



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO. 361 OF 2016

CHAITANYA AMRITAL SEVEK.....1ST APPLICANT

FRANK NGUU KARIITHI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application herein by Chamber Summons dated 4th October, 2016 is for anticipatory bail pending any arrest against the Applicants. In a Supporting Affidavit sworn by the 1st Applicant on his behalf and that of the 2nd Applicant, it is deposed that the matters for which the police are intending to arrest the Applicants are not criminal in nature. It is said that the Applicants are directors of a company known as Adra International Limited. The main director is one, Raj Devani who has since ceased to run the company due to his mental incapacity. The company has been in financial trouble and is unable to meet its liabilities. An amount of Kshs. 5.8 million was credited to its account for payment of goods supplied by Kenya Power and Lighting Company. The two Applicants appropriated the money to paying some of its debts and salaries as the workers were threatening a court action. Mr. Raj Devani has been declared incapable of running the company by High Court Family court. The said court has replaced him with his sister in the running of the company and other businesses. According to the Applicants, these issues are totally unrelated to criminal liability for which police officers cannot arrest them.

The other complaint raised by the Applicants as reflected in the Supporting Affidavit involves purchase of a motor vehicle Reg. No. KBL 126K Range Rover by the 1st Applicant from the said Raj Devani. As per the sale agreement marked Annexure CAS4, the 1st Applicant has fully settled the purchase price. In that regard, the police cannot also purport to arrest both Applicants on account of an issue related to the said motor vehicle.

It is the Applicants' case that one Mr. Kipchumba alleging to be from CID headquarters has been calling the 1st Applicant and threatening him and the 2nd Applicant with arrest on account of issues related to the above matters. The said Mr. Kipchumba, it is alleged, has been representing himself as the investigating officer in the matters. Learned counsel, Mr. Okatch for both Applicants submitted in court that the said Mr. Kipchumba organized a meeting with the Applicants whereby they would meet him on 3rd October, 2016 for purposes of recording a statement. The Applicants were accompanied by their lawyers to see the said Mr. Kipchumba at CID headquarters. On arrival at CID headquarters, the said Mr. Kipchumba became evasive and no meeting took place. Mr. Kipchumba has subsequently threatened to arrest the

Applicants and also to meet them for purposes of recording a statement. It was also Mr. Kipchumba's submission that the Applicants were ready to cooperate with the police and were willing to record statements.

At that juncture and with confirmation with Mr. Okatch, learned counsel Ms. Kimiri for the Respondent was willing to organize with the said Mr. Kipchumba to ensure that he was available on 17th October, 2016 in the afternoon to facilitate the recording of statements by the Applicants. The court adjourned to enable Ms. Kimiri get in touch with Mr. Kipchumba for this purpose. Mr. Okatch on the other hand gave Ms. Kimiri the telephone number for which the 1st Applicant has been communicating with Mr. Kipchumba. For avoidance of doubt, this number was given as 0733 394 761.

The file was called again after about 10 minutes when both Mr. Okatch and Ms. Kimiri returned to court. Ms. Kimiri reported to the court that the number could not be reached; in other words the subscriber was not on air. In quick rejoinder, Mr. Okatch told the court that he had information from a senior counsel that the latter had gone to the CID headquarters looking for the said Mr. Kipchumba and was informed that he was not known by the police. At that point, I ordered that the application proceeds to its conclusion. Ms. Kimiri submitted that the application was unmerited as no report had been made to the police at the headquarters for which a Mr. Kipchumba was investigating. Her view was that the court had already confirmed that the mentioned Mr. Kipchumba was an imposter and was not representing any State organ and had no mandate to conduct any investigation. In any case, the Applicants had not demonstrated that any of their constitutional rights had been infringed or were under threat of being infringed. She urged the court to note that the police were mandated to conduct any investigations and had also a duty of arresting any suspect who they believed had committed an offence. Therefore should the Applicants be arrested, the Constitution, under Article 49(1)(s) provides for checks and balances against arbitrary arrest and incarceration in custody. She urged that the application be dismissed. Ms. Kimiri relied on Grounds of Opposition filed on 17th October, 2016. She however withdrew grounds 3, 4 and 7.

In rejoinder, Mr. Okatch submitted that the fact that the Respondent had filed a response to the application was evidence of confirmation that the police were investigating a matter against the Applicants and were intent on arresting them. He noted that this case presented special circumstances for which the court would intervene and grant anticipatory bail so as to avoid arbitrary arrest against the Applicants.

I have considered the respective submissions and I take the following view of the application. Anticipatory bail shall be granted only when an Applicant demonstrates that his Constitutional right has been violated or is likely to be violated. See the case of **Richard Makhanu –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:

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

Similar sentiments were observed in the case of **Eric Mailu vs Republic and 2 others Nairobi Misc. Crim. Application No. 24 of 2013** in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by a an organ of State. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach or infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labors under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.

In the instant case, I would not belabor to emphasize that the Applicants have not in any way

demonstrated a violation of their constitutional right or a threat of breach of their fundamental rights and freedoms. The court did what was most unexpected of asking counsel for the Respondent to call the purported Mr. Kipchumba who is said to be investigating the Applicants. As it were, it has turned out that Mr. Kiptchumba could not be reached. The mobile phone number given by counsel for the Applicant was un-operational, and by the Applicants counsel's own admission, Mr. Kipchumba is not known at CID headquarters. I can only safely conclude that either the Applicants are laboring under apprehension of non-existent complaints or, an imposter has been calling them for reason not disclosed to this court. The Respondent having confirmed that the police are not investigating such complaints as are raised by the Applicants drives me also to conclude that no investigations are being conducted against the Applicants. In that case, the Applicants should by now have made a complaint with the police against threats by an imposter for which investigations should commence.

I have said it before that the police are free to conduct any investigations against any complaint that may be raised against a suspect. The Applicants are not exceptions and any investigations can be carried against them. And should the police find it necessary to arrest them, the Constitution provides for safe guards against arbitrary incarceration in custody. Should their rights be violated after arrest, they are at liberty to seek redress in the legal justice system. In my view, the Applicants have not demonstrated that this application is merited. There is no evidence that their fundamental rights and freedoms have been infringed or are under threat of being infringed. I dismiss it with no order as to the costs.

DATED and DELIVERED this 18th day of OCTOBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Mr. Okatch for the Applicants.*
- 2. Ms. Kirimi for the Respondent.*