



Napotikan v Ethics and Anti-Corruption Commission & 2 others (Miscellaneous Application E164 of 2022) [2023] KEHC 477 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E164 OF 2022
RN NYAKUNDI, J
JANUARY 27, 2023**

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF BILL OF RIGHTS AND FUNDAMENTAL HUMAN RIGHTS UNDER CHAPTER FOUR ARTICLES 19, 20, 21, 22, 29, 39, & 49 OF THE CONSTITUTION OF KENYA 2010 AND THE INHERENT POWER OF THE HIGH COURT OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY JEREMIAH EKAMAIS LOMORUKAI NAPOTIKAN FOR AN ORDER OF ANTICIPATORY BAIL OR BAIL PENDING ARREST AND/ OR CHARGE

AND

IN THE MATTER OF SECTIONS 69 AND 123(1) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA AND THE GENERAL PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW

BETWEEN

BETWEEN

JEREMIAH EKAMAIS LOMORUKAI NAPOTIKAN APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT



RULING

1. By a Notice of Motion dated 11th October, 2022, the Applicant seeks the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to admit the Applicant to anticipatory bail pending arrest or charge on any bailable offence consequent to or arising from an alleged complaint from the 1st Respondent through its CEO Twalib Mbarak.
 3. That this Honourable Court do issue orders to the Respondents by themselves, agents or servants from arresting or pressing charges against the Applicant and continuing the investigation into the Applicant during the pendency of High Court Constitutional Petition No. E288 of 2022 before Hon. Lady Justice Hedwig Ongudi with regard to matters forming the subject matter herein.
 4. That's costs of the application be provided for.
2. The petitioner is premised on the grounds therein and it is further supported by the affidavit sworn by Jeremiah Ekamais Lomorukai Napotikan, on 11th October, 2022.

Applicant's Case

3. The Petitioner deposed that he is the current governor for Turkana County having been duly elected on the 9th of August, 2022. He further deposed that he knows from watching the television and reading print media that the CEO for EACC gave an address on 22nd September, 2022 to the newly elected members of the National Assembly indicating that the governor was to be arrested. The Applicant further deposed that he knows from the news on all the leading television channels in the country that the following day on 23rd September, 2022 the 1st Respondent leaked the information about his impending arrest.
4. The Petitioner contends that the sentiments by the CEO of the 1st Respondent regarding his arrest were made in clear violation of the orders granted in the case that he had earlier filed before the Constitution Court touching on the same issues that formed the basis of his arrest.
5. The Applicant deposed that he had filed a Constitutional petition in light of a media release by the IEBC on 4th June, 2022 which purported to block his gubernatorial bid based on a report from the 1st Respondent that Kenya Methodist University (KEMU) University had revoked his degree certificate.
6. The Applicant maintains that the subject matter of the alleged impending arrest is being canvassed in the High Constitutional Petition No. E288 of 2022 before Hon. Lady Justice Hedwig Ongudi, in which orders had been granted to the effect that KEMU University had not revoked the Applicant's degree certificate.
7. The Applicant further deposed that after listening to the parties in the said petition the Honourable Judge on 16th June, 2022 issued the following orders;
 1. That since the Respondent has not revoked the Petitioner/Applicant's degree and it is still carrying out its investigations there nothing to stop the Court from granting the prayers sought.



2. That therefore prayer No. 2 is granted of the Notice of Motion dated 12/06/2022 pending the hearing and determination of the said application. To wit- A conservatory order is hereby issued staying the unilateral decision of the Kenya Methodist University Senate to revoke the Degree Certificate issued to Jeremiah Ekamais Lomorukai issued on 23rd July, 2016 pending the hearing and determination of this Application.
8. The Applicant contends that it is in the premise of the said orders that the IEBC cleared him to vie in the gubernatorial elections for Turkana County under the ODM party ticket.
9. The Applicant is surprised and apprehensive that the Respondents are acting upon an incomplete investigation to issue orders of his arrest without making any prior of formal communication to him.
10. In light of the media release regarding his impending arrest, the Applicant through his legal representatives sent a letter dated 24th September, 2022 to both the 1st and 2nd Respondents explaining the status of the case but this has stopped the constant calls and threats from police officers of the 1st Respondent about his impending arrest.
11. Due to the constant fear and apprehension of the impending arrest, the Applicant argues that he has not been able to perform his duties as the Governor of Turkana County. The Applicant further maintains that his rights and freedoms are protected by the Constitution of Kenya and that he should be free harassment and threats of arrest while performing his duties as governor.
12. The Applicant contends that unless the orders sought are issued, then the ends of justice will be defeated to his detriment.

