



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPLICATION NO. 39 OF 2018

ERICK KOMBO.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATION.....1ST RESPONDENT

NATIONAL POLICE SERVICE.....2ND RESPONDENT

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

1. By Notice A Motion dated the 11th May 2018 brought under Article 19, 20 (3) & 4:21 (1), 22 (3) & 4, 29, 47, 49 (1) (h) and (2) & 50 (2) (a) of the Constitution of Kenya, 2010, Section 123 part 5 of Criminal Procedure Code, Cap 75 Laws of Kenya Section 5(2) of the Judicature Act Cap 8 Laws of Kenya the applicant seeks the following orders .

- i. Spent.
- ii. That pending the hearing and determination of this Application inter-partes the Honorable Court be pleased to admit the Applicant to anticipatory bail pending arrest.
- iii. That in the alternative, the Court releases the Applicant on his execution of a personal bond.
- iv. That costs of this Application be in the cause.

The application is based on the annexed affidavit of ERICK KOMBO MOSETI the Applicant and the following grounds:-

- i. That on 4th May 2018, officers from the CID'S office Kitale and their counterparts from Kisii came to the Applicant's office at Kisii to arrest him.
- ii. That since then, the officers have been hovering around the applicant's offices.
- iii. That the dispute between the complainant and Applicant is purely civil in nature and the complainant is using CID officers both at Kisii and Kitale to harass the Applicant.
- iv. That the Applicant needs to have his rights protected by this court.
- v. The Applicants faces imminent danger of redress of a denial violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights contrary to Article 23 of the Constitution of Kenya 2010.

2. The application is supported by the affidavit of the applicant and he deposes as follows; that he is a director of Transline Limited. On the 4th May 2018, he was informed that officers from Kitale and Kisii came to my office at Kisii to arrest me with regard to a transaction involving the purchase of a vehicle. That the officers have since been hovering around my office. That he intended to purchase a Motor Vehicle Toyota Hiace registration **KCL 745N** from **Smep Micro-Finance Bank** (hereinafter referred to as the bank) on behalf of Transline limited but due to unavoidable circumstances, one of them being his negative listing with the credit reference bureau (CRB), Smep Micro-Finance Bank he shelved the idea at the last minute. That the vehicle had been repossessed from a bank's customer who had been unable to fulfill his obligations. He had already deposited Kshs.450,500/= to a Kenya Commercial bank Account No.1103578235 in the name of Small Mirco Enterprise Programme in form of cheque 000613 kshs.250,000/= and a cash deposit of Kshs.200,000/= both transactions done on the 5th January 2018. That the Bank's Manager at Kitale Mr. Polycarp Odongo hatched a plan B and suggested to him that since the bank

will not process a refund, he takes immediate possession of the vehicle in the bank's custody. The bank manager further suggested to me to do a written Agreement with one Richard Mungai Kiarie who the Bank purported to be the co-owner of the repossessed motor vehicle number KCL 745N.

