



Dancos Engineering & Contractors v Director of Public Prosecution & another (Miscellaneous Criminal Application E057 of 2022) [2022] KEHC 16548 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E057 OF 2022
JN KAMAU, J
DECEMBER 20, 2022**

BETWEEN

DANCOS ENGINEERING & CONTRACTORS APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR CRIMINAL INVESTIGATIONS 2ND RESPONDENT

RULING

INTRODUCTION

1. In its notice of motion dated May 5, 2022 and filed on May 6, 2022, the applicant herein sought orders that the court be pleased to arrest and release its proprietor one Jared Peter Odoyo on reasonable bond terms.
2. The said application was supported by the affidavit of the applicant's proprietor, the said Jared Peter Odoyo, that was sworn on May 5, 2022. He averred that he received a call from a police officer who had introduced himself as working for the 2nd respondent informing him that he would be arrested. He pointed out that when he sought for more details from the said police office, he was sent a photograph of a letter from the 2nd respondent dated April 27, 2022 that had been received by its Nairobi office that the applicant was being investigated for having been fraudulent. He asserted that this took him by surprise as neither had he been summoned over any investigations nor been involved in any criminal activity as he had never engaged in fraudulent activities.
3. It was his contention that he was a politician and at the material time a candidate in the August 9, 2022 General Elections for the position of Member of Parliament for Uriri Constituency and had posed a threat to some politicians who were worried about his candidature.



4. At the time, he had been apprehensive of being whisked away by the 2nd respondent while he was in his campaign trail. He was emphatic that the 1st and 2nd respondents' actions were malicious without probable cause as they were out to harass, intimidate and incarcerate him.
5. He complained that the 1st and 2nd respondents had not afforded him any opportunity to give his statement but had only wanted to embarrass him at the peak of his campaigns. He urged this court to grant him bail pending arrest because his arrest was imminent.
6. In opposition to the present application, on May 17, 2022, No 81216 CPL Mamuti Musa, a police officer attached at the Directorate of Criminal Investigations, Insurance Fraud Unit, swore a replying affidavit on behalf of the 2nd respondent herein.
7. The said unit averred that the application herein was misconceived, an abuse of the court process and was meant to intimidate and/or prejudice the ongoing investigations against the applicant. It pointed out that the entire request for supply of crucial documents under scrutiny were captured in the applicant's annexure.
8. It further stated that all citizens were equal before and under the law irrespective of their political ambitions or status and that the applicant was attempting to scuttle investigations by introducing a political narrative to an otherwise purely criminal inquiry which was geared at unduly influencing the justice system.
9. It contended that the application was grossly premature as there existed no imminent danger of arrest and urged the court to dismiss the application.
10. The 1st respondent did not respond to the application. Both the 1st and 2nd respondents did not file written submissions. The applicant's written submissions were dated June 16, 2022 and filed on July 14, 2022. This ruling is therefore based on the said applicant's written submissions and the 2nd respondent's replying affidavit.

Legal Analysis

11. The applicant submitted that the mere fact that the 1st respondent did not bother to respond to the application and/or participate in the proceedings was evident that it was not aware of the 2nd respondent's actions and/or sanctioned the same. It asserted that as much as the 2nd respondent was within its constitutional mandate to carry out investigations, the timing of the same coupled with the verbal constant threats of the arrest of its director was uncalled for and was bound to breach its fundamental rights and freedoms guaranteed in the Constitution.
12. It placed reliance on article 29 of the Constitution of Kenya, 2010 and the case of *Mandiku Luyeye v Republic* [2015] eKLR where it was held that anticipatory bail would only issue when there was serious breach of a citizen's rights by organs of state. It was categorical that in the absence of 1st respondent's intention to charge and/or prosecute it and the failure by the 2nd respondent to disclose the offence that they were investigating it on to court, it ought to be given the benefit of doubt and it be believed that the 2nd respondent was merely harassing it. It pointed out that it had met the threshold for the granting of the relief sought and thus urged the court to grant the same.
13. 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 of Kenya, 2010.



