

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANOUS CRIMINAL APPLICATION NO. 67 OF 2016

**IN THE MATTER OF AN APPLICATION FOR BAIL UNDER ARTICLE 19,20,21,22 AND 29
OF THE CONSTITUTION AND UNDER SECTION 123 OF THE CRIMINAL PROCEDURE
CODE AND ALL THE ENABLING PROVISIONS OF THE LAW**

JOSEPH MUNYWOKI KIVUNZYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant has filed an application by way of a Notice of Motion dated 12th July 2016 seeking orders that he be admitted on bail before arrest and on his own personal bond, and that the State through the Directorate of Criminal Investigations through its agents either in Makueni or otherwise be restrained from arresting and/ or detaining the Applicant on the basis of the report made vide OB NO. 18/1/7/2016 at Makueni Police Station.

The Applicant in his supporting affidavit sworn on the same date explained that he is an employee of Gold Crown Beverages (K) Limited and is employed as the said Company's Eastern Region sales representative, and that some of his customers have not been paying for their deliveries in time with the total amount of money owed by the said customers as at 2/7/16 being Kshs 294,904/=. Further, that the said company started making demands to the Applicant that he pays the company the due amount, and thereafter follow up with the customers to pay him. The company through its agent one Moses Opiyo, then made a report of stealing by agent at the Directorate of Criminal Investigations at Makueni (hereinafter referred to as the 'DCI') vide OB NO. 18/1/7/2016.

Pursuant to that report, the Applicant was summoned to the DCI on 2/7/16, and he went there accompanied by his wife one Irene Munini Matheka, and whereupon the DCI threatened to lock him up in the cells. The Applicant's wife was under duress and coercion consequently compelled to draw a cheque in favor of Gold Crown Beverages (K) Ltd of Kshs. 294,904 of the same date. The said cheque on presentation was not honored by the bank for want of a dequate funds. The Applicant averred that the DCI as a result are now looking for him to arrest him for issuing a bad cheque, and that in order to avert the said arrest, the Applicant has already paid the complainant a total of Kshs. 162,904/=, which sums he contends were unduly and unprocedurally paid and ought to be recovered as he owes the complainant nothing.

The Applicant is therefore under a reasonable apprehension of imminent arrest and detention, and avers that he is ready to report to any police station if is so required and to appear in court to face any charges that may be brought against him.

The Applicant also availed to the Court detailed submissions dated 16th February 2017, in which reliance was placed on Article 27 of the Constitution which provides for equality and freedom from discrimination, and Article 29 (a) which provides for freedom and security of the person. Further, that the officers who arrested the Applicant herein did so unlawfully since there were no specific charges against him in contravention of Article 49 of the Constitution which states that an arrested person has the right not to be compelled to make any confession or admission that could be used in evidence him or her. It is the Applicant's contention that the Director of Criminal Investigation is looking to have him arrested since the cheque that was signed under undue influence was bad.

Furthermore, that there was great injustice and the Applicant is therefore bound to suffer mental anguish and turmoil should he be arrested over an inexistent "civil debt". Reliance was placed on the decision of the Court of Appeal in **The Commissioner of Police and The Director of Criminal Investigations Department & Another vs. Kenya Commercial Bank Limited & 4 others, Civil Appeal No. 6 of 2012**, where the court found that the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute.

Lastly, the Applicant stated that he is apprehensive that the Respondent will continue violating his fundamental rights and freedoms by forcing them to admit to intended charges to enable the police to arrest them. Hence his prayer for bail or anticipatory bail pending intended arrest and arraignment in court, which is a right enshrined under Article 49 (1)(h) of the Constitution and section 123 (1) of the Criminal Procedure Code.

I have considered the applicant's application and note that anticipatory bail is usually granted where there is alleged to be serious breaches by a state organ as held in **W'Njuguna versus Republic, [2004] 1 KLR 520**. While the Applicant has submitted that he is in imminent danger of being arrested, I am not persuaded that the Applicant has demonstrated the likelihood of any serious breach of his rights by the police, to warrant the granting of the orders sought. This is for reasons that the Applicant has not given any particulars or details of the coercion, duress and undue influence that he alleges was placed on him, for this Court to be able to make a determination if indeed there was an infringement of his rights and the nature of that infringement.

In addition, while the Applicant is entitled to equal protection before the law under the Constitution, the actions of the police in investigating any complaint lodged against the Applicant or his wife is also equally a lawful step, and cannot be said in itself to violate the Applicant's rights. Lastly, the Applicant will still have the right to apply for bond upon arrest, and in my view the application for bond at this stage is premature and speculative, particularly as the Applicant has indicated that he has been paying his employer the amounts demanded.

The prayers sought in the Notice of Motion dated 12th July 2016 are accordingly denied for the foregoing reasons with no order as to costs.

Orders accordingly.

DATED AT MACHAKOS THIS 21ST DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE