



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. E016 OF 2021

BENARD NAKUKU TALI.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

INCOME PLUS CREDIT LIMITED.....1ST INTERESTED PARTY

JEMIMAH WANJIKU MWANGI.....2ND INTERESTED PARTY

LILIAN KHAVOKOI TALI.....3RD INTERESTED PARTY

RULING

1. This is a Ruling on the Notice of Motion dated 28th July 2021 where the Applicant seeks the following orders;

- A temporary injunction restraining the Respondents from preferring any charges and arraignment of the Applicants or any other employee or Agent of Income plus Credit Limited in relation to the contracts entered into with clients Pending the hearing and determination of this Petition or until further Orders of this Court.
- An Order of temporary injunction be and is hereby issued restraining the Respondents in any manner whatsoever from illegally (without a court order) searching, confiscating any records, documents, files and furniture from the Applicants and Interested Parties home and offices.
- The Honourable Court be pleased to admit the Applicant herein, Bernard Nakuku Tali, and the 2nd and 3rd Interested Parties Jemimah Wanjiku Mwangi and Lilian Khavokoi Tali to anticipatory bail on affordable and reasonable terms pending arrest or charge.
- Costs

2. The application is supported by an affidavit and submissions filed on 15th October 2021. The Applicant also filed a supplementary affidavit on 24th September 2021. The Respondents filed submissions on 21st October 2021. They also filed a replying affidavit on 20th September 2021.

3. The application is based on the grounds that the 2nd respondent has claimed there are various complaints against the 1st interested party at various police stations and they would want to arrest the Applicant and the Interested Parties. Further, that the 2nd respondent has since proceeded to arrest the Applicant without issuing any summons to him.

4. The Applicant contended that on various dates the 2nd respondent continuously issued arbitrary and endless summons to the Applicant and other employees of the 1st interested party for inquiry into issues that are civil and contractual in nature. The 2nd respondent has also stormed into branches of the 1st interested party's offices in Eldoret, Kisumu, Nakuru and Kitale, conducted searches and seized office documents, records and furniture without warrants. It is the applicant's case that the intended arrest and arraignment of the applicant is an illegality. The respondent's actions amount to an abuse of power and is a manifest exercise of unfair administrative action.

The Response

5. The Respondents raised the issue of res judicata and contended that the present application is similar to the original application dated 19th July 2021 that was heard and determined by Hon. Lady Justice Sewe in her ruling dated 26th July 2021. The wording has changed but the nature of the orders remains the same.

6. The Respondents submitted that the principles on which courts grant conservatory orders are well settled in **Centre for Rights Education Creation and Awareness (CREAW) & 7 Others v Attorney General, Petition no. 16 of 2011**. It was further submitted that the courts are extremely reluctant to interfere with the constitutional discretion given to the DPP and the National Police Service and the petitioner has not met the threshold for conservatory orders to be issued.

7. The Respondents cited **Richard Makhanu v Republic (2014) eKLR** on the issue of anticipatory bail or bond and submitted that the petitioner was released on free bond. It was further submitted that there is no reason for him to fear that he will be illegally detained.

8. The Respondents submitted that proceedings are held in camera where the security of the litigants or witnesses is in grave danger. The petitioner has not indicated that he is in danger. It was further submitted that the petitioner has not illustrated how he stands to suffer if the police continue to investigate him. He has failed to show how a decision to charge him, if made, will be tainted with illegality or unconstitutionality.

9. The Respondents submitted that the amended application is res judicata and the court should not grant any of the orders.

Determination

10. Upon considering the pleadings, submissions by rival parties and all the authorities relied on, I have identified the following issues for determination;

1. Whether the application is Res Judicata
2. Whether anticipatory bail should be granted
3. Whether the proceedings should be held in camera

Whether the application is res judicata

12. Section 7 of the Civil Procedure Act provides as follows on Res Judicata;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

13. The substantial matters in issue in the present application are; in a nutshell, a conservatory order preventing arrest or contacting of the Applicant, an order for anticipatory bail, an injunction restraining the Respondents from preferring charges against the Applicant and searching the Applicant's premises.

14. The application dated 19th July 2021 sought, substantially the same orders prohibiting the arraigning of the Applicant in court, prohibiting the Respondents from conducting searches and investigations and a mandatory injunction for the release of all documents seized from the Applicant's offices to the Applicant. These issues were determined by Hon. Sewe vide the ruling dated 26th July 2021.

15. The present application seeks similar prayers substantially with regards to prayers 2, 3 and 4. The only prayer that has not been previously determined is that of anticipatory bail.

In the premises I find that the application is Res Judicata save for prayers 5 to 8.

Whether anticipatory bail should be granted

16. In **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR** Odunga J held that anticipatory bail ought not to be granted to prohibit investigations. Courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the Constitution of Kenya and/or to prevent such bodies or institutions from carrying out their mandate. Such an order should only be granted clear situations that point to a violation, infringement or threat or contravention of a person's right under Article 49 of the Constitution of Kenya.

17. The Applicant has not produced adequate evidence to prove that there is a likelihood of infringement of his constitutional rights. Investigations are known legal processes that cannot amount to an infringement of constitutional rights.

Whether the proceedings should be held in camera

18. Proceedings are usually held in camera in order to protect a witness who is in danger under section 4 of the Witness Protection Act. Article 50(8) of the constitution envisages the protection of witnesses or vulnerable persons. The Applicant has not met any of the requirements for proceedings to be held in camera. I find that this prayer fails in its entirety.

In the premises the application fails on all limbs and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Eldoret this 20th day of December 2021.

E. O. OGOLA

JUDGE