



Olooso & another v Inspector General of Police & another (Miscellaneous Criminal Application E003 of 2023) [2023] KEHC 25855 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2023
F GIKONYO, J
NOVEMBER 22, 2023**

BETWEEN

MARGARET NAISIANOI OLOLOSO 1ST APPLICANT

JANE WANJIRU OLULOSO 2ND APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DPP 2ND RESPONDENT

JUDGMENT

Anticipatory Bail

1. Before the court is a Notice of Motion dated 11.04.2023 which is expressed to be brought pursuant to Articles 10, 21(1), 22(2), 23,28 ,29,47(2),49(1), 159(2) and 244(C) of *the Constitution* and Section 123 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.
2. The substantive orders sought in the Motion are;
 - i. That the honorable court be pleased to admit the applicants to anticipatory bail on such reasonable terms pending the hearing and determination of this application.
 - ii. That the respondents and all officers subordinate to them be restrained by an order of injunction from arbitrarily summoning, arresting, incarcerating, and/or charging the applicants in relation to an Environment and Land court matter currently pending in court.
 - iii. That the costs of this application be provided for.



The Applicants' Case

3. The application was premised on grounds on the face of the notice of motion and supported by the Applicants' affidavit that was sworn on 11.04.2023. The grounds were elucidated in the Written Submissions filed on 11.10.2023.
4. Their case was that they were summoned to appear before the office of the directorate of criminal investigations in Narok County on several occasions through their cellphones pertaining to an Environment and Land court matter currently pending in Narok Chief Magistrate's court MCELC 158 of 2018.
5. The DCI officers have been purporting to be investigating the Environment and Land court matter MCELC 158 of 2018 with a mention date of 09. 05.2023 to confirm the substitution of the 1st Defendant in the matter Joshua Morana Olooso who died on 18.01.2023.
6. The applicants heeded to the summons of 17.03.2023. The DCI officers had threatened them that if they did not agree with the 4th defendant Mary Naitu Lolchoki to reach an out-of-court settlement regarding the matter above then they were going to charge them with criminal charges of forceful retainer.
7. The applicants allege that they have been subjected to psychological anguish and torture, causing them unreasonable anxiety as a result of the arbitrary summons by the 1st respondent's officers despite them being aware that their action is sub judice and in contempt of the court above currently clothed with the matter.
8. The applicants are of the view that the continued malevolent actions by the respondents are unjustified and a threat to the rights and fundamental freedoms of the applicants.
9. The applicants are apprehensive that unless the aforementioned orders are granted, the applicants stand to suffer great prejudice.

The Respondents' Case

10. The respondents filed a response via the replying affidavit sworn by CPL Dancan Mwangi and filed on 11.05.2023. The 2nd respondent filed written submissions on 21.07.2023.
11. The respondents contend that the DCI is involved in the investigations relating to a case of forcible detainer contrary to section 91 of the penal code and other- allied offences.
12. That at the time they took over the investigations, the facts of the case were that one Mary Naitu Lolchoki reported the case vide OB No. 29/10/03/2023 at Narok police station that her late husband John Lochoki purchased a parcel of land CIS MARA/ ENAIBELIBELI ENEGETIA/ 1228 measuring approximately 20 acres from Joshua Morana Olosos also now deceased who was the husband of the applicants.
13. The deceased also purchased another parcel of land known as CIS MARA/ENBELIBELI- ENEGETI/1229 measuring approximately 25 acres from two brothers: Mukwe Olekirrokor ID No. 20...94 and Kunini Kirrokor ID No. 27...2 who had prior bought it from the husband of the applicants. The two brothers acknowledged and confirmed that they sold a parcel to the late husband of the reportee.
14. After both the vendor Joshua Morana Olooso and buyer John Lochoki died, the reportee Mary Naitu Lolchoki was denied access to the said parcel.



