



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CR. APPLN NO. 73 OF 2019

JOSEPH IFEANYICHUKWU EZEKING.....1ST APPLICANT

ALICE KAWIRA MAOKA.....2ND ACCUSED/APPLICANT

VERSUS

COMMANDER-ISIOLO ATPU DETACHMENT.....1ST RESPONDENT

CORPORAL JATTANI TOLOSA.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

RULING

1. By a Motion on Notice dated 26/11/2019, the applicants sought the stay of the proceedings in the CM's **Isiolo Criminal Case No. 809 of 2019**. They also sought for a declaration that the first charge against the 1st accused in the aforesaid case is defective in as far as the general and specific definition of the particulars therein was concerned. There was a further declaration that the trial court had infringed on their right to freedom of worship thereby making the criminal trial unconstitutional, null and void.

2. The application was predicated upon the provisions of **Article 2 (5&6) and Articles 32 (1-4) of the Constitution of Kenya, Section 40 (1-10) of the Kenya Citizenship and Immigration Act No. 12 and Articles 2 and 18 of the UDHR**.

3. The application was supported by the affidavit of **Joseph Ifeanyichukwu Ezeking** sworn on 26/11/2019. The deponent averred that he is a Nigerian Citizen; that several months after his entry to Kenya, he was arrested and charged for entering various churches, praising and worshipping God as his religion demands. That the said actions infringes on his right of worship which is an inherent universal right which should not be denied and/or inhibited by the respondents.

4. The deponent further stated that his visa has since expired and he is apprehensive that he would be arrested on the basis of being in the country without a valid permit. That the charges levelled against him are malicious and fuelled by an intention to malign his reputation.

5. The application was opposed by the respondents through the replying affidavit of **Cpl Jattani Tolosa (Jattani)** sworn on 26/11/2019. **Jattani** is an investigating officer stationed at DCI – ATPU, Isiolo. He averred that on 27/9/2019, a report was made at Maua Police Station by **Julius Gitari** a bishop of Jerusalem International Gospel Church (JIGC) that the 1st applicant has been preaching in local churches without a work permit.

6. That efforts to help the applicant obtain the work permit had been fruitless as he failed to meet the requirements of its acquisition, viz a certificate of good conduct and theological training. That in his investigations, Jattani had established that between 9th and 11th August 2019, the 1st applicant had preached at a crusade for three days. That he also has reason to believe that the intent of the applicant besides working illegally, is to smuggle of human beings and obtain money by false pretences as reflected in the statement of the witnesses a matter still under investigation and may lead to further charges.

7. It was on the basis of the witness statements and the evidence he had so far collected, that Jattani had decided to charge the 1st applicant with two counts of engaging in a profession without being authorised by a work permit contrary to **section 53 (1) (m) as read with section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011** and wilfully obstructing police in due execution of their duties contrary to **section 103 of the National Police Service Act No. 11a of 2011**.

8. That he had also charged the 2nd applicant with two counts of; harbouring a person who engages in a profession in Kenya without being authorised to do so by a work permit contrary to **section 53 (1) (k) as read with section 53 (2) of the Kenya Citizenship and Immigration Act no. 12 of 2011** and wilfully obstructing police officers in due execution of their duties contrary to **Section 103 of the national Police**

Service Act No. 11a of 2011. He produced copies of statements, copy of the 1st applicant's passport and a letter dated 4/10/2019 from the Isiolo Immigration Office providing the status of the applicant's passport.

9. On 9/12/2019, the Court directed the parties to file their respective submissions within 28 days. None of the parties had filed their submissions as at the time of writing this ruling.

10. I have considered the affidavits of both parties. The facts are simple; the 1st applicant came to the country and began to preach under the banner of Jerusalem International Gospel Church (JIGC). The members of JIGC having been impressed by his performance, wished to open a branch in Meru for him. However, he required a work permit to be able to undertake the preaching obligations. However, when they approached the immigration offices, they were informed that the 1st applicant required testimonials in theology to help him secure a work permit. He failed to secure the same but in turn assured the respondents witnesses that he had obtained the permit. It was only after an argument ensued as to the preaching duties in the Meru Branch of JIGC that its members found that the 1st applicant did not have a permit.

11. In **Samuel Roro Gicheru & another v O.C.S. Nanyuki Police Station & another, Nyeri Cr. Misc Appln No. 22 of 2014**, Mativo J listed the following as the grounds to consider in an application for stay of a criminal proceeding:-

(i) when the continuation of the proceedings would constitute an 'abuse of process,'

(ii) when any resultant trial would be 'unfair' to the accused, and

(iii) when the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

This Court fully associates itself with the foregoing.

12. Undermining of the integrity of the criminal justice system is not only limited to abuse of the trial court procedures and processes, it would also extend generally to abuse of the administration of criminal justice process as a whole.

13. From the outset, I note that this was just a miscellaneous application under the cited provisions of the law. I doubt if the Court can properly exercise its jurisdiction and grant the orders sought. This is so as there was allegations of breach of constitutional rights. However, there was no Constitutional Petition to accompany the Motion. That alone warrants the Motion to be dismissed peremptorily.

14. In **Kiambu County Tenants Welfare Association v Attorney General & another [2017] Eklr**, the Court held:-

"The concept of the Supremacy of the Law is a vital feature in Constitutionalism, where by the law as a whole ought to be regarded with great esteem. The law includes but is not limited to the Constitution. Other laws in the queue include the laws enacted by legislative organ of the given State and laws governing conduct of judicial proceedings. This primarily involves the supremacy of the Constitution and respect of others laws made there under and laws governing institution of court proceedings, which are consistent with the constitution. Everybody, including institutions and organs of Government and litigants and their advocates are bound and must respect the constitution, all laws enacted there under and court processes. All citizens are constitutionally mandated to safeguard the Constitution or any provision thereof and all laws and must respect court processes. Any court the law and respect for court proceedings..."proceedings instituted in total abuse of court proceedings ought to be declared as such and rejected so as to protect the supremacy of the law".

15. From the evidence on record, the issues in contention is whether the 1st applicant's conduct breached certain provisions of the law as contested by the respondents. This Court is alive to the provisions of **section 18 of the UDHR and article 32 of the Constitution** which safeguards the right to worship. The same however, has to be consistent with the existing laws including the Kenya Citizenship and Immigration Act.

16. As held in **Kiambu County Tenants Welfare Association v Attorney General & another (supra)**, the supremacy of the law is a vital feature in Constitutionalism, whereby the law as a whole ought to be regarded with great esteem. The law includes but is not limited to the Constitution. Other laws in the queue include the laws enacted by the Legislature. Thus, in enjoyment of the rights under the constitution, the same should be exercised within the limits permitted by the law.

17. In line with **section 40 of the Kenya Citizenship and Immigration Act** and according to the **Ministry of Interior and Coordination, Department of Immigration, Service portal**, a Class I Work/Residence permit is issued to a member of missionary society approved by the Government of Kenya and whose presence is beneficial to the country. The Class I requirements include; a copy of the registration certificate of the organization and the academic and professional certificates of the applicant. There is also a processing fee of Kshs.1,000/- non-refundable. Fee payable is Kshs. 5,000/= per year or part thereof. (See; <https://www.immigration.go.ke/departments-of-immigration-services/as-of-29/1/2020>)

18. It is alleged that the applicants breached specific laws of the country. To this Court's mind, that is an issue that should be decided upon by the trial Court. This Court cannot arrogate itself the jurisdiction to decide the culpability or not of the applicants.

19. It was alleged that the applicants were fully aware of the Immigration laws and took part in making an application for the issuance of a permit in accordance with **section 40 of the Citizens and Immigration Act**. They were duly advised that the 1st applicant needed a professional certificate which he did not produce. The applicants have not addressed the finality of the process. It was not clear whether they had appealed or reviewed the decision of the public officer in terms of **section 57 of the Kenya Citizenship and Immigration Act**. The same provides;

57. (1) Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.

20. There was no allegation that the criminal charges were being initiated and/or commenced for other ulterior motive other than criminal justice.

21. In view of the foregoing, I find the Motion to be without merit and the same is hereby dismissed. I will make no orders as to costs.

SIGNED at Meru

A. MABEYA

JUDGE

DATED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 2020.

F. GIKONYO

JUDGE