That he was informed the Mr. Odongo that he was acting for and on behalf of Transline Limited a registered company and could therefore could not agree to the Plan B. by then he had already deposited a substantial amount of money on behalf of the company to the Bank's account and for fear that the bank will never process a refund, he was left with no option but to agree to Plan B as suggested by Mr. Odongo in utmost good faith. But before the release or inspection of the said motor vehicle, Mr. Odongo requested him to deposit some extra payment of Kshs.95,000/= vide a postdated cheque number 000616 dated 15th January which he agreed to. That the earlier cash deposit of Kshs.200, 000/= was in the place of the postdated cheque number 000615 which the bank agreed to return to him as soon as the following Monday the 8th January 2018. On Saturday evening the 6th January 2018, Bank officials came up with another figure of Kshs.10, 000/= being storage fee. He gave them Kshs.3, 000/= in cash and Kshs.7, 000/= which he withdrew from an MPESA agent that the bank gave to him in the name of Seaman Invests Mega Centre Kitale. That he signed an already prepared agreement with Mr. Kiarie and the vehicle was released to him. He gave the vehicle to a Mr. Robert Tarus a broker from Eldoret to drive the same to Kisii but on the way, they detected that the vehicle was defective. He spent more than 14 hours on the road on a journey that normally takes a 5 maximum of hours to Kisii. Mr. Tarus, the broker confided to me that the vehicle had been vandalized by Mr. Richard Kiarie after he realized that the bank was going to repossess if for non-payment of a loan advanced to him. He tried to repair the vehicle but was in vain and he wrote to the bank informing them that had held a directors meeting and came up with a conclusion not to proceed with the arrangement. His company could not continue running a third party account held in the bank. That it was his understanding that the post-dated cheque no.000616 dated 15th January 2018 of Kshs.95,000/= should not have been deposited until the issue pertaining the condition of the motor vehicle and a proper valuation and assessment was conducted by a qualified personnel to give the actual value of the said motor vehicle. That cheque number 000615 of Kshs.200, 000/= that was replaced by a cash deposit on 5th January 2018, was to be sent to **Snep Micro Finance Bank's** office in KISII or alternatively was to be sent to our Kisii office situated at 1st Floor Hashi petrol Station main, Kisii-Migori Road since its value had already been paid for in cash. That the company could not finalized a transaction in respect of a defective vehicle and it was not safe dealing with a third party Loan Account which in itself is not only illegal but also dangerous. That his co-directors overruled him on proceeding with the transaction and proposed that the vehicle be sold to us at the correct market and value or alternatively, the same be returned to Kisii Branch of bank in the current condition and SMEP MICRO FINANCE BANK refunds all the monies deposited including expenditure as the company was not contented with the bank's plan B. That in the alternative it was proposed that the bank allows the company to repair the vehicle after valuation and assessment has been done and to pay the bank the balance directly in a single installment based on the valuation and assessment report and facilitate transfer of ownership immediately. That the bank manager proceeded to bank the cheques without the pending issues being sorted out and has now claimed that he issued him with cheques when there were no funds in the account. He knows that he had no capacity to transact on behalf of Transline Limited since it is a limited liability company and that he could not transact with the bank since he had not qualified for a facility. That the bank cannot therefore claim that he owes then since he has not received any funds from them and the vehicle that was handed over to him was not in a condition to be used since it has been grounded since and has caused myself expenses of almost Kshs.300,000/=. That the bank's branch manager of the Kitale Branch has sworn to teach me a lesson over unspecified sins and is now abusing police power to harass me. That numerous police officers have been hovering around my offices telling my staff that they want to arrest me. He has committed no crime to warrant his arrest. That he is apprehensive that the police officers from Kitale and Kisii are out to harass, intimidate and incarcerate me and it is honest belief that an arrest is imminent. That he faces imminent danger of redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights contrary to Article 23 of the Constitution of Kenya 2010 and seeks to be granted Anticipatory Bail.

3. The prosecution in response submitted that the applicant has constitutional safeguard and if arrested he will be granted bond and produced in court within 24 hours. That the apprehension of arrest must be real and that the annexures only show a dispute and his fear of arrest is from a bounced cheque. That a postdated cheque does not give rise to a criminal offence. That if the police are intending to arrest him for such an offence which does not exist then the Court can consider giving him anticipatory bail as to whether it will assist him he does not know.

DETERMINATION

4. The applicant states that the dispute between him and the complainant is purely a civil one in nature and that the complainant is using CID officers both at Kisii and Kitale to harass him. The applicant's rights are protected under **Chapter four** of the **Constitution of Kenya** which establishes the Bill of Rights and which guarantees rights and fundamental freedoms. The supporting affidavit filed by the applicant details the case he has with the Complainant which is purely a civil case. The applicant is apprehensive that he could be arrested. In my view the applicant's apprehension is not real. What he is facing is a possible civil suit but not a criminal case. His affidavit merely mentions he is being harassed with no much detail of the harassment. His alleged fears as explained in his affidavit have not persuaded me that he is entitled to anticipatory bail. As was submitted if at all he is arrested he will be granted bail and his counsel can address the court on the nature of the charges that will be preferred against him if all. I find no merit in his application dated the **11th of May 2018**. I decline to grant the ordered sought, the application is dismissed. No orders as to costs. It is so ordered.

Dated signed and delivered this **14th** Day of **June 2018**.

R.E. OUGO

JUDGE

In the presence of;

Miss Moguche h/b for Mr. Ochoki For the Applicant

Mr. Otieno For the 1st, 2nd and 3rd Respondents

