

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.144 OF 2016

FRANCIS MWANIKA NJUGUNA.....APPLICANT

VERSUS

THE HON. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

By Notice of Motion dated 15th April 2016, the Applicant sought to be granted anticipatory bail by this court as he was apprehensive that he would be arrested by the police in respect of a complaint lodged by his brother on allegation that he had stolen some trees belonging to his said brother. The Applicant was apprehensive that he would unnecessarily be incarcerated by the police pending his production in court with a view to intimidating him to accept a proposal made by his brother in relation to how a parcel of land belonging to their father would be sub-divided. The Applicant averred that there was a pending case before the Environment and Land Court (ELC No.209 of 2013 Samuel Muciri W’Njuguna –vs- Francis Mwanika Njuguna & Winfred Mumbi Maina) which is yet to be heard and determined. The Applicant stated that if the police had any case against him, then he should be requested to appear in court without being detained in police custody. Other grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Applicant.

The application is opposed. The State filed grounds in opposition to the application. The State was of the view that the application was misconceived as the Applicant’s rights had not been infringed by any State organ; that the application was an abuse of court process as the reasons given in support of the application were based on mere allegations; that the orders sought were untenable in law as the same were based on unsubstantiated fears. The grounds in support of the application and in opposition to the application were amplified by Ms. Gaithuma for the Applicant and by Ms. Sigei for the State.

This court has carefully considered the rival submission made by the parties to this application. It has also considered the grounds put forward by the Applicant in support of his application. It was clear to this court that the Applicant is justified in being apprehensive that he may unnecessarily be placed in custody by the police before his arraignment in court on account of a long standing land dispute between the Applicant and his brother. The argument advanced on behalf of the State that the Applicant was improperly before this court or that his application had no legal foundation is not supported by evidence. What is apparent from the evidence that the Applicant put forward by way of affidavit is that he is justifiably apprehensive that his fundamental right to freedom may be infringed if the court does not issue an appropriate order to remedy the same. Under **Article 22(1)** of the **Constitution**:

“Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

In the present application, this court is of the view that the police can still investigate, and where the commission of a crime is established, have the Applicant charged in court without the necessity of having the Applicant arrested and placed in police custody pending his arraignment in court.

In the premises therefore, this court finds the Applicant's application has merit. He is granted anticipatory bail on the following conditions:

I. He shall present himself before the police, either in person or accompanied by his lawyer, for the purposes of assisting the police with investigations. He shall do so within seven (7) days of today's date.

II. If the police decide to charge the Applicant, he shall be issued with notice to appear before court to take plea to the charge. In that regard, this court hereby grants the Applicant personal bond of Kshs.100,000/- to secure his attendance before court should he be charged.

III. The court that shall take plea (if the Applicant is charged) shall be at liberty to issue or grant bond or bail terms that it deems fit in the circumstances.

It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF MAY 2016

L. KIMARU

JUDGE