.

GEORGE DULU

JUDGE