



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO.161 OF 2016**  
**JAMES OGOTI AGATA .....APPLICANT**  
**VERSUS**  
**INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**  
**AND**  
**KIPUNEI OLE TUNTA.....INTERESTED PARTY**  
**RULING**

By Notice of Motion dated 4<sup>th</sup> May, 2016, the Applicant and the Interested Party prays to be granted anticipatory bail pending arrest or charge on terms that the court may deem fit to impose. They also pray that the Respondents by themselves, agents, servants or police officers acting in their authority be prohibited from arbitrarily arresting or detaining them in contravention of their right to freedom.

The ground on which the application is premised is that the Police have threatened to arrest both the Applicant and the Interested Party on an issue that is purely civil and has no criminal element. In the submission by the counsel for the Applicant it was stated that the Applicant who is an Advocate of the High Court of Kenya represented the complainant and the Interested Party in preparing and executing a sale agreement in respect of sale of a parcel of land situated in Kajiado. The title to the land was genuine but a dispute arose on the location of the land which is not the location the complainant (*purchaser*) was shown by the Interested Party (*vendor*). According to the Applicant, he was only an agent between the parties and cannot be held criminally liable for any omission or commission for an act done in that capacity.

Learned State Counsel Ms. Nyauncho opposed the application. She submitted that the Police had no intention whatsoever of arresting the Applicant. All that he was required to do was to record a statement on his role in the transaction which he did. She submitted that once the investigations were complete, the person most likely to be charged was the Interested Party. In that case, the Applicant would be a witness in the trial. Furthermore, the police had not in any way harassed the Applicant by merely summoning him to record a statement.

I have accordingly considered the application and the respective submissions. It is trite that anticipatory bail will only issue where an Applicant demonstrates that his right to freedom has been infringed or is likely to be infringed on by a state organ. In the present case, the only allegation fronted by the Applicant against the Respondents is that the police are likely to charge him for an offence which he did not commit. He rightly states that he was the advocate between the complainant and the Interested Party in the sale agreement. The police have categorically stated that they have no interest in charging him. I have no reason to doubt that statement coming from their legal representative. Although the counsel appearing on record for both the Applicant and the Interested Party submitted that the Interested Party too should not be charged, I wish to emphasize that this court cannot curtail the police from carrying out any investigations comprising the transaction between the complainant and the Interested Party. I believe the investigations would involve finding out whether the Interested Party received the money from the complainant by deceit. Should the police find the Interested Party culpable, they would be at liberty to arraign him in court. Whether or not there exists a civil element in the transaction is not, of itself, a bar to the police preferring criminal charges against him. The guilt or otherwise of the party charged is a matter to be determined by the trial court. I do not in the circumstances, find merit in this application.

In the upshot, the application herein is dismissed.

**DATED and DELIVERED this 19<sup>th</sup> day of MAY, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Ayego holding brief for Mr. Obare for the Applicant and the Interested Party.*
2. *Mr. Warui for the Respondent.*