



Thiru v Director of Public Prosecutions & 4 others (Miscellaneous Criminal Application E042 of 2022) [2022] KEHC 17209 (KLR) (Crim) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 17209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E042 OF 2022
JM BWONWONG'A, J
DECEMBER 20, 2022**

BETWEEN

MISHECK MURAGE THIRU APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

OCS, NAKURU CENTRAL POLICE STATION 3RD RESPONDENT

CLEMENT NJUGUNA 4TH RESPONDENT

STEPHEN NJUGUNA NJOROGE 5TH RESPONDENT

RULING

1. The applicant filed an application dated March 17, 2022 pursuant to articles 22, 23, 28, 39, 48, 50 and 165 of the Constitution of Kenya, 2010 and section 123 of the Criminal Procedure Code (Cap 75) Laws of Kenya, in which he sought the following main orders:
 - i. That the Honourable court do admit him to anticipatory bail pending arrest or charge on such terms as the court may deem fit.
 - ii. Costs of the application.
2. The application is premised on the grounds on the face thereof and supported by an affidavit dated February 14, 2022, sworn by the applicant. The averments are that he is the director and founder of Big Pig Firm Limited, which operated a hotel business in Nakuru. The 4th respondent was his co-director, after he sold him 300 shares representing a 30 percent stake in the company vide an affidavit dated April 10, 2021. His role was to manage the kitchen. The 5th respondent is the biological father of the



- 4th respondent and also supplied pork to the company. He was paid upon delivery of the goods. When the business began, it did not pick up as expected and was unable to pay for its operational expenses. Subsequently, the 4th respondent resigned as a co-director through an email. On December 2, 2021 the 4th and 5th respondents stormed the company premises demanding to take the assets of the company. The applicant avers that he reported the matter to Central Police Station in Nakuru and Corporal Peter Nderitu was assigned as the investigating officer.
3. It was then that he noticed that the officer was biased in his investigations and threatened to arrest him. He asserts that he was subsequently coerced to go to a lawyer, where he was forced to sign a debt acknowledgment agreement of Kshs 442,000/- which was done under duress to avoid being arrested. In addition, he paid the advocate fees and agreed to pay Kshs. 20,000 to the 5th respondent every month until the amount of Kshs 442,000 was settled. Due to financial difficulties, the business closed and he moved to Nairobi to seek other ventures.
 4. On February 10, 2022, he received a whatsapp message from Nakuru Central Police station addressed to Kamulu Police Station requesting the Kamulu Crimes Office for further investigations against him for the offence of obtaining by false pretence. He is apprehensive that the police intend to arrest him and prosecute him for a non-existent debt. He avers that he does not owe the 5th respondent any money and urges the court to grant the prayers sought.
 5. In opposition to the application, 1st respondent filed a preliminary objection dated February 22, 2022. The grounds raised were that the application lacks merit and is ill advised, the court lacks jurisdiction to entertain the application as it emanates from Nakuru, the OCS Kamulu Police Station is just an agent to effect the order and not the author of the letter on whose basis the application is made and the transaction in issue emanated from Nakuru County.

The applicant's written submissions

6. Mr Gichuki, learned counsel for the applicant submitted that the jurisdiction of the High Court in both civil and criminal matters is unlimited within the Republic of Kenya. He cited the case of *Mukaziton Josephine vs Attorney General* [2015] e-KLR, where the Court of Appeal stated that:

“...the jurisdiction of the High Court covers the entire geographical territory of the Republic of Kenya”

Learned counsel further submitted that the applicant lives in Nairobi and the court has the necessary jurisdiction to determine the matter on its merit. He further submitted that the applicant is before the court seeking to stop the unconscionable actions of the respondents, who are pursuing a civil dispute through the criminal justice system.

The 1st respondent's written submissions

7. Ms Ntabo, learned prosecution counsel submitted that anticipatory bail can only be granted, when an applicant demonstrates that his right to liberty has been breached or is under threat of violation. She argued that the applicant has not demonstrated that his right to liberty has been infringed or is likely to be infringed or violated. Further, the applicant being summoned by an investigating officer is not a basis for granting anticipatory bail.
8. Learned prosecution counsel referred to section 52 (1) of the *National Police Service Act*, which gives the police powers to compel the attendance of witnesses at a police station. She insisted that the application was without merit as no cogent reasons have been given to warrant the court's interference with the constitutional and statutory mandate of the police in conducting investigations. Further, the



application seeks unlimited orders against unspecified police officers. She argued that the application is premature as it pre-empts the results of an ongoing investigation, while the applicant has not even been summoned.

