



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 205 OF 2018.**

**JAMES THUITA NDERITU .....APPLICANT.**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT.**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT.**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT.**

**RULING**

1. James Thuita Nderitu, hereafter the Applicant, brought this application by way of Notice of Motion dated 17<sup>th</sup> May, 2018 under Articles 22, 23, 25, 28, 29, 39, 47 and 50 of the Constitution, Section 123(3) of the Criminal Procedure Code, the inherent jurisdiction of the court, the general principles of natural justice and the rule of law. The main prayer is that he be admitted to bail pending arrest in respect of allegations of corrupt dealings and/or other allegations on such terms as he court shall deem fit. Alternatively, the court be pleased to release the Applicant on his execution of bond for his appearance upon institution of any criminal proceedings against him in respect of the said allegations.

2. The application is premised on grounds that the Applicant was a major shareholder of Firstling Supplies Limited, hereafter the Company, which has been doing lawful business with the National Youth Service as an approved supplier of goods. That lately he has been subjected to untold mental and psychological anguish and torture due to press statements by the Respondents and an article in the Daily Nation on 14<sup>th</sup> May, 2018 alleging that Kshs. 9 billion had been lost by the National Youth Service and adversely mentioning the Company. That the media reports detail an elaborate scheme to steal from the National Youth Service and mentioning the Company in the same vein has cast it and the Applicant as conspirators and has had the net effect of damaging the reputation of the Company. Consequently, this has caused the Applicant to fear being prosecuted in the public domain. That neither the Applicant nor officials of the Company had been interrogated, called to write a statement, summoned by the police or sought in any manner by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' officers although he was ready to avail himself and record a statement.

3. Further, the Applicant is of the opinion that the press had obtained the information in question from the investigators which caused him to worry that he was being condemned unheard against the rules of natural justice. He was apprehensive that the Respondents' officers would ambush him, arrest him and arraign him in court on trumped up charges. He asserts that the sole aim of the police is to harass, humiliate and disparage him, an act of violation of his rights under Articles 28 and 29 of the Constitution. That there was therefore presently a high likelihood that his fundamental rights and freedoms would be breached by the Respondents if their actions are unchecked. That he was ready to avail himself for any intended criminal proceedings as and when directed to do so but was apprehensive to do so under unclear circumstances. That it was therefore in the interest of justice and fairness that the prayers sought to be granted.

4. The application is supported by an affidavit sworn by the Applicant on 17<sup>th</sup> May, 2018 in which he reiterated and expounded on the grounds underpinning the application. He also attached various documents to prove the continuing lawful conduct of business of the company and National Youth Service, hereafter NYS.

5. The Respondents through learned State Counsel, Miss Kimiri filed grounds of opposition on 21<sup>st</sup> May, 2018. They are that; (i) the application was grossly defective and a clear abuse of the court process, (ii) an order for anticipatory bail can only issue where an applicant demonstrates that his fundamental rights have been or are in danger of being seriously breached by a state organ, (iii) the application was based on apprehension founded on unsubstantiated media claims that cannot stand the constitutional test, and (iv) the application lacks merit.

6. The application was canvassed me on 22<sup>nd</sup> May, 2018 with Mr. Gachie representing the Applicant whilst Ms. Kimiri acted for the Respondents. Mr. Gachie begun by submitting that there are rumours that the Applicant as a director of the company is involved in the NYS

scam. He submitted that the company was incorporated in the year 2006. That the Company had offered services to the NYS in the course of its business. That the Daily Nation newspaper published a story about Kshs. 9 billion being stolen from the NYS and that the Company was one of the recipients, that indeed it had received the biggest chunk of the payments. In addition, that the newspaper alleged that the Company was a shell that had been supplying “air” to NYS. He pointed to the annexures as an indication of the mercantile activities of the Company. Further, that the information in the media had emanated from the investigators as they try to establish the veracity of the scam whereas the Applicant has not been given a chance to counter the information in question. He submitted that the prosecution was being fueled by the President’s order that investigations take place.

7. Counsel relied on the case of **Gladys Shollei v. Attorney General & 3 others**[2015]eKLR to urge the court that the circumstances of the case met the threshold for grant of anticipatory bail. He submitted that the Applicant was ready to subject himself to investigations and all he asks for was protection. He concluded by urging the court to allow the application.

8. Ms. Kimiri in opposing the application submitted that the same was an abuse of the court process as it was grounded on media claims which do not comprise any piece of evidence. She added that the Applicant had not met the threshold for grant of anticipatory bail. More so, that he had not demonstrated that his fundamental rights and freedoms had been breached by a State organ. She urged the court to also note that the Applicant had not been summoned by any of the Respondents hence the media rumours could not be substantiated. She also relied on the **Gladys Shollei(Supra)** case and submitted that where an Applicant relies on rumours and unsubstantiated lies bail cannot issue.