The 1st Respondent's Case

13. The 1st Respondent vide the Replying Affidavit sworn on 4th November, 2022 by Celestine Owiti, an investigator with 1st Respondent opposed the said application.
14. The 1st Respondent's case is that on 27th January, 2017, it received a complaint alleging that the Applicant who is the current Governor of Turkana County, irregularly and fraudulently acquired a Degree in Bachelor of Arts in Counselling from the Kenya Methodist University (KEMU).
15. The 1st Respondent further deposed that in the complaint it was alleged that the Petitioner who sat for the 1994 KCSE examination in Lodwar High School and had attained a C- (Minus) was not eligible to join University for an undergraduate Course.
16. The 1st Respondent maintains that at the time, the Applicant was a Member of County Assembly of the County Assembly of Turkana and was vying for the position of the Member of Parliament for Loima Constituency which he later won.
17. Upon receipt of the complaint, the 1st Respondent in accordance with its mandate under Article 252 and Chapter Six of the *Constitution*, Section 11 (1) (c) and (d) of the *Ethic and Anti-Corruption Commission Act* and Section 42 of the *Leadership and Integrity Act* investigated the complaint through its North Rift Office.
18. Arising from the said investigations, the 1st Respondent deposed that it was established that the Applicant had applied for a pre-University Programme at KEMU in January, 2012 and soon thereafter and before completing the Pre-University Programme, the Applicant purported to have applied for a Diploma in Counselling in 2012.



19. The 1st Respondent contends that at KEMU there are no records of the Applicant registering for the Diploma Course. The 1st Respondent further contends that the Applicant was not eligible to undertake an undergraduate course or be awarded a Degree Certificate without first completing the Pre-University Programme and Diploma in Counselling.
20. Through the investigations, the 1st Respondent further established that the Applicant had fraudulently obtained a Degree Certificate through the falsification and alteration of records at KEMU. That the fraudulently acquired certificate was used by the Applicant on 6th March, 2017 in his Self-Declaration Form that was used in securing his clearance from IEBC when he was vying for the position of Member of National Assembly.
21. The 1st Respondent further deposed that upon concluding the said investigations and in accordance with Section 35 of the *Anti-Corruption and Economic Crimes Act*, it vide a letter dated 23rd November, 2021 forwarded a report to the 2nd Respondent with recommendations that the Applicant herein be charged with forgery and uttering a false document.
22. The 1st Respondent in accordance with its mandate as envisaged under Chapter Six of the *Constitution* during the clearance process by the IEBC for the 2022 general election, issued a list of persons vying for public office including the Applicant whom it had investigated and established that there were unresolved issues relating to their integrity and were therefore unfit to vie for public office.
23. The 1st Respondent maintains that the list which included the Applicant's name was widely circulated through the media. The 1st Respondent argues that the Applicant was therefore aware that he was being investigated and that there was a possibility that the investigations may result in his arrest and arraignment in Court.
24. The 1st Respondent contends that despite of the recommendations that were made by it, the IEBC proceeded to clear the Applicant to vie for the Gubernatorial seat for the County Government of Turkana which he later won.
25. The 1st Respondent further deposed that the 2nd Respondent having concurred with the recommendations that 1st Respondent had made, it vide a letter dated 22nd June, 2022 directed that the Applicant be arrested and charged for the offences recommended.
26. According to the 1st Respondent, the investigations conducted by the Commission were independent, impartial, transparent, fair and in accordance with the law and do not form the subject matter in Constitutional Petition No. E288 of 2022 before Hon. Lady Justice Hedwig Ongudi. The 1st Respondent further contends that the order granted in Constitutional Petition No. E288 of 2022 stayed the decision by KEMU to revoke the Degree Certificate issued to the Applicant but did not stop the investigations either by KEMU or the by it in relation to the subject certificate.
27. The 1st Respondent contends that it is not a party to Constitutional Petition No. E288 of 2022 and therefore any directions or orders made therein are not binding to it. Further that the existence of the Constitutional Petition cannot be bar to the investigations touching on the fraudulent academic certificates.
28. According to the 1st Respondent the mere communication through media of the impending arrest and arraignment of prominent persons in Court does not amount to harassment.
29. The offences having been established against the Applicant, the 1st Respondent argues that the Petitioner should then appear before it for processing and arraignment in Court.



