



Wanderi v Inspector General of Police & 3 others (Miscellaneous Criminal Application E087 of 2022) [2023] KEHC 21629 (KLR) (7 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E087 OF 2022
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

MARK MUIGAI WANDERI APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

**DIRECTOR OF CRIMINAL INVESTIGATIONS, ELDORET POLICE
STATION 2ND RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD
RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

M/s Bett & Co. Advocates

1. The applicant approached this court vide a Notice of Motion application dated December 15, 2022 seeking the following orders;
 1. Spent
 2. That the honourable court be pleased to arrest and release the applicant one Mark Muigai Wanderi on appropriate, just, due and reasonable bond/bail terms.
 3. That any other orders deemed expedient in the circumstances.
2. The application is premised on the grounds that the applicant is apprehensive that the officers of the 1st and 2nd respondents are intending to arrest him without any justifiable cause.



Applicant's case

3. I perused the application of the applicant and the grounds as stated out are reproduced in the supporting affidavit. A clear reading lays out the applicants' case in its entirety. The applicant averred that the 1st and 2nd respondent's officers are investigating a matter involving alleged land fraud and the loss of the original title deed known as land parcel no Uasin Gishu/Moiben Scheme/3 alleged to have been surrendered to the County Land Registrar's office in the year 2020.
4. The applicant stated that the 2nd respondent summoned him to record a statement on the allegations which he complied with. But the 2nd respondent has since refused to give him a copy of the statement and further, that since 2021 he has never been summoned over the matter again or updated on the progress of the investigations. He stated that he has been called on several occasions by strange cell phone numbers wherein the callers identify themselves as officers of the 1st and 2nd respondents threatening him with arrest. He deposed that he is willing to submit himself to the 2nd respondent when needed or summoned and no harm will be suffered by the respondents if the prayers sought are granted.

Respondent's case

5. There is no response on the part of the respondents.

Analysis & determination

6. Basically the criminal procedure code while paying due regard to the language on provisions as to bail does not expressly provide for anticipatory bail guidelines as reflective in Section 123, 123(A) & 124, of the code. The residual powers of the High Court to admit the adjudication of anticipatory bail is vested in Article 49 (1) (h) of *the constitution* which specifically requires in its preamble on rights of arrested person. The framework of anticipatory bail as read holistically with Article 19, 21, 22, 23, 24, 27, 28, & 29 of *the constitution* emphasises the approach to interpretation of the Bill of Rights which is usually referred to as purposive to protect and guarantee the rights of arrested persons. In the case of *S v Zuma* 1995 (2) SA 642 (CC) the constitutional court of South Africa laid down guidelines as to how courts should go about breathing life to a petition touching on fundamental Rights and Freedoms that may be under threat, infringement, or violation. Thus "while we must always be 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 it is 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's reminder that even a constitution is a legal instrument. The language of which must be respected, if the language used by the lawgiver is ignored in favour of a general resort to "value" the result it 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.
7. The power under Article 49 (1) (h) of *the constitution* implicit of anticipatory bail is of an extra ordinary character and must be exercised sparingly in exceptional cases. Why extra ordinary? Where a legitimate case can be made by an investigating agency or the National Police Service, of the need to place the suspect under interim custody to secure some incriminating evidential material or information the right to anticipatory bail ought to be denied. The rationale behind this deserving relief is underpinned



in the case of *George Joshua Okunga & Another v The Chief Magistrates Court, Nairobi & Another* (2014) eKLR it was held:

“The law is that the court ought not to usurp the constitutional mandate of the director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and gain, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought to be relied upon by a court in order to halt criminal process undertaken bona fide since that defence is always open to the petitioner in those proceedings. However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitutes an abuse of process and are being carried out in breach of or threatened breach of the petitioner’s constitutional rights, the court will not hesitate in putting a halt to such proceedings.
.....”

