



REPUBLIC OF KENYA



**Ngumi v Republic (Miscellaneous Criminal Application
3 of 2022) [2023] KEHC 2602 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION 3 OF 2022**

**MW MUIGAI, J
MARCH 29, 2023**

BETWEEN

JOHN GITAU NGUMI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Application

1. The Applicant herein John Gitau Ngumi filed an application in Milimani Law Courts under Certificate of Urgency dated 11th November, 2022 and sought the following orders;
 - i. That the Court grant the Applicant an Anticipatory Bail against a probable arrest and upon reasonable terms to be determined by the Court
 - ii. That the Court grant any orders it deems fit and just.
2. The Application is based on the following grounds:
 - 1) That the Applicant has/had been summoned to appear before Criminal Investigations Office at Mlolongo Police Station to answer to an alleged offence of obtaining money by false pretense and other possible alternative charges.
 - 2) That the Applicant has/had been reliably informed that the police are investigating a claim whereby it had been reported by one James Kahura that a certain Mr. Benedict Musyimi received a sum of Kshs.500,000/- from the said James Kahura John being purchase price for the sale of a Plot located at Mlolongo being Plot No H6 measuring approximately 50x100 excised from LR No 1504/7 on or about the 11th October, 2012.



- 3) That the Applicant had been shown an alleged written document titled “Authority to sell” where it is purported that he sold the said plot to one James Kahura John for a sum of Kshs.500,000/-.
 - 4) That the Applicant admits that he was at one time the owner of the said Plot but he sold the same to a willing buyer on or about the year 2011 but not to the said James Kahura John.
 - 5) The said document bears the Applicant’s name as the seller of the said plot and also his National identify Card Number.
 - 6) That the applicant is a stranger to the said transaction document and his purported signature appended thereon is forged.
 - 7) That the Applicant is also a stranger to the said James Kahura John who is purported to have purchased the said Plot from him.
 - 8) That the Applicant suspects that the said Benedict Musyimi who is known to him may have retrieved particulars of his identification including his Identification card and prepared the said document with a view to obtain money from the said James Kahura John by purporting to sell a plot that had since been sold by the Applicants using the Applicant’s particulars.
 - 9) That the Applicant has already reported the matter at Central Police Station, Nairobi and has been issued with an OB number.
 - 10) That the Police Mlolongo Police Station are adamant and keen to have the Applicant arrested and have informed him that he shall be released on a police bond pending conclusion of investigations.
 - 11) That the Applicant is apprehensive that he will soon be arrested, detained and charged with an offence that he is not privy to and subsequently will suffer great prejudice.
 - 12) That the applicant is willing to assist the police and the Director of Public Prosecutions by adducing evidence as a prosecution witness and assist the Court to reach a fair decision in the matter.
 - 13) That the Applicant will abide by any terms that the Court may impose on him as a condition for granting the orders sought.
3. The Application is supported by the Affidavit of the Applicant sworn on even date deposing the same facts outlined as grounds. He stated that he is willing to assist the police and the Director of Public prosecution by adducing evidence as a Prosecution witness and assist the Court to reach a fair decision in the matter and he will abide by any terms or conditions that the Court may impose on him as a condition of granting the orders sought.
 4. On 22/11/2022 this matter was transferred to Machakos High Court for hearing and disposal vide the Court order issued by D. Ogembo J as the matter emanates within the jurisdiction of Machakos High Court. The matter was set to be mentioned on 24/11/2022 at Machakos High Court.
 5. On 6/12/2022 the parties appeared before this Court and the matter fixed for a further mention on 8/12/2022.

Replying Affidavit

6. Mr. Mwangera for ODPP swore Replying affidavit deposing that the Applicant herein admits to have owned the property in dispute (LR No 1504/7) 2011.



7. That the Applicant has not demonstrated how he will suffer any substantial injustice, since his rights are guaranteed under article 49 of the Constitution.
8. That the application is premature, since the Respondent has not scrutinized the police file, in order to make the decision whether to charge the Applicant or not and that the application seems to be ill-advised, frivolous and abuse of the Court process.

