



Muyale & 2 others v Director of Public Prosecution (Miscellaneous Criminal Application E029 of 2023) [2023] KEHC 25891 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E029 OF 2023
SC CHIRCHIR, J
NOVEMBER 23, 2023**

BETWEEN

MORRICE MUSETI MUYALE 1ST APPLICANT

NDULULU MUCHERA 2ND APPLICANT

WILLY NYANDO MUNYOVI 3RD APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The applicants' notice of motion dated 18.7.2023 seeks for the following orders: -
 1. That the Sub-county Chief CIO Likuyani sub-County be restrained from handling matters concerning land parcel No. Kakamega/Soy/3238 as it squarely falls under Jurisdiction of land and Environmental Court.
 2. The Sub-County CIO Likuyani Sub-County be restrained from arresting and prosecution 1st, 2nd and 3rd Appellants/Applicants as the said land Parcel has a valid title deed and land selling agreements which can be proved beyond any reasonable doubt in Land and Environmental Court.
 3. The DCIO likuyani sub-county be strained from mutating part of Land Parcel No. Kakamega/Soy/3238 measuring approximately 0.6 acres as the 1st appellant has stayed, possess and developed the land for over 4 years since 2018.
 4. In case the sub-county CIO decides to prefer charges against the appellants/applicants the police should not to hold them in custody and may grant them reasonable bond terms.



2. The Application is supported by the grounds appearing on the face of the Application as well as the Affidavit dated 18.7.2023 sworn jointly by the Applicants.
3. The 1st Applicant has stated that he purchased the whole of that parcel of land known as Kakamega/soy/3238, measuring 0.6 acres from one Moses Mungai Ndungu . The 2nd and 3rd Applicants were his witnesses during the purchase. He has attached a sale agreement dated 16.8.2018, in respect of the said purchase.
4. That upon issuance of Title document, he found he had been given 0.4 acres instead of 0.6 acres; that on making an inquiry from the seller, the seller referred the matter to the Directorate of criminal investigations (DCI.) The Applicants have attached notices from the DCI offices summoning them to attend their offices for purposes of investigation.
5. The applicants fear that they may be arrested for a matter which relates purely to a civil transaction, and which can be resolved through the Environment and Land Court.

Determination

6. I have considered the application and the parties' submissions. The Applicants contend that the subject matter of the intended investigation is civil in nature, and therefore read mischief in the attempts to involve the police.
7. There is a sale agreement, annexed to the Application. It is in respect of a sale 0.4 acres portion out of Title No. Kakamega/Soy/430. (marked "MNW1A") The agreement was signed on 16.8.2018.
8. There is also a title deed (marked "MNW2A") which the 1st Applicant allege that it was issued pursuant to the purchase. The title deed is for Parcel No. Kakamega/Soy/3238. Under part B of the proprietorship section, it indicates that the parcel is a sub- division of Parcel NO. 430.
9. Thus, prima facie, this is purely a land transaction. I have seen the notices from DCI. They indicate that the DCI wants to question the Applicants in relation to possible crimes relating of forgery, making a false document, and forcible detainer
10. The finding in the case of *Samuel M. Njuguna vs. Republic* (2004) eKLR, captures the essence of anticipatory bail. The court held: "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 prescribed under *the Constitution*..... It would indeed be a tragedy, if *the constitution* is not providing 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 the organ of the state of a citizen's fundamental rights or where the police have contravened or is likely to contravene the rights to liberty of a citizenIn granting anticipatory bail the High court would be exercising its supervisory powers to prevent the abuse of of the powers granted to the executive to the detriment of the individual"
11. The Applicants have already been summoned. Their apprehension therefore has a basis. It is not based on rumours. A sale agreement was signed and therefore, the transaction, at least on the face of it, is or was civil in nature.
12. However, I hasten to add that in the course of carrying out an otherwise civil transaction, crimes may be committed necessitating the intervention of criminal investigative Agencies.



13. Whether the intended questioning touches on the sale Agreement, title deed or both, is unknown, as the DCI summons are missing on such particulars. However, to the extent that the transaction appears civil in nature, it should and must remain such, until and unless the investigations reveal otherwise.
14. For now, the applicant's apprehension is real. Any arrest will interfere with their constitutional rights to liberty. They deserve the protection sought for.
15. I find that the Application for anticipatory bail is warranted. It should be noted however that anticipatory bail is not a bar to any investigation that the DCI might be carrying out or may want to carry out in respect to the Applicants or issues touching on the subject transaction.
16. Consequently, some of the orders sought for are not capable of being granted. Prayer 1, 3 and part of prayer 2, for instance, cannot be granted, as that would amount to barring the DCI from carrying out investigations.
17. In conclusion I will proceed to make the following orders;-
 - a. Each of the Applicants is hereby admitted to anticipatory bail of a personal cash bail of kshs.50,000/-
 - b. The Applicants are hereby ordered to appear before the Likuyani Sub-County Criminal Investigation Officer, when and as required by the DCI
 - c. The Applicants are further ordered to cooperate with the Directorate of Criminal Investigation on any matter touching on the matters referred to in notices to attend dated 13.7.2023 by Likuyani Criminal investigating Officer.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 23RD DAY OF NOVEMBER, 2023.

S. CHIRCHIR

JUDGE

In the presence of:-

Court Assistant – Erick

Ms. Osoro for the Respondent

No appearance by the Applicants.

