



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. E031 OF 2020

1. FRED B'DIALO LUGANO

2. AMINA MKANYIKA WANJALA.....APPLICANTS

- VS -

1. OFFICER COMMANDING STATION LIKON POLICE STATION MOMBASA

2. DIRECTORATE OF CRIMINAL INVESTIGATIONS

LIKONI SUB-COUNTY DCI HQRS

3. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS

RULING

1. The applicants Fred B'Dialo Lugano and Amina Mkanyika Wanjala filed a notice of motion application dated 5th of November 2020 pursuant to Articles 221(1), 23(1), 25, 28, 29 and 165(3) of the constitution of Kenya 2010 and Rule 3(1) and (2) and 19 of High Court (practice procedure) Rules and all enabling legal provisions seeking that an order do issue restraining the Respondents their agents, officers and/or persons acting under their directions departments and/or offices from arresting, harassing, torturing or otherwise from interfering with the Applicants rights and freedoms and specifically with regards to plots nos. Buburu Extension Settlement (Scheme/701, 702, 711, 693, 736, 737 & 738 pending the conclusion of criminal proceedings in CR. Case No. 334 of 2020 Mombasa – Republic vs Fred B'Dialo Lugano and Amina Mkanyika Wanjala and CR. Case No. E129 OF 2020 which proceeding before different courts.

2. They sought that they be released on reasonable bail terms pending their arrest and/or change by Respondents over alleged forcible detainer contrary to Section 91 of the penal code.

3. They further sought that in alternative and without prejudice to prayer 2 the court admits them to personal bond pending arrest and/or charge over alleged forcible detainer.

4. It was also sought that the court restrains the Respondents, their agents, officers and/or persons acting under their directions, departments and/or offices from arresting, harassing, torturing or otherwise from interfering with the Applicants rights and freedoms pending further orders of the court.

5. The application is supported by the grounds on the face of the application and the supporting affidavit of the 1st Applicant shown on 5th November 2020. Interim orders were granted on 6/11/2020 staying operation of summons issued by Cpl. Abdalla Saidi.

6. The 3rd Respondent opposed application vide grounds of opposition dated 11th November 2020 to the effect that the application offends the law on grant of anticipating bail as laid down in *Mandiki Luyeye vs Republic [2015] eKLR*;

i. That the sufficient reasons were not given by applicant for grant of anticipating bail.

ii. That the fact that applicant has been called to answer to summons and/or record a statement by the police is not sufficient reason for grant of anticipatory bail.

iii. That the application is bad in law as it seeks to pre-empt the results of investigations being carried out by the 1st and 2nd Respondent.

iv. That the application is bad in law, scandalous frivolous and vexatious.

v. That the applicants had not demonstrated exactly how their rights had been infringed by the 1st Respondent undertaking its investigative mandate.

7. The application was canvassing by way of written submissions. The applicant on his submissions argued that his harassment by the Respondents was due to his being out spoken in regard to unlawful invasions and irregular land allocation on Buburu Extension Settlement Scheme as well as demolitions conducted thereon.

8. He said he had made several complaints to various governmental authorities including National Police Service, Deputy County Commissioner, District Land Adjudication and Settlement Officer, the National Land Commissioner, DCI and Kituo Cha Sheria.

9. He said that Khalid Hadi Khamed one of the defendants in Civil Case No. E135 of 2020 had resorted to nefarious means to harass 1st Applicant and defeat his quest to ventilate his constitutional proprietary rights in the scheme. It was submitted that the said Khalid Hadi Ahmed is the complainant in all the arrests orchestrated against them and issuing 1st and 2nd Respondents to frustrate them.

10. Applicants argued that Civil Suit No. E135 OF 2020 would resolve the issues that are being punished by police and yet the criminal charges are still being brought against them. It was contested that the dispute is Civil and not Criminal in nature. The Applicants relied in the holdings in *Mandiki Luyeye vs Republic [2015] eKLR* where it was held that bail shall be granted only when an applicant demonstrates that his constitutional rights has been violated or is likely to be violated.

11. The holding in *Richard Makhanu vs Republic* - in Bungoma H.C. Misc. CR. Case No. 10 of 2015 where it was held that:-

“With regard to the issue of anticipatory bail it is usually granted where there is alleged to be serious breaches by a state organ. In the case of W’ Njuguna vs Republic Nairobi Misc Case No. 710 of 2002 (2004) 1 KLR 520 the court held that anticipatory bail can be granted; when there are circumstances of serious breaches of a citizens rights by an organ of the state when is supposed to protect the same”.

12. The applicants argued that their right to liberty and fair hearing had been violated through repealed harassment and arrests. Applicants submitted that they have demonstrated that their claims are real and have therefore met the threshold for grant of anticipatory bail as they fear that they shall be arrested in a bid to frustrate his efforts at exploring legal mechanisms to resolve the issues touching on the scheme.

13. The 3rd Respondent in submissions argued that the mere fact that the applicants have been called to answer to summons on record their statements does not entitle them to a grant of anticipatory bail. It was also argued that the nature of orders sought would serve as a complete halt to any future arrests of the applicants even if they were to commit an offence.

14. It was submitted that grant of anticipatory bail is limited to circumstances where there are manifest breaches of the rights of a citizen by a state organ. That the apprehensive on suspicion of arrest must be demonstrable and real & buttressed by facts showing the alleged breach (See. *Mandiki Luyeye vs Republic [2015] eKLR*).

15. The 3rd Respondent also relied on the case of *Martin Nyaga Wambora vs Speaker of the County Assembling of Embu & 3 Others* – Misc. CR. Appl. No. 3 of 2015 – Ernest – where it was held:-

“The danger must be imminent and evident, tune and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus an allegedly threatened violation that is remote and unlikely will not attract the courts attention”.

16. The 3rd Respondent argued that the law allows concurrent civil and criminal jurisdiction and relied in the holding in *Peter Mutua Kanyi vs DPP & 2 Others [2019] eKLR* which quoted with approval the discussion of Odunga J in *Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd vs 3 Others [2013] eKLR* where it was held:-

“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 interfere with the investigative powers conferred upon the police ...unless cogent reasons are given for doing so”.

17. The Respondents urged the court to dismiss the application as the applicants have not demonstrated how their rights are being abused as to warrant the grant of anticipatory bail.

18. The basis of the application for anticipatory bail is summons served upon the 1st applicant on 2/11/2020 asking him to attend at DCI Likoni in line with Section 52 of National Police Service Act of 2011. The reason for summon is stipulated on the summons which 1st Applicant duly signed in receipt. There is no summon in respect of 2nd Applicant to warrant her to seek for anticipatory bail.

19. In regard to 1st Applicant, I do find that he has demonstrated that he has been summoned but there is nothing to show that he is going to be detained unlawfully contrary to Article 49 of the constitution of Kenya. This court cannot stop investigations into an offence the 1st Applicant is suspected to have committed.

20. Be that as it may, this court hereby orders that 1st Applicant presents himself to CPL Abdalla Saidi for investigations. He will in the meantime sign personal bond of Kshs.1,00,000/= to facilitate his appearance for investigations. The order for bond will be discharged upon a report being presented in court on 16/3/2021 by CPL Abdalla Saidi confining statues of investigations and action taken.

Dated, signed and delivered at Mombasa this 25th day of February, 2021 by Microsoft Teams/Open Court.

HON. LADY JUSTICE A. ONG'INJO

JUDGE