



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 520 OF 2017

JIMI WANJIGI.....1ST PETITIONER

IRENE NZISA WANJIGI.....2ND PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS...3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By Notice of Motion dated 23rd October 2017 and filed in Court on the same day, ***The Inspector General of Police, Director of Public Prosecutions (DPP), Director of Criminal Investigations*** and the ***Attorney General***, the respondents/ applicants, applicants, sought an order of this Court varying the terms and conditions of anticipatory bail granted to the petitioner/ respondents on 17th October 2017.

2. The Applicants in particular, sought to have the anticipatory cash bail of Ksh50, 000 given to the respondents enhanced and further that the petitioners be ordered to deposit their travelling documents into Court and that they be prohibited from leaving the jurisdiction of the Court without prior notification to the Directorate of Criminal Investigations and authorization by the Court. They also sought to have the Court to direct the petitioners to present themselves to the police for purposes of recording statements and taking of finger prints. Finally they asked the Court to impose cash bond/bail terms that are higher and justified so as to meet the ends of justice.

3. The Motion is supported by an affidavit by ***Chief Inspector Joseph Gichuhi*** sworn on 23rd October 2017 and the grounds appearing on the face of the motion. The main grounds on which the motion is based are that the police are investigating the petitioners/respondents of offences of possession of firearms, a cognizable offence, contrary to the Firearms Act and therefore due to the seriousness of the offences under investigation, strict bond terms should be imposed; that the anticipatory bail terms imposed should reflect the true nature and seriousness of the offences under investigation and that the cash bail of Ksh50,000 granted by the Court is inordinately low compared to the offences being investigated, hence petitioners should be asked to post substantial securities.

4. In his further depositions, **C I Gichuki** stated that they received information that there were illegal firearms in a residence in Malindi which police officers searched and recovered 5 Firearms and 94 live ammunitions. He deposed that on interrogating the occupants of the house, they were informed that the premises were associated with the 1st petitioner and that the firearms too belonged to him.

5. He deposed that they also recovered document from that house in the name of KWACH, a Group of Companies associated with the 1st petitioner that they then went to the petitioners' residence in Muthaiga where they used reasonable force to gain entry and recovered Five Pistols, two assault rifles and 646 rounds of ammunition of different calibers. It was deposed that from the above recoveries, the matters under investigation are very serious hence the anticipating cash bail of ksh50, 000/- is insufficient. According to **C I Gichuki**, it necessary to impose strict terms including enhanced cash bail, deposit of travel documents with the Court and that the petitioners should not leave the jurisdiction of the Court without prior notification to the police and authorization by the Court.

6. The petitioners/respondents filed a replying affidavit sworn on 6th December 2017 by **Jimi Wanjigi**, the 1st petitioner/respondent and filed in Court on 8th December 2017. **Mr. Wanjigi** deposed that the application is an abuse of the Court process and is made in bad faith. The 1st petitioner deposed that the order issued in 17th October 2017 did not and has not stopped the respondents/applicants from continuing with investigations. He deposed in particular that the respondents/applicants have never contacted them, invited them and or even summoned them for interview with respect to any alleged offences.

7. **Mr. Wanjigi** went on to depose that the application is an attempt to curtail their movement and a scheme by the respondents/applicants to continue harassing and oppressing them in violation of their right to freedom of movement. He deposed that they are business people with business interests both locally and abroad which requires them to often travel outside the country. He further deposed that in his view, the primary goal of the application is to impose restrictions on their movement which neither furthers a legal objective nor a just course. According to the deponent, the application is not only intended to persecute them but also cause them undue hardship and suffering.

8. The 1st petitioner stated that they are not a flight risk and have no reason to abscond from the country. He further stated that they are ready and willing to fight the intended prosecution to protect their rights and dignity. He deposed that there is no justification for seeking strict bail terms given that they have not violated the terms imposed by the Court.

9. **Mr. Wanjigi** finally admitted that indeed firearms were found in their residence but contended that they are lawfully owned and attached firearms certificate ("**JW1**") to substantiate his assertion. He deposed that the applicants have not given sufficient reasons to warrant varying the anticipatory bail terms.

Submissions

10. During the hearing of the application, **Mr. Ashimosi** appeared for the respondents/applicants and **Miss July Soweto** for the petitioners/ respondents. **Mr. Ashimosi** learned counsel for the respondents/applicants submitted, relying on their affidavit in support of the application and grounds on the face of the motion, that they are seeking variation of the anticipatory bail terms with a view to having them enhanced and further that the petitioners be ordered to deposit their travel documents with the Court and that they should not leave the jurisdiction of the Court without the Courts permission. Learned counsel also submitted that the petitioners should be ordered to present themselves to the police for investigations.

11. **Mr. Ashimosi** submitted that their main grounds for seeking variation of anticipatory bail terms were stated at Paragraph 15 of the supporting affidavit. That paragraph states that the firearms were recovered in the petitioners'/respondents' premises, which the petitioners had admitted at paragraph 14 of their replying affidavit. Learned counsel submitted that based on those depositions and admissions; there are sufficient materials before Court to warrant variation of the anticipatory bail terms since the police are investigating a cognizable offence which is serious and a threat to national security. Counsel contended that although grant of bail is discretionary, the facts of this case warrant re-consideration of the

anticipatory bail terms with a view to enhancing them.