Respondents Grounds of opposition dated 8/3/2023

9. That the National Police Service is mandated under article 245 of the Constitution to investigate any alleged offence reported to them.
10. That the application is still premature since the police file has not been brought to the Office of the Director of Public Prosecutions for further scrutiny and consideration.
11. That the Applicant has not demonstrated how he will suffer any substantial injustice since his rights are guaranteed under article 49 of the Constitution.
12. That the Application is misconceived, frivolous, vexatious and an abuse of the Court process.

Supplementary Affidavit

13. That vide letter dated 8th February, 2023 the applicant's advocate wrote to the District Criminal Investigation Office (DCIO) at Mlolongo police station appraising them of the progress of the hearing of this matter after one of their officers called the applicant's advocates inquiring into the status of the case.
14. That the Applicant's advocate received a reply from the DCIO authored by the office of DPP Mavoko and addressed to the DCIO Mlolongo giving the chronology of events relating to how one James Kahuro John (the complainant) allegedly paid money for the purchase of Plots. Nos. H6 & H7 purportedly then owned by the Applicant.
15. That it is true that the said plots Nos.H6 & H7 belonged to the Applicant but has since sold them to third parties way back in early 2011,he had no further interests in the said plots at the time the complainant purportedly purchased the same.
16. That the letter stated that said James Kahuro John engaged his agent one Peter Gakwa Njendo who allegedly transacted on his behalf for the purchase of Plot H6 & H7 respectively. That one Benedict allegedly forged the signature of his brother Richard Wambua in the agreement for the sale of Plot H7.
17. That the ODPP has concluded its investigations and found that the said Benedict was the one who received the purchase price for the alleged sale of Plot H6 & H7 respectively and without the Applicant's knowledge hence it is only fair and in the interest of justice that the instant application for anticipatory bail be allowed so that the applicants can appear as a prosecution witness now that the ODPP has confirmed that the Applicant is not the one who received the alleged purchase price from James Kahuro John.
18. That in the said letter the said Benedict's brother one Richard Wambua has agreed to refund the complainant James Kahuro John the monies that the said Benedict received in lieu of purchase price from the complainant with respect to the alleged sale of Plot H7.
19. That Benedict admitted that he forged his brother's signature Richard Wambua in the agreement for the sale of Plot H7 and agreed to refund the monies received in lieu of purchase price for the said plot



the prosecution ought to solely pursue the said Mr. Benedict for the offence of receiving money by false pretenses with respect to two plots and exclude the Applicant from any possible prosecution.

Submissions

Applicant's Submissions

20. On behalf of the Applicant it is submitted that the signature appended on the said agreement purported to be his is a forgery. That he suspects one Benedict Musyimi who once acted as his land broker to be the mastermind of the said transaction since the said Benedict at one time had copies of the Applicants particulars such as his National ID Card. The Applicant has already reported the purported forgery of his signature to the Police.
21. That there is no proof of evidence adduced to prove that the Complainant knows the Applicant as the person who received money from him.
22. That there is no reason adduced as to why the complainant has waited for more than 10 years to institute criminal proceedings on a matter that allegedly took place in the year 2012.
23. 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.
24. Reliance is on the case of Coroline Kutbie Karanja v Director Public Prosecutions & 2 others [2021] eKLR, where the court while allowing the application, observed that;

“ However, where the remedy has been considered, the courts have applied the threshold for an application for violation or threatened violation of rights under article 23 and 165(3) of the Constitution. Under article 29 of the Constitution, 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.”
25. In the instant case the applicant has indicated his willingness to co-operate with the investigators and adduce evidence as a prosecution witness and assist the court to arrive at a fair and just decision as well as abiding by any terms that the Court may impose on him as a condition for granting the orders sought.

