REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION CASE NO. 152 OF 2015

EGAL MOHAMED OSMAN.....PETITIONER

VERSUS

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

CABINET SECRETARY MINISTRY OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

ATTORNEY GENERAL….....3RD RESPONDENT

RULING NO.1

1. On 7th April, 2015, the 1st Respondent, the Inspector General of Police caused to be published in the Special Issue of the Kenya Gazette Vol. CXVII–No. 36 Gazette Notice No. 2326 calling upon the entities listed therein to demonstrate within twenty four hours why they should not be recommended to the 2nd Respondent, the Cabinet Secretary for Internal Security and Co-ordination of National Government for declaration as specified entities within the meaning of sections 2(1)(m) and 3 of the Prevention of Terrorism Act No. 30 of 2012 (POTA). The Attorney General is the 3rd Respondent.

2. In the 1st Respondent's said list, the Petitioner, Egal Mohamed Osman was listed at No. 37 as Mohamed Sheik Osman Egal. Consequently, the Petitioner filed the petition dated 20th April, 2015 in which he seeks various reliefs in regard to Gazette Notice No. 2326.

3. The petition was filed together with the notice of motion application dated 20th April, 2015. Through the said application the Petitioner seek orders as follows:-

"1. THAT this application be Certified Urgent and be heard ex-parte in the first instance.

2. **THAT pending *inter partes* hearing of this Application, there be an order restraining and/or staying the implementation and/or further implementation by the Respondents, their agents, servants, officials or offices under their docket and/or any other entity, of any directive/order issued by or on behalf of the Respondents in relation to Gazette Notice No. 2326 Published in the Kenya Gazette Vol. CXVII–NO. 36.**

3. **<u>THAT</u> pending *inter partes* hearing of this Application, there be an order restraining the 2nd Respondent, its agents, servants, officials or offices under its docket, from acting, dealing and/or in any manner whatsoever executing any recommendations given by the 1st Respondent pursuant to the Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII–NO. 36.**
4. **<u>THAT</u> pending the full hearing and determination of the Applicant's Petition, there be a stay of implementation and/or further implementation by the Respondents, their agents, servants, officials or offices under their docket and/or any other entity, of any directive/order issued by or on behalf of the Respondents in relation to Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII–NO. 36.**
5. **<u>THAT</u> pending the full hearing and determination of the Applicant's Petition, there be an order restraining the 2nd Respondent, its agents, servants, officials or offices under its docket, from acting, dealing and/or in any manner whatsoever executing any recommendations given by the 1st Respondent pursuant to the Gazette Notice No. 2326 Published in the Kenya Gazette VOL. CXVII–NO. 36.**
6. **<u>THAT</u> the costs of this application be in the Petition."**

The application is supported by the grounds on its face and the supporting affidavit of the Petitioner/Applicant sworn on 20th April, 2015.

4. The Applicant's case is that he is a British National currently residing in Kenya and working as a lecturer at the RAF International University-Kenya having obtained a two year entry permit running from 29th September, 2012 to 29th September, 2014 from the Director of Immigration Services. He is married to a Kenyan citizen and the marriage is blessed with five children all born and resident in Kenya.

5. The Applicant contends that the 1st Respondent's Gazette Notice No. 2326 is illegal and unconstitutional as it offends Section 3 of the POTA and Articles 24(1), 27(1) and (2), 28, 29 (c), 33(3), 35(1) and (2) 45(1), 47(1) and (2), 50(2), 238(2)(a) and (b) and 244 (c) of the Kenyan Constitution.

6. The Applicant asserts that the 1st Respondent has no powers to act as he did. Further, that the 1st Respondent has pursuant to the issuance of the said directive occasioned the freezing of his bank account held at the Queensway House Branch of Barclays Bank.

7. It is the Applicant's case that he has never been charged with any criminal offence and was indeed issued with a Certificate of Good Conduct by the Criminal Investigations Department which falls under the authority of the respondents. It is the Applicant's averment that his good conduct is demonstrated by the fact that on 3rd April, 2015 he was among the leaders invited by the Ministry of Foreign Affairs and International Trade to attend a consultative meeting of Muslim leaders following the attack that took place at Garissa University on 2nd April, 2015.

8. The Applicant contends that the notice of twenty four hours given to him to demonstrate why he should not be recommended for listing as a specified entity was unreasonable and he never complied with the same within the specified period as the notice came to his attention after the expiry of twenty four hours.

9. According to the Applicant his being named in the Gazette Notice is an act of bad faith and improper motive whose sole intention is aimed at frustrating his various attempts to obtain Kenyan citizenship which the Government has rejected without giving any reasons. He reveals the existence of Petition No.176 of 2014 between him and the Director of Immigration Services and Petition No. 139 of 2015 in which he has sued the Director of Immigration Services and the respondents herein.

