



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CRIMINAL APPLICATION NO. 10 OF 2018

**(IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 28, 28 & 29 OF THE
CONSTITUTION OF KENYA AND SECTION 123(1) PART 5 OF THE
CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA)**

BETWEEN

PAMELA AKINYI ODHIAMBO.....APPLICANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION.....RESPONDENT

RULING

1. Pamela Akinyi Odhiambo the applicant herein, by Notice of Motion dated 5th February, 2018 prays for orders that:

1. This Honourable Court be pleased to issue a conservatory order restraining the respondents, their servants, juniors, officers and/or anybody whatsoever acting under their directions or departments or offices from arresting, harassing or otherwise howsoever interfering with the applicant herein pending the hearing and determination of this application

2. This Honourable Court be pleased to grant the applicant anticipatory bail pending arrest or charge on such terms the court may deem fit to impose

2. The application is made on the ground that the applicant has been informed of imminent breach of her rights in the Bill of Rights by the respondent which is a state organ.

3. The application is supported by the affidavit of the applicant sworn on the 6th February, 2018. The same basically states that the respondent is investigating her academic documents. Attached to the affidavit are various annexures that the respondent is alleged to be investigating.

4. The application is opposed on the basis of a replying affidavit sworn by Grace Kwamboka Omweri, an advocate of the High Court of Kenya and counsel on record for the respondent. She concedes that the respondent is investigating the applicant's academic documents and adds that the applicant was on 9th June, 2017, interrogated and her statement recorded.

4. It is the respondent's case that it is fulfilling its investigative mandate under the provisions of Section 42(1) of the Statute Law Misc. Amendment 2014, and that a finding of wrong doing or otherwise on the part of the applicant is yet to be established.

5. Issues for determination

1. Whether the Applicant ought to be granted a conservatory order

2. Whether the Applicant ought to be granted anticipatory

1. Whether the Applicant ought to be granted a conservatory order

6. Under Article 22(3) of the Constitution the Chief Justice is mandated to make rules providing for the court proceedings referred to in the Article. The Article provides for enforcement of the Bill of Rights. Those rules were gazetted in the Kenya Gazette Supplement No.95 of 28th June, 2013. Rule 4 states:

1. where any rights or fundamental freedom provided for in the constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

7. On the other hand, Rule 10 states:

(1) an application under Rule 4 shall be made by way of a petition set out in form A in the Schedule with such alterations as may be necessary.

8. In the first prayer, applicantis seeking redress for the breach of her fundamental rights under chapter 4 andshe ought to have done so by way of a petition. I am in total agreement with the Supreme Court ruling in **Petition No.27 of 2014** in the case of **Yusuf Gitau Abdalla –Vs- The Building Centre Kenya Ltd (KLtd) and 4 others** in which Hon. Justice Ibrahim delivered himself as follows:-

“He filed his “petition” to this Court on the 23rd of July, 2013 under what he terms as a petition under a certificate of urgency. It is worth noting that from the onset this matter took a peculiar trajectory for despite invoking what can only be termed as a unique jurisdiction of the court; the pleadings have a unique bearing. Ordinarily, one will file a petition and an application which application could then be accompanied by a certificate of urgency. I do not intend to dwell on this issue but parties at this stage who come to courts seeking justice should follow the legal channel provided for when accessing courts and should not by way innovation craft pleadings unknown in law.”

9. That holding of the Supreme Court vindicates the provision of Rule 10(1) of the Rules which are coached in mandatory terms and so if the applicant were instituting proceedings claiming breach of fundamental freedoms as enshrined in the Bill of Rights having been denied, violated or infringed, or threatened she mandatorily could have come to court by way of a petition.

10. The applicant having brought her application under Articles 22 and 23 of the Constitution ought to have sought the orders in a petition. The Supreme Court in **Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR** stated that it was mandatory that prayers sought under Article 22 of the Constitution must be sought by way of a petition.

11. Other than the applicant has not properly moved the court, she has similarly not demonstrated with exactitude how in fulfilling its investigative mandate under the provisions of Section 42(1) of the Statute Law Misc. Amendment 2014, the respondent has violated her rights. Having said that, I find applicant’s prayer for a conservatory order is unmerited.

2. Whether the Applicant ought to be granted anticipatory

12. There is no specific provision on grant of anticipatory bail pending arrest or charge. However, this Court has jurisdiction to determine this matter for reasons that the **Constitution of Kenya, 2010** in **Article 22(1)** affords every person the right:

“ ...to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

13. The legal regimeregulating grant of anticipatory bail is to be found in **Article 165** of the **Constitution** and Section 123 of the Criminal Procedure Code. Under **Article 165** of the **Constitution** the High Court has jurisdiction 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.

14. Section 123 of the Criminal Procedure Code states that:

“(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this part.

15. There are a myriad of cases on instances when court’s jurisdiction to grant anticipatory bail and instances when it may issue. In the case of **Hon. Martin Nyagah Wambora –Vs- Attorney General, Inspector General of Police and Director of Public Prosecution (DPP), Embu High Court Criminal Miscellaneous Application Case No.3 of 2015** the court observed that Article 23 gives wide discretion to the court to grant anticipatory bail.

16. In the case of **W’Njuguna versus Republic, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520**, where 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.”

In the case of **Martin NyagaWambora vs. Speaker of The CountyOf Assembly of Embu& 3 Others (Supra)**, Mwongo, J expressed himself as follows:

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true 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 court’s attention.”

17. Taking all matters in the case before me into consideration, all that the applicant has confirmed is that the respondent is undertaking investigations against her. I am however not persuaded that the Applicant has demonstrated the presence of serious breach of her rights by the respondent which is an organ of state which is supposed to protect these rights, to warrant the granting of anticipatory bail.

18. Furthermore, if the matters in question are still under investigation the outcome of those investigations cannot be pre-empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and *per se* do not amount to infringement on the fundamental rights and freedoms of the applicant. In any case she will be entitled to bail as provided by the Constitution. To my mind, the apprehension by the Applicant does not meet the threshold of serious breach of his rights by a state organ.

I therefore dismiss the Application.

SIGNED, DATED and DELIVERED in open court this..15th..Day of..February.. 2018

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Carolyne

Applicant/Petitioner - Ms Nyamita/Mr Achuro

Respondent - Ms Omweri.