**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CRIMINAL APPLICATION NO. 30 OF 2003**

**REPUBLIC …… APPLICANT**

**VERSUS**

**1. COMMISSIONER OF POLICE**

**2. ATTORNEY GENERAL ……RESPONDENTS**

**RULING**

Application appears urgent. No serious reason not to issue a certificate.

D.A. Onyancha

Judge

Order

1. Application is certified as urgent and service thereof is hereby excused in the first instance.

2. Hearing of the application inter-partes fixed on 27.1.2003 before this court.

3. Applicant to serve the application upon the Attorney-General on or before 22.1.2003.

D.A. Onyancya

Judge

27.1.2003

Coram: Before Hon. justice D. Onyancha

Wandugi For applicants

Mr. Okumu for Respondent

Onduma Court clerk

Mr. Wandugi

I appear together with Mr. Ombeta but can take off without him being in court. He will join us soon. I have preliminary maters to clarify.

Order

Hearing adjourned to 29.1.2003.

D.A. Onyancha

Judge 2

9.1.2003

Coram: Before Justice Onyancha

Mr. Okumu for the Respondent

Mr. Wandugi for the applicants

Onduma – Court clerk

Wandugi & Ombeta

May the two applications no. 29 of 2003 and 30 of 2003 be consolidated and the applications heard and determined jointly.

D.A. Onyancha

Judge

Mr. Okumu

No objection

D.A. Onyancha

Judge Order

Misc. Cr. Applications Nos. 29 and 30 of 2003 are hereby

consolidated.

D.A. Onyancha

Judge

Wandugi

Application by way of Habeas …. under Section 9 (i) (2) of Cap 76 – Extradition.

The applicants were apprehended between 19th & 20th September 2002. They were taken before a Kibera Magistrate Miscellaneous Application No. 34 of 2002, which sought the court to give the police authority to investigate the applicant's bank accounts. Objections (preliminary) were raised and the court rejected the requests on 23.9.2002. On the same day they were ordered discharged. However the police re-arrested them and brought them back to court vide Miscellaneous Application No. 35 of 2002 – That was on 24.9.2002.

The State sought to institute Extradition Proceedings. No warrants appear to have been sought after their discharge for rearresting them such warrants are necessary in relation to such proceedings.

I have now seen the warrant of surrender signed by the minister/Attorney – General. It invisages that the order of Habeas corpus had not been made.

Now there is this application for habeas Corpus, the Order of the minister is not tenable.

There is no reason also he believes that the applicants have been removed from our Jurisdiction.

If this is so, and we think it is so, we request for an order directing the Attorney General, Commissioner of Police or the FBI urgent having custody, to produce them.

They have their right to be in court as their application is proceeded on. There is no evidence that they have been surrendered to the USA Government. If they are still in Kenya, they are within this court's jurisdiction and can be ordered produced in this court.

D.A. Onyancha

Judge

Mr. Ombeta

Habeas Corpus presumes that the subjects are within the jurisdiction f the court. Even if there is surrender warrant already signed, that does not take away their power to produce the subjects. There is no evidence to the effect that the applicants have been physically passed over. The state cannot therefore sold their hands and say they cannot produce them. Unless the law says that once a warrant of surrender is signed, the maker cannot rescind the same, and then the state has power and obligation to produce the subjects. We see an order of production, so that we can proceed while they are here.

D.A. Onyancha

Judge

Mr. Okumu

We oppose the preliminary application to the effect that the subjects must be produced in court before the Habeous Corpus application is argued.

This court lacks Jurisdiction to order the productions of the applicants. The applicants have not quoted any provision of the law under which they seek production of the applicants before the application is heard. The main application is brought under Cap 76.

The applicant has a duty to show under what provisions they make this preliminary application.

Section 9 (i) (2) were quoted by Mr. Wandugi. We say that those provisions have been spent and overtaken by events.

The principal magistrate made committal orders on 11.12.2002, committing the applicants to custody of (prison) pending their extradition to America, or pending their applications fro the issue of directions in the Nature of Habeas Corpus. The court there explained the applicant's heir rights under Section 9 (i) (2). They could not accordingly be extradited until the end of 15 days, or if they filed the expected applications in the nature of Habeas Corpus and contrary orders were made during such.

15 days expired on around 26.12.2003. No such application for issue of direction had been made by the applicants during the 15 days. Failure to file such an application automatically set into operation Section 9 (2) which gave the Minster authority a warrant of surrender. This is what the Minster has done to issue the Warrant in the file. This was done on 16.1.2003.

The main application for Habeas Corpus was filed on 20.1.2003

– Too late to be legal.

- This court therefore has no jurisdiction.

- Meanwhile the applicants filed stay of Execution.

The application was dismissed by this court. At page 4 the Judge made a finding of fact that the applicants failed to apply for the Directions in the nature of Habeaus Corpus.

- He also made a finding that the provisions of Section 9 (i) were exhausted and Section 9 (2) were now applicable – which now the Minister has acted

. - At page 7 he said, stay application was not grantable as it would just be a delay of an obvious act eventually. - The applicants have been physically surrendered to USA urgent . Mr. Blair is not a party to this application and no Order can be made against him in his absence, as that would be against a rule of natural Justice.

- I would still have objected to their surrender because this court has at present no jurisdiction to make such order.

May this application be dismissed for lack of that special Jurisdiction.

D.A. Onyancha

Judge

Wandugi

Mr. Okumu's argument that this court has no jurisdiction is an affront to our constitution and this court. Section 9 (i) or Cap 76, does not oust or limit the jurisdiction of this court in particular Section 60.

Whether we filed the application for the direction in the nature of Habeaus Corpus, we still have a right to come to this court.

Section 9 (i) we argue, only allows the applicants to come for direction after 15 days and not within 15 days. Where is the evidence that the applicants have been surrendered.

- Where is an affidavit to that effect. Surrender of the applications would only have been done by this court. It is only this court that has jurisdiction to hear the Directions under Section 9 (i) and no body else. The Minister has no power to surrender the applicants except with the Order of this court under Section 9 (i).

- Who signed the warrant – which Minster – on 16.1.2003

Wako was not a Minster nor is he one now.

- Mbogholi J.'s order is a mere opinion not a finding. Page 4.

- He did not really make a finding as to whether it is within or after 15 days.

- There is no evidence of surrender or removal.

D.A. Onyancha

Judge

Order

1. Ruling on 6.2.2003.

2. Status Quo to be maintained until the ruling is delivered.

3. Certified copy of this order be served upon the Attorney- General.

D.A. Onyancha

**JUDGE.**