



Ndonga v Director of Public Prosecutions & another (Miscellaneous Criminal Application E053 of 2023) [2023] KEHC 18174 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E053 OF 2023**

HM NYAGA, J

MAY 25, 2023

BETWEEN

DANIEL MACUA NDONGA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 4th May, 2023.
2. The application is anchored under Articles 22, 25, 28, 47(2), 49(1), 159(2)(c), 165(3), 244(c) of the Constitution of Kenya, and it seeks the following Orders:-
 - i. That the Applicant herein be admitted to anticipatory bail on such reasonable terms and conditions that this Honourable Court deems fit to grant, pending investigations, arrest and or charge by the Respondents.
 - ii. That this honorable court be pleased to issue a conservatory order restraining the Respondents, their Servants, Agents, junior officers and/ or anybody from effecting and/or anybody from arresting, harassing or otherwise however interfering with the Applicant herein pending the hearing and determination of this application/petition in the matters related to Land Parcel Numbers Nakuru Municipality Block 17/206 and Nakuru Municipality Block 17/207.
 - iii. That the costs of this Application be provided.
 - iv. That this Honourable Court does issue such further or other orders as it may deem fit and expedient.



Applicant's Case

3. The Application is premised on the grounds that the Applicant is apprehensive of being arrested in an unprocedural manner and detained in breach of his fundamental rights and that he is entitled to the protection of his fundamental rights including but not limited to liberty and fair trial.
4. The Application is supported by an Affidavit sworn by the Applicant, Daniel Macua Ndonga on the even date. In a nutshell the applicant states that on April 30, 2007 he was issued with a Certificate of Lease over the Parcel of Land known as Nakuru Municipality Block 17/206 after having legally acquired the same. That the said Certificate of lease was later defaced while in his custody and on December 20, 2013 he was reissued with a replacement Certificate of Lease after following the due process.
5. He further deposed that he enjoyed quiet possession of the said parcel of land until sometime in the year 2014 when he was in need of funds to carry out a development project. He decided to approach Jamii Bora Bank for a credit facility of Kshs. 7, 500,000/= and he used the aforesaid parcel as security and a charge in favour of the said bank was registered after the Bank Counsel followed the due process.
6. He further contended that on October 21, 2014 he entered into a Sale Agreement with one Sammy Karinga Mubea for a purchase of another parcel of Land known as Nakuru Municipality Block 17/207 for a consideration of Kenya Shillings Fifteen Million (15,000,000/=) only. As per the aforesaid sale agreement, he paid a deposit of Kshs. Five Million (Kshs.5, 000,000/=) at the execution of the agreement and a balance of Kshs. Ten million (Kshs.10,000,000/=) was to be sourced from Jamii Bora Bank Limited through a credit facility upon transfer of the said parcel to him and thereafter the registration of a charge against it in favour of the bank was to be effected. That due diligence was done and the bank successfully had a charge registered in its favour against the title Nakuru Municipality Block 17/207 and the balance of the agreed purchase price was disbursed in accordance with the sale agreement. He thereafter continued to enjoy quiet possession of the aforementioned two parcels of land as he diligently continued to service the credit facilities he received from the bank using the said properties as security.
7. The applicant averred that sometimes in the year 2015 or thereabouts he received a call from police officer, one Mr. Okello asking him to visit the Nakuru Police Station as he had inquiries over his two aforementioned parcels of land. He visited the said station and was grilled and interrogated for several hours by the said Mr. Okello and he even recorded his statement. He stated that at no particular time was it revealed to him that there were any irregularities with the titles over the said parcels and he was under the impression that he was assisting with what was put to him as “general inquiry into activities involving properties within Nakuru Municipality Block 17” and since he suspected nothing of alarm, he even provided all the documents to the said officer.
8. It was his deposition that he did not hear from the said officer again until sometime in the first week of May this year when he informed him that he was following up on their earlier discussions and that he had opened an inquiry file No.97 of 2019 and he was likely to arrest him on the strength of that information. He averred that through his advocate he wrote a letter to the 1st respondent herein that he was willing to cooperate with the authorities if and when required and to offer assistance in case of any investigations.
9. He contended that after sending the letter he received a phone call from the said officer inquiring of his whereabouts on Friday May 5, 2023 and that such line of questioning got him apprehensive of an impending arrest and detention over the weekend as it would only be possible to press charges, if any, on Monday May 9, 2023.



