



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISCELLANEOUS NO. 27 OF 2018**

**1. JOASH MOGAMBI OINDO**

**2. SALOME LUDENYI MUNUBI.....APPLICANTS**

**VERSUS**

**1. INSPECTOR GENERAL OF POLICE**

**2. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS**

**RULING**

1. The Applicants filed similar but separate applications namely Misc Criminal applications Nos. 258/18 & 259/18 which were on 17<sup>th</sup> July 2018 consolidated for purposes of hearing. After transfer from the Criminal division they were registered as ACEC Misc. application No 27 of 2018.

2. In the Notices of Motion dated 12<sup>th</sup> June 2018 the Applicants seek the following orders:-

i. That the Applicants be granted anticipatory bail or bond before arrest and/or charge pending the hearing and final determinations of this application.

ii. Any further or other orders directions or write the honourable court considers appropriate in the circumstances to so grant.

3. The application is supported by the grounds on its face and the affidavits by the Applicants. A summary of the grounds and averments is that:-

i. The 2<sup>nd</sup> Applicant is the Director of National Land Commission in charge of valuation and taxation while the 1<sup>st</sup> applicant is the Deputy Director of National Land Commission in charge of valuation and taxation.

ii. They have been falsely accused by the Public, Media, Parliamentary Accounts Committee, the Land Environment and Natural Resources Committee of the Senate and the National Assembly; the Ethics and Anti-Corruption Commission of compulsorily acquiring public land when indeed the land was private land.

iii. That following the public interest that has been raised in this issue there is a high likelihood that the Police will arrest and charge them with fraudulent acquisition of land.

iv. That the media has already reported that the police are going to effect their arrest any time.

v. That the orders sought are necessary in protecting the Applicants' constitutional right to freedom of movement and liberty and no party would be prejudiced if the said orders were granted.

vi. Annexures **JMO- 1-4 & SLM – 1-4** which are documents in respect of the land acquisition were annexed to their affidavits.

4. When the application came for hearing M/s Ouko submitted that the Applicants were fearful of arrests and were asking for bail pending arrest. She argued that there was no knowledge as to when investigations into the compulsory acquisition of Land L.R. 209/7879/4 would be finalized. That the applicants could be arrested anytime hence the application.

5. The Respondents filed a replying affidavit by Mark Ndiema together with grounds of objection. A summary of the grounds and averments is as follows:

- i. That there is no demonstration of breach or threatened breach of the Applicants' fundamental rights by a state organ.
- ii. That the application is premature as the 2<sup>nd</sup> Respondent has not made any recommendation with regard to the prosecution of the Applicants.
- iii. That investigations are ongoing and several documents EACC 1-4 are in possession of the EACC which is undertaking the investigations.
- iv. That both Applicants have recorded statements with the EACC.

6. During the hearing M/s Nyamosi for the 2<sup>nd</sup> Respondent submitted that the 1<sup>st</sup> Respondent is not seized of this matter since it is the EACC that is carrying out the investigations. That they have not stated which state organ is harassing them. She argued that the Applicants could not stop investigators from investigating them as this would be contrary to section 5(1) of the National Police Service Act.

7. It was her submission that there was nothing wrong with arresting a suspect as long as no constitutional right is breached. She further argued that once investigations are complete necessary action would be taken. To her, this application is an abuse of the court process.

8. Mr Njeru also for the 2<sup>nd</sup> respondent referring to the case of **Samuel Muciri Misc. Cr. Case no 710 of 2002 [2004] 1KLR 520** submitted that anticipatory bail may only be granted where there is proof of breach of fundamental rights or fear of such breach. It was his submission that the Applicants have not shown any such breach for an ulterior motive or anything else. He argued that the mere fact of being called to record a statement did not amount to harassment. He cited the case of **Gladys Boss Shollei Misc. Cr. Application no 128/15 [2015] eKLR** and **Richard Makhanu Misc. Criminal No 10/14 [2014] eKLR** to buttress this. He added that a threat of interrogation does not amount to harassment.

9. He argued further that investigations are part of our law and cannot amount to breach of rights. That the Applicants had not shown any serious breach of their rights. In support of this he referred the court to the case of **Ben Chikamai & 2 Others Misc. Criminal application No 44 of 2013 – [2016]eKLR**.

10. In a rejoinder M/s Ouko submitted that in as much as the EACC is the one investigating the matter, it is the Respondents who will carry out the arrests and so the Applicants are properly before the court. She contended that anticipatory bail is granted where there is threat of an arrest and the authorities cited confirmed that. It was her argument that they had annexed documents showing what the Respondents were upto hence the need for bail so that the Applicants are not arrested or held in custody.

11. I have considered the application, affidavits, grounds of objection the submissions and the authorities cited. The basis of this Application is a fear by the Applicants that they will be arrested by the Police and placed in custody. Is that sufficient reason for this court to grant anticipatory bail?

12. In the case of **Samuel Muciri W' Njuguna v Republic** (supra) K.H. Rawal J (as she then was) and L. Kimaru J gave circumstances under which anticipatory bail would be granted. The court stated thus:-

**“..... the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of State of a citizen's fundamental right.”**

13. There is no dispute that there is an ongoing investigation into the compulsory acquisition of Land L.R. No 7879/4. There is also no dispute that the Applicants work for the National Land Commission (NLC) as Director and Deputy Director Valuation and Taxation Respectively. It is further not disputed that the NLC was involved in the acquisition of this land. Statements (EACC4 in both files) recorded by the Applicants were annexed to the replying affidavit by Mr. Mark Ndiema.

14. Besides the recording of these statements there is no allegation raised against the EACC, Police & DPP in respect to breach of any rights or threats of arrest. The 1<sup>st</sup> applicant at paragraphs 10 & 11 of his supporting affidavit states:

*10. THAT based on the attention that the transaction has caught the eyes of the public, media and Parliamentary accounts commission, Land, environment and natural resources committees of both the senate and the National Assembly, the ethics and Anti Corruption commission there is high likelihood that the police will arrest and charge me with fraudulent acquisition of land.*

11. That the media has already reported that the police are going to effect my arrest any time.

The same averments are replicated by the 2<sup>nd</sup> Applicant at paragraphs 10 & 11 of her supporting affidavit.

15. All that the Applicants are relying on to make this application are Media reports and public comments. They have not been threatened by anyone or any State organ with any form of arrest. Had that been the case they could have said it. The matter in issue is being investigated by the EACC which is not a party herein. Even if the EACC was a party to these proceedings neither the court or even the Applicants can monitor it to know how far they are with the investigations and when they will complete them.

16. I would wish to echo what Justice Achode said in the case of Kelvin Okore Otieno vs Republic Nrb High Court Criminal Revision no 207 of 2013 She stated thus:

**“ 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 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.**

17. Arrest of an individual *per se* is not a breach of his/her right to freedom of movement and liberty. In this case the Applicants had to show how their constitutional rights to freedom of movement and liberty have been breached or threatened with breach. The organs of state charged with the duty of investigating this matter should be given an opportunity to carry out the investigations to their rightful conclusion. If there shall be need for them to carry out any arrests Article 49 of the Constitution has put in place safeguards for any arrested persons.

18. After due consideration of all the material before me, I have found that the Applicants have not demonstrated any breach of their rights to warrant the issuance of the Orders sought. I therefore find the application to be without merit and I dismiss it.

**Dated, signed and delivered this 23<sup>rd</sup> day of July 2018 in open court at Nairobi.**

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**HEDWIG I. ONG’UDI**

**JUDGE**