



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 34 OF 2015

IN THE MATTER OF THE CRIMINAL PROCEDURE (DIRECTIONS IN THE NATURE OF HABEAS CORPUS) AND FOR AN ORDER OFF HABEAS CORPUS FOR SEBASTYAN KRYVSKYY

AND

IN THE MATTER OF SECTION 33 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011 ARTICLE 2(4) , 10, 28, 47, 50 AND 159 OF THE CONSTITUION OF KENYA 2010

AND

IN THE MATTER OF THE LEGALITY OF THE DECLARATION OF SEBASTYAN KRYSKVY AS A PROHIBITED IMMIGRANT UNDER SECTION 33 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011.

AND

IN THE MATTER OF THE INTERPLAY BEETWEEN SECTION 33 OF THE KENYAN CITIZENSHIP AND IMMIGRATION ACT 2011 VIS-A VIS ARTCILE 22(4), 10, 28, 47 AND 50 OF THE CONSTITUION OF KENYA 2010

SEBASYAN KRYVSKYYAPPLICANT

VERSUS

CRIMINAL INVESTIGATIONS DEPARTMENT

NAIROBI 1ST RESPONDENT

THE DIRECTOR PUBLIC PROSECUTIONS 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

This application is by way of an amended chamber summons amended on 14th day of April, 2015 and seeks for an order of declaration that;

1. Spent
2. Spent
3. Spent
4. The certificate dated 18th March, 2015 issued by the second Respondent under section 33 of the Kenya Citizenship and Immigration Act No. 2011 whereby the applicant was declared a prohibited Immigrant be declared as null and void for all purposes. That the applicant Sebastyan Kryvskyy is entitled to visit Kenya and engage in lawful business in terms of the entry Visa that he holds.
5. That it be declared that the deportation of the applicant by the Respondents on 31st March, 2015 was and is illegal.
6. That it be declared that section 33 of the Kenya Constitution and Immigration Act 2011 contravenes articles 10, 28, 47, 50 of the Constitution of Kenya 2010 and to that extent the same be declared as null and void for all purposes as provided in article 2(4) of the Constitution of Kenya and in the alternative if the said section 33 is not nullified it be declared that before the exercise of the power to declare a person as a prohibited Immigrant the 3rd Respondent do comply with rules of natural justice in the following manner:-

(a) Serve the immigrant with reasons why his status is deemed as Warranting his declaration as a prohibited immigrant.

(b) The Immigrant ought to be given reasonable time for example 14 days to challenge the intended declaration in a Court of law even if one is under police custody.

(c) Upon determination of the matter by such a Court, the immigrant could then be deported if the Court agrees with the 3rd Respondent or the intended declaration would be deemed as of no consequence.

Background

The Applicant is a Ukranian and Hungarian and holder of a passport No. ETO17773 and foreign certificate No. 637203.

On 28th March, 2015 at about 7:00 p.m. he was arrested by police along with four of his friends at Nyali estate. A search was conducted in his house and three pistols and three firearm licenses were seized among other goods. He was first taken to Nyali police station together with his four friends but they were later separated and he was taken to Railway police station. On 30th March, 2015 he was driven to Nairobi and in the early hours of 31st March, 2015 he was given an Air ticket for a KQ flight and he was forcefully made to board the plane.

It is contended that he was never served with a declaration of a prohibited immigrant or other document explaining the reason for his deportation.

Two separate grounds of opposition have been filed. One by Wanjiku Mbiyu Chief State Counsel for the Attorney General and the other by Mr. Wamotsa Senior Prosecution Counsel for the Director of Public Prosecution. 3rd and 4th Respondents grounds of opposition are:-

1. That the application is incompetent and bad in law as the prayers sought do not lie.
2. That the applicant is a prohibited immigrant.
3. That the applicants work permit expired on 28th February, 2015 and was never renewed nor any application for extension lodged with the 2nd Respondent.
4. That the Court lacks the jurisdiction to hear the chamber summons and issue any orders and or declarations.
5. Alternatively, the matters, before the Court are non justiciable and offend the doctrine of separation of powers and International conventions on aliens and deportees.