12. **Miss Soweto**, learned counsel to the petitioners on her part submitted that grant of anticipatory bail is discretionary and in granting anticipatory bail in this matter, the Court took into account the relevant materials before it. Learned counsel contended that the respondent/applicants have not shown that in granting anticipatory bail, the Court did exercise its discretion judiciously. Counsel argued that the Court appreciated the facts before it while granting anticipatory bail.

13. Learned counsel went on to submitted that although the applicants had stated in their certificate of urgency that the orders granted had paralyzed investigations, the petitioners have deposed in their replying affidavit that police have never sought to interrogate them hence the orders granted have never hindered investigations or at all. According to learned Counsel, it is not factually correct to state that investigations have been hampered by the orders.

14. **Miss Soweto** argued that it is incumbent upon the applicants to show that they had sought co-operation from the petitioners without success before turning to this Court for assistance. Learned counsel went on to argue that the petitioners' freedom of movement is guaranteed under the Constitution and any intention to limit it must be in accordance with the constitutional dictates. Such limitation must not only be reasonable but also justifiable in an open and democratic society. Counsel contended that no evidence had been placed before Court to give the Court the comfort to limit a fundamental right.

15. Counsel argued that at best the application is premature and betrays the respondents' mischief since no charges have been preferred against the petitioners. In counsel's view, the Court does not know what is alleged against the petitioners to contemplate how serious the offence is, or whether the petitioners will ever be charged and or prosecuted. "It would be unfair to limit the petitioners' rights at this stage". Counsel submitted..

16. On the allegation that the petitioners are a flight risk, learned counsel contended that there was no evidence placed before Court to justify such a claim. According to learned counsel, the petitioners are citizens and have no intention of absconding. Counsel took the view that the application is intended to oppress the petitioners and not for purposes of upholding the law.

17. **Miss Soweto** concluded therefore, that the applicants' main ground is that firearms were recovered in the petitioners' residence but contended that the firearms were lawfully in the petitioners' possession and they had produced firearms certificates to show that they have not committed any offence.

Determination

18. I have considered the application, the response thereto and submissions by counsel. The applicants seek a review of the anticipatory bail terms of Kshs50,000/- granted to the petitioners with a view to enhancing them. They also seek an order that the petitioners deposit their travel documents with the Court and further that they should not leave the Court's jurisdiction without the Court's permission. The applicants also seek an order directing the petitioners to co-operate with the police and present themselves for recording of statements.

19. The applicants argued that firearms were recovered from the petitioners' residence which is a serious offence hence the petitioners may abscond since they face investigations with a possibility of serious charges and they are therefore a flight risk. The petitioners/ respondents have contested the application arguing that it is not merited. In their view, the application is a continued persecution against them since they have not committed any offence known to law, that the firearms are lawfully held and that they do not intend to abscond or leave the Court's jurisdiction. They argue that the applicants merely intend to limit their movement which is unconstitutional. They argue that they have not refused to co-operate with the police since they have never been contacted for investigations of whatever nature.

20. Bail/Bond, anticipatory or otherwise, is a constitutional right and terms thereof are at the discretion of the Court. Whether to grant such bail or bond, and on what terms, will depend on the facts of the case and

the nature of the charge an accused person faces. Once granted, whether or not to review those terms and conditions is again at the discretion of the Court.

21. When the petitioners approached the Court for conservatory orders the petitioners did not know what the police were looking for in their premises. The Court exercised its discretion and granted anticipatory bail after it was, informed that the petitioners, citizens of this country, were literally caged and it was unclear what would happen to them.

22. In exercise of its discretion the Court granted anticipatory cash bail of kshs50,000/-. The orders the Court granted did not in any way stop the police from conducting investigations over any matter. As it turned out, the applicants now say, they recovered several firearms and ammunitions from the petitioners' residence which, according to the applicants, is a serious offence and a threat to national security. That is the reason why they now seek to have the anticipatory bail terms enhanced among other conditions.

23. The petitioners have deposed in their replying affidavit as well as argued through their counsel, that the firearms are lawfully held and have attached copies of fire arm certificates to show that this is the case. They maintain that they have not committed any offence known to law.

24. For the Court to vary bail or bond terms there must be not only tangible but also compelling reasons that such variation is legally sound and tenable. The applicants, apart from stating that the offence is serious, have not laid before Court any other reason to show that variation of the anticipatory bail terms is justified. It is a fact that fire arms were recovered in the petitioners' residence. It is also a fact that the petitioners have attached copies of fire arms certificates to show that they lawfully hold these firearms raising the question of whether or not the petitioners illegally held the fire arms. That is not a question for this Court.

