



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION 356 OF 2016**

**IN THE MATTER OF ARTICLES 19,20,21,22,23(1),24(1),25(A,B,C), 26(1&3), 28,29,31,47,49(1(h)),50(2(a)) AND 165(3) OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF AN APPLICATION OR BAIL PENDING ARREST(ANTICIPATORY) UNDER THE COURT’S IHERENT ORIGINAL JURISDICTION.**

**AND**

**IN THE MATTER OF SECTION 123 OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE COMMON LAW AND ALL OTHER ENABLING PROVISIONS OF LAW.**

**BETWEEN**

**DIDMUS WEKESA BARASSA.....APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Applicant by Notice of Motion, dated 28<sup>th</sup> September 2016, prayed that he be admitted to anticipatory bail pending arrest for any bailable offence, that a date be appointed for him in the company of his advocate to appear at a police station to enable the police undertake investigations without taking him into custody and that a day be appointed for him to appear in court for purposes of taking a plea for any charge that may be preferred against him. In summary it is premised on the grounds on which the application is based that police officers are calling him, his wife and his driver with threats that he would

be arrested on complaints of fraud related charges filed by one Jevons Mulongo. That the said Jevons Mulongo is filing the complaints at the instigation of the current Member of Parliament for Kimilili constituency, one Hon. Suleiman Murunga. The Applicant is a future contestant and a forerunner against the incumbent Member of Parliament. In that respect the complaint is politically motivated and aimed at harassing him. He therefore asks that in the interest of justice he be granted anticipatory bail.

He has sworn a supporting affidavit reiterating the grounds on which the application is premised. In addition, he swore a Supplementary Affidavit on 7<sup>th</sup> October, 2016 in which he has disclosed that the police officer who has incessantly been calling him is one Corporal Kosgei of Kilimani Police Station. He further depones that Jevons Mulongo's aim in filing the complaint is to taint his image so that he cannot be elected as a Member of Parliament.

In opposing the application, the Respondents filed a Replying Affidavit sworn by CPL Peter Kosgei of Kilimani Police Station on 5<sup>th</sup> October, 2016. He admits having called the Applicant and summoned him to the police station on 28<sup>th</sup> September, 2016 for purposes of recording a statement on a complaint leveled against him. It was agreed between them that the Applicant would appear at the police station on 4<sup>th</sup> October, 2016 to record a statement but the Applicant did not honor the summons. He depones that the case he is investigating does not relate to a complaint filed by Jevons Mulongo. He was also not aware of any complaint filed by him at the police station. For that reason he states that neither he nor the police are intent on arresting him on account of a complaint filed by Jevons Mulongo. Further, that in the course of his investigations he has not in any way threatened or intimidated the Applicant.

The application was canvassed before me on 10<sup>th</sup> October, 2016. Learned counsel, Mr. Karuku, appeared for the Applicant whilst learned State Counsel, Ms. Atina was present for the Respondents. From the brief submissions made by Mr. Karuku and Ms. Sigei it was disclosed that there was indeed a complaint being investigated by a CPL Peter Kosgei of CID Kilimani. The officer had summoned the Applicant to record a statement but he had not honored the summons. It was also apparent that the complaint related to the instant application was totally different from what CPL Peter Kosgei was investigating. On noting that the Applicant had surrendered himself to the jurisdiction of the court and was willing to co-operate with the police on any investigations they were carrying out, I directed that the Applicant be escorted by his advocate before CPL Peter Kosgei to record a statement. That has so far been done.

That said though, the case for the Applicant is that notwithstanding that he had recorded a statement, the instant application is unrelated to the case being investigated by CPL Kosgei. On the part of the Respondent the application was opposed and argued as unmeritorious and a waste of the court's time. The assertion was hinged on the fact that no complaint had been made by a Mr. Jevons Mulongo at Kilimani Police Station for which any police officer would commence investigations. In that regard, the orders sought were baseless and founded on no good reasons.

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.

The present case does not represent a scenario in which the Applicant can claim a breach of his rights by the police. The Respondents have adequately demonstrated that no formal complaint has been made to the police in relation to the information the Applicant has disclosed. Specifically, he claims that one Mr. Mulongo was being instigated by the incumbent Member of Parliament for Kimilili constituency, Hon. Suleiman Murunga, to harass him by framing fraud related charges. In this respect, he claims that 2 police officers from Kilimani Police Station, namely; Corporal Kosgei and PC Tonjo, were calling him and threatening him with arrest. To the contrary, it has been established that the said Corporal Peter Kosgei who has sworn the Replying affidavit on behalf of the Respondents is an investigating officer in a different case totally unrelated to the matter subject of this application.

A look at the entire application clearly shows that there is no material disclosure of the exact complaint that the said Mr. Mulongo has filed with the police. This necessitated the court to order the Applicant be escorted by his lawyer to Kilimani Police Station on 11<sup>th</sup> October, 2016 to record a statement with CPL Kosgei. As it were upon recording his statement it was clear that CPL Kosgei was investigating a totally different case from the instant complaint. Infact, CPL Kosgei admitted to having called the Applicant to go to the police station to record a statement in the case he was investigating. That is the case for which the Applicant will be charged in court on 14<sup>th</sup> October this year.

In summary, I find this application frivolous and not based on any substantiated information. The Applicant is merely laboring under apprehension on no founded evidence. And even if the police, specifically CPL Kosgei, will require him to record a statement for another case, he now knows he is not dealing with a stranger but a specific police officer with whom he ought to cooperate. I emphasize that the police are mandated by law to investigate any complaint filed with them and the Applicant is obligated to do his part, cooperate.

In the end, I find that the Applicant has not demonstrated any breach of his Constitutional rights or freedoms by the police or any State organ. The police have also undertaken to not arrest him for no good reason. The application lacks merit and I dismiss it with no orders as to costs. However, in the respect of the matter that the Applicant has recorded a statement, he should ensure he reports back on 13<sup>th</sup> October, 2016 for purposes of being processed to take a plea on 14<sup>th</sup> October, 2016. It is so ordered.

**DATED AND DELIVERED AT NAIROBI ON 13<sup>TH</sup> DAY OF OCTOBER 2016.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Karuku for the Applicant.*
2. *Miss Kimiri for the Respondents.*