6. The prayers sought cannot be granted on an interlocutory application.
7. Alternatively, the prayers sought being grounded on the Constitution and the bill of rights they cannot issue on an interlocutory basis.

It is the contention by the Director of Public Prosecution on ground No.5 that by dint of article 39(3) of the Constitution and section 22(1) (a) of the Kenya Citizenship and Immigration Act 2011, the right to enter, remain in and reside anywhere in Kenya is inherently vested in Kenya citizens.

Aliens, which the applicant is, have no right to remain or reside in Kenya. A non-citizen's residence and their act of remaining in Kenya is a privilege which may or may not be granted.

Further that the Kenya Citizenship and Immigration Act as a whole and in particular section 33 is not unconstitutional in terms of article 24 limitations of rights, as the Constitution itself recognizes that entry of non-citizens as well as their working in Kenya is not a right but a permission or privilege and an act of absolute state sovereignty and not a determination of a civil right. That section 33 gives effect to article 39 (3) of the Constitution.

That the declaration of the applicant as a prohibited immigrant automatically resulted in the revocation of his entry permit in terms of the provisions of Kenya Citizenship and Immigration Act and the Kenya Citizens and Foreign Nationals Management Service Act.

That the orders sought can only be issued in a substantive suit commenced by way of a petition premised on article 22 of the Constitution.

Case for the applicant

It is the contention by Counsel Mr. Gikandi that the deportation of the applicant was illegal in that section 33 of the Kenya Citizenship and Immigration Act 2013 contravenes articles 10, 28, 47 and 50 of the Constitution of Kenya and therefore its null and void to the extent of its inconsistency.

Alternatively, the Court is invited to “**read in**” the act provisions which should be undertaken before orders for deportation are made. Those provisions, include reasons in a documented form explaining why the affected party is being declared a prohibited immigrant. That document be served on the party who should be given at least 14 days to challenge the declaration in a Court of law in terms of section 57 of the Act.

Counsel places reliance in High Court Petition No. 586 of 2012 between **Bashir Mohamed Jame Abdi and Minister for Immigration & Others** where Lenaola Judge held that,

“By denying the subject Abdi Bashir entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or orders and without according him a hearing to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subjects fundamental rights and freedoms so as to equal treatment and equal action/justice to deprivation of the society and recognition of his family under articles 27(1), 45(1) and 47 of the Constitution”.

Reliance is also placed in the case of **Samuel Mukira Mohochi Vs. Attorney General of Uganda EAC Judge ref No. 5 of 2011** where the Court was at a loss as to why a suspect was returned from one partner state to another while he was allegedly suspected of terrorism related activities without him being interrogated or questioned on those alleged activities.

The case of **Republic –Vs- Otieno Kajwang Exparte Mohmud Siras (2009) eKL** where Dulu Judge stated that,

“A suspect deserves the opportunity to give his side of the story before any adverse action can be taken against him”.

The case of **Samura Engineering Ltd. & Others –Vs- Kenya Revenue Authority High Court Petition No. 54 of 2014** where Majanja Judge stated that,

“Kenya and its people must now embrace the culture of justification which requires that every officials act must find its locus in the law and under pinning the Constitution”.

Reliance is also placed in the case of Salim Awadh Salim & 10 Others Vs Commissioner of police violation of petitioners right to due process.

It is further contended that section 33 as read with section 57 of the Act are not in harmony with article 10 which is on national values and principles of governance,

Article 47 which is on fair administrative action.

Article 49 on rights of arrested persons.

Article 50 on fair hearing.

On the issue as to whether this application is properly before this Court and whether the prayers sought can be issued, Counsel relies on article 22(3) (b) of the Constitution which provides:-

“For making of rules by the Chief Justice which satisfy the criteria that (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum and in particular that the Court shall if necessary entertain proceedings on the basis of informal documentation”.

