



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC CIV APPLI 1652 OF 2004

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW, ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: APPLICATION OF CLASS "H" PERMIT AND SEIZURE AND CONTINUED DETENTION OF THE APPLICANT'S PASSPORT NO.723546 (CAMEROON)

AND

IN THE MATTER OF: THE CONSTITUTION, THE IMMIGRATION ACT CAP 172 AND THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

LEONARD SITAMZE APPLICANT

VERSUS

THE MINISTER FOR HOME AFFAIRS 1ST DEFENDANT

THE COMMISSIONER OF POLICE 2ND DEFENDANT

THE PRINCIPAL IMMIGRATION OFFICER 3RD DEFENDANT

RULING

The applicants Counsel Dr Khaminwa has opposed the court looking at a classified document which is in possession of the State and which one of the deponents of the affidavit in reply to the application before me has invited the Court to look at before making a determination in this matter. Dr Khaminwa argues that looking at the document will make this court not to be independent and impartial as per section 77(9) of the Constitution.

The State on its part has argued that the document contains an answer to the applicants contentions in this application, otherwise the State would be denied of a complete defence by the court's failure to do so.

My immediate inclination is to state at the outset that the High Court in terms of our Constitution is the Constitutional Court and the foremost guardian of the Constitution. It has unlimited original jurisdiction in both criminal and civil matters under s 60 of the Constitution. The High Court is final in the interpretation of the Constitution and all Constitutional matters except as regards Chapter v fundamental rights where there is a constitutional right of appeal and the Election provisions. In addition and quite apart from the original jurisdiction vested in the High Court under s 60 of the Constitution the High Court has the second original jurisdiction under s 84 of the Constitution. By virtue of the international principles concerning fundamental rights the original jurisdiction under s 84 is subject to appeal - because there must always be an appeal, so as to better secure fundamental rights.

The importance of stressing the issue of the powers which this Court has is not to bask in the glory of such power if it exists at all and after all it was never vested in a Judge as a person, but to underscore the fact that the High Court must always act as a guardian of the Constitution. It is a breach of our constitutional oath to do otherwise. The Court must constantly and consistently stand between the individuals and the State especially in the enforcement of fundamental rights and freedoms.

It follows therefore, I must find that it is absolutely necessary to look at the classified document. The finding should be viewed from the Courts unique but central role of doing justice. The reason why the court should look at a classified document in my view, need not be conferred by any statute or law, and the Court has an inherent power to do so where the demands of justice so require.

What is unknown is what could be a stranger to justice or a threat to the court to do justice. Justice itself is as naked as the Hamilton statue outside this magnificent Court Building, a building which prides in the 1930's beautiful architecture. Laying it bare is in some cases such as this, an endeavour to do justice and not to violate any fundamental right of the applicant as he claims.

The other reason why the court must look at the document is that some fundamental rights are subject to the national security considerations, which courts of law should never ignore at this time and age. Even international instruments some of which have been cited by the applicant have this as permissible limitation to some of the rights.

The 1985 - United Nations Declaration on Human Rights of Individuals Who Are Not Nationals of the Country in which they live Article 5(2) provides:

“subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security public safety, public order, public health or morals or the rights and freedoms of others and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights”

The same Article 5(1) (d) provides:

“Aliens shall enjoy in accordance with domestic law and subject to the relevant international obligation of the state in which they are present in particular the following rights

(d) The right to choose a spouse, to marry, to found a family”

It is therefore clear to the Court some of the rights are subject to issues of national security whereas others are not but they must be enjoyed in accordance with the domestic law. If the domestic law classifies documents for purposes of national security this requirement cannot possibly be illegal and the only issue is whether the national security can limit the rights in question and if so to what extent.

In my view a court cannot deal with a constitutional objective, such as national security without evidence because courts are not experts in matters of security. Classified information where relevant to the issue at hand cannot be kept away from the court. Fortunately in this case it is not the State which is objecting. Where the State claims privilege in my view a Court should where necessary probe, the basis

for any Executive privilege to keep any relevant information from the Court.

Where the State objects to production, it would be met with the same argument. It is for the Court to keep both Legislative and Executive arms of government compliant with the Constitution. It would be a sad day for the executive to be the sole determinant of what national security is in all situations.

Excluding classified document, where such evidence has been offered by one party might prejudice the party tendering the document and thereby occasion a miscarriage of justice. I think it should suffice for this court to do the balancing act between the State and the Individual since the Court is under the Constitution vested with the crucial role of adjudicating on threatened contraventions or actual contraventions. No other institutions can take over this role in a democratic state.

While it is a cardinal principle that this Court must safeguard and enforce fundamental freedoms, I dare add, it is equally true both the old and the new freedoms face new challenges and threats. As the freedoms increase so will be the threats and this court cannot shut itself from scrutinizing any circumstances which could lead or result into a threat to any freedom or right.

Finally concerning the alleged partiality of the Court if it were to look at the classified report, the demands of justice require such scrutiny because the document has been specifically referred to in the respondent's affidavit.

The Court cannot find better words to express its role than words I found hanging on my Court wall in a recent calendar carrying words attributed to former United States President Theodore Roosevelt who defined justice as under:

“Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong.”

It is for this reason as well that I disallow the objection. The above quotation represents the core duty of this Court. A Court does not cease to be independent by being partial in favour of one of the parties after putting all the facts, evidence, and the law on the scales of justice. I shall proceed to scrutinize the report as and when availed and if not availed today, I shall proceed to appoint a date for its scrutiny.

Costs shall be in the cause.

DATED and delivered at Nairobi this 4th March 2008.

J. G. NYAMU

JUDGE