



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 112 of 2018.

SAMUEL KAMAU CHEGE.....APPLICANT.

VERSUS

THE O.C.S(RUAI POLICE STATION.....1ST RESPONDENT.

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT.

THE ATTORNEY GENERAL.....3RD RESPONDENT.

THE D.C.I.O (KAYOLE).....4TH RESPONDENT.

THE D.C.I.O (EMBAKASI).....5TH RESPONDENT.

(An application under sections 123, 124 and 126 of the Criminal Procedure Code and Articles 50, 15a and 165 of the Constitution of Kenya and any other enabling provision of law.)

RULING.

1. Samuel Kamau Chege, hereafter the Applicant, filed the present application by way of an amended notice of motion dated 19th March, 2018. In it he sought prayers that; (i)he be admitted to bail pending arrest or charge on such terms as the court may deem fit and (ii)there issue an injunction restraining the 1st,2nd, 3rd, 4th and 5th Respondents and or the police acting on their directions, instructions or command from arresting and/or harassing the Applicant in any manner whatsoever. The application was based on the grounds that; (i) the Applicant believed that police officers under the command of the 1st,2nd and 4th Respondent intend to arrest him for undisclosed offences, (ii) the police service was being misused by elements actuated by malice including the 5th Respondent in a bid to harass and intimidate him and (iii) that the Applicant is ready and willing to abide by any terms as may be set by the court. The Application was supported by an affidavit sworn by the Applicant in which he deponed that he was a land owner who had been fighting off cartels that were bent on grabbing his property. That there had been several attempts by hired goons, with police protection, to invade the said property resulting in the destruction of property. That the cartels in question are using the police service to harass and intimidate him resulting in inexplicable arrests without being charged. That in the exercise of his rights he has made appropriate complaints that do not seem to have gone down well with the implicated police officers. That he has learnt from the community policing committee chairman that the police are looking for him for unspecified and unclear reasons and he was therefore apprehensive that if unchecked his constitutional right to fair trial would be violated and he would be exposed to a cycle of harassment. He annexed to the application documents related to his ownership of the property and also chronicling the dispute in question.

2. Grounds of opposition dated 20th March, 2018 were filed by the prosecuting counsel. They were that; (i)the application is misconceived as the Applicant's rights had not been breached by any State organ, (ii)the application is an abuse of the process of the court and merely meant to waste the court's precious time and lastly (iii) the application and the orders sought are unattainable in law as they were based on unsubstantiated fears.

3. The Application came up for hearing on 21st March, 2018 with Mr. Ngala appearing for the Applicant while Ms. Atina acted for the State.

4. Mr. Ngala begun by stating that the facts adduced in the supporting affidavit were not contraverted through the filing of a replying affidavit. That the history of the application was that the Applicant was being harassed by the police and that complaints had been made against the 4th Respondent and officers under the 1st Respondent. That in one incident the Applicant's caretaker was arrested and taken to the offices of Embakasi Ranching Company where he was later released without being charged. In another the Applicant's son was arrested on the grounds that he was building on land that did not belong to him and that the Applicant was arrested when he went to check on him. They

were both kept in custody for 3 days but no charges were preferred. That the Applicant had disclosed the specific officers who were harassing him. He submitted that the Applicant was a target yet he did not know of any existing complaint against him and thus any arrest would be arbitrary as there were no reasonable grounds that he had committed an offence. He concluded by stating that the Applicant was ready to abide to any orders made.

5. Ms. Atina begun by stating that the application was opposed. She submitted that the officer supposedly harassing the Applicant, one Peter Dombi, was not the DCIO Embakasi whose name, and that of his deputy, she supplied to the court. That no Sergeant Kinyua exists at Kayole Police Station and therefore that the Applicant had failed to show that his rights had been violated by a state organ. Further, that it had not been demonstrated that the Applicant's fundamental rights have been breached. That the annexures to the application present a situation where the police are trying to assist the Applicant. She concluded by urging the court to dismiss the application.

6. In response Mr. Ngala submitted that the respondent had misconceived the application and that the Applicant had exhibited letters that showed police harassment. That the Applicant was only able to get the names of officers serving in the police stations and that the Respondent had not provided evidence that the named officers were not serving at the stations in question.

7. The court has considered the respective parties submissions and whereas a dearth of information still perpetuate the court is under a duty to arrive at a determination. The issue at hand involves the alleged harassment of the Applicant by the police with regards to land acquired from the Embakasi Ranching Company Limited. The Applicant contends that he has been harassed by officers of the Respondents due to a land tussle existing between him and the 5th Respondent. He provided examples of the harassment in question which involved the arrest of his appointed caretaker, his son and himself which did not lead to any charges being preferred against them. He submitted that he had received information that his arrest was imminent which led him to file the present application. The allegations by the Applicant are serious as they relate to the use of police powers to abuse his rights. The Applicant's advocate submitted that the Respondents had not contravened the facts laid out in the Applicant's supporting affidavit. The court considered this and further, as submitted by the Applicant's counsel, the failure to substantiate the submissions by Ms. Atina that the officers referred to by the Applicant, one Dombi and Sergeant Kinyua, were not the DCIO Embakasi or an officer at Kayole Police Station respectively.

8. In light of the above this court has to consider whether the admission to anticipatory bail is warranted in the circumstances of the case. Anticipatory bail is only granted where the Applicant can adequately substantiate to the court that an imminent infringement of his right to liberty will occur. The court in granting such bail does not act in a vacuum as the court is supposed to substantiate his assertion that his arrest is imminent. The court has considered the application before it and finds that while it alleges harassment on the part of the officers it does not indicate that his arrest is imminent. This is in no way a trivialisation of the allegations in question. However, the court finds that matter pertaining to harassment at the hands of the police are not matters that fall within the scope of the present application. The Applicant is better suited in laying his complaints before the Independent Police Oversight Authority, further recourse is afforded him by the way of judicial review. That being said this court finds that the Applicant has not demonstrated sufficient grounds to be admitted to anticipatory. It is not all lost though as this court orders that in case of his arrest the Applicant is to be presented before a court within 24 hours as per the requirements of Article 49.

9. With regards to his second prayer urging the court to grant an injunction against the 1st, 2nd, 4th and 5th Respondents and officers acting under their direction, instruction and command from arresting and/or harassing him this court finds that granting such an order, which in effect takes the form of the judicial review remedy of Prohibition would be untenable in the present application. With regards to his arrest is due to first the wide ranging nature of such an order and the fact that as per the finding above the Applicant has not illustrated that his arrest is imminent. Secondly, with regards to harassment, the court has already laid out the alternative remedies available to the Applicant. The court will therefore not grant the injunction in question.

10. In the upshot, the application is dismissed with no orders as to costs. It is so ordered.

DATED and DELIVERED this 11th day of April, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1.for the Applicant

2.for the Respondent