



**Thuita v Ethics and Anti-Corruption Commission & 4 others (Miscellaneous Criminal Application E363 of 2023) [2023] KEHC 22488 (KLR) (Crim) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E363 OF 2023  
DR KAVEDZA, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**ENG. MICHAEL MWANGI THUITA ..... APPLICANT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant, Eng. Michael Mwangi Thuita, has, through a notice of motion application dated September 21, 2023 under certificate of urgency, sought to be admitted to anticipatory bail or bond. The motion which was brought under articles 19, 20, 21, 22, 27, 29, 28, 49(1), 165 (3) and 258 of *the Constitution* is supported by the affidavit of the applicant of even date.
2. Secondly, the applicant has sought conservatory orders to restrain the respondents, whether acting by themselves, their servants, agents, junior officers and/or anybody, from summoning, arresting, holding, detaining, incarcerating and/or in any other way interfering with his liberty and/or in any other way without following the due process of the law.
3. The motion is based on the grounds, inter alia, that: the applicant is the current Chief Executive Officer (CEO) of Athi Water Works Development Agency, having been appointed on May 30, 2018. Further,



that the 1<sup>st</sup> Respondent has commenced investigations into the award of tenders for the construction of the following dams:

- i. Karimenu IIDamwater supply project IFCP No.KDBWA/IFP/04/2013, awarded on May 9, 2014;
  - ii. Ruiru IIDamwater supply project tender No. AWSB/REOI/03/2012-2013, awarded on May 30, 2017; and
  - iii. Kitui Matuu Towns Last Mile Connectivity Of Water and Sanitation In Tanathi Water Works Development Agency AreaContract No. AWSB/AFD/KTSWSSP/W/10/2018, awarded on September 18, 2019.
4. The applicant has averred that vide a letter dated May 24, 2023, the 1<sup>st</sup> Respondent sought information from Athi Water Works Development Agency in relation to the ongoing investigations. Additionally, that on diverse dates between May 25, 2023 and June 7, 2023, Athi Water Works Development Agency responded to the 1<sup>st</sup> Respondent's request by forwarding all the necessary documentation to aid with the investigations.
  5. The applicant has further stated that on September 17, 2023, his attention was drawn to a news item broadcasted by Citizen TV calling for his suspension from the Agency and subsequent arrest on allegation of corruption in the award of the above-mentioned tenders. He however stated that the subject tenders, in particular, Karimenu IIDamwater supply project and RuiruII Damwater supply project were awarded on May 9, 2014and on May 30, 2017respectively, which was way before his appointment as CEO of the Agency.
  6. Lastly, the applicant has contended that subjecting him to investigations and threats of possible arrest for acts allegedly committed before his appointment as CEO of Athi agency violates his rights under article 27 and 28 of *the Constitution*. He is therefore apprehensive that the investigations are founded by an ill motive to hound him out of office.
  7. Having gone through the notice of motion and the supporting affidavit of the applicant, it is clear that the right being threatened is a right provided in article 29 of *the Constitution*; Freedom and security of every person.
  8. Article 22(1) of *the Constitution* states that every person has the right to institute court proceedings claiming that a right or fundamental in the bill of rights has been denied, violated, infringed or is threatened.
  9. While the right to anticipatory bail or bond pending arrest is not specifically provided for by statute, there is no lacuna in *the Constitution*. Similarly, article 49(1) of *the Constitution* states that an arrested person has the right to be released on bond or bail, or on reasonable conditions, pending a charge or trial, unless there are compelling persons not to be released.
  10. The said article of *the Constitution* does not discriminate parties seeking orders of anticipatory bail. However, before issuance of such an order, the court must be convinced that the threat is real.
  11. A party cannot for instance, obtain an order of anticipatory bail by merely shouting that "I fear my lord". He must demonstrate that unless the orders sought are granted by the court, his right to liberty will be infringed.
  12. The applicant herein has raised concerns about the imminent threat of arrest. These concerns stem from the investigations conducted by the 1<sup>st</sup> respondent into the awarding of tenders by Athi Agency, specifically relating to construction of Karimenu II Dam, ruiru II Dam and construction works for



Kitui Matuu Last Mile Connectivity of Water and Sanitation In Tanathi Water Works Development Agency Area, all awarded on 9/5/2014, 30/5/2017 and 18/9/2019 respectively. It is essential to note that the applicant's apprehension was triggered by the broadcast of news on Citizen TV, where the 1<sup>st</sup> respondent called for his immediate suspension from the Agency and subsequent arrest on allegations of corruption and mismanagement in the award of the mentioned tenders. To substantiate these claims, the applicant has annexed supporting evidence to the application.

13. I have duly examined the nature of the annexed exhibits as well as the materials submitted to the 1<sup>st</sup> Respondent by Athi Water Agency on diverse dates between May 25, 2023 and June 7, 2023 to aid in investigations of the alleged irregular award of tenders. Indeed, the voluminous nature of the materials necessitate a thorough and time-consuming analysis. Additionally, it is noteworthy that two of the tenders under investigations, specifically those for Karimenu II Dam and Ruiru II Dam, were awarded way before the applicant was appointed as the CEO of the Agency, that is, May 30, 2018.
14. Given the circumstances of this case and the potential impact on the applicant's right to liberty under article 29 of *the Constitution*, I find it necessary, at this ex parte stage, to grant anticipatory bail to the applicant in the following terms:
  - a. That the application is certified urgent.
  - b. That the applicant is admitted to anticipatory bail in the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000), to be deposited in court.
  - c. That for the avoidance of doubt, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are at liberty to investigate or charge the applicant for any Criminal Conduct. However, they shall not arrest, neither shall they detain him in view of order (b) above, or until further orders of the court.
  - d. That the applicant shall cooperate with the investigators during the period of investigations.
  - e. That for further avoidance of doubt, and upon such investigations, the DPP (2<sup>nd</sup> respondent) is at liberty to present any charge against the applicant in any court in which case the orders of this court shall lapse; and such trial court will be at liberty to set any new terms of bail/bond or determine whether or not to grant bail/bond.
  - f. That the application and the order of this court shall be served upon the respondents within 7 days, with effect from September 27, 2023, and the respondents shall upon service, file their responses within 21 days.
  - g. That this matter shall be mentioned on November 21, 2023 for directions.

**RULING DATED AND DELIVERED IN ABSENCE OF PARTIES ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**D. KAVEDZA**

**JUDGE**