Counsel also relies on article 159 (1)(2)(d) of the Constitution which, provides that,

“ Justice shall be administered without undue regard to procedural technicalities”.

Miss Murage assisting Counsel for the applicant (subject) submits for ***“reading in words”*** to section 33 of the Kenya Citizenship and Immigration Act so as to harmonize and bring it in tandem with the Constitution.

She places reliance on article 20(3)(4) of the Constitution which provides (3) in applying a provision of the bill of rights, a Court shall;

“ (a) develop the law to the extent that it does not give effect to a right or fundamental freedoms; and

(b) Adopt the interpretation that must favours the enforcement of a right or fundamental freedom.

(4) In interpreting the bill of rights, a Court or tribunal or other authority shall promote -

(a) The values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and

(b) The spirit, purport and objects of the bill of rights.”

She relies on the South African Constitutional case CCT 10/99. The **National Coalition for Gays and Lesbian Equity – Vs The Minister for Home Affairs**, where the Constitution remedy of ***“reading in”*** was applied. It is contended that a prohibited immigrant should be given reasons and time to challenge the deportation orders in Court.

She also relies on the case of **Anne Kinyua -Vs- Nyayo Tea Zone Development Corporation & 3 Others (2012)** eKLR where Abuodha Judge applied the remedy of ***“read in “***.

Case for the respondents

Mr. Wamotsa Senior Prosecution Counsel for Director of Public Prosecution submits that the original chamber summons application sought Habeus Corpus orders. Subsequently, there was an amendment but no jurisdiction was invoked for the grant of orders 4, 5, and 6. That the anomaly cannot be cured by article 159 of the Constitution.

Reliance is placed on **Petition No.7 and 8 of 2014 (Consolidated) Masono Salim Hemed –Vs- Director of Public Prosecution** where it was stated that,

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution that procedure should be strictly followed”.

Counsel has also relies on the case of Richard Dickson Ogenda & 2 Others Vs the Attorney General. Knauf Vs Shaughnessy 338 US. Jong Yue Ting Vs United States of America 149 US.

Lem Moon Sing Vs Limited States 158.

In the case of Knauf Vs Shaughnessy the US Supreme Court held,

“The admission of aliens to this Country is not a right but a privilege which is granted only upon terms as the United States prescribes”.

In the case of Jong Yue Ting the US Supreme Court held, ***“the right to exclude or to expel aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace is an inherent and inalienable right of every sovereign nation”.***

It is also contented that the subjects foreigners certificate expired on 27th February, 2015 and there was no application for renewal. On 30th March, 2015 his presence in the country was unlawful and therefore he cannot benefit from an illegality. Counsel relies on the case of **Khadija Noor Mohamed -Vs- The Minister for Kenyan Citizenship and Immigration.**

Mr. Masila for the Director of public Prosecution submits that the Chief Justice has already made rules relating to alleged breach of the bill of rights which state that an application for the said breach should be by way of a petition.

Mr. Ngare litigation Counsel for the Attorney General submits that the issue of ***“read in”*** should best be left to the legislative arm of the Government .

Further that the subjects foreign certificate annexure No. 2 expired on 27th February, 2015 and there is no evidence to the effect that an application had been made to have it extended.

Determination

Prayers No. 2 and No. 3 have been overtaken by events and cannot lie.

The substantive orders sought are Nos. 4, 5, and 6.

Prayer No. 4 is for the certificate dated 18th March, 2015 issued by the 2nd Respondent, under section 33 of the Kenya Citizenship and Immigration Act 2011 declaring the subject a prohibited immigrant to be declared as null and void.

5. That the deportation of the Applicant by the Respondents be declared illegal.
6. That section 33 of the Kenya citizenship and Immigration Act be ordered null and void for being in contravention with articles 10, 28, 47 50 of the Constitution of Kenya.

Section 33(1) of the Kenya Citizenship and Immigration Act provides,

“for purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is

(a) Not having received a pardon-

(I)

(ii)

(iii)

(b)

(c)

(d)

(e)

(f) a person whose presence in or entry into Kenya is unlawful under any written law.