Respondent's Submissions

26. On behalf of the Respondent it is submitted that the Constitution provides that no person should be deprived of his freedom arbitrarily without a just cause. The applicant in this matter is a person of interest in an ongoing investigation.
27. It is further submitted that the Kenya police is mandated under article 245 of the Constitution to investigate any offence reported to them. The Police officers from Mlolongo Police Station are indeed investigating a land case whereby the Applicant admits in his application that he once owned the property in dispute (LR 1504/7) in 2011.
28. Reliance is on the case of Mandiki Luyeye v Republic [2015] eKLR the Court held thus:

“Similar sentiments were observed in the case of *Eric Mailu v Republic and 2 others* Nairobi Misc. cr. Application no 24/2013 in which it was emphasized that anticipatory bail would only issue wherein there was serious breach of a citizen's rights by organs of state. Accordingly, it's 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 to fundamental right must be real and demonstrable. An applicant must demonstrate the breach by acts and facts constituting the alleged breach.”

29. See also in the case of *Republic v Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Limited & 3 others* [2013] eKLR the Court held thus;

“However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.

30. The Applicant herein has failed to demonstrate how his Constitutional rights have been breached.

Determination

31. This Court is called upon to determine the issue of bond pending arrest or anticipatory bail. This Court considered carefully the pleadings and submissions by the parties, the party/Applicant seeks anticipatory bail on account of alleged impending unjustified arrest and arraignment in Court of Law.
32. The law does not expressly or specifically provide for anticipatory bail but it is envisaged by article 29 of the *Constitution*; which provides for a person’s

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;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58

33. In *Samuel Muciri W’Njuguna v Republic* [2004] eKLR Hon Kimaru J (as he then was) & Hon. Rawal LJ said of anticipatory bail under the *repealed Constitution*;

While it is true that the right to anticipatory bail or bail pending arrest is not specifically provided for by statute we are of the humble opinion that the right to anticipatory bail or bail pending arrest is envisaged by section 84(1) of the *Constitution*. The applicant’s ordeal at the hands of the police is an instance where a right to anticipatory bail accrues. 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. In the instance case, the applicant has had dreadful experiences at the hands of the police where he has been severally incarcerated for no apparent or justifiable reason. For the respondent to say that a person in such a situation should do nothing because there is no law providing for such a person to seek a remedy in Court will completely be the antithesis of the spirit of the Constitution which provides for the protection of fundamental rights and freedoms in the Bill of Rights.

34. The Applicant deposed detailed chronology of events that he has been summoned to before Criminal Investigations Office at Mlolongo Police Station to answer to an alleged offence of obtaining money by false pretense and other possible alternative charges. The investigation is based on a report by one James Kahura John that Benedict Musyimi received Kshs.500,000/- from the said James Kahura John being purchase price for the sale of a Plot located at Mlolongo being Plot No H6 measuring approximately 50x100 excised from LR No 1504/7 on or about the 11th October, 2012 which at one time belonged to the Applicant before he sold the said Plot in 2011.
35. The Applicant was shown a document titled “Authority to sell” purporting that he sold the said plot to one James Kahura John for a sum of Kshs.500,000/- and bear his names and Identity Card Number and signature as the seller of the Plot.
36. The Applicant contends the signature is forged. The Applicant’s Advocate on record found out that James Kahuro John engaged his agent one Peter Gakwa Njendo who transacted on his behalf for the purchase of Plot H6 & H7 and that one Benedict allegedly forged the signature of his brother Richard Wambua in the agreement for the sale of Plot H7.
37. That the ODPP has concluded its investigations and found that the said Benedict was the one who received the purchase price for the alleged sale of Plot H6 & H7 respectively and without the Applicant’s knowledge.
38. Benedict’s brother one Richard Wambua agreed to refund the Complainant James Kahuro John the monies that the said Benedict received in lieu of purchase price from the complainant with respect to the alleged sale of Plot H7.
39. That Benedict admitted that he forged his brother’s signature Richard Wambua in the agreement for the sale of Plot H7 and agreed to refund the monies received in lieu of purchase price for the said plot the prosecution ought to solely pursue the said Mr. Benedict for the offence of receiving money by false pretenses with respect to two plots and exclude the Applicant from any possible prosecution.
40. From these facts, prima facie there seems to be no nexus between the Complainant’s claim and the Applicant save that he owned the suit property Plot H6 & H7 and sold in 2011. Secondly, the investigations seem to point at one Benedict Musyimi who purported to sell the same suit property and he received Kshs 500,000/- from James Kahuro John and/or his agent Peter Gakwa Njendo. There is total silence on whereabouts and/or status of Benedict Musyimi since the purported sale and receipt of funds in 2012.
41. The Applicant served the Application to both Respondents, Kenya Police Service and Office of Director of Public Prosecution. The Facts outlined above were/are not controverted by any other cogent and/or tangible evidence implicating the Applicant’s involvement in any way.



