



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APP. NO. 265 OF 2019**

**COLLINS MUHIA MBATIA.....1<sup>ST</sup> APPLICANT**  
**ERIC KINYUA MURITHI.....2<sup>ND</sup> APPLICANT**  
**GRACE WANGUI MUIRURI.....3<sup>RD</sup> APPLICANT**  
**IRENE BETH NYAMBURA.....4<sup>TH</sup> APPLICANT**  
**KENNETH MBAABU MUCHIRI.....5<sup>TH</sup> APPLICANT**  
**PROGRESSIVE CREDIT LIMITED.....6<sup>TH</sup> APPLICANT**

**AND**

**INSPECTOR GENERAL OF NATIONAL POLICE SERVICE....1<sup>ST</sup> RESPONDENT**  
**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicants moved to this court by way of a Notice of Motion dated 16<sup>th</sup> May, 2019 seeking anticipatory bail pending their arrest and charge in court. They premise their application on grounds that they are aware that the police are investigating a case against them arising from a loan agreement dated 9<sup>th</sup> November, 2018 between the 6<sup>th</sup> Applicant and one Mrs. Arsanaidar Kerubor Barake who complained to the police. They cited a report with police at the Nairobi DCI office headquarters. It asserted that upon the complainant's failure to pay the loan, the creditor moved to recover the debt by repossessing goods that were deposited to secure the loan.
2. According to the Applicants, the police have moved to the business premises of the 6<sup>th</sup> Applicant with a view to arresting all the Applicants. It is therefore the case for the Applicants that the police are abusing their power by interfering with a matter that is legally civil in nature. For this reason therefore, they urge the court to grant them bail pending the intended arrest. They assert that they shall cooperate with the police at all times as they have been doing with a view to facilitating any investigations.
3. The application is supported by an affidavit of Collins Muhia Murithi, the 1<sup>st</sup> Applicant sworn on 16<sup>th</sup> May, 2019. Several documents have been annexed to the affidavit which the court will refer to if need be.
4. At the hearing of the application, counsel for the Applicant, Mr. Mugwe reiterated the grounds on which the application is premised. She referred the court to the loan agreement annexed to the application to demonstrate that indeed the dispute at hand is a civil matter. He referred to the Occurrence Book (OB) report No. 30/6/2/2019 which relates to the report the complainant made at Central Police Station. She also recorded a statement on 22<sup>nd</sup> February, 2019 at DCI Headquarters. The complaint culminated into criminal Case No. 660 of 2019 being preferred against Peter Rono and Dickson Aika, both employees of the 6<sup>th</sup> Applicant. The two were charged with stealing.
5. Counsel submitted that since the two were charged the police have been visiting the 6<sup>th</sup> Applicant's business premises with a view of arresting the all Applicants. He added that the Applicants are willing to continue cooperating with the police in ensuring that thorough investigations are carried out. In this regard, counsel submitted that the Applicants have recorded a total of ten statements in support of the

investigations. They also have no objection to being charged but registered their fears that the police would arbitrarily arrest them so as to embarrass them.

6. Learned State Counsel, Mr. Nyamache for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application. He relied on Grounds of Opposition dated 21<sup>st</sup> May, 2019. Basically, they are that the application was misconceived, mischievous and unmeritorious, that the Applicant had failed to demonstrate how their fundamental rights and freedoms had been violated or breached to warrant the orders sought, that the Applicants had failed to demonstrate how the police had acted outside the law, that the application was intended to circumvent and subvert the interests of justice and that the Applicants were merely misapprehending that the police intended to arrest them.

7. In oral submission, counsel stated that the application was premature and ought to be dismissed. He underscored the role of the police to investigate a complaint filed by any citizen. In that respect, he submitted that the police shall have to investigate to conclusion the complaint that the complainant raised. He submitted that the Applicants had not demonstrated that the police, in the process of conducting the investigations have violated their fundamental rights and freedoms. He also urged the court to consider that the Applicants had not demonstrated that any statements had been recorded with the police. He added that in the event that the Applicants are arrested, the Constitution provides for safeguards which cushions against violation of fundamental rights and freedoms of an individual.

8. Mr. Nyamache relied on the cases of **Pamela Akinyi Odhiambo v Ethics & Anti Corruption Commission (2018) eKLR**, **Gladys Boss Shollei V AG & 3 Others (2015) eKLR** and **Abdi Abdullahi Somo V Ben Chikamai & 2 Others (2016) eKLR** to buttress his submission.

9. In rejoinder, Mr. Mugwe submitted that the Applicants had demonstrated that the police were harassing them save for the production of statements. He urged the court to allow the application.

10. I have accordingly considered the application, the respective rival submissions and the cited case law and I take the following view of the application. The law is now settled that anticipatory bail shall only issue if an Applicant demonstrates that his/her constitutional fundamental rights and freedoms have been violated. In the case of **W’Njuguna V Republic, Nairobi HC Misc Case No. 710 of 2002 (2004) eKLR**, the court held that anticipatory bail can be granted;

*“... 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”*

11. The holding was in the footsteps taken in the case of **Eric Mailu V Republic and 2 Others Nairobi Misc. Cr. Appl. No. 24 of 2013 (2013) eKLR** in which the court held that anticipatory bail can issue in cases of serious breach of a citizen’s right by a State organ. As this court held in the case of **Gladys Boss Shellei V Attorney general & 3 Others(2015) eKLR**,

*“... it is then salient that anticipatory bail is aimed at giving remedy for breach or 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 rumours or unsubstantiated claims.”*

12. Anticipatory bail should only be granted where an Applicant demonstrates with evidence that his/ her fundamental rights and freedoms have violated. An applicant cannot rely on misapprehension of this assertion when circumstances are such that the police are merely carrying out their duties of investigations.

13. In the present case, the Applicants argue that the police are harassing them with an intention of arresting them on account of the ongoing investigations of the complaint filed Mrs. Arsanaidar Kerubor who is a debtor to the 6<sup>th</sup> Applicant. The fact of the ongoing investigations is conceded to by both parties in the application. What is in issue is whether the police are acting outside their mandate through harassment of the Applicants thereby breaching their fundamental rights and freedoms.

14. As rightly stated by counsel for the Respondents, the police have a duty to conduct investigations of criminal nature once filed with them. They however have no mandate to go outside their powers in the process of executing their duties. They must conduct their duty strictly in accordance with the Constitution. In my honest view, the mere fact that the police visited the business premises of the 6<sup>th</sup> Applicant does not constitute a breach of fundamental rights and freedoms of the Applicants. It neither amounts to a harassment of the Applicants. What would be worrisome is if the visits are accompanied by physical harassment or intimidation to coerce the Applicants to act in a particular manner. This has not been alluded to therefore, dispelling fears that the police are harassing them.

15. I underscore the need to facilitate police conduct their duties without undue interference by courts. That explains why anticipatory bail should only issue in deserving cases so that courts are not seen to cripple a fundamental process of the criminal justice system which is investigations. At the same time, courts must not shy from guarding against arbitrary use of police powers in the interest of protecting the fundamental rights and freedoms of individuals as enshrined in the Constitution.

16. Since the Applicants have agreed to cooperate with the police, the police should only be courteous to summon them to the police station or DCI headquarters for purposes of either recording statements of charging them. This is made easier by the fact that they have a counsel on record who can accompany them for this purpose.

17. In a nutshell, I find the application is unmerited. The Applicants have failed to demonstrate that they deserve the orders sought. I dismiss it with the following orders.

a) The police are at liberty to charge the Applicants. If a decision in this regard shall be reached, police shall summon the applicants to the police station for purposes of recording statements and preparing them to take plea in court.

b) In this regard, police should not further visit the business premises of the 6<sup>th</sup> Applicant in respect of the complaint filed by Mrs. Arsanaidar Kerubor.

c) If the Applicants fail to submit themselves to the police upon summon, the police shall be at liberty to arrest and arraign them in court. In case of an arrest police must ensure not to incarcerate the Applicants in custody for a period longer than is provided by the Constitution.

**Dated and delivered at Nairobi This 27<sup>TH</sup> Day of May, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

***In the presence of;***

*1. No appearance for Mr. Mugwe for the Applicants*

*2.Mr. Momanyi for the Respondents.*