



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT VOI**

**MISCELLANEOUS CRIMINAL APPLICATION NO 25 OF 2017**

**ALEXANDER KUBO MWANGKA.....APPLICANT**

**VERSUS**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**ETHICS & ANTI CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant's Notice of Motion dated 24<sup>th</sup> March 2017 and filed 26<sup>th</sup> March 2017 was brought pursuant to the provisions of Articles 22, 23, 25, 28, 29, 49, 165 (3) and 258 of the Constitution and Section 3A of the Civil Procedure Rules, 2010. It sought the following orders;

**1. THAT the Applicant's constitutional right to a fair hearing and access to information held by another person and required for the exercise or protection of right or freedom was about to and/or had already been transgressed.**

**2. THAT the Applicant had been subjected to denial of his Constitutional guaranteed right to a fair trial and/or to adequately prepare for the same by the Respondents and that his right to fair trial had thereby been grossly violated and/or has been transgressed by the Respondents**

**3. THAT the remedy/grant and/or relief of anticipatory bail or bail pending arrest and charge was constitutionally provided for and that the same was lawfully available to the Applicant**

**4. That pending the hearing and/or determination of this matter the Respondents by themselves, agents and/or howsoever be barred from effecting and/or arresting the Applicant.**

**5. That the 3<sup>rd</sup> Respondent be ordered to expedite and/or conclude investigations on the matters reported in 2014 and 2017.**

**6. Costs of the application.**

2. Despite having been served with the application herein, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file their respective responses to the aforesaid application.

3. On 12<sup>th</sup> June 2017, the Applicant filed an *ex parte* Notice of Motion application of even date seeking orders that the National Examination Council, Caribbean University and KCA University produce all the academic documentation he attained from the said institutions, that the Director of Immigration Services produce his Passport Number A098233 and that the County Police Commander produce the Police Investigation file and/or confirm to the court the progress or outcome of Criminal Complaint OB/41/3/10/2014.

4. On the same date, this court directed that the Director of Immigration furnish the Applicant with a written confirmation that his said Passport got lost and that the County Police Commander furnish the Applicant with certified copies of the Police Abstract of 21/3/2017, the Investigations Report and OB Number 41/3/10/10/2014.

5. In his letter dated 7<sup>th</sup> July 2017 and filed in court on 12<sup>th</sup> July 2017, the County Police Commander forwarded certified copies of the original Police Abstract and OB Extract and indicated that there had been no Investigation file as the report the Applicant had made was

purely for loss of documents and no suspicion was alluded to in the said report.

### **THE APPLICANT'S CASE**

6. The application was premised on grounds similar to Prayers (1) to (3) and supported by the Applicant's affidavit that was sworn on 24<sup>th</sup> March 2017. His Written Submissions were dated and filed 6<sup>th</sup> November 2017,

7. His case was that he was competitively recruited as a County Executive Committee Member of Taita Taveta County for a five (5) year term with effect from 10<sup>th</sup> June 2013. On his recruitment, he was in charge of Public Works and Infrastructure but that at the time of filing the proceedings herein, he was in charge of Tourism, Wildlife, Environment and Natural Resources.

8. On or about 24<sup>th</sup> February 2017, he received the 2<sup>nd</sup> Respondent's letter dated 16<sup>th</sup> January 2017. The same was hand delivered to him, in an unmarked and unaddressed envelope, from persons who were unknown to him and who refused to identify themselves. In the said letter, the 2<sup>nd</sup> Respondent had required that he appear before it on 28<sup>th</sup> February 2017 with original and certified copies of his Identity Card, his academic certificates, Passport with entries until December 1999, Curriculum Vitae (CV) and the letter of appointment of his last job.

9. He was of the view that the period of the notice within which he was required to appear before the 2<sup>nd</sup> Respondent was inadequate considering that the documents it required he appear with had been stolen during a break in at his house sometime in the year 2014, a matter that he reported to the Police and was recorded in the Occurrence Book (OB). An extract of which the said OB had annexed to his affidavit. His Passport that had entries upto December 1999 was replaced by the Immigration in December 2008.

10. The 2<sup>nd</sup> Respondent wrote to him a second letter dated 2<sup>nd</sup> March 2017 which required that he appear before it on 9<sup>th</sup> March 2017 at 9.00am. Once again, the letter was sent to his advocates on the date he was to appear at 10.00am, an hour late from when he was to appear. He thus complained the manner in which letters were being sent to him demonstrated malice on its part.