25. This Court is not sitting on a criminal trial. It was moved in exercise of its constitutional jurisdiction for protection of rights and fundamental freedoms under Article 165(3)(b) of the Constitution. It exercised its discretion and granted anticipatory bail of Ksh. 50,000 to prevent further violation so that the Court could interrogate the claim. The applicants, it has been argued, have never attempted to investigate the petitioners. They have also never called upon the petitioners to present themselves for interrogation. They have not even summoned them for any questioning. These facts though deposed in the petitioners' affidavit, they have not been controverted by the applicants.

26. As stated earlier, this Court is not setting on a criminal trial, there is no charge preferred against the petitioners that has been placed before it to show what charge, if any, the petitioners are facing or likely to face. The applicants merely state that they intend to investigate an offence allegedly committed by the petitioners. That, in my view, cannot form a basis for reviewing the anticipatory bail terms with a view to enhancing them.

27. The applicants have also asked that the petitioners be directed to co-operate with the police for purposes of necessitating investigations. I do not see how this Court having been moved on the basis of alleged violation of rights and fundamental freedoms should be asked to assist applicants investigate an alleged offence that no one has stopped them from investigating.

28. The petitioners have stated on oath, which has not been denied, that they have never been summoned by the applicants for interrogation. This being the fact of the matter, I absolutely see no reason to make such an order. I say so because despite the fact that the applicants were in the petitioners' residence on 17th October 2017 when anticipatory bail was granted, as at 8th December 2017 when the application was heard, the applicants had not contacted the petitioners for purposes of interrogations. In the circumstances, therefore, no basis has been laid for such a direction.

29. The applicants have also sought an order from this Court directing the petitioners to deposit their travel documents into Court and not to leave Court's jurisdiction without its permission. Well, I find this request most unfortunate. I have stated not once, that this Court is sitting as a constitutional Court exercising its constitutional jurisdiction under Article 165(3)(b) of the Constitution to determine whether

the petitioners' rights and fundamental freedom have been denied , violated or threatened.

30. From the facts of the matter, the petitioners are merely suspected of having committed a crime. They have not been charged in a Court of law, investigations have not been conducted and it is not known whether they will ever be conducted. If finally done, it is not known whether the petitioners will ever be charged in Court and if so for what.

31. The right to movement is a constitutional right. It is one of the basic rights every individual must enjoy by virtue of being human and is inviolable. Rights and fundamental freedoms are not granted or grantable by the state and cannot be limited except as contemplated under the Constitution. In that regard, the right to free movement is recognized and protected by Article 39 of the Constitution which states that ***every person has the right to enter and leave Kenya***. This right cannot be limited except in accordance with Article 24(1) of the Constitution and even then, **such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.**

32. By virtue of Article 4(2) of the Constitution, Kenya is a democratic state founded on the national values and principles of governance. According to Article 10(2) national values and principles of governance include (b) **human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized.** Article 2(1) is critical and declares the Constitution as the Supreme law of the Republic. It binds all person and all state organs. Article 19(1) goes further and decrees that the **Bill of Rights is an integral part of the country's democratic state and is the frame work for social, economic and cultural policies.** It goes even further to state in Sub Article (2) that the purpose of recognizing and protecting human rights and fundamental freedoms is **to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.**

33. The Constitution declares in Article 19 (3)(1) that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state and are subject only to the limitations contemplated in the Constitution. That means rights are for enjoyment and not for limitation. That makes sense when Article 20(2) states that ***every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***

34. The petitioner's right to movement is undoubtedly granted by the Constitution, is unlimited and must be enjoyed to the greatest extent. This Court as a state organ, is bound by the Constitution and must obey the constitutional Command in Article 4(1). It is also bound by Article 20(1) which states that ***the Bill of Rights applies to all law and binds all state organs and all persons.*** This Court sitting as a constitutional Court is the custodian of the Constitution and enforcer of rights and fundamental freedoms in the Bill of Rights. It is the ladder citizens must scale to reach the fountain of justice. Conscious of the values and principles of our Constitution, this Court must not be the one to assist in the curtailment of rights and fundamental freedoms.

35. I say so because what the applicants have in essence done is to ask this Court to limit the petitioners' right to movement enshrined in Article 39 of the Constitution. They have not laid before Court any basis to give it the comfort to curtailing the petitioners' fundamental right to movement in view of our constitutional dictates. Article 24(1) of the Constitution has laid down conditions for limitation of rights and fundamental freedoms. Where such circumstances do not exist, any purported limitation would be a violation of the values and principles in the Constitution.

36. I think I have said enough to demonstrate that this Court, as a creature of the Constitution is bound by the Constitution and has the solemn duty to preserve and protect rights and fundamental freedoms. It must decline the invitation to be the agent of violation or limitation of the same rights it is duly bound to protect. The request by the applicants is to say the least unwarranted. The petitioners have not been investigated and or charged. It is unknown whether they will ever be investigated, charged or even prosecuted. If in the end, they are charged and or prosecuted the applicants will have to address their concerns before the trial Court. For now, there is nothing before me to warrant variation of the conservatory bail terms. The best this Court can do is to decline the invitation; which I hereby do.

37. In the circumstances I find that the application dated 23rd October 2017 has no merit and is hereby dismissed with Costs.

Dated, Signed and Delivered at Nairobi this 31st Day of January 2018

E C MWITA

JUDGE