

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO 238 OF 2017

DANIEL MOKUA MASEBI & OTHERS.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The 1st Applicant by way of Notice of Motion dated 18th August, 2017 prays to be admitted to anticipatory bail pending his arrest on allegations of committing a fraud. The application is brought under **Articles 22, 23, 25, 28, 29, 39, 47 and 50 of the Constitution of Kenya, Section 23(3) of the Criminal Procedure Code**, inherent jurisdiction of this court and general principles of natural justice and the rule of law. The application is supported by the affidavit of 1st Applicant sworn on 15th August, 2017.

Learned counsel for the Applicant, Mr. Amito argued that the police from Parklands Police Station are harassing the 1st Applicant by intending to arrest him on circumstances which disclose a civil case as opposed to a criminal offence. She gave a brief history of how the 1st Applicant and the 1st Respondent entered into a verbal contract in March, 2017 by which the 1st Respondent was to supply equipment for harvesting and transporting electric poles from Bomet. In turn, the 1st Applicant was to provide money. The latter provided the money as required but the 1st Respondent withdrew the equipment from the site save for the tractor which, it was submitted, was being held at Bomet Police Station at the instance of the 1st Applicant. According to the counsel, the cause of action arose within the jurisdiction of Bomet Police Station and not Parkland Police Station. Therefore, the 1st Respondent was using Police from Nairobi to intimidate the 1st Applicant so that he could be charged with a criminal offence of defrauding the 1st Respondent to the tune of Kshs. 8,000,000/=. It was submitted that the circumstances of the case demands that the 1st Respondent files a civil suit rather than a criminal complaint. The 1st Applicant adds that he is ready to cooperate with the police and would attend the court when and if required.

Learned State Counsel, Miss Aluda opposed the application. She submitted that police investigations had disclosed that the 1st Applicant had defrauded the 1st Respondent a sum of Kshs. 8,000,000/= He has been going underground with the intention of not paying the 1st Respondent which prompted the latter to report the matter to the police. Furthermore, the 1st Applicant had in addition obtained restraining orders barring the 1st Respondent from repossessing his tractor. It was the counsel's submission that the police are acting within the confines of the law in both investigating the case and intending to charge the 1st Applicant. It was urged that the application be dismissed.

I have accordingly considered the application and the respective rival submissions. In an application of this nature, the Applicant must demonstrate that if the police arrested him, his constitutional rights to liberty will be violated. That is to say that anticipatory bail will usually only issue where it is alleged that there exists serious breach of a person's rights by a State organ. See **Richard Makhanu vs Republic-Bungoma High Court Misc. Cr. No. 10 of 2015** and **Erick Mailu vs Republic and 2 others-Nairobi Misc. Cr. App. No. 24 of 2013**. The court must thus determine whether in the present case there is a serious breach of the 1st Applicant's right by a State organ through the acts of the police intending to arrest him. Should the court find affirmatively, appropriate remedy would issue aimed at protecting the

fundamental rights and freedoms of both Applicants. Needless to say, anticipatory bail will not issue in circumstances that an Applicant labors from mere apprehension of issues that cannot be substantiated or where the fear of breach of the rights is not real or demonstrable or where the constitutional and statutory obligations of a State organ are likely to be curtailed. After all, courts must operate in tandem with other stake holders who facilitate them to realize their objectives. That is to say that it is not the duty of the court to make the work of the police difficult by barring them to arrest suspects where on investigations, they reasonably believe a person has committed an offence and should therefore be arrested and charged accordingly. Furthermore, it must be borne in mind that the process of criminal justice in investigations entails arrest of suspects for purposes of getting information from them and processing them to court. Therefore, unless there is very good reason to stop police from arresting a suspect, anticipatory bail should not issue. Needless to say, our progressive Constitution provides for safeguards against arbitrary arrests and confinements. Where this is defied, our very Constitution and others laws provide for means of seeking redress.

In the present case, the 1st Applicant's case is that the circumstances behind his intended arrest disclose a civil case as opposed to a criminal case. However, this has been refuted by the 2nd Respondent who argues that investigations have been carried out which have disclosed a criminal offence for which they intend to charge the 1st Applicant. As a court, it is difficult at this point to discern the exact evidence the police have in their case. In any case, it does not always follow that because some civil elements are established in a case, the police are barred from filing a criminal case. My take on this is that the two issues can only be distinguished once the evidence is adduced in court. Should it arise that the same establishes a civil case, I have no doubt in my mind that this will acquit the Applicants. As at now, I am unable to rule in favour of the Applicants because doing so would be tantamount to crippling the smooth process of police investigations. Furthermore, since the 1st Applicant has submitted himself to the authority of police and court, he can as well voluntarily go to the police station to record a statement. Thereafter, the police can do the needful.

The upshot of my observations is that the Applicant has not demonstrated any breach of his constitution rights or freedoms by the police or any State organ. The application lacks merit and the same is hereby dismissed with no orders on costs.

DATED and DELIVERED this 17th day of August, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Amito for the Applicant

2. No appearance for the Respondent