



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. E001 OF 2021

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2013

AND

IN THE MATTER OF: KENYA CITIZENSHIP AND IMMIGRATION ACT, 2011

AND

IN THE MATTER OF: EXTRADITION (CONTIGUOUS AND FOREIGN COUNTRIES ACT)

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR THE ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

SELEHADDIN GULEN.....APPLICANT

VERSUS

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

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

DIRECTOR OF IMMIGRATION.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR.....4TH RESPONDENT

CHIEF MAGISTRATE KIAMBU LAW COURTS.....5TH RESPONDENT

RULING

1. This Court is called upon to determine the Preliminary Objection dated 5th March, 2021 and a Chamber Summons application dated 27th January, 2021.

BACKGROUND

2. **SELEHADDIN GULEN** (hereinafter **GULEN**) travelled from New York connecting to Dubai and onwards to Nairobi. He arrived at Nairobi on 17th October, 2020. Gulen stated in this matter that he is a permanent resident of the United States of America but a citizen of Turkey. Further, that on his arrival in Nairobi the immigration officer found his documents to be compliant and he was allowed into Kenya. He was subsequently arrested at Jomo Kenyatta International Airport (JKIA). On being arrested, Gulen was handed over to officers of Interpol Nairobi. That arrest was as a result of a Red Notice alert issued by Interpol Washington which informed three countries, including Kenya, that Gulen was a fugitive and was wanted in the Republic of Turkey.

3. Director of Public Prosecutions (DPP) moved the Chief Magistrate's Court, Kiambu, under the file Criminal Misc. Application NO. 448 of 2020 with an application dated 19th October, 2020. DPP by that application DPP sought an order for Gulen to deposit his passport and travel documents in court for the duration of the proceedings; for Gulen to present himself before DCI Interpol offices every Monday; and for Gulen to provide two Kenyan sureties or/an any other bond terms the court should order.

4. The Chief Magistrate court, Kiambu, on 19th October, 2020 granted orders for Gulen to deposit his passport and travel documents in court pending extradition proceedings, and also ordered for Gulen be released on bond of Kshs.1 million with two Kenyan sureties of similar amount; and for Gulen to report every Monday at DCI.

5. Gulen filed an application dated 15th January, 2021, before Chief Magistrate's Court, Kiambu for orders that he be discharged from the proceedings before that court; that his passport and other travel documents be released to him; and that the Director of Immigration do facilitate his safe passage to U.S.A.

6. That application filed by Gulen was partly argued before the Chief Magistrate's court.

7. DPP filed another application by Notice of Motion dated 21st January, 2021 before that court. The prayers in that application are:-

- (a) *THAT the applicant be allowed to withdraw the application (Misc. Application No. 448 of 2020) before Honourable Court.*
- (b) *THAT the respondent/fugitive SELAHADDIN GULEN be released back to the National Central Bureau (NCB) Nairobi to allow us hand him over to the requesting INTERPOL member country in compliance with Article 2(1) of the INTERPOL Constitution.*
- (c) *THAT the respondent/fugitive travel documents be released to National Central Bureau (NCB) Nairobi to enable us effect he respondent/fugitive's removal.*
- (d) *THAT any bail or bond amount paid by the respondent/fugitive be refunded and thereafter the Kenyan surety be released.*
- (e) *THAT the honourable court makes any other order that it deems fit.*

8. The Chief Magistrate received the parties' submissions on that application and reserved a ruling for 3rd march, 2021. Before that Ruling was delivered Gulen approached this Court in this matter, seeking leave to institute judicial review proceedings. That leave is sought by a Chamber Summons dated 27th January, 2021.

9. DPP and the Inspector General of Police (IG) filed a preliminary objection dated 5th March, 2021. The objection is raised on the grounds that the judicial review matter is bad in law because the issues raised herein are *sub judice* to the matter before the Chief magistrate Kiambu.

PARTIES SUBMISSION

10. It is clear that if this Court upholds the preliminary objection Gulen's Chamber Summons for leave to institute judicial review proceedings will not be considered for it will fall-by-the-wayside. This is because if the preliminary objection is upheld the whole of this proceeding will be struck out.

11. It was submitted on behalf of DPP that in filing this matter by Gulen, it resulted in multiplicity of actions. That this Court lacks jurisdiction to entertain the judicial review matter because the issues thereof are *sub judice*. DPP sought this action be struck out for that reason.

12. Gulen's response is that the matter before the Kiambu Chief Magistrate is dissimilar to the judicial review matter because it relates to extradition proceedings. Further, that the Chief Magistrate's court does not have jurisdiction to entertain judicial review proceedings.

ANALYSIS

13. The main objection raised by DPP to this action is that it is *sub judice* to the action before the Chief Magistrate. I wish to begin by citing the case where the court considered the term, *sub judice*, that is **REPUBLIC VS. PAUL KIHARA KARIUKI, ATTORNEY GENERAL & 2 OTHERS EX PARTE LAW SOCIETY OF KENYA (2020) ECLR** as follows:-

“23. The Supreme Court of Kenya IN KENYA NATIONAL COMMISSION ON HUMAN RIGHTS V ATTORNEY GENERAL; INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 16 OTHERS (Interested Parties) had occasion to pronounce itself on the subject of *sub judice*. It aptly stated:-

‘[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as:- ‘Before the Court or Judge for determination.’ The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...’