(g)

(h) A person in respect of whom there is reasonable cause to believe that he or she is engaged in activities any activity detrimental to the security of Kenya or any other state.

(f)

(g)

(h)”

Article 39 of the Constitution which provides for freedom of movement and residence resonates with section 22(1) of the Kenya Citizenship and Immigration Act by providing,

“(1) Every person has the right to freedom of movement

2. Every person has the right to leave Kenya

3. Every citizen has the right to enter, remain in and reside anywhere in Kenya”.

This provision is deliberate as it grants Kenyan citizens only, the right to enter, remain and to reside anywhere in Kenya. It deliberately denies other persons not citizens of the country that right. Section 22(1) of the Act provides,

“Every citizen is entitled to the rights (a) the right to enter, exit, or remain in and reside anywhere in Kenya”.

Article 24 of the Constitution provides for limitation of rights and fundamental freedoms.

Article 25 provides for fundamental rights and freedoms that may not be limited.

These are ;

“(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment

(b) Freedom from slavery or servitude

(c) the right to a fair trial

(d) the right to an order of habeas corpus”.

Section 34 of the Kenyan Citizenship and Immigration Act provides,

“A person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya, unless she or he has a valid permit or pass”.

It is not denied that the subject is the holder of foreign certificate No. 6372033 issued on 23rd June, 2013 and expiring on 27th February, 2015. This certificate is marked SK 2 and is an annexure to his affidavit sworn on 10th April, 2015.

At paragraph 3 of his own affidavit he deposes that he was arrested on 28th March, 2015. At the time of his arrest his foreign certificate had already expired. There is no evidence to the effect that he had made any efforts towards renewal of the same.

In the Court of Appeal Case of **Khalifa Ramtulla Nur Mohamed and The minister for Citizenship and Immigration.** The judges noted that,

“the applicant had admitted that his visa had expired and his presence therefore in the the country was unlawful. They were of the view that to allow the petitioner plea would be tantamount to endorsing and protecting his illegitimate presence in the Country”.

Section 33 of the Citizenship and Immigration Act is not unconstitutional for limiting the rights of non citizens as same limitation of rights is to be found in article 24 of the Constitution.

I am satisfied that the applicant was unlawfully present in Kenya at the time of his deportation as he had no valid permit to stay and or remain in the Country. His deportation was lawful.

In the cited case of **Bashir Mohamed Jama Abdi.** A letter was received from the Director General of NSIS; Immigration officers were alerted and when Abdi appeared at the Airport he was promptly returned back. In the present case the certificate of a prohibited immigrant was issued by the Cabinet Secretary as provided for under the Kenyan Citizenship and Immigration Act. Though the certificate does not indicate that the subject had no valid permit the Court has found that the subject had admitted through his own annexures to his affidavit that his foreign certificate had expired. The subject/applicant cannot be heard to argue that in respect to his case no due process was followed.

In respect of this case there would be no good reason to ***“read in “*** words to the statute as prayed by the applicant.

Article 13 of the ICC PR provides,

“An alien lawfully in the territories of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

This is contemplated in section 57 of the Kenya Citizenship and Immigration Act which provides for review and appeal.

However, the due process contemplated is one where the subject is lawfully present in the country. The subject in the present case was not. By reasons of the foregoing this application is dismissed with no

orders as to costs.

Ruling delivered dated and signed this **10th** day of **July, 2015**.

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M. MUYA

JUDGE

10TH JULY, 2015

In the presence of:-

Learned Counsel for Prosecution Mr. Masila and Ngare

Learned Counsel for the applicant Miss Murage and Gikandi

Court Assistant.

M. MUYA – JUDGE

Miss Murage:

We have an application to file and appeal. We will be asking for certified copies of the ruling.

Court:

Same to be furnished to both parties for purposes of appeal.

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M. MUYA

JUDGE

10TH JULY, 2015