15. Legally she has the colour of right and access owing to the fact that she is the undisputed wife of the late John Lolchoki.
16. The applicants destroyed the land beacons and chased away the reportee from the land alleging that their late husband had not sold the land or engaged in any transaction(s) regarding the sale of the aforementioned parcels of land.
17. The records obtained from the land registry indicate that the land belongs to the reportee Mary Naitu Lolchoki.
18. Following the unlawful and illegal acts of destroying the beacons and chasing away the reportee from her land, the DCI officers had a constitutional duty to arrest the two applicants and from their preliminary investigations released them on cash bail pending further investigations.
19. The suspects are out on bond and have never been summoned by phone to the DCI office. The cash bail rules and regulations have not been breached in one way or another.
20. The matter currently pending in Narok Chief Magistrate Court MCELC 158 OF 2018 is civil in nature and not under investigations whatsoever by their office. The offences under investigation are criminal in nature and constitute criminal culpability. Once investigations are complete, they intend to charge the suspects before the court of law.
21. The constitutional rights of the suspects have been duly adhered to and continue to be observed in each and every stage of their investigations.

Directions of the court.

22. On 14.04.2023 this court upon consideration of the application dated 11.04.2023 ordered and directed as follows;
 1. That application is certified to be urgent
 2. That the respondent shall not arrest the applicants in respect of matters forming part of these proceedings
 3. Nevertheless, subject to order 2 above, should there be lawful grounds to, the respondents are at liberty to investigate matters which they reasonably believe to constitute criminal culpability.
23. The application was canvassed by way of written submissions. The 1st and 2nd applicants have filed. The 2nd respondent has also filed. The 1st respondent has however not filed.

1st and 2nd Applicants' Submissions.

24. The applicants are not against the 1st respondent exercising their lawful mandate of investigating but are against the coercion as it offends the doctrine of sub judice taking into account that the matter is active in court. The applicants relied on Article 29 of *the Constitution*, Section 6 of the *Civil Procedure Act*, and the case of *Kajiado High Court Criminal Miscellaneous Application No. 16 of 2018 Between Kipkerich V Director of Public Prosecution & 2 Others [2018] eKLR*.
25. The applicants submitted that the balance of convenience in this matter is in favour of the applicant since the applicant on the face of the pleadings, in this case, has a serious grievance worth the attention of this court. The applicants urged this court to allow their application with costs.



2nd Respondent's Submissions.

26. The 2nd respondent submitted that the arguments by the applicants are the set of facts herein disclose a civil case and attempts by police to arrest them amounted to harassment is untenable. Section 193 of the CPC stipulates that the existence of a civil case does not act as a bar to instituting criminal proceedings.
27. The 2nd respondent submitted that from their ongoing investigations, the 1st respondent confirmed that there exists a criminal element from the raised complaint and thus as is their mandate pursuant to section 52 of the *National Police Service Act*. It is the obligation of the 1st respondent to require any person in writing if they have reason to believe that person has information which may assist in their investigation of an alleged offence to appear before them at the police station.
28. The 2nd respondent submitted that there is no evidence of malice or abuse of power as action taken against the applicants was documented by the 1st respondent. The 1st respondent has both constitutional and statutory duty and powers to investigate criminal complaints made to them.
29. The 2nd respondent submitted that asking not to be summoned for investigations is an attempt to oust section 52(a) of the *National Police Service Act* which allows for investigations.
30. The 2nd respondent submitted that the applicants have not proved any prejudice they will suffer as a result of the pending investigations. The 2nd respondent relied on the case of *W. Njuguna Vs Republic, Nairobi Misc. Cr. Case No. 710 of 2002 [2004] eKLR 520*.
31. The 2nd respondent submitted that the applicants have not demonstrated the likelihood of any serious breach of their rights by the police to warrant the grant of the orders sought.
32. The 2nd respondent urged this court to find the application herein to be without merit and dismiss the same.