10. He considers the Police officer's communication as harassment and intimidation as he has never been served with any formal summons by the police or informed of the allegations against him so as to enable him give a statement. He also finds it suspicious for the said officer who is no longer stationed at Nakuru but at Kiambu to be the one still calling him over the said parcels of Land which are situated in Nakuru and thus under the jurisdiction of an officer within Nakuru.
11. It was his deposition that it is questionable that he is not aware of any other person of interest having been interrogated over the issue, including the vendor of the aforesaid parcels of Land and the Bank regarding the legality of the titles thereof.
12. He prayed that the respondents do issue him with formal summons to enable him visit the station accompanied by his Advocate, to have that nature of investigations against him, if any, revealed to enable him to choose the mode of his response and whether to record a statement in the presence of his Counsel.
13. He stated that the statement he recorded in the year 2015 was obtained through trickery, undue influence, and misrepresentation and material nondisclosure of facts by the said officer and thus they should not form the basis of his impending arrest.
14. He asserted that he is committed to cooperate with the authorities and to appear upon formal summons before the police or any other authority in the company of his counsel to enable him undertake the legal and formal procedure including issuing a statement under charge and caution if necessary.
15. He believed he has substantiated his claims and has demonstrated how the said apprehension has been catapulted by Mr. Okello's incessant calls informing him of his impending arrest and seeking to find his whereabouts on Friday May 5, 2023.

Respondent's Case

16. The Respondent swore a Replying Affidavit through its state Counsel M/s Nekesa Murunga on May 11, 2023.
17. The Respondent averred that the Application lacks merit and it should be dismissed as the Applicant has not demonstrated how his fundamental rights have been breached.
18. It was averred that prior to institution of charges, investigations must be conducted and preemptive Applications such as this one should not be allowed.
19. The Respondent asserted that anticipatory bail is not provided for either in the Constitution or any act of parliament and that under article 49 an arrested person has a right to be released on bond pending trial.
20. It is the Respondent's case that police are constitutionally mandated to independently carry out investigations and effect arrest if need be and that by allowing this application will be tantamount to asking the police to conduct investigation but not to effect arrest and that such act will amount to interference with the independence of the police.
21. The respondent contended that Kenya is one of the countries that has embraced the rights of an arrested persons and has gone ahead to entrench those rights in its constitution and that entertaining an application of this nature is a reminder of dark old days of arbitrary arrest and detention without trial when such orders were most sought. She averred that in Kenya this is no longer a case since as per the Constitution 2010 any arrested person is supposed to be presented before court within 24 hours.



22. The respondent averred that the Applicant has not proved that the alleged calls were actually made.

Issues For Determination

23. The issue for my determination is whether the application has met the threshold of being granted anticipatory bail and conservatory orders.

Analysis

24. Article 49 of the Constitution provides for the Rights of Arrested Persons. 49(1) states: An arrested person has the right;

(h) to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

25. It is clear from the wording of the article 49 that only the arrested person is entitled to the rights stipulated therein.

26. An arrested person is supposed to be presented before court within 24 hours unless those hours fall outside the ordinary courts hours. The Police officers are not allowed to arbitrarily hold an arrested person for longer. Article 49(1) (f) provides that if a person is arrested they are to be brought before a court within 24 hours of arrest unless the 24 hours fall outside the ordinary court hours.

27. Article 28 of the Constitution provides that Every person has inherent dignity and the right to have that dignity respected and protected while Article 29 of the Constitution of Kenya provides as follows:-

“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 under a state of emergency in which case the detention is subject to article 58;
- c. subjected to any form of violence from either public or private sources;
- d. subjected to torture in any manner, whether physical or psychological;
- e. subjected to corporal punishment in a cruel, inhuman or degrading manner.”

