



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 197 OF 2018.

FRANTZ BERNHARD HENRIK VON BULOW.....APPLICANT.

[IN RESPECT OF SUSAN ABIBA alias AICHA ABIBA ID No. 36860723]

VERSUS

REPUBLIC.....RESPONDENT.

RULING.

1. Frantz Bernhard Henrik von Bulow, hereafter the Applicant, brought the present application for the writ of *habeus corpus* by way of a Notice of Motion dated 9th May, 2018. The application prayed; (i) that this court do order the authorities in Zanzibar, the OCS Paje Police Station, the OCD Makunduchi Police Station and the Tanzanian Inspector General of Police to return his wife, Susan Abiba, to his house or property, (ii) for the court to order the Tanzanian Inspector General of Police, the Tanzanian Director of Public Prosecutions and the Tanzanian Attorney General to commence investigations into the abduction and trafficking of his wife Frantz Bernhard Einar von Bulow, and (iii) for the court to grant a warrant of arrest against Shara Living resident in Bwejuu, Zanzibar.

2. The Application is supported by an affidavit sworn by the Applicant on 9th May, 2018 in which he reiterated his grounds on which the application is premised, that he was a resident of Bwejuu, Zanzibar and that Susan Abiba alias Aicha Abiba was his wife. That she was abducted on 18th March, 2018 by the same people who also had earlier abducted his son. He swore that after his wife's abduction one Shara Living approached him and offered to release her in exchange for his property. That he approached the Zanzibari police who refused to investigate the matter even though the Mufti and the District Commissioner had ordered them to investigate the matter. Further, that on 30th March, 2018 the Shaha of Donge, who is not their Shaha, informed him that they were investigating if his wife was a minor. He deposed that they could not detain her if she was a minor and should have instead released her to the Children services.

3. The rest of his affidavit dwelt on matters relating to his marriage and a Swedish man which this court would rather not reproduce. Further, that he was invited to Kenya by his father-in-law and arrested for stalking his wife. He was of a view that this was done with the intention of killing him in prison. He filed a number of documents in support including; marriage certificates, the information relating to Susan Abiba alias Aicha Abiba's immigration status, temporary permits, High Court's Family Division orders, maps and various documents from the United Nations Office on Drugs and Crime.

4. The respondent filed grounds of opposition on 29th May, 2018. They are that; (i) the application and the orders sought were unattainable as the court lacked jurisdiction under Section 389 of the Criminal Procedure Code, (ii) the application was misconceived as the subject of the application is not unlawfully, improperly detained or held in custody, and (iii) the abduction and trafficking of human beings are criminal offences subject to police investigations therefore no remedy lies by writ of *habeus corpus*.

5. The application was canvassed before me on 29th May, 2018 with Ms. Atina representing the Respondent whilst the Applicant was in person. His oral submissions were simply a reiteration of the issues he deposed in his affidavit. Ms. Atina, in reply, submitted that the application was opposed as the court lacked jurisdiction to hear the matter under Section 389 of the Criminal Procedure Code as the subject was not within the jurisdiction of the court. She pointed out that the Applicant had conceded that the victim was being held in Zanzibar which is outside the jurisdiction. That this also applied to the person adversely mentioned by the Applicant. As such, a writ of *habeus corpus* could not apply to them. Further, that the Applicant alleged that his wife had been abducted or trafficked which are criminal offences which may be followed up through the investigative processes which this court does not have. She submitted that the application was a waste of court's time and abuse of the process of the court and should therefore be dismissed.

6. The Applicant, in reply, submitted that he understood that the United Nations had mechanisms in place for dealing with cases of *habeus corpus* and trafficking of persons. He submitted that the Zanzibari police could not investigate the complaints as they are a part of the scheme in abducting his wife. Further, that they are trying to kill him and working in cahoots with his father in law.

7. The court has considered the respective rival submissions. It is doubtless that the subject matter of the writ sought is being held in Zanzibar and the parties the Applicant seeks be compelled to release her are various authorities and individuals in Zanzibar and the Republic of Tanzania.

8. It is clear that Section 389(1)(a) limits the powers to issue a writ of *habeus corpus* to the boundaries of Kenya. In view of the facts presented before me, this court lacks the jurisdiction to consider the application.. Ojwang J., as he then was, enunciated the rationale to the provision in **Mariam Mohamed & another v. Commissioner of Police & another**[2007] eKLR thus:

“This Court, within the concept of Habeus corpus, will be unable to make orders for the production of the Subject, because such an order would be in vain. It is a fundamental principle applicable in the judicial settlement of disputes, that a Court of law is not to make an order in vain. Courts’ orders are focussed, clear, enforceable, and capable of being secured by applying the law of contempt, against those who disobey. From the facts placed before this Court, the respondents are, at this moment, not in control of the physical custody of the subject, and so they would not be in a factual position to comply with a writ of Habeus corpus.”

9. In the same manner, the court is being asked to give orders in vain as they are not enforceable in Kenya. Likewise, some elements of intention to institute private prosecution against some police officers who are unwilling to assist the Applicant with his problem or are threatening him were disclosed in the Applicant’s submission. The process of institution of private criminal prosecution is within the jurisdiction of a Magistrate’s Court. That is where an application seeking leave to institute such proceedings must commence. As such, allowing the instant application would be an exercise in futility.

10. I need not go further than this than to be categorical that the application lacks merit and the same is hereby dismissed with no orders as to costs. It is so ordered.

DATED and DELIVERED this 7th day of June, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present in person.
2. Miss Atina for the Respondent.