30. According to the 1st Respondent, the Applicant is inviting this Court to interfere with its powers as provided for the by Constitution and other relevant laws without any justifiable cause, a move that this Court should not allow.
31. In addition, the 1st Respondent contends that the Petitioner herein has not demonstrated to the Court how his constitutional rights have been or are threatened to be infringed by the 1st Respondent's recommendations and the 2nd Respondent's direction
32. The Petitioner contends that this instant application is scandalous, vexatious and an abuse of the Court process and should therefore be dismissed with costs.
33. The 1st and 2nd Respondent filed submissions dated 8th December, 2022 whereas the Applicant did not file any.

Determination

34. Article 28 of the *Constitution* of Kenya, provides for the right to Human dignity: "Every person has inherent dignity and the right to have that dignity respected and protected. Further in Article 29, the right to freedom and security of the person; every person has the right to freedom and security of the person, which includes the right not to be (a) deprived of freedom arbitrarily or without just cause.
35. The sanctity of the bill of rights and the protection of fundamental rights and freedom of individual citizens is guaranteed in our constitution. The right to liberty and security of the person under Article 29 of the *constitution* is one of such rights that a person cannot be deprived of arbitrarily or without a just cause. The words of Article 49 (1) (h) of the *Constitution* are clear that an arrested person has a right to be released on bail or bond pending a charge or trial unless there are compelling reasons. This article places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the bill of rights as conjunctively with Articles 19, 20, 21, and 22 of the constitution. The constitutional court in *S v Zuma* 1995 (2) SA 642 (CC) para 17 I gave guidance for determining the meaning of a provision of the Bill of rights as the literal Interpretation of the text itself in the following language by Kentridge AJ thus:

.....While we must be always conscious of the value underlying the Constitution, It is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective meaning". Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce' reminder that even a constitution is a legal instrument. The language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to "value" the result is not interpretation but divination... I would say that a constitution "embodying fundamental principles should as far as its language permits be given a broad construction.

36. The true legal position is a great deal of the scheme on interpretation of the constitution is provided for under Article 259 demonstrating the manner it shall be interpreted by the court. The Canadian Court in *R vs Big M Drug Mart Ltd* 1985 18 DLR 321 395-6: In this regard held as follows:

"The meaning of a right or freedom guaranteed by the Charter was to be ascertained by the analysis of the purpose of such a guarantee. It was to be understood in other words in the light of the interest it was meant to protect in my view, this analysis is to be undertaken and the purpose of the right of freedom in question to be sought. By reference to the character



and larger objects of the charter (of Rights and freedom) itself to the language chosen to articulate the specific right or freedom to the historical origins to the concepts enshrined, and where applicable to the meaning and purpose of the other specific right and freedom with which it is associated with the text of the charter. The interpretation should bea generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charters protection”

37. From the perspective of the constitutional legal order grant of refusal of anticipatory bail is depended upon the peculiar facts of which case and no heard rule can be laid down to limit any provision under the Bill of Rights. One of the recurrent worries is the flourishing applications on an anticipatory bail against the state organs charged with the responsibilities of crime detection, investigations and recommendation to the DPP for an indictment. My textual interpretation of the constitution on the scope of the arrest bail is one to be limited to exceptional circumstances. It must be pointed out that the right to anticipatory bail does not take away the constitutional mandate of the police and the EACC to investigate into offences brought to the attention by any other person or entity. Moving to the more limited challenge is that courts should exercise discretion sparingly so as not interfere with the mandate of those institution whose powers are clearly spelt out in the constitution.
38. In Kenya there are no express provisions on anticipatory bail save for the constitutional provisions under the bill of rights. This lacuna has been further buttressed through the emerging jurisprudence articulated by the High Court.
39. I observe that in India a common law jurisdiction upon which our Criminal procedure code is premised has a specific section 438 of the code on *Criminal procedure* on anticipatory bail. It states as follows;
- (1) where any person has a reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, *inter alia* the following factors namely;
 - 1) The incident and gravity of the accusations
 - 2) The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence
 - 3) The probability of the applicant to flee from justice and
 - 4) Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.
40. The constitutional court of India went further to consider the fundamental aspects of anticipatory bail to be of such importance and anchored on the right to life and liberty of a person.
41. The principles that guide the court in considering whether to grant anticipatory bail were ably set out by Rawal and Kimaru, JJ in *Samuel Muciri W’Njuguna v. Republic* [2004] eKLR, to wit:
- “When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution did not provide a remedy to a citizen whose fundamental rights have been breached... We are of the humble opinion that the right to anticipatory bail has



to be called out when there are circumstances of serious breaches by an organ of the state of a citizen's fundamental right.”