11. He was emphatic that the 2<sup>nd</sup> Respondent had made him suffer anguish and mental torture by hounding him with repeated letters to investigate him for unspecified crimes he had allegedly committed while in service. Further, he contended that his constitutional right to a fair hearing was breached due to the 2<sup>nd</sup> Respondents its failure to give him adequate time to prepare to respond to the allegations.

### **THE 2<sup>ND</sup> RESPONDENT'S CASE**

12. In response to the said application, on 8<sup>th</sup> June 2017, Daniel Tipape Loomu swore a Replying Affidavit on behalf of the 2<sup>nd</sup> Respondent herein. The same was filed on 12<sup>th</sup> June 2017. Its Written Submissions were dated 29<sup>th</sup> December 2017 and filed on 2<sup>nd</sup> January 2018.

13. The 2<sup>nd</sup> Respondent contended that on 3<sup>rd</sup> March 2015, it received an anonymous complaint regarding the criteria employed by the County Government of Taita Taveta in recruiting the Applicant herein and Harison Mghana as County Executive Committee (CEC) Members.

14. Pursuant to its mandate, it wrote to the County Government of Taita Taveta vide its letter dated 26<sup>th</sup> May 2016 requesting for documentation regarding the said recruitments. On 14<sup>th</sup> November 2016, it received another anonymous complaint raising issues regarding the Applicant's academic qualifications particularly his Bachelor of Commerce awarded by the Caribbean University in the United States of America.

15. Through the Governor of the County of Taita Taveta, the County Secretary and Clerk of County Assembly complied with its request for documentation. It observed from the documents that were supplied that the Applicant's academic certificates were not part of the documents supplied and further all the CEC Members were issued with letters of appointments before the procedural vetting and approval by the County Assembly.

16. It carried out investigations at Kenyatta University, Caribbean University and at KCA University to establish whether or not the Applicant had been a student in the said institutions. In its letter dated 7<sup>th</sup> December 2016, Kenyatta University stated that he had never been a student in its University and thus had not attained a degree from the institution. In its letter dated 2<sup>nd</sup> February 2017, KCA University confirmed that he enrolled as a student for a Post Graduate Diploma in Corporate Governance, but that he failed to complete his studies. In its letter dated 12<sup>th</sup> January 2017, Commission for University Education confirmed his degree of Bachelor of Commerce as the Applicant had applied for recognition.

17. It stated that it wrote to him on 16<sup>th</sup> January 2017 and 2<sup>nd</sup> March 2017 to produce documents it required to complete its investigation and for him to report to its offices for him to record a statement. It was its averment that the issue of fair trial had not arisen as the matter was still at the investigative stages and that he had failed to demonstrate how it had breached his constitutional rights. It stated that there was no imminent danger of his arrest and urged this court to dismiss his application.

### **THE 4<sup>TH</sup> REPSONDENT'S CASE**

18. In opposition to the said application, the 4<sup>th</sup> Respondent filed Grounds of Opposition dated 15<sup>th</sup> August 2017 on 21<sup>st</sup> August 2017. Its Written Submissions were dated 7<sup>th</sup> December 2017 (**sic**) and filed 8<sup>th</sup> November 2017.

19. It contended that the dispute herein was between the Applicant and the 2<sup>nd</sup> Respondent and it was thus a stranger in the proceedings herein. It further averred that the Applicant failed to demonstrate how it breached his constitutional rights or specify which constitutional rights it had been breached. It was its contention that his application against it was misdirected and was thus an abuse of the court process. It urged this court to dismiss the same.

## **LEGAL ANALYSIS**

20. The Applicant pointed out that he had not submitted a degree from Kenyatta University or a Post Graduate Diploma from KCA University to the 2<sup>nd</sup> Respondent but that he forwarded to it, a copy of his degree from the Caribbean University and the correct CV vide his letter of 6<sup>th</sup> June 2017. He distanced himself from the erroneous CV that the 2<sup>nd</sup> Respondent was relying on.

21. He contended that he had applied for certified copies of the degree certificate and transcripts from the Caribbean University and it would therefore be unfair and malicious for the 2<sup>nd</sup> Respondent to arrest and charge him before a response from the said Caribbean University could be received. He relied on the cases of **W’Njuguna vs Republic (2004) 1 KLR 520** and **Susan Mbinya Musyoka vs Inspector General of Police & Another [2016] eKLR** in support of his case

22. On its part, the 2<sup>nd</sup> Respondent contended that under Articles 79 and 252 (1)(a) of the Constitution of Kenya, 2010, the Anti-Corruption and Economic Crimes Act No 3 of 2003, the Ethics and Anti-Corruption Commission Act No 22 of 2011 and the Leadership and Integrity Act No 19 of 2012, it had mandate to investigate corruption and economic crimes and to enforce Chapter Six (6) of the Constitution.