9. In reply, Mr. Gachie, submitted that the criteria in the **Gladys Shollei(Supra)** case had been met as the Applicant had demonstrated how the media has sensationalized the NYS scandal yet the Applicant had therefore been condemned unheard. He reiterated that the Applicant simply wanted to be interrogated in an atmosphere devoid of threats or harassment and that he would abide by any conditions that the court shall set.

### **DETERMINATION**

10. I have considered the application, the opposition to the application and the respective rival submissions. I now take the following view of the application.

11. The Applicant prays to be admitted to anticipatory bail. Certain conditions must be met for a court to find that such admission is warranted; paramount being that the Applicant must demonstrate a breach of his fundamental rights and freedoms. See: **Samuel Muciri W’Njuguna v. Republic**[2004] eKLR in which the High Court held;

***“When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution is not providing a remedy to a citizen whose fundamental rights have been breached... We are of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental right.***

...

***If the police have contravened or is likely to contravene the rights to liberty of a citizen for ulterior purposes, an anticipatory bail should be an appropriate order to be granted.”***

12. The Applicant alleges that a number of his rights are threatened and therefore urges the court to preempt the breach by granting the remedy. The nexus of the application is a scandal at the NYS in which it is alleged that billions of shillings were paid out for services that were not rendered. The Applicant submits that a company in which he is the main shareholder and a director has been mentioned adversely in various media reports related to the scandal and that this has had the effect of painting it, and consequently him, as a part of the scam. He submits that the media reports are based on information that was acquired from the Respondents and he is therefore fearful that they will soon act on the information notwithstanding the fact he has not been summoned to answer to the allegations.

13. The Applicant contends that action by the Respondents would take the form of an ambush and arrest which would infringe his right to liberty and at the same time amount to an infringement of his right to human dignity. Consequently, the same would subject him to inhumane and degrading treatment. Further that he had suffered immeasurable mental and psychological anguish and torture as a result of the media and public attention.

14. In the view of the Respondents, the matters currently in the media are nothing more than rumours and unsubstantiated claims. Further that the Applicant had not shown how the Respondents had or would infringe his rights in the event that he is investigated or arrested. After all, he had not been summoned to record a statement.

15. The Applicant bases the application on media reports detailing the NYS scandal. He is of the view that reference by the media of his Company as a shell is a clear breach of his rights and meets the threshold set out in the case of **Gladys Shollei(Supra)**. In that case, this court held that:

***“It is 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.”***

16. It is worthy to re-emphasize that the apprehension by an Applicant that his rights would be infringed if he is arrested must be based on tangible grounds and not merely rumours and unsubstantiated claims. This case represents a similar scenario as in the Gladys Shollei’s where

anticipatory bail was sought majorly on grounds of a media publication of a scandal. It is common sense to state that the news reports this far is from unknown sources. Even though the Applicant asserts that the Respondents are the source, that claim is unsupported by any evidence. And if they were published in a sensational manner, it is also reasonable to add that sensationalized news is intended to capture the reader's eye. Obviously, that is the news that sells. But it does not imply that the news represents all facts on the grounds. I add a rider that the Applicant is at liberty to seek redress against the media if he is of the opinion that such reports were malicious and unjustified. For purposes of this case, I make a finding that media reports do not amount to evidence that a court can rely upon.

17. If indeed as the Applicant asserts, he has conducted a legal and clean business with NYS, he has nothing to fear if any investigations are conducted. The documentation attached to the supporting affidavit in the application would form a good basis of defence should the police decide to charge him. It is at that point in time that he can demonstrate that indeed his company is not a shell company and that he never sold or delivered “air” to NYS. He shall also demonstrate that he has not done anything intended to freeze NYS.

18. At this point, I am unable to delve into the issue of whether or not the media reports have occasioned disrepute to his company, a matter that can be ably dealt with in a civil suit. He concedes that he has not been in contact with the Respondents. It is then immature to make a conclusion that the police are investigating him or are likely to arrest him. An eminent arrest can only be glanced from an on-going investigation or summons or a warrant issued in respect thereof. None of these circumstances obtains, rendering the court hard-hit to find that the application is merited. The Applicant has clearly failed to show an imminent breach or threat of breach of his fundamental rights and freedoms. He has tendered a case based purely on mere apprehension and unfounded rumours. To that extent there is nothing for which the court can come to his protection.

19. The court is pleased to note the Applicant's willingness to cooperate with law enforcement agents if any investigations will be conducted against the company. I then urge him to be calm until such a time that he or any other director of the company shall be required to record a statement or is summoned to assist with investigations. Having stated that he only did clean business with NYS should accord him no cause for worry as the truth shall set him free.

20. In conclusion, I cannot hesitate to find that this application is unmerited. It does not meet the threshold for grant of anticipatory bail to the Applicant. The same is dismissed with no orders as to costs. It is so ordered.

**DATED and DELIVERED this 25<sup>th</sup> day of May, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

*1. Mr. Wachira for the Applicant*

*2. M/s Kimiri for the Respondent*