Analysis And Determination

33. Does the application meet the threshold for grant of relief of anticipatory bail and conservatory orders?

Of Anticipatory Bail

34. In some jurisdictions anticipatory bail is a direction issued by the court to release a person on bail, even before the person is arrested. It is a pre-arrest relief taking the form of pre-arrest bail. India is good destination on anticipatory bail.
35. In other jurisdictions, anticipatory bail is granted to a person who has been arrested by the court.

Anticipatory Bail in India

36. Anticipatory Bail or Pre-arrest Bail: It is a relief that allows an accused person to apply for bail before being arrested. In India, pre-arrest bail is granted under section 438 of the Code of Criminal Procedure, 1973.
37. Section 438 on anticipatory bail states as follows;
 - (1) Where any person has a reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, inter alia the following factors namely;



- 1) The incident and gravity of the accusations
 - 2) The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence
 - 3) The probability of the applicant to flee from justice and
 - 4) Where the accusation has been made with the abject of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.
38. However, courts have held that; “Sec. 438(1) should be interpreted in the light of Article 21 (Protection of Life and Personal Liberty) of *the Constitution*.” (Gurbaksh Singh Sibbia vs State of Punjab (1980) case: SC).
39. The relief is issued only by the Sessions Court and High Court. And the power to grant pre-arrest bail is an extraordinary power to be exercised only in exceptional cases. According to the jurisprudence coming through the Supreme Court of India, the Court could impose appropriate restrictions on a case-by-case basis.
40. In addition, and most pointed about section 438 India code is that the person seeking anticipatory bail should have reason to believe that they may be arrested for a non-bailable offense. The person may be required to surrender to the investigation authority as and when required and may have to surrender to custody once the period of the anticipatory bail expires or if he violates the conditions or terms of anticipatory bail.

Anticipatory Bail in Kenya

41. In Kenya, there is no specific provision on anticipatory bail. However, where the remedy has been applied for, courts have considered it, and applied the threshold for an application for violation or threatened violation of rights under Articles 23 and 165(3) of *the Constitution*.
1. 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.
42. The court is acutely aware that arguments have been made that anticipatory bail could be tailored and granted as appropriate relief by the court under Article 23(3) of *the Constitution*. Thus, anticipatory bail is a creature of judicial craft in Kenya- but as the order is granted by different courts in different circumstances so does the relief of anticipatory bail remain at large; increasing the danger of having a relief without specific genre, character, scope, core, and content.
43. In India, anticipatory bail has clear content and character and is a relief given ‘...where any person has a reason to believe that he may be arrested on accusation of having committed a non-bailable offence...’
44. In Kenya, all offences are bailable under Article 49(1)(h) of *the Constitution* and the necessity of anticipatory bail may be diminished. Similarly, adaptation of anticipatory bail in the sense of the terminology and comparative jurisprudence, may have to take completely new shape and character under article 23 and 165(3) of *the Constitution*. The kind of shaping of appropriate relief- but still in the name of anticipatory bail- is the real task.
45. Care should be taken not to adopt the practice of anticipatory bail without regard to right to bail, redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended



in *the Constitution*, and perhaps, the bona fide exercise of constitutional function and mandate by other state organs.

46. Odunga J. stated in the case of *Republic vs Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR as follows: -

“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 as 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.”

Applying the Test...

47. The applicants have applied for anticipatory bail as well as conservatory order. The application has been brought as an application for redress for breach or threat of breach of Rights and fundamental freedom of the applicant.

48. 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.”

49. The applicants have claimed violation and threatened violation of their rights and fundamental freedom by the Police. The violation is said to be in the fact that the matter which is the subject of investigations is also the subject of a civil case pending in court. And, that the police are using their investigative powers to coerce a settlement of the civil dispute.

50. They seek orders to stop criminal investigations and charging in a court of law on the basis of matters forming part of the ELC case.