10. The respondents' opposition to the application was by way of a replying affidavit sworn on 20th April, 2015 by Inspector Leonard Bwire of the Anti-Terrorism Police Unit. The respondents' case is that Gazette Notice No. 2326 was published legally pursuant the powers conferred upon the 1st Respondent by Section 3 of the POTA and the same was intended to urgently inform the various persons and

organisations named therein to demonstrate why they should not be recommended by the 1st Respondent to the 2nd Respondent for listing as specified entities.

11. According to the respondents, the notice of twenty four hours was not cast in stone and even though that period had expired, the 1st Respondent had continued receiving the named entities and giving them an opportunity to demonstrate why they should not be recommended to the 2nd Respondent for listing as specified entities.

12. Further, that the Applicant has indeed disclosed that he had complied with the notice and had appeared at the 1st Respondent's CID offices at South C in Nairobi and the application in so far as it seeks the stopping of the implementation of the Gazette Notice is no longer viable.

13. The respondents assert that the requirement for the Applicant to demonstrate why he should not be listed as a specified entity is well founded on various intelligence reports and the respondents are willing to share those reports with the Court at the opportune time as per the requirement of Section 3(8) of the POTA.

14. In respect of the order of mandamus given by this Court (Lenaola, J) in Petition No. 176 of 2014, the respondents reveal that they have since considered the Applicant's case and rejected his application for citizenship and a report had been filed with the Court as directed.

15. The Director of Public Prosecutions (DPP) who was allowed on 29th April, 2015 to join this matter as an Interested Party did not file any papers in response to the application. Mr. Okello for the DPP, however, made oral submissions in opposition to the application. He supported the arguments of the respondents and proceeded to assert that the law does not require service of allegations on a person targeted for listing as a specified entity. Further, that if the application is allowed as drafted, it will result in the quashing of the entire list. He also contends that the Gazette Notice is yet to be implemented and in any case the Applicant has already submitted to the process.

16. In response, Mr. Musyoki for the Applicant stressed that the fact that the Applicant has submitted to the process does not take away the unconstitutionality and illegality of the process. He asserts that orders are issuable in regard to the Applicant alone and they need not affect anybody else on the list.

17. At this stage, the Applicant seeks conservatory orders pending the hearing and determination of his application. In the **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** the Supreme Court explained the place of conservatory orders in legal proceedings as follows:

> **[86] *"Conservatory orders"* bear a more decided *public-law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest.* Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes.''**

18. A conservatory order is akin to an order of stay of proceedings in judicial review matters. The purpose of stay in judicial review proceedings was clearly explained by Maraga, J (as he then was) in **Taib A Taib v Minister for Local Government and 3 others [2006] eKLR** when he stated that:

> **"I wish to state that, as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction. It is the non-availability of injunctions against the Government that Glidewell LJ had in mind when in the case of Republic – Vs – Secretary of State for Education and Science, Ex-parte Avon**

County Council (No2) CA(1991)1 ALL ER 282, he said: -

"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."

That this court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1(4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.

I also want to state that in judicial review applications like this one 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. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?

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. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act."

19. At this stage I must guard against making any comments that are likely to point to the outcome of the petition. It is only important to note that although the Petitioner alleges Gazette Notice No. 2326 is illegal and unconstitutional, the respondents and the Interested Party hold a contrary opinion. The parties are yet to place their arguments before the Court.

20. In issuing a conservatory order or an order of stay, the Court ought to be alive to the fact that it has not heard the parties' arguments on the substantive case. Although the strength of an applicant's case as presented in the pleadings may tilt the case in the supplicant's favour that is not always the case. The application for a conservatory order is considered in the unique circumstances of the case before the Court. The Court must look at the big picture and even consider how the orders may affect persons who are not before the Court.

21. There is no evidence that the Petitioner's case will be rendered nugatory if stay orders are not issued. The issue here is that of public safety and security. When that is weighed against the rights and fundamental freedoms of an individual, the balance of convenience should tilt in favour of the interests of the majority. It is only after the petition has been heard that a decision will be made as to whether or not the respondents' decision is unconstitutional and/or unlawful. If the Applicant is successful, any prejudice suffered will be remedied by issuance of the appropriate orders.

22. In view of the circumstances of this case, I find that the notice of motion application dated 20th April, 2015 fails. I direct that this petition be heard and determined on priority basis. The issue of costs in respect of this application shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 12th day of May , 2015

W. KORIR,

JUDGE OF THE HIGH COURT