9. Counsel cited *Republic v Chief Magistrate Milimani & Another, ex parte Tusker Mattresses Ltd & 3 Others* (2013) e-KLR, in which the court held that the High Court should not interfere with the investigative powers, conferred upon the police or the Director of Public Prosecutions, unless cogent reasons are given for doing so. Counsel also submitted that the actions of the police was a fair process and did not amount to harassment or a violation of the applicant's right to liberty.
10. On the jurisdiction of the court, learned prosecution counsel submitted that the matter emanates from Nakuru. The High court sitting in Nairobi, therefore, lacks jurisdiction to entertain the application. She urged the court to dismiss the application.

Issues for determination

11. I have considered the application, the response, the submissions by the parties and the applicable law. The issues that arise for determination are:
 1. Whether this court has jurisdiction to entertain and determine this application
 2. Whether the applicant has met the threshold for the grant of the orders sought.

Analysis and determination

12. The jurisdiction of a court is everything and once a court realises that it has no jurisdiction, it has to lay down its tools, because anything done without the requisite jurisdiction, which ordinarily is conferred by statute is a nullity. In the case of *Owners of the Motor Vessel Lillian "S" Caltex Oil (K) Limited* (1989) I KLR 1, the court held thus:

Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law lays down its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

13. There is no dispute that under article 165 (3) of the *Constitution* of Kenya, the High Court has unlimited jurisdiction in both civil and criminal matters throughout the Republic of Kenya. However, those powers are also for good order, convenience and delivery of justice which is further amplified in our statutes, among them the Criminal Procedure Code (Cap 75), Laws of Kenya. The question in this application is in respect of this court's territorial jurisdiction, which is of utmost importance and cannot be taken lightly.
14. In the instant application, the transaction in issue involving the applicant and the 4th and 5th respondents took place in Nakuru County. However, no charges have been preferred against him. He has also not been arrested and is seeking the protection of the court against arbitrary arrest. This court sitting in Nairobi, where he currently resides has the jurisdiction to determine the issue at hand, which is an application for anticipatory bail. The jurisdiction of this court is not tied to the national administrative units in the country, be they counties or districts, for the latter are for administrative convenience. They have absolutely nothing to do with the jurisdiction of the High Court, which extends to the entire territory, airspace and maritime areas of Kenya.



15. In the instant application, the applicant claims that the police have been biased and coerced him to sign a debt acknowledgement agreement. Further, he was apprehensive that he would be arrested and yet the issue is a civil dispute. In considering such an application, the court has the discretion to grant or refuse to grant the orders being sought.
16. The applicant has to satisfy the court that there is a breach of his rights by a state organ.
17. That the current Constitution protects the applicant from harassment by oppressive state organs is not in doubt. The court in *W’Njuguna vs Republic*, Nairobi Misc Criminal Case No 710 of 2002, [2004] 1 KLR 520, on the circumstances under which anticipatory bail can be granted stated that:-

...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.”
18. The remedies permitted in article 23 of the *Constitution* as a whole are tailored toward addressing any infringement of a right envisaged in cases, where parties seek for anticipatory bail especially due to the lack of a statutory framework for anticipatory bail.
19. I find that it is common cause that the dispute between the applicant and his business associates is of a civil nature. I further find that the respondents have not filed any relying affidavit in opposition to the averments in the applicant’s supporting affidavit. It therefore follows that the averments of the applicant have not been controverted. I find they are credible.
20. I further find that the respondents have not filed any affidavit to indicate the alleged offence that they were investigating, if any. I find that in a matter of this nature, the police should indicate the offence that they are investigating. It is not enough for the prosecution counsel to submit that the police have a mandate to investigate, which is not in doubt.
21. I therefore find on the affidavit evidence of the applicant and the applicable law that the applicant has met the threshold for the grant of the orders sought.
22. The applicant has demonstrated that there has been a breach of his liberty by the respondents. I therefore grant his application as prayed. The applicant is hereby ordered to execute a personal bond of Kshs 50,000/- and undertakes to appear before the police station, when required to do so, upon being served with reasonable notice to attend, which summons should specify the offence in respect of which he is being investigated.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH OF DECEMBER 2022.

J M BWONWONG’A

JUDGE

In the presence of-

Mr Kinyua court assistant

Mr Gichuki for the applicant.

Ms Akunja for the Respondent

