



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civ Appli 19 of 2007**

**IN THE MATTER OF: AN APPLICATION BY CHAMANLAL KAMANI FOR ORDERS OF  
CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**CHAMANLAL KAMANI ..... APPLICANT**

**VERSUS**

**KENYA ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**RULING**

The applicant has accessed the Court as stated in his application under O 53 Rule 1(2), 1(3) & 1(4) of the Civil Procedure Rules.

From the subject matter the urgency is clearly established and I have no problem in certifying the matter as urgent. Similarly the notice to the registrar is dispensed with for the same reasons.

The substantive reliefs sought in the application are:

- (1) That the applicant be granted order of certiorari to remove into this court and quash the decision of the respondent taken under the provisions of section 31(2) of the Anti-Corruption and Economic Crimes Act imposing the conditions that the applicant deliver to the respondent a bank guarantee of Kshs Twenty Million (Kshs 30 million) and one surety for a similar amount as a condition precedent to the release of the applicants passport No A 814437**
- (2) That the applicant be granted leave to apply for an order of mandamus compelling the respondent to release passport No 814437 to the applicant forthwith**

**(3) That the grant of leave to apply for the aforesaid orders of certiorari and mandamus do operate as a stay of the respondents' decision imposing the conditions that the applicant do deliver to the respondent a bank guarantee of Kenya Shillings Thirty Million (Kshs. 30 million) and one surety for a similar amount as condition precedent for the release of the applicants' passport number A 814437 and the respondent be directed to temporarily release the applicants aforesaid passport forthwith to enable him travel for medical treatment pending the hearing and determination of the judicial review application upon such term as this Honourable Court may consider just.**

- a. The application is supported by a Verifying Affidavit of Kamanla Kamani and I have read the same. The grounds are as set out in the body of the application and the Statement filed on 16<sup>th</sup> January 2007. The main grounds include that the decision is irrational and unreasonable and is within the Wednesbury principle
- b. Conditions imposed are impossible thereby denying the applicant access to medical treatment
- c. That the decision frustrates legitimate expectation
- d. That the respondent did not make the decision judicially and therefore acted in excess and/or without jurisdiction
- e. That the decision is unfair
- f. That the decision is an abuse of power
- g. That the condition touches on financial ability instead of the statutory criteria of whether or not the applicant will turn up whenever required by the respondent
- h. That the conditions smark of official arbitrariness calculated to deprive the applicant of his right to liberty and freedom of movement
- i. That the indefinite detention imposed by the conditions is the antithesis of the right to liberty and security of the person
- j. That in imposing the condition the respondent has failed to take into account relevant factors such as: it is a matter of speculation to whether or not the applicant will be charged with a criminal offence; what offence; attracting what penalty.

In addition to the above grounds counsel for the applicant did at the hearing bring in possible contravention or violation of s 72, and 81 of the Constitution although this is not a constitutional application and the sections were also not pleaded. In this regard he relied on the US Supreme Court case of *KENT v DULLES, 357 US 116 (1955)* where it was held that the right to travel is part of "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment. Also relied on is the English case of *Re JJ 2006 ALL ER D 330 June QB* where it was held as under:

**"As indeed it is obvious that, by its very Constitution every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law, ... that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it maybe, not inferred of the nature of the charge against him, or the name of the accuser."**

The same decision declared:

**"neither the common law from which so much of the European Convention is derived nor international human rights laws allow indefinite detention at the behest of the executive however well intentioned. It is not for the executive to decide who should be locked up for any length of time let alone indefinitely. Only the courts can do that and except as a preliminary step before trial only**

