

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.142 OF 2017

BRYAN ERICK FOCKLER.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Bryan Erick Fockler filed an application under **Articles 3, 10, 22, 23, 27, 29** and **39** of the **Constitution** seeking orders from the court to direct the Director of Immigration Services to forthwith release the Applicant's Canadian passport to enable him travel back to Canada. The grounds in support of the application are not in dispute. The Applicant is a key prosecution witness in **Nairobi Milimani CM.C. CR. Case No.563 of 2016 Republic –Vs- Dennis Sawo Wachira** which has been scheduled for hearing on 19th June 2017. The subject matter of the charge is an immigration offence which was allegedly committed by the accused in that case. The Applicant was the victim of the alleged offence. The Applicant's Canadian passport is a crucial document which shall be produced in court during the hearing of the case.

The Applicant does not object to the production of his Canadian passport as a prosecution's exhibit in the case. However, he is of the view that a photocopy of the said passport can be taken, then certified and produced before court. The prosecution is of the view that the best possible evidence is the Applicant's original Canadian passport which will enable it establish the charge brought against the Appellant. In that regard, the prosecution insists that the Applicant maybe allowed to travel out of the country by using a travel document to be issued by the Canadian High Commission. The Applicant countered the prosecution's argument by stating that he has been resident in Kenya for the last fifteen (15) years and was married to a Kenyan. He was required in Canada due to an illness that has afflicted his son. He therefore urgently requires to travel to Canada to attend to his sick son. He undertook to return the passport and be available to testify on behalf of prosecution upon his return to Kenya.

This court has carefully considered the rival positions taken by the parties to this application. It is clear to this court that there is actually no dispute between the prosecution and the Applicant regarding whether or not the Applicant should travel to Canada. The prosecution obviously trusts that the Applicant will return to Kenya after he has attended to his sick child in Canada. The dispute is over the question whether the Applicant's original Canadian passport should be released to him or the same should be retained by the prosecution pending its production before the trial court. The Applicant is willing to have the said passport photocopied and certified so that the duly certified copy may be availed to the court for production during the hearing of the case.

The prosecution is not prepared to consider this option. It wants to retain the Applicant's original Canadian passport in its custody pending its production in court. This court is not persuaded by the reason advanced by the prosecution in refusing to release the Applicant's Canadian passport to him. The prosecution does not doubt that the Applicant will return to Kenya after he has attended to his sick child in Canada. Indeed, the Applicant has a family in Kenya. He is a witness in the prosecution's case. He has no incentive or reason to fail to attend court during the hearing of the case. The prosecution's refusal to release the Applicant's Canadian passport is therefore unreasonable in the circumstances.

The upshot of the above reasons is that the Applicant's application shall be allowed. The Director of

Immigrations is hereby ordered to have the Applicant's Canadian passport photocopied and the copy thereof certified. The Director of Immigration shall release the original Canadian passport to the Applicant to enable him travel to Canada to attend to his sick child. The Applicant shall surrender the said passport to the Director of Immigrations upon his return to Kenya. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF JUNE 2017

L. KIMARU

JUDGE