42. This Court is alive to the Constitutional & Statutory mandate provided by article 245 of the Constitution, section 24 of National Police Service & sections 21,22 & 29 of the Criminal Procedure Code that bestow the right to conduct investigations from any complaint or occurrence of any crime. However, in this case, while investigations are on going, there are conflicting versions of the outcome of these investigations. On the one hand the applicant vide the supplementary Affidavit admits ownership of Plots H6 & H7 and further claims he sold these Plots to other undisclosed buyers in 2011 and no proof of the same is disclosed.
43. On the other hand, the ODPP Office Mavoko wrote to DCIO Mlolongo on 15/9/2022 that in property H6 and according to an Agreement dated 10/10/2012, the parcel was owned and sold by James Gitau who received consideration of Kshs 500,000/- and it is recommended that John/James Gitau & Benedict are charged with conspiracy to commit a felony in relation to Land Parcel H6.
44. It is interesting to note that there is recommendation to have the Applicant charged with Benedict for the offence in relation to Plot H6, whereas in a similar offence with regard to Plot H7 admittedly Benedict is granted opportunity to refund the money and these 2 positions are irreconcilable; Benedict admitted forging the brother's signature and obtained the money/ sale proceeds and not James/John Gitau. Benedict is said to have received the funds and not the Applicant.
45. The agreement to sell that contains the Applicant's names, ID number and signature is alleged to have been forged unless the contents of the Agreement are subjected to forensic investigation it cannot be conclusive as the Applicant challenges the same.
46. Secondly, the Applicant contends as owner of the 2 Plots he sold to other purchasers and did not sell to the Complainant herein or his agent. Kshs 500,000/- was received by Benedict.
47. The case-law above portends 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 and 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.
48. Without interfering with investigations in the matter and the ODPP's mandate to prosecute, from the circumstances above this Court finds it would be remiss not to fully explore forensic investigations on the agreement to sell marked GN-1 that is purported to be by the Applicant and /or direct evidence of receipt of Kshs 500,000/- by the Applicant before exercising statutory duty/mandate to arrest, charge and prosecute the case against the Applicant.
49. From the totality of the evidence from pleadings and submissions, the Applicant is subject to arrest and arraignment in Court albeit various unresolved questions /issues with regard to receipt of Kshs 500,000/-.In this Court's view the arrest before resolution of alleged forgery of agreement to sell and evidence of receipt of Kshs 500,000/- by the Applicant, would amount to violation of the applicant's freedom under article 29 of Constitution 2010. In the circumstances, this Court grants the applicant, John Gitau Ngumi anticipatory bail in the following terms;

Disposition

- a) The Applicant John Gitau Ngumi shall execute a bond of Kshs 500,000/- which shall expire within 6 months from date of this Ruling.
- b) The Applicant shall appear attend to any summons requests and avail himself to the Police during investigations into the matter.



- c) The Investigations shall be completed within 6 months before arraignment if need be after verification of Applicant's claims.

It is so ordered.

**DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 29TH MARCH 2023.
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Owang - For the Applicant

Mr. Mwongera - For the Respondent

Geoffrey/Patrick - Court Assistant(s)

