



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 43 OF 2019

IN THE MATTER OF: ARTICLES 20, 22, & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OR THREATENED CONTRAVENTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 20, 21, 22, 23,

25, 28, 29, 31, 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

KRISTAN OROSS PAL..... PETITIONER

AND

1. HON. ATTORNEY GENERAL

2. NATIONAL POLICE SERVICE

3. INSPECTOR GENERAL OF POLICE.....RESPONDENTS

RULING

The Application

1. The Notice of Motion application before the Court dated 28.5.19 prays for the following surviving orders:

(i) That pending the hearing and determination of this petition the Honourable Court issues a conservatory order in the nature of an injunction to restrain the 2nd and 3rd Respondents by themselves or by their officers, agents, servants and/or any person acting through them from interfering in any way the yacht (LILITH) Vessel type CATAMARAN) of the Petitioner.

(ii) That pending the hearing and determination of this application and/or petition the Honourable Court does direct the Investigating Officer at Shimoni dealing with this matter and the police to surrender the Petitioner's air gun German Walther Pistol Serial No. PP 17062713 to the Kenya Revenue Authority for clearance and compliance.

(iii) That the cost of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of the Applicant filed on 28.5.19.

3. The Applicant's case is that he was arrested while in his yacht on the 5th February, 2019 while he had docked at Shimoni Jetty. He was intercepted on his way to Tanzania. He was stopped by the navy guards (coast guard), who then confiscated his yacht and found his yacht to be having his German Walther Pistol Serial No. PP 17062713, which had a firearm certificate from his native country. He was subsequently released on a cash bail of Kshs. 20,000/= on the same day and was ordered to report the next day to Kwale Law Courts where he was subsequently charged in Criminal Case No. 129 of 2019 Kwale, with the offence of being in possession of a firearm without a firearm certificate as per CAP 114 of the Laws of Kenya. Upon his arrest the police retained his yacht, German Walther S/No PP 170627136, 9 rounds of ammunition, Passport No Be 1346589 and Firearm Certificate issued in Hungary, PP170627138. The yacht was detained by the police, purporting to be carrying out investigations, but was subsequently released to him upon obtaining a Court Order from the trial Court on 12.3.19 and it is currently docked at his residence in Bamburi. The Applicant was subsequently cleared of any wrong doing, as the police at the Mombasa Airport noted that there was breach of protocol on the part of the ground handlers that led to his being in possession of his firearm (German Walther S/No PP 170627136) without a Kenyan certificate. Subsequently the charges against him were withdrawn by the prosecution on 17.5.19.

4. The prosecution noted that the Petitioner was not in contravention of the law as there was a breach by the Airline ground handlers on 6.6.19 when he arrived in the country. The airline that he had boarded (Turkish Airline) had not declared the gun to the Kenya Revenue Authority, but they had instead taken it directly to the police who handed the same to him. The Charges against the Applicant were subsequently withdrawn, and he was advised that the German Walther S/No PP 170627136 should be surrender to the Kenya Revenue Authority so as to comply with the law.

5. Upon the Applicant's discharge on 17.5.19, the police only released to him his Hungarian passport. On the 20.5.19 the Applicant visited the police station at Shimoni, seeking to have them release his original firearm certificate from his native country and to ask them to forward the German Walther S/No PP 170627136 to the Kenya Revenue Authority for him to comply with the law but they declined to do the same stating that they could only act when served with a Court order. The Applicant is currently in the country on a Tourist Visa and the same has been extended until the end of May, and wishes to ensure that he is not in any problem with the Kenyan law before he travels to his native land. On 17th May, 2019 he was visited by officers of the Kenya Revenue Authority, who wanted to inspect the yacht, and he is apprehensive that once he travels his yacht will be left vulnerable and his residence may be unnecessarily visited by various government official, hence contravening his right to privacy under Article 31 of the Constitution. The Applicant will suffer loss if the orders he seeks in the application are not granted urgently.