23. It submitted that it was well within its mandate to carry out investigations into the recruitment and appointment of the CEC Members of the County Government of Taita Taveta. It was its contention that the Applicant’s unhappiness with its the investigations did not amount to an infringement of constitutional rights and freedoms. It relied on the case of **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR** where 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 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.”**

24. It averred that the application herein had been overtaken by events given that a year had lapsed since it issued the Applicant with its notices dated 16<sup>th</sup> January 2017 and 2<sup>nd</sup> March 2017 and he had failed to avail it documents it had requested. It pointed out that on 4<sup>th</sup> April 2017, this court granted him anticipatory bail on an interim basis for sixty (60) days during which time he would have furnished it with the necessary documents and appeared to record a statement with it. It pointed out that he failed to do so and in fact that he only appeared before it on 13<sup>th</sup> July 2017 upon this Court’s further orders.

25. It was its contention that since he had not been arrested, apprehended or harassed and prosecution was yet to be instituted, the substratum of his application had been overtaken by events.

26. It added that his application did not meet the threshold of being granted anticipatory bail as was enunciated in the cases of **Samuel Muciri W’Njuguna vs Republic** (Supra) and the case of **Gladys Boss Shollei vs Attorney General & 3 Others [2015] eKLR**. It submitted that the mere fact that it had summoned him to record a statement did not amount to any form of harassment because it was only discharging its core function as provided by law.

27. It submitted that the investigations were still on-going and the outcome of the same could not be pre-empted by the court. It added that in any event, he was still protected by the Constitution. It also relied on the case of **Richard Mahkanu vs Republic [2014] eKLR** in this regard.

28. It further submitted that he ought to have sought redress of alleged infringement of his constitution in a Petition and not in a miscellaneous application. It placed reliance on the case of **Gladys Boss Shollei vs Attorney General & 3 Others** (Supra) where Ngenye J held as follows:-

**“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.”**

29. On its part, the 4<sup>th</sup> Respondent submitted that the 2<sup>nd</sup> Respondent had the mandate to carry out the investigations into the appointment of the Applicant and the other CEC members by virtue of Section 23 of the Anti-Corruption and Economic Crimes Act. It was emphatic that the same did not amount to abuse of power or a violation of the Applicant’s rights or be termed as harassment as it was an inquiry into the method and criteria of how all the CEC Members were recruited. It was categorical that the Applicant had failed to demonstrate how his constitutional rights were infringed by any of Respondents.

30. It added that under Section 35 of the Anti-Corruption and Economic Crimes Act, the 2<sup>nd</sup> Respondent was required to submit to it, after an investigation, its findings investigation for its evaluation before arrest and possibility of prosecution of the Applicant. It added that he was entitled to bail under Article 49(1)(f) of the Constitution of Kenya in the event he was arrested.

31. In this regard, it relied on the case of **Kevin Okore Otieno vs Republic Criminal Revision No 207 of 2013** where Achode J held as follows:-

**“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 perse, do not amount to infringement on the fundamental rights and freedoms of the applicant. In any case he will be entitled to bail as provided for 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.”**

32. As was rightly submitted by the 2<sup>nd</sup> Respondent and correctly held by Ngenye J in the case of **Gladys Boss Shollei vs Attorney General & 3 Others** (Supra), the Applicant ought to have sought the redress of infringement of his constitutional rights under the provisions of Article 22 of the Constitution as well as Rule 4 (1) and Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 by way of a Petition.

33. Be that as it may, the institution of proceedings seeking protection from violation of constitutional right is not hinged on technicalities, which must be kept to a minimum. Indeed, 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.”**

34. While addressing the question of technicalities when instituting proceedings seeking redress for constitutional infringement, in the case of **Abdi Abdullahi Somo v Ben Chikamai & 2 others [2016] eKLR**, Gikonyo J rendered himself as follows:-

**“In my life as a judge, I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that, as a matter of general principle, a Notice of Motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing the particular proceeding in question...the Constitution seems to seek keeping of formalities especially on applications based on denial, or violation or infringement or threatening of fundamental rights and freedoms, to bear minimum.”**

35. 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.”**

36. 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 could therefore institute proceedings on his own behalf claiming that the Constitution of Kenya had been infringed or contravened or was threatened with contravention.