14. Under article 29 of the *Constitution of Kenya*, every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.
15. In dealing with an application of this nature, the court is under a duty to go to the lengths and breadths of the *Constitution of Kenya* to protect the rights and fundamental freedoms of persons where there is a violation and possible violation of constitutional rights that are guaranteed in the *Constitution of Kenya*.
16. Having said so, this court was alive to its obligation not to curtail the other organs of state from carrying out their constitutional mandate. Courts are therefore called upon to cut a delicate balance when considering whether or not to grant anticipatory bail.
17. In the case of *Republic v Chief Magistrate Milimani & another Ex parte Tusker Mattresses Limited & 3 others* [2013] eKLR the court held that:-

“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 other 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...., the High Court ought not to interfere with the investigative process conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.”
18. Articles 23, 29 and 258 of the *Constitution of Kenya* empower the court to hear and determine applications relating to denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights.
19. The issue for determination before this court was therefore whether or not the applicant had demonstrated that its rights were under threat of infringement, violation or denial. The applicant herein had contended that the respondents had been harassing its proprietor with investigations for alleged crimes it had specified in its affidavit.
20. The applicant did not provide proof of the harassment by the respondents. All that it submitted was a letter from Directorate of Criminal Investigations (DCI) dated April 27, 2022 in which the DCI had sought certain documents that were enumerated therein with a view to carrying out investigations.
21. Investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement on the rights or fundamental freedoms of any person who is under investigations per se. 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.
22. Merely feeling inconvenienced by investigations was not sufficient reason for relief. Proof of violation, infringement or threat or contravention of a person’s right under the *Constitution of Kenya* was required.
23. In the absence of any evidence, this court came to the firm conclusion that the applicant had not demonstrated that its fundamental rights had been breached or denied or that there was a threat of them being infringed, contravened and/or violated.



24. Having said so, this court noted that the Applicant was not seeking to restrain the 1st and 2nd respondents from carrying out their investigative duties. It was merely seeking that its proprietor be arrested by this court and thereafter be given reasonable bond terms as he awaited being formally charged in the lower court.
25. Notably, the 1st respondent was not certain of how to proceed in the matter herein. In fact, this matter was mentioned in court several times resting with the attendance on July 19, 2022 when this court reserved the Ruling herein after the 1st respondent's counsel indicated that she had still not received any instructions in this matter.
26. Going further, in paragraph (4) of his replying affidavit that was sworn and filed on August 17, 2022, Mamuti Musa averred that the present application was grossly premature as there did not exist any imminent danger of arrest. From the way the orders were couched, it was evident that granting of the orders would not hamper investigations herein by the DCI as the applicant's proprietor would still be arraigned before the trial court if arrested and charged and an application on bond/bail made before it.
27. In view of the fact that the applicant's proprietor had been apprehensive of witch hunt due to his candidature during the General Elections that were held in August 2022 and he had still not yet been arrested to date, there was need to stop further anxiety that was caused by long inaction by the respondents in this matter. The sword of damocles has continued to hang on the head of the applicant's proprietor with no sign of when the same would ever be removed.
28. As this court did not see any prejudice that would be suffered by the respondents if the court granted the applicant's proprietor anticipatory bail, it found and held that there was merit in granting the orders that had been sought herein. In the event there was any prejudice, nothing was placed before this court to demonstrate the same.

Disposition

29. For the foregoing reasons, the upshot of this court decision was that the applicant's notice of motion application dated May 5, 2022 and filed on May 6, 2022 was merited and the same be and is hereby allowed in terms of prayer No (3) therein.
30. It is hereby directed that the said applicant's proprietor namely, Jared Peter Odoyo be and is hereby arrested forthwith. He will be released on a personal bond of Kshs 200,000/= and a surety of a similar amount or in the alternative, a cash bail of Kshs 100,000/= pending his arrest and arraignment of charges relating to the subject matter herein.
31. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2022

J KAMAU

JUDGE