**after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and, security of the person.”**

I have great sympathy for the principles expressed but they are not for adjudication or determination now. I have given this matter serious consideration and find on a prima facie basis the applicant counsel cannot, with respect, effectively articulate the constitutional matters mentioned above without bringing a constitutional application alleging the violation/or contravention by the passage of the Anti Corruption and Economic Crimes Act or the section upon which the powers have been exercised by KACC. On the other hand the application as framed is substantially a judicial review application. It would for example be necessary to establish whether the Anti Corruption and Economic Crimes Act itself does satisfy the principle of legality which is a common thread affecting nearly all the rights and freedoms enshrined in Chapter 5 of the Constitution. Thus whether or not s 33 constitutes an acceptable limitation under the Constitution, is a great constitutional issue. It cannot be established or argued on the sidelines of a judicial review application where it has not even been pleaded. In addition section s70 of the Constitution which limits nearly all the rights on the ground of public interest casts a long shadow on the need to have filed a constitutional application. The application brought on the other hand is substantially a judicial review application. A constitutional application is much wider and it could where appropriate seek judicial review reliefs eg. Under s 84 in the case of ***R v ATTORNEY GENERAL ex parte P.K. WAWERU H.C. Misc Application No. 118 of 2004*** unreported the court gave orders of prohibition and mandamus in a Constitutional application and in the **SAITOTI** case where a combination was allowed in a judicial review application because the subject matter was substantially judicial review aimed at the Goldenberg Report and where the Constitution provisions were specifically pleaded and further where the Courts' inherent power was also invoked and the reliefs could not be brought separately. Also refer to the GITHUNGURI II cited in the **SAITOTI** case.

It is for the above reason that I decline to consider the tentative arguments touching on constitutional violations or limitations. An attack under the Constitution can be lodged separately and this is not inconsistent with s 3 of the Judicature Act.

Turning to the grounds raised in support of the application for leave since the applicant has alleged inter alia grounds such as Wednesbury unreasonableness or irrationality, abuse of power and the taking into account irrelevant considerations in giving more emphasis to financial might instead of securing the applicants presence in Kenya when required, the court is of the view that the grounds are prima facie arguable. The court has no hesitation in granting leave in terms of prayer 3 and 4 of the application.

As regards prayer 5 the same is refused or declined firstly because such leave cannot in law apply to the order of mandamus and the application is incompetent in seeking leave to operate as stay as regards mandamus and secondly as regards certiorari it has not on a prima facie basis been shown that the decision is patently Wednesbury irrational or unreasonable and it has also not been sufficiently demonstrated that the medical treatment intended is not available locally, and thirdly it has not on a prima facie basis been demonstrated that Kenya is in the circumstances a better home to return to instead of the intended destination. Thus it is not in dispute that the applicant has recorded a statement and has two sons outside jurisdiction. The affidavits of Henry Muriithi Mwithia the Investigator including the earlier exhibited affidavit filed on 12<sup>th</sup> October, 2006 have indicated that the investigations are extremely complex, intensive and spread worldwide in scope. The terms imposed do prima facie reflect a genuine concern in wanting to uphold the public interest in undertaking the investigations. It cannot be denied that the conduct of investigations is not in the public interest I therefore decline the order of stay or that leave granted do operate as stay.

In this proceedings I endorse in full the statement of the objectives of judicial review as set out in the Supreme Court Practice 1997 Vol. 53-14/I:

**“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial review is made, but the decision making process. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that**

**it is not part of that purpose to substitute the opinion of the Judiciary or individual judges for that of the authority constituted by law to decide the matters in question.”**

S 31 vests the power to make the decision and to impose conditions on KACC. The mandate of this court is to ascertain if the implied duty of fairness placed on KACC has been discharged. If the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that KACC can make it again in accordance with the law. The court cannot however substitute its own decision and impose its own conditions as invited to do by the applicant. This would be usurpation by the court of the powers clearly vested in KACC. Similarly KACC’s decision and conditions can as has been done here be attacked on being Wednesbury unreasonable – but the court having come to the conclusion that in the circumstances the conditions are not prima facie Wednesbury unreasonable there cannot be any ground for intervention.

Similarly on a prima facie basis the court finds no irrelevant considerations having been taken into account or relevant considerations having been ignored.

In the result leave shall not operate as stay.

Application for judicial review to be filed within 21 days and served within 8 days failing which the order for leave shall automatically lapse.

Costs to abide the outcome of the main application.

Notwithstanding the above conditions concerning filing and service of the judicial review application the applicant may when the application is filed and served have the matter mentioned with a view to obtaining the necessary orders to fast-track the hearing of the same.

It is so ordered.

DATED at Nairobi this 2<sup>nd</sup> day of February 2007.

**J.G. NYAMU**

**JUDGE**