26. Paraphrasing what I said in the above case, the key words in applying *sub judice* rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the *sub judice* rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.

...34. Second, in determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. The substance of this suit is wholly identical to the earlier suit.”

14. I have already set out above, in this Ruling, the matter before the Chief Magistrate Kiambu. DPP before the Chief Magistrate’s Court seeks to withdraw the matter filed by him before that court and additionally seeks the release of Gulen to DCI Interpol.

15. The Chamber Summons dated 27th January, 2021, filed by Gulen is for the following orders:-

(a) *Certiorari* to quash the decision by the 2nd Respondent to institute extradition proceedings against the applicant being Criminal Case No. 448 of 2020 which are pending before the Chief Magistrate’s court at Kiambu (hereinafter called “the said proceedings”).

(b) That the grant of leave to operate as stay of the said proceedings and of all decisions and acts complained of herein.

(c) An order of prohibition restraining the 1st respondent from arresting the applicant and/or handing him over to the National bureau for purposes of being deported to Turkey.

(d) An order for prohibition restraining the 3rd and 4th respondents from purporting to illegally and unconstitutionally deport the applicant to Turkey.

(e) An order of prohibition prohibiting the 5th respondent from proceeding with the hearing of the said proceedings which are both illegal and unconstitutional.

(f) Order of *mandamus* directed to the 1st, 2nd and 5th respondents compelling them to release to the applicant his passport and other traveling documents to enable him travel back to the United States of America.

(g) The costs of this application be provided for.

16. From the above prayers it become very clear that what Gulen seeks as one of the prayers is, leave to quash the decision of DPP to institute the extradition proceeding before the Chief Magistrate’s Court. As of now the Chief Magistrate has not yet ruled on that extradition application by DPP. Gulen is therefore quite entitled to seek leave to quash the decision of DPP to seek his extradition. Judicial Review proceedings are *sui generis*. They are not criminal or civil in nature. Judicial Review is concerned with legality of a decision of government and public bodies.

17. What is before the Chief Magistrate’s court is an application for extradition of Gulen. What is before this Court is an application for leave to quash the decision of DPP to apply for Gulen’s extradition. A close look at what is before the Chief Magistrate and now what is before this Court will show clearly that the two actions are very dissimilar. They are contrasting. There is no basis in my view in the argument by DPP that this matter is *sub judice*.

18. I therefore make a finding that there is no merit in the preliminary objection raised by DPP. It is therefore dismissed.

19. Having disposed of the preliminary objection, I will now go on to consider Gulen’s application for leave to institute Judicial Review proceedings.

20. **Order 53 Rule 1** of the Civil Procedure Rules provides that a party seeking to apply for *orders of mandamus, prohibition or certiorari* must first seek, the leave of the court. In obedience to that Rule, Gulen has approached this Court with his Chamber Summons dated 27th January, 2021 seeking leave to institute application for *Certiorari, prohibition and mandamus*. The main reason why leave is sought was considered in the case **REPUBLIC VS. COUNTRY COUNCIL OF KWALE A& ANOTHER EX PARTE KONDO & 57 OTHERS, MOMBASA HCMCA NO. 384 of 1996**, where the court stated that leave is required in judicial review matter, to ensure that an applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.

21. In considering an application for leave the court is not required to delve deeply into the arguments of the parties. The court should only peruse the evidence before it and make a decision as to whether an applicant's case is sufficiently shown to be meritorious to justify leave.

22. Although parties in making submissions before me went on and presented their argument as though the court was hearing the substantive judicial review, I will only say that having considered these arguments, I am satisfied that Gulen has sufficiently justified the leave he seeks. This Court therefore will grant him leave.

23. Gulen has also sought that the leave do operate as stay. In the case of **REPUBLIC VS. NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD EX PARTE PATANISHO MATERNITY AND NURSING HOME (2019) eKLR** the court considered the circumstances under which leave may operate as stay. The court stated:-

“The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision and in various decisions by Kenyan Courts.

15. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in JARED BENSON KANGWANA VS. ATTORNEY GENERAL, Nairobi HCCC No. 446 of 1995 that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in TAIB A. TAIB VS. THE MINISTER FOR LOCAL GOVERNMENT & OTHERS Mombasa HCMISCA. No. 158 of 2006 expressed himself on this factor as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

24. In this case, the ruling of the Chief Magistrate's court on DPP's application for extradition of Gulen has not yet been delivered. In granting the stay sought by Gulen it would indeed ensure that his substantive judicial review application is not rendered nugatory. The stay therefore, by Gulen, will be granted.

DISPOSITION

25. The order of the Court are as follows:-

- (a) The Preliminary Objection dated 5th March, 2021 is dismissed with costs.
- (b) Orders (a) to (f) of the Chamber Summons dated 27th January, 2021 are granted as prayed.
- (c) The costs of the Chamber Summons dated 27th January, 2021 shall abide with the outcome of the substantive Judicial Review application.

RULING DATED and DELIVERED at KIAMBU this 6th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

Applicant:Mr. Paul Muite SC. With Mr. J. Arwa

Respondents: Ms. Mwaniki for 1st & 2nd respondent

COURT

RULING delivered virtually.

MARY KASANGO

JUDGE