



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO. 54 OF 2016**

MUSAU NDUNDA .....1<sup>ST</sup> APPLICANT  
GENARD NYAGA.....2<sup>ND</sup> APPLICANT  
DAVID MAKORI NYAMBANE.....3<sup>RD</sup> APPLICANT  
CHRSTOPHER TENGE.....4<sup>TH</sup> APPLICANT  
MICHAEL NJOMBITA.....5<sup>TH</sup> APPLICANT

**VERSUS**

INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT  
DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

**RULING**

By Ex-Parte Chamber Summons dated 10<sup>th</sup> February, 2016, the Applicants pray for the following main orders:-

- a. That they be granted anticipatory bail pending arrest for any bailable offence and return of summons.
- b. That on a day to be appointed by the Honourable Court the 1<sup>st</sup> and 2<sup>nd</sup> Applicants who are the National officials of Kenya National Parents Association residents in Nairobi and the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Applicants who are branch officials of the Association resident in various Counties beyond Nairobi do pursuant to any legitimate process competent against them subject to formal proceedings thereof including charge and caution if necessary without necessarily being taken into custody.
- c. That a day be appointed by the Honourable Court for all the Applicants to appear in Court for purposes of trial if criminal charges are preferred against them.
- d. Any further orders the Honourable Court may deem fit to grant.

It is brought under Articles 49, 50, 159 and 169 of the Constitution of Kenya 2010, Sections 123 and 124

of Criminal Procedure Code and Section 131 of the National Police Officers Service Act as read with the Standing Orders and all other enabling provisions of the law. It is further supported by the affidavit of Musau Ndunda the 1<sup>st</sup> Applicant herein on his behalf and on behalf of the other Applicants sworn on 10<sup>th</sup> February, 2016.

The background to this application is a letter dated 1<sup>st</sup> February, 2016 by Fred Matiang'i, Minister of Education, Science and Technology to Mr. Ndegwa Muhoro, the Director, Criminal Investigations Directorate requesting the addressee to commence investigations into possible criminal activities by the officials of the Kenya National Parents Association. According to the Minister, he believed that there was a possibility of existence of criminal activities perpetrated by the officials of the Kenya National Parents Association in the following manner.

- a. Collecting monies from parents, schools and education officials by menaces and coercion without any lawful cause.
- b. Receiving money from educational officials through false pretence, which is a criminal act.
- c. Harassing and intimidating Ministry officials through real and imagined litigation process in a manner aimed at disrupting the smooth running of schools and accountability for resources.
- d. Possible non-compliance with the requirements of the Societies Act, under which the association is registered, by failing to submit annual returns complete with audited accounts.

In addition, the Cabinet Secretary requested the Principal Secretary for Basic Education to write to all County Directors of Education (CDEs) to avail any additional evidence in writing through his office. The letter was copied to Mr. Joseph Kinyua, Chief of Staff and Head of Public Service, State House, Mr. Githu Muigai, Attorney General, State Law Office and Dr. Belio Kipsang, Principal Secretary, State Department for Basic Education Ministry of Education, Science and Technology.

According to the Applicant, the administrative process by which the investigations have been commenced is extremely unfair and prejudicial to them. More importantly is that, although the Minister is calling for investigations into how they have been collecting money from parents, schools and education officials and harassing those persons in the process of collecting the money, they had been given authority by the same Minister to receive the money. Hence, it cannot be deemed as a crime that they received the same monies. Furthermore, it would appear the Applicants are being coerced to incriminate themselves for offences they did not commit.