8. Under Kenyan law the purpose of anticipatory bail is to ensure the appearance of a suspect or defendant submits himself or herself to a trial and the judgement of the court and not preventing any further action by the National Police Service or investigating agency. In the new constitutional dispensation due process rights are emphasised under Article 49 and 50 of *the Constitution*. Overall due to the presumption of innocence, in Article 50 2(a) of *the constitution* the incarceration of a suspect or an accused person at the pre-trial stage unless on compelling reasons is frowned upon *the constitution*. To overturn the presumption of innocence there must be legal evidence of guilty carrying home a degree of conviction short only of absolute certainty. It is this continued connection with the principles of due process and the presumption of innocence explicitly and implicitly the concrete substance to anticipatory bail.
9. The applicant as the mover for the remedy of anticipatory bail has the burden of proof which at this stage constitutes two aspects of the coin. First the burden of persuasion of convincing the High Court that the existence of a fact out there is more probable of suspicion and vendetta on the part of the investigating agency which descriptively by all means does not fall within the rubric of any breach of penal law. Second is the production burden or probative evidence that rebut that the National Police Service or the investigating agency have no justification to summon him/her to answer a public interest issue raised by a known or identifiable victim under the regulation of the Kenyan criminal justice system. It is common for emphasis that anticipatory bail should not be used as a mechanism for suspects if crime to cover up factors like non- co-operation with the police investigation. As participants, in the making of *the constitution* of Kenya, a distinction has to be drawn between factual guilt of an accused person as a matter of fact and the requisite in conformity the due process to cooperate with the National Police Service or investigative agency to perform their constitutional mandate without any obstruction or barriers. Like any other society it may be that most people are good, honest, sincere faithful to the creed of the law and free from blame but it is also equal to state that those who are accused of having committed a criminal offence should not be left scot free. To establish factual innocence and factual guilt is dependent upon the evidential material from known persons used as witnesses. As *the constitution* it recognises all persons as held innocent until the contrary is declared by independent tribunal or court the essentials to securing anticipatory bail should be limited and not to be deemed indispensable. It is right to accept that a suspect to a crime cannot be treated entirely the same on equality before the law as a non suspect citizen. Once a citizen of Kenya is a candidate of suspicion of criminality the law focuses on that individual notwithstanding that his or her status does change and his or her rights to liberty and to bodily integrity may be curtailed. For instance, is a subject of the law by



the mere suspicion and he or she may be required to attend the National Police offices for questioning and would not generally be free to terminate the inquiry at a time of his or her choosing. The crucial point is, undoubtedly the state has a constitutional dictates to fulfil its responsibility to investigate allegation of criminal wrong doing. If the National Police Service and other state agencies maintain an awareness of the Bill of Rights, in *the constitution* any such threats, infringements or violations, complained of by the citizens are more likely to be kept to the minimum and may not degenerate to a constitutional petition for a remedy in Article 23 of the same *constitution*. These principles will mirror the broader view I take of this matter.

10. Upon considering the application and affidavit supporting the same, the following issue arises for determination;

Whether the application for anticipatory bail is merited

The Constitution of Kenya provides for;

- a) Bail of arrested person under Article 49(1)(h)
 - b) Appropriate relief under Article 23(3) for breach of the Bill of Rights
11. In Kenya, there are no specific provisions on anticipatory bail. 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.
 12. In 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 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”.
 13. In order for one to be successful in an application for anticipatory bail, he must prove that there is a real danger of his constitutional rights being breached by the respondents. In the present application, the applicant has merely stated that he has received calls from people purporting to be the officers of the 1st and 2nd respondent. He has not provided any corroboration of these alleged calls actually existing or that the callers identified as officers of the respondents as alleged. It is trite law that he who alleges must prove and as such, the applicant has made allegations without any evidence.
 14. The applicant has failed to prove that there is any breach of his rights or potential for the same. by his own statement, the respondents have not summoned him for close to two years. As for the phone calls, he has failed to establish the nexus of the callers to the respondents, even worse, that any such phone calls have been made.
 15. The ideal of the threshold to grant anticipatory bail has not been met by the applicant. As the case is built on evidence, by the suspect it is inevitable to rule that the potential of the many issues adverted



to remain unreliable to this independent tribunal to grant a remedy as prayed for by the Applicant. Generally speaking, in context given the provisions of Article 49 on Rights of an arrested person it's incumbent upon the applicant to demonstrate that he or she has reasons to believe that he may be arrested for a non- bailable offence or has reason to believe that the investigative agency will decline to abide by the provisions of the law. It is not enough to allege fear of an arrest or some sort of apprehension that some police officer is keeping vigil on one's person either directly or indirectly without cogent evidence to apply for anticipatory bail. If the High Court exercises its jurisdiction on anticipatory bail under the umbrella of unfettered discretion on the basis of vague and unsubstantiated evidence it would be opening a Pandora's box and as many as the adult populace perpetually will invoke this remedy for consideration. As a cautionary statement anticipatory bail is not a device or a tool or remedy, formulated to operate in contradiction with the powers of arrest and investigation.

16. In the premises, I find that the application is unmerited and dismiss it in its entirety.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7TH DAY OF AUGUST 2023

In the Presence of:

.....

R. NYAKUNDI

JUDGE