28. The High Court therefore has authority under article 23 and article 258 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

29. As rightly submitted by the Respondent, Anticipatory bail is not provided for in the Constitution. Anticipatory bail was really necessary pre-Constitution of Kenya, 2010. Lady Justice Teresia M. Matheka in Simon Mwaniki & 2 others v Director of Public Prosecution & 2 others [2021] eKLR aptly captured this position. She observed thus:-

“Anticipatory bail was really necessary in this country in the dark days when one could be arrested and detained for days and months without any reason and, without trial and sometimes for trumped up non- bailable offences.

That changed with the promulgation of the Constitution of Kenya 2010 through which we the people put in measures to bring to an end those dark days. The Bill of Rights at



article 25 provides that certain fundamental rights and freedoms shall not be limited, article 28, guarantees the right to human dignity and article 29, freedom and security of person whereby everyone has the right not to be deprived of their freedoms arbitrarily or without just cause.

To achieve this the framers of our Constitution demarcated the lanes for law enforcers, giving them powers needed to carry out their jobs, while at the same time keeping them within the binding boundaries of the Constitution and the Bill of Rights. Article 20 clearly speaks to this: It states:

Application of Bill of Rights

- (1) The Bill of Rights applies to all law and binds all State organs and all persons.
- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.’

30. The Applicant herein contended that the police officer interrogated him regarding the aforesaid parcels of land and that at no point was he ever informed of any irregularities regarding the said properties. He said the police officer informed him that he had opened an inquiry file and that he was likely to arrest him. He also contended that he received a call from the said police officer inquiring about his whereabouts on May 5, 2023 and he was apprehensive that he may be arrested and detained over the weekend and charges pressed if any on Monday May 9, 2023.
31. It is imperative to note that no evidence has been adduced to prove that the Applicant was indeed questioned over the said parcels and that he had been called by the said police officer. Further the issue of arrest on May 5, 2023 did not happen and as such his apprehension was unfounded.
32. Section 52 of the *National Police Service Act* allows a police officer to require any person, in writing, if they have reason to believe that person has information which may assist in investigation of an alleged offence, to appear before him at the police station.
33. In addition, Investigations are known legal processes in our justice system and do not amount to infringement on the fundamental rights and freedoms to any person. The said processes must be allowed to run their course for proper administration of justice.
34. In the case of *Mandiki Luyeye v Republic* [2015] eKLR, Ngenye J held as follows:-

“Similar sentiments were observed in the case of *Eric Mailu v Republic and 2 others* Nairobi Misc. Cr. 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 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 to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”
35. In the case of *Republic v Chief Magistrate Milimani & another exparte Tusker Mattresses Ltd & 3 others* [2013] eKLR, Odunga, J held that anticipatory bail ought not to be granted to prohibit investigations, a position that this court wholly associates itself with.



36. Indeed, despite having authority to grant anticipatory bail, courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the Constitution of Kenya and/or to prevent such bodies or institutions from carrying out their mandate.
37. In the case of *Richard Mahkanu v Republic* [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations. This position was also held in the case of *Kevin Okore Otieno v Republic* (2013) eKLR.
38. Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person's right under Article 49 of the Constitution of Kenya.
39. In the instant case, I do not find any iota of evidence that the Applicant's fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated or that the respondents have been harassing the Applicant with investigations for unspecified crimes. The police are entitled to investigate the propriety or otherwise of the titles to the land in question, irrespective of how long they have been in existence.
40. The upshot is that there is no basis for granting the orders sought. The Application lacks merit and is hereby dismissed in its entirety.
41. Be that as it may, should the Applicant's rights under article 49 and 50 of the *Constitution of Kenya* be infringed upon, denied or contravened, he has the liberty of seeking appropriate orders before a court of competent jurisdiction.

DATED, SIGNED AND DELIVERED NAKURU THIS 25TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Mr. Yogo for Applicant