51. Impeding criminal investigation or charging of an individual in a court law must be on cogent and constitutionally-sound reasons. For instance, as was stated in the case of *W’Njuguna vs Republic* (2004) eKLR such orders are granted only: -
- “...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”
52. In the case of *Mandiki Luyeye vs Republic* [2015] eKLR, Ngenye J held as follows:-
- “Similar sentiments were observed in the case of *Eric Mailu vs 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.”
53. In the case of *Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others* (Supra), Odunga J held that anticipatory bail ought not to be granted to prohibit investigations.
54. In the case of *Richard Mahkanu vs 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- a position that was also held in the case of *Kevin Okore Otieno vs Republic* (2013) eKLR.
55. Any relief by whatever name called say, anticipatory bail, requires courts to ensure that interference with the functions of other bodies and institutions established by law; statute, or *the Constitution* of Kenya, is only on cogent and robust reasons. Merely feeling inconvenienced by investigations is not sufficient reason for relief. Proof of violation, infringement, threat, or contravention of a person’s right under *the Constitution* of Kenya is required.
56. The Applicants herein had contended that the Respondents had been coercing them to have the land matter in issue settled out of court.
57. The police on the other hand have stated that they are investigating a claim of forcible retainer of land and not the case pending in ELC. This offence is still in our statutes and investigations towards may be carried out. Except, the investigations are based on reasonable suspicion and grounds to believe that a crime has been committed, and is conducted in accordance with the law and regulations governing investigations, and employing only tools, methods and techniques which are provided and permitted in law; and which do not violate *the Constitution* and the Bill of Rights. Adherence thereto, avoids objections on constitutional front such as right to human dignity (art. 28), freedom and security of person (art. 29) right to privacy (art. 31), to mention but a few.
58. The exercise of the function of investigation should not be oppressive or in abuse of the process and purpose of criminal investigation to bring suspects to book. Oppression may take many and different forms depending on the circumstances of each case. But, may include, use of much or excessively intrusive tools, methods and techniques not permitted or authorized in law or which by their nature completely routs the protection of fundamental freedoms and rights in the Bill of Rights such as



torture or threat to torture methods. Abuse include; to procure or force a settlement of a civil claim or debt or personal scores; and in some cases, to cover police failures or merely to please or sooth a curious public or political audience.

59. Notably also, according to section 193 concurrent criminal and civil proceedings is permitted. Specifically, the section provides that: -

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

60. The police may investigate such matter which may also be substantially or directly in issue in a pending civil proceeding. Save, it bears repeating that, care should be taken that they are satisfied that an offence has been committed, and that the investigation is not to settle a score or civil debt between the parties. Short of the threshold, the investigation is liable to impeachment by the court on the basis of abuse of power or function, and the police may be liable for violation of right or malicious prosecution.
61. A successful case for redress of violation of rights or fundamental freedoms should spell out and prove the violation or threat of violation of right or fundamental freedoms. Other than making mere allegations, the applicants did not provide proof that the police are using their investigation powers to coerce settlement of the land dispute between the parties.
62. Accordingly, having carefully considered the affidavit evidence, the Written Submissions, and the case law that was relied upon by the parties herein, this court does not find any iota of evidence that the Applicants' fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are legal processes aimed at fact-finding of the commission of a crime in our justice system and do not, per se amount to an infringement on the rights or fundamental freedoms of the person under investigation. As long as investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice.
63. The foregoing notwithstanding, the police granted the applicants bond. There is every indication that they have obeyed any summon before the investigators. Therefore, they need not arrest the applicants. If, they need to charge them, there are many less intrusive methods of procuring attendance in court such as summons to answer charges.
64. In the upshot, Notice of Motion application dated 11.04.2023 fails and is rejected in so far as it seeks to stop investigations and charging in court in respect of matters forming part of the civil case in ELC CM court. However, the applicants shall not be arrested except they shall, when required, appear before court if any charges are preferred.
65. No orders as to costs given the nature of these proceedings.
66. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 22ND DAY OF NOVEMBER, 2023.

HON. F. GIKONYO M.

JUDGE

In the presence of:-



M/s Kiprono for Applicant

M/s Mwaniki for Respondent

