



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO 144 OF 2018

PETER MUTUA KANYI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 3RD September, 2018 and filed 4th September, 2018 was brought pursuant to the Provisions of Articles 19, 20, 21, 22, 23, 28 and 29 of the Constitution and Section 123 (1) Part 5 of the Criminal Code Cap 75 of the Laws of Kenya. It sought the following substantive orders;

a. THAT the honorable court be pleased to grant the applicant anticipatory bail pending arrest or charge on such terms the court may deem fit to impose.

b. That this honorable court be pleased to issue a conservatory order restraining the Respondents, their Servants, Agents, junior officers and/ or anybody from effecting and/or anybody from arresting, harassing or otherwise however interfering with the Applicant herein pending the hearing and determination of this application/petition in the matters related to Malili Ranch Company Ltd .

c. The Costs of the suit be in the cause.

2. There is nothing on record to show that the 2nd and 3rd respondents were served with the application herein and it is clear that they did not file their respective responses to the aforesaid application.

3. On the same day, the Applicant filed a certificate of urgency that was heard on 6th September, 2018 wherein this court directed that the applicant report to the DCIO Machakos and he shall not be locked up but bonded to appear in court. The said order was reviewed on 20.9.18 to include the DCIO Salama Police Station.

The Applicant's Case

4. The application was premised on grounds on the face of the notice of motion and supported by the Applicant's affidavit that was sworn on 3rd September, 2018 and his further supporting affidavit sworn on 25th September, 2018. His Written Submissions were dated and filed on 10th December, 2018.

5. His case was that he was summoned to appear before the office of the DCIO Salama and Machakos Police Stations on several occasions.

6. At Salama Police Station he was shown a sale agreement dated 11.1.2011 with an allotment letter dated 28.7.2006 and he does not remember to have bought such property that is under investigations as the membership number belongs to another person and his name is just inserted.

7. At Machakos police station he was summoned and locked up for several hours where he was interrogated on the ELC 350 of 2017 that was formerly ELC 819 of 2014 Nairobi.

8. He was of the view that as a former official of the Malili Ranch Co Ltd, he was aware of the then officials of the company therefore the chairman's signature on the purported allotment is suspect and therefore he needs court's protection for he feels that his constitutional rights have been threatened and violated.

9. In his further supporting affidavit he stated that he was arraigned in court in 2009 in criminal case 2141 of 2009 and charged for stealing by directors and acquitted for lack of evidence. He was also sued in Nairobi ELC 819 of 2014 that is now Machakos ELC 350 of 2014 that is still pending but he was summoned by the DCIO Machakos, locked up and no offence disclosed to him hence a violation of his constitutional right.

The Respondents' Case

10. In response to the said application, none of the respondents have filed any opposition to the application.

Legal Analysis

11. The Applicant pointed out that under article 165 of the Constitution and Section 123 of the Criminal Procedure Code, his remedy is provided for and thus submitted that he has duly filed petition before the court. He relied on the case of **Pamela Akinyi Odhiambo v EACC (2018) eKLR.**

12. There is no contention on behalf of the respondents. The issue for my determination is whether the application has met the threshold of being granted anticipatory bail and conservatory orders.

13. In the case of **Republic vs Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others [2013] eKLR** Odunga J stated 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.”

14. From the court record and as was rightly submitted by the applicant and correctly held by Ngenye J in the case of **Gladys Boss Shollei vs Attorney General & 3 Others(2015) eKLR**, the Applicant has sought the redress of infringement of his constitutional rights under the provisions of inter alia Article 22 of the Constitution by way of a Petition.

15. Article 22 (3)(b) of the Constitution of Kenya provides as follows:-

“The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that:-

(b) Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.”

16. 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.”

17. The High Court therefore has authority under Article 23 and Article 258 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Indeed, every person acting in his own interest or on behalf of another person has the right to institute court proceedings claiming that this Constitution of Kenya, has been contravened, or is threatened with contravention. In the same vein, the Applicant herein has instituted proceedings on his own behalf claiming that the Constitution of Kenya had been infringed or contravened or was threatened with contravention.

18. Grant of anticipatory bail is provided for in Article 49 of the Constitution of Kenya.

19. The said Article 49 (1) (h) of the Constitution of Kenya provides as follows:-

“An arrested person has the right to be release on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

20. The terms under which a person may be granted anticipatory bail is more or else settled in several cases that have been decided by various courts. In the case of W’Njuguna vs Republic (2004) eKLR where, the court therein stated as follows:-

“...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.”

21. 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.”

22. 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, a position that this court wholly associates itself with. Indeed, despite having authority to grant anticipatory bail, 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.

23. 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 Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person’s right under Article 49 of the Constitution of Kenya.

24. The Applicant herein had contended that the respondents had been harassing him with investigations for unspecified crimes and 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 Applicant’s fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are known legal processes in our justice system and do not amount to infringement on the fundamental rights and freedoms to any person. The said processes must be allowed to run their course for proper administration of justice.

25. Should the Applicant’s rights under Article 49 and 50 of the Constitution of Kenya be infringed upon, denied or contravened, he has the liberty of seeking a review of this court’s decision. In this regard, this court comes to the firm conclusion that the application herein has not met the threshold for the granting of anticipatory bail to the Applicant herein as sought. In any case there is no evidence that the Applicant once arrested is not likely to be granted bond and if such occur he is at liberty to approach the court over the same.

26. In the same breath, the court is unable to grant prayer 3 in the application and in view of the fact that this was a criminal matter, the court cannot make any determination on costs.

Determination

27. For the foregoing reasons, the upshot is that the Applicant’s Notice of Motion application dated 3rd September, 2018 and filed on 4th September, 2018 is without merit and the same is hereby dismissed. The interim orders earlier granted are hereby vacated.

It is so ordered.

Dated and Delivered at Machakos this 31st day of January, 2019

D.K. KEMEI

JUDGE