



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 279 OF 2017

ZULFIKARALI ISMAIL MOHAMMED.....APPLICANT

VERSUS

S.M. MUNIKAH T/A MUNIKAH AND CO. ADVOCATE.....1ST RESPONDENT

GATHERU GATHEMIA, ADVOCATE.....2ND RESPONDENT

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

RULING

Background

The applicant made an application to this court by way of Notice of Motion dated 22nd of September, 2017 under **Articles 20 (2) and (4), 24, 47, 50, 159, 244 of the Constitution of Kenya and Sections 1A, 1B, 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules**. He sought orders to bar the 1st and 2nd Respondents from arresting, harassing and intimidating him.

The application is based on the grounds that;

1. His belief that the 1st and 2nd Respondents seek to have him arrested in regard to alleged forged documents that were produced in civil case, being **E&L Court Case No. 24 of 2008**.
2. That the 1st and 2nd Respondents seek to obstruct and hinder him from carrying out his duties as an officer of the court with specific regard to **ELC Misc. No. 24 of 2008 Dusan Construction Co. Ltd vs. S.M. Munikah t/a S. M. Munikah and Co. Advocates**.
3. That the Environment and Land Court had granted him protection from being arrested on the 11th of September, 2017 for a period of Seven (7) days pending a subsequent application for further protection (Annexed and marked ZM-2).
4. That the application mentioned above was followed by some unpleasant utterances by the 2nd Respondent, " *I will get you somehow.*"
5. That the 1st and 2nd Respondents never challenged or raised an objection on the production of the "QUITCLAIM BILL OF SALE" and only alleged the document was forged on the 11th of

September, while the Applicant was prosecuting an earlier dated application.

6. That the forgery has not been proved and the document is valid and was lawfully executed in the State of California before a Notary Public (Annexed and marked ZM-1).

7. That the affidavit of the 2nd Respondent confirmed that there was a letter by the National Police Service dated the 11th of August, 2017 that the matter was already forwarded to the Police.

The application is supported by the affidavit of the Applicant sworn on the 22nd of September, 2017.

Response and Grounds of Opposition

The Respondents opposed the application. The 1st and 2nd Respondents were represented by learned counsel, Mr. Makori. Learned Counsel relied on the affidavits sworn by Gatheru Gathemia Advocate on the 25th of September, 2017 and Samson Masaba Munika Advocate filed on the 26th of September, 2017. He submitted that the powers of arrest do not lie with either the 1st or 2nd Respondents and that therefore the relief sought should be referred to the 3rd Respondent. He added that there was no evidence of harassment of the Applicant by either the 1st or 2nd Respondents to warrant the grant of the relief sought. Counsel submitted that the alleged utterances that were made were not corroborated by any other person and were therefore false. Mr. Makori also added that there was no evidence that the Applicant was summoned by any police who cannot charge anyone before conducting and completing investigations.

Counsel submitted that the Applicant alleged that he was being harassed by the Respondents because of documents that were produced in the afore stated civil case. He referred the court to annexure GG2 on the 2nd Respondent's Supporting Affidavit which was a document examiner's report prepared in July, 2017. The same confirmed that the document was attested by persons who were deceased and was therefore a forgery. The document was adduced by the Applicant's client. Accordingly, the Applicant should assist the police with investigations. He added that this fact was brought to the attention of the judge hearing the civil suit but no action was taken.

The 3rd Respondent was represented by learned State Counsel, M/s Nyauncho. She relied on her Grounds of Opposition filed on the 25th of September, 2017. She submitted that the Applicant had not made any reports of the accusations of forgery to the police. He had also not reported or recorded a statement of his harassment by either the 1st or 2nd Respondents. That therefore no police officer would arrest him. Furthermore, the 1st and 2nd Respondents had no power or authority to effect such an arrest. In addition, counsel submitted that the Applicant had not demonstrated that he faced any threat of imminent arrest to warrant the orders sought.

With regard to the alleged forged document, Miss Nyauncho submitted that if the document examiner concluded that the document was indeed a forgery, the Applicant would go through due process of investigations before he is charged in case he is found culpable. And once charged, he would be produced before a court of law within 24 hours as the Constitution provides. He would also be availed the right to bail as the law provides. It was her view that the application was unmerited and urged the court to dismiss it.

Determination

After considering the rival submissions, I find this application directed against the 1st and the 2nd Respondents. Until the court advised the Applicant to enjoin the 3rd the Respondent so that it can be seized of jurisdiction, the matter was purely civil in nature. But even after the amendment of the Motion, the prayers sought are still directed against the 1st and the 2nd Respondent; that the court restrains them from arresting or intimidating or harassing him. Further, they be restrained from obstructing, hindering or preventing him from carrying out his duties as an advocate.

It is common knowledge that an ordinary member of public has no powers of arrest unless in cognizable instances. Thus, if the Applicant feels that the 1st and 2nd Respondents have wronged him in any way, which wrong would constitute a criminal offence, he should report to the police for necessary action. Again, as he submitted, the harassment arose within the course of proceedings in the afore stated civil matter by words allegedly uttered by the 2nd Respondent. To that extent, he should have sought an injunctive/restraining order against the 2nd Respondent in the civil matter. Again, if he felt that the words resulted in threat that constituted a criminal offence, he was free to make a report with the police for necessary investigations. On his assertion that the two Respondents are obstructing him from carrying out his professional duties as a lawyer, it is a fact that such a complaint can be raised with the necessary legal professional body.

The above notwithstanding, since the 3rd Respondent was enjoined in these proceedings, and although the prayer for anticipatory bail was not sought, the court will address itself as to whether he is entitled to anticipatory bail. Anticipatory bail is only granted under specific circumstances as set out in **W’Njuguna v. Republic [2004] 1 KLR 520**;

“The right to anticipatory bail has to be called out when there are circumstances of serious breaches of a citizen’s rights by an organ of the State which is supposed to protect them.”

The onus of proving such harassment occasioned against the Applicant by the Police lies with the Applicant himself. The mere mention that the police are investigating a case of forgery does not in any way amount to harassment. After all, it is the duty of police to do investigations of any complaint made to them and if investigations reveal criminal culpability, they take necessary action by charging the culprit. Issuing orders against police intended to halt their work would amount to an interference with their work. That is not the duty of the court. Instead, courts should complement other organs in the criminal justice sector by appreciating the work they do. Court’s interference would only come in handy when it is demonstrated that State organs are exceeding their mandate in executing their duties. This threshold has not been met in this case. No evidence has been laid to show that any police officer or a representative of the police has harassed the Applicant. Indeed, no report of any threat to the Applicant has been made to the police. The mere apprehension of arrest does not amount to violation of the rights of an individual.

I accordingly find that the Applicant has not at all demonstrated that there exists any threat to his rights to fundamental freedom or that his fundamental freedom has been violated to warrant the grant of the orders sought. In sum, he has failed to demonstrate what rights the Police or the 1st and 2nd Respondents have violated. The application is hereby dismissed with no orders as to costs.

DATED AND DELIVERED THIS 29TH SEPTEMBER, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Applicant present in person.*
- 2. Makori for the 1st and 2nd Respondent.*
- 3. M/s Akunja for the 3rd Respondent.*