The Response

6. The application is opposed by the Respondents through a Replying Affidavit sworn by PC Ahmed Adan Noor Force No. 94308. The Respondent's case is that the Petitioner, a Hungarian citizen, of passport No. BE 1346589 was on board a yacht by the name Lilith which docked at Shimoni jetty on 5.2.19. Thereafter, a security team conducted a search and found that the Petitioner was in possession of a German Walther pistol Serial No. PP 170627136 with 9 rounds of 9mm blank, a magazine and a firearm certificate purported to have been issued to the Petitioner in Hungary. An inventory was prepared for the items recovered and it was signed by the Petitioner and witnessed by officers. The Petitioner was then arrested and charged with an offence of being in possession of a firearm without a firearm certificate before Kwale Court vide CR. 129/2019. The firearm was examined by ballistic experts and confirmed to be a firearm under the Firearms Act Chapter 114 Laws of Kenya. The yacht which had been detained as an exhibit was released to the Petitioner on 13.3.19 after photographs were taken as an exhibit. Since then the Respondents officers have not visited the Petitioner's residence to search /seek any information concerning the yacht as alleged by the Petitioner. The charge against the Petitioner was withdrawn vide Section 87(a) of the CPC. The above Section does not bar the officers from conducting investigations and charging the Petitioner if found guilty of an offence. It is the Respondents' view that the release of the firearm to the Petitioner will hinder investigations which are still on going. The Petitioner has been in the country for a period of more than one year and being in possession of the firearm without having a certificate. It is the duty of any visitor being in possession of a firearm to visit the nearest police station in order to have the firearm registered and be issued with a certificate. The Applicant did not do that. The Respondents state that with heightened security threats in the country, strict security measures are being put in place and must be adhered to by everybody. The action taken by the 3rd Respondent was in good faith to ensure that the general public's interest is protected and the orders being sought by the Petitioner are unmerited.

The Determination

5. Parties submitted on the application on 13.6.19. I have carefully considered the submissions. The only issue for determination now is whether the police should release the said firearm German Walther Pistol Serial No. PP 170627136 to the Kenya Revenue Authority for clearance and compliance.

6. I have noted that the subject matter of this application and even the petition is almost dissipated. The Applicant was charged in criminal case for failure to disclose that he had a firearm at the time he entered Kenya. However, the case was withdrawn by the DPP when the DPP found out that indeed there was disclosure. After the case was withdrawn, the Applicant's yacht was also released to him, and he was cleared of any wrong doing. The only outstanding issue is that the said firearm is still being held by the police in Shimoni stating that they can only release it to the Applicant upon a Court Order. The Applicant states that the procedure is for the said firearm to be released to the Kenya Revenue Authority, who will in turn procedurally release it to the Applicant.

7. There is no real opposition to the application. The Replying Affidavit does not state why the Respondents insist on remaining with the said firearm when they have cleared the Applicant of all wrong doing. Their continue withholding of the said firearm does not make any legal sense.

8. Accordingly, this Court finds that the said firearm should be forthwith released to the Kenya Revenue Authority as per the procedure.

9. In the upshot, the application is allowed in the following terms:

(i) Pending the hearing and determination of this petition a conservatory order in the nature of an injunction is hereby issued to restrain the 2nd and 3rd Respondents by themselves or by their officers, agents, servants and/or any person acting through them from interfering in any way the yacht (LILITH) Vessel type CATAMARAN) of the Petitioner.

(ii) Pending the hearing and determination of this petition the Investigating Officer at Shimoni dealing with this matter and the police are hereby directed and ordered to surrender the Petitioner's air gun German Walther Pistol Serial No. PP 17062713 to the Kenya Revenue Authority for clearance and compliance.

10. Parties to bear own costs.

Dated, Signed and Delivered at Mombasa this 7th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Wachira for Petitioner

Ms. Mwenja for Respondents

Mr. Kaunda Court Assistant