It is further the case for the Applicants that the Cabinet Secretary in the Ministry of Education, Science and Technology by a letter dated 25<sup>th</sup> January, 2016, to the 1<sup>st</sup> Applicant informing him of revocation of authority to form parents associations was in utter disregard of a High Court Order in **Nairobi High Court Constitutional Petition No. 424 of 2014**. The order is marked as annexure MN5 to the Supporting Affidavit and was issued on 17<sup>th</sup> September, 2014, by Hon. Justice Odunga, restraining the then Cabinet Secretary, Ministry of Education, Science and Technology, Principal Secretary Department of Education, Dr. Belio Kipsang and the Attorney General by themselves, their servants, agents, or persons acting under their authority from suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees at the school level and or in any way whatsoever from interfering with the Applicants' (therein) rights to conduct and supervise election of the School Parents Association, Sub-County Parents Association, County Parents Association and National Parents Association pending the hearing and determination of the petition. The Petitioner therein was the Kenya National Parents Association through the Secretary General who is the 1<sup>st</sup> Applicant herein. By the aforementioned letter dated 25<sup>th</sup> January, 2016, the Cabinet Secretary was advising the 1<sup>st</sup> Applicant that the Kenya National Parents Association was not an umbrella body of parents associations anticipated under the **Basic Education Act No. 14 of 2013**, hence his advice on revocation of authority to form parents associations. In the view of the Applicants, on the strength of the order of Hon. Justice Odunga, the Kenya National Parents Association conducted elections countrywide for school parents associations which culminated in national elections on 30<sup>th</sup> January, 2015. The appeal was heard in its entirety and unfortunately dismissed on 5<sup>th</sup> January, 2016. An Appeal was filed before the Court of Appeal. According to the Applicants therefore, the Cabinet Secretary, Ministry of Education, Science and Technology wrote the letter

requesting for investigations against them as a revenge against them as opposed to responding to the issues raised in the Constitutional Petition. The Minister was therefore, abusing and misusing his powers by fabricating charges against the Applicants.

Finally, it was the case for the Applicants and as submitted by their Learned Counsel, Mr. Wamalwa that the complainant to any criminal charges against them ought to be the Director of Public Prosecutions as opposed to the Cabinet Secretary in the Ministry of Education, Science and Technology. However, according to the counsel, the Applicants were willing to face any charges against them and will be willing to present themselves to a Police Station for that purpose at a time appointed by the court. However, they decay unfortunately, the process by which they are being subjected to the criminal charges.

Learned State Counsel Ms. Wario opposed the application. She submitted that there was no danger of eminent arrest against the Applicants so far, as the same as not been executed since the complaint letter was written. In any case, the application makes reference to election of office bearers of the Kenya National Parents Association which has no relationship with the recommended investigations against the applicants. The investigations revolve around unlawful conduct of officials of the Kenya National Parents Association. As for the association itself, the investigations are about non-compliance with the Society's Act. With regard to the latter, although the Applicants allude under paragraph 8 of the Supporting Affidavit they have filed returns with the Registrar of Societies, no documentary evidence was tendered in support thereof. Finally, Ms. Wario submitted that the police are legally mandated to conduct investigations against any complaint raised and that the Applicants ought to cooperate with the police. They have a choice to present themselves to a police station for purposes of recording statements.

The main prayer in this application is for anticipatory bail in respect of the Applicants who are apprehensive that they may be arrested and charged with criminal offences pursuant to the complaints made by the Cabinet Secretary in his letter of 1<sup>st</sup> February, 2016 to the Director of Criminal Investigations (Annexure 2). The law is now settled that anticipatory bail shall be granted only when an Applicant demonstrates that his constitutional rights have been violated or are likely to be violated. See the case of **Richard Makhamu vs Republic, Bungoma High Court Miscellaneous Criminal Case No. 10 of 2015** in which a concurrent court held that:

***“with regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches by a State organ. In the case of W’Njuguna vs Republic, Nairobi Miscellaneous Case No. 710 of 2002, (2004) 1 KLR 520 the court held that anticipatory bail can be granted:***