42. It is then salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what the constitution envisages constitutes protection of fundamental rights and freedom of a citizen. It cannot issue where an Applicant labours under apprehension founded on rumours or unsubstantiated claims.
43. In dealing with an application of this nature, it is the constitutional duty of this court to go to the lengths and breadths of the constitution to protect the rights and fundamental freedoms of Kenyans where need be, but it should be alive to its obligation not to curtail the other organs of state from carrying out their constitutional mandate. It is a very delicate balance which this court is expected to carry out.
44. In the case of *Mandiki Luyeye Vs Republic* [2015] eKLR, the court held thus;
- “Similar sentiments were observed in the case of Eric Mailu Vs Republic and 2 Others Misc. Criminal Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen's rights by organs of the State.
- Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what the constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an applicant labours under apprehension founded on unsubstantiated claims. The fear of breach of fundamental right must demonstrate the breach by acts and facts constituting the alleged breach”.
45. In the present case, the Applicant submitted that he is facing an imminent arrest from the 1st Respondent officers. This is with regard to his Degree Certificate from KEMU which the Applicant contends is the subject matter in Constitutional Petition No. E288 of 2022 before Hon. Lady Justice Hedwig Ongudi. The Petitioner further contends that no formal communication has been made to him regarding the impending arrest. That following the media release of his impending arrest, the Applicant contends that he has been receiving constant calls and threats from the police officers of the 1st Respondent about his impending arrest.
46. The 1st Respondent's case on the other hand is that having received a complaint regarding the Applicant's Degree Certificate, it pursuant to the law duly carried out is investigations and made recommendations to the 2nd Respondent's that the petitioner be charged which recommendations were echoed by the 2nd Respondent.
47. I have keenly perused the pleadings and submissions in this matter and in my view the Applicant herein has not demonstrated to this particular Court how the Respondents have threatened or about to threaten his Constitutional rights.
48. I have also keenly perused pleadings from Constitutional Petition No. E288 of 2022 before Hon. Lady Justice Hedwig Ongudi annexed by the Applicant. While appreciating that Court orders are never issued in vain. There is no nexus between the Respondents herein with the orders that were issued by Hon. Lady Justice Hedwig Ongudi in Constitutional Petition No. E288 of 2022.
49. Applicant has further alleged that he has been receiving constant calls and threats from police officers of the 1st Respondent. He however, has not tendered any evidence to support the said allegations. I agree with respect that the power conferred upon the respondents has not been abused or used *mala-*



fides. In the first instance, all offences as prescribed under section 123 of the Criminal Procedure Code as read with Article 49(1h) of the constitution are bailable. In essence, in our constitutional scheme of things both misdemeanours and serious offences are all bailable offences. The grounds on which the petitioner as a mover of the petition to this court revolves around phone calls and threats of being arrested and detained in custody before being arraigned in court. The question then is whether he has demonstrated sufficient cause capable of securing anticipatory bail. From the events and facts disclosed in the affidavit it remains to exist as a fear and apprehension with no reasonableness of that belief.

50. In my view by undertaking investigations, the Respondents herein were only carrying out their constitutional mandate under Article 244 and 253 of the Constitution and cannot be curtailed by this Court if the so wish to bring charges of any kind against the Petitioner.
51. Further, the Petitioner save for being apprehensive about the impending arrest has not demonstrated to this Court any illegal or unlawful manner in which the Respondents might have undertaken the said investigations. It goes without saying that issues relating to ripeness of infringement of the Bill of Rights as agitated by the petitioner remains in doubt.
52. The Petitioner contends that Respondents are acting upon an incomplete investigation to issue orders for his arrest. The Petitioner has not shown this Court his basis for believing that the investigations in question are in fact incomplete. In the end, I see no merit in the Petitioner's application. The Petitioner has failed to demonstrate that the Respondents have breached his fundamental rights to freedoms or that there exists any threat of his rights to warrant the grant of anticipatory bail. The Petition has no merit and I accordingly dismissed it.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY, 2023.

.....

R. NYAKUNDI

JUDGE

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