37. The above notwithstanding, this court noted that Prayers Nos (2) and (3) of the Applicant’s application appeared to have been more of grounds in support of his application to be granted anticipatory bail. They did not appear to have been orders that were being sought for infringement or contravention of the Constitution from the way the prayers had been drafted. This court did not therefore find it necessary to delve further into the question of whether or not the present application was competent as had been alluded to by the 2<sup>nd</sup> Respondent as it was apparent that the substantive prayer was for a grant of anticipatory bail as provided for in Article 49 of the Constitution of Kenya.

38. 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.”**

39. 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**(Supra), 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.”**

40. 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.”**

41. 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 associated 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.

42. Often times, applications for anticipatory bail have been made to courts to pre-empt investigations from being carried and/or to defeat the wheels of the administration of justice. Indeed, there is an emerging trend where persons facing investigations in our jurisdiction approach courts to seek orders for bail or bond even where there is no indication of any arrest. It is an order that is prone to abuse and has been abused as persons seek to prohibit investigations. Notably, apprehension of an impending arrest is not sufficient cause for an applicant to be granted anticipatory bail or bond. Mabeya J also arrived a similar conclusion in the case of **Richard Mahkanu vs Republic [2014] eKLR**.

43. This 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** (Supra). 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.

44. Although the Applicant herein had contended that the 2<sup>nd</sup> Respondent had been harassing him with investigations for unspecified crimes and without giving him adequate notice within which to prepare his defence, it was apparent from the documentary evidence that the 2<sup>nd</sup> Respondent issued him with two (2) notices dated 16<sup>th</sup> January 2017 and 2<sup>nd</sup> March 2017. After being issued with the first notice, he complained about the inadequate notice. The 2<sup>nd</sup> Respondent issued him with a second notice dated 2<sup>nd</sup> March 2017.

45. It may or may not have been correct that the notice the 2<sup>nd</sup> Respondent gave the Applicant may not have him accorded sufficient time to attend its offices to record a statement as he had contended. Notably, this court was not able to arrive at a conclusive determination of this issue because the 2<sup>nd</sup> Respondent maintained that the said notices were properly despatched to him while he contended that the said notices were short and inadequate. However, bearing in mind that this court extended him time to appear before the 2<sup>nd</sup> Respondent by another sixty (60) days, he could not therefore be heard to say that he was not granted sufficient time to prepare his case.

46. He appeared before the 2<sup>nd</sup> Respondent on 13<sup>th</sup> July 2017 pursuant to orders of this court issued on 12<sup>th</sup> June 2016. However, he did not provide to this court any documentary proof to demonstrate that he submitted the documents that the 2<sup>nd</sup> Respondent had requested. He never sought extension of time to obtain the documents after the orders it issued him on 12<sup>th</sup> June 2016. Indeed, a year had almost passed since the 2<sup>nd</sup> Respondent issued him with Summons and there has been no indication that he had been summoned again or that he had been harassed.

47. Accordingly, having carefully considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court did not find any iota of evidence that the Applicant’s fundamental rights had been breached or denied or that there was a threat of them being infringed, contravened or violated. Investigations, arrest and arraignment in court 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.

48. 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 redress from the court for breach of abuse of the said fundamental rights and freedoms. In this regard, this court came to the firm conclusion that the application herein did not meet the threshold for the granting of anticipatory bail to the Applicant herein as he had sought.

49. It was premature of him to have enjoined the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in this matter because the matter was still in the investigative stages. In view of the fact that this was a criminal matter, it was regrettable that this court’s hands were tied from condemning him to pay costs against the Respondents herein.

## **DISPOSITION**

50. For the foregoing reasons, the upshot of this court's Ruling was that the Applicant's Notice of Motion application dated 24<sup>th</sup> March 2017 and filed on 26<sup>th</sup> March was not merited and the same is hereby dismissed.

51. It is so ordered.

**DATED at NAIROBI this 25<sup>th</sup> day of May 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at VOI this 30<sup>th</sup> day of May 2018**

**F. AMIN**

**JUDGE**

In the presence of:-

Mr Bwire not present for the Applicant

AG Never entered appearance for the 1<sup>st</sup> Respondent

AG Never entered appearance for the 2<sup>nd</sup> Respondent

Miss Anyumba holding brief for Mr Kagucia and Miss Jemutai jointly for the 3<sup>rd</sup> Respondent

Miss Anyumba for the 4<sup>th</sup> Respondent

Josephat Mavu- Court Clerk