***“..when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”***

Similar words were echoed in the case of **Richard Mailu vs Republic and 2 others Nairobi Misc. Criminal Application No. 24 of 2013** which emphasized that anticipatory bail shall only issue where there is serious breach of a citizen’s rights by organ of State. It is then salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen as enshrined in **Chapter 4 of the Constitution**. Needless to say, anticipatory bail will not issue where the Applicant labours under apprehension founded on fear and unsubstantiated claims or with a view to preempting lawful investigations by legally constituted investigative bodies. In the present case, the Applicants allude that the process through which the investigations have commenced are unfair and vindictive. To them, the Cabinet Secretary has no mandate of requesting the Director of Criminal Investigations to commence the investigations as that is the mandate of the Director of Public Prosecutions. Moreover, the Cabinet Secretary himself is calling on complaints from all over the country specifically from County Directors of Education to avail any additional evidence for purposes of condensing the intended charges against the Applicants. That, according to the Applicants is very unfair because they are being accused of offences for which evidence has not been availed.

From the outset, this court emphasizes that it is not true that only the Director of Public Prosecutions (DPP) can make a complaint on a criminal matter. A complainant can be made by any person or any

entity that is aggrieved by an unlawful act of a criminal nature by a suspect. The mandate of the DPP is to recommend investigations and prosecute cases. That role is clearly spelt out under **Article 157 (6)(a) of the Constitution** which provides that the DPP shall institute and undertake criminal proceedings against any person before any court other than a Court Martial in respect of any offence alleged to have taken place. Under Article 157(4), he is further mandated to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General will comply with any such direction. From these provisions, it is clear that the Director of Criminal Investigations who works under the Inspector General of National Police Service can, following any complaints of any criminal conduct commence investigations. The complainants would definitely include, but not limited to, any Kenyan citizen or legally established institutions and the persons under whom those institutions work. Therefore, the Cabinet Secretary, Ministry of Education, Science and Technology was within his right to file a complaint with the Director of Criminal Investigations. It is then up to the latter to conclude his investigations after which he would recommend to the DPP whether or not there is enough evidence to charge the Applicants. If this court were to issue the anticipatory bail, it would amount to hampering the due process of investigations for which the police are mandated to do. The Applicants have the option in the company of their lawyers to present themselves to any Police Station to record any statement relating to the complaint made. In any case, given the facts of this case, it is clear that so far, the Police have neither summoned them to record statements nor informed them that they are likely to be charged. I believe the investigations are at a raw stage and that the Applicants are only suffering from unfounded apprehension that they can be arrested at any time. Besides, an arrest of a suspect comprises a part of the process of investigations. But since the Applicants are aware of the matter, the best they can do is to present themselves to the police to record statements.

Be that as it may, I have often said and emphasized that the Constitution provides for safeguards against arbitrary arrests by Police because a suspect can only be held in police custody for not more than 24 hours before he is arraigned in court. And should the police choose to violate the Constitution, the same Constitution provides for avenues for seeking redress against such arbitrary arrests and incarceration in police custody. This court is impressed to note that the Applicants are willing and ready to cooperate with the police if summoned to help with investigations. The choice is theirs given my above observations.

Regarding the strength of the evidence likely to be adduced in the trial, it is not the obligation of this court to determine its veracity. Should the Applicants be charged, they shall be given an opportunity to defence themselves. It will also behoove the prosecution to prove their case to the required standards. I am, in the circumstances, unable to comment on whether or not the Applicants unlawfully collected any monies from parents and schools or whether they have been filing Returns with the Registrar of Societies. Let me also emphasize that the fact that the Applicants have filed an appeal before the Court of Appeal against the judgment in the Constitutional Petition is not, of itself, a bar to the DPP preferring any criminal prosecution against them.

In the circumstances, and in view thereof, I hold that the Applicants have not demonstrated that any of their fundamental freedoms and rights have been infringed or are likely to be infringed or violated to warrant the granting of anticipatory bail.

The application is accordingly dismissed with no orders of costs.

**DATED and DELIVERED** this 25<sup>th</sup> day of **FEBRUARY, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Wamalwa for the Applicants.*
2. *M/s Wario for the Respondent.*

