REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISC. CRIMINAL APPLICATION NO.128 OF 2015

(IN THE MATTER OF ARTICLES 22, 25, 28, 29, 49 AND 165(3) OF THE CONSTITUTION OF KENYA)

BETWEEN

GLADYS BOSS SHOLLEI …….....…….APPLICANT

AND

THE HON. ATTORNEY GENERAL……...…..1ST RESPONDENT

ETHICS &ANTI-CORRUPTION COMM……...2ND RESPONDENT

INSPECTOR GENERAL OF POLICE…….3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION……4TH RESPONDENT

RULING

Gladys Boss Shollei the applicant herein, by Notice of Motion dated 23rd April, 2015 prays that she be admitted to bail pending arrest in respect of allegations of violation of procurement law and/or any other allegations on such terms as the court shall deem fit. In the alternative she asks that the court do release her on her execution of bond for her appearance upon institution of any criminal proceedings against her in respect of the same allegations.

A summary of the grounds on which the application is premised is as follows:-

a. That she been subjected to untold mental and psychological anguish and torture hounded by repeated reports in local media that she is being investigated by the 2nd respondent for a host of unspecified crimes she allegedly committed during her tenure as Chief Registrar.
b. That at no time did the 2nd Respondent notify her of any investigations against her or require her to record any statements and declined to do so.
c. That she severally requested the 2nd Respondent to give her a confirmation of any on-going investigations against her based on the incessant media reports on the same but the 2nd Respondent declined to do so. This, according to her, violated her rights under Article 35 of the Constitution.
d. That she was shocked to later learn that her name was included in a report by the 2nd Respondent dated 20th March, 2015 presented to parliament by the president alleging that she was being investigated on a number of procumbent irregularities.

e. That it was not until the 2nd of April, 2015 that the 2nd Respondent formally wrote to her inviting her for interview and statement recording on grounds that she had been adversely mentioned in investigations into allegations of corruption in the Judiciary. She thereafter appeared before the 2nd Respondent for this purpose on 13th of April this year.
f. That despite the 2nd Respondent stating that the alleged investigations are incomplete,it has indicated nonetheless that it will take her to court within a week from the date of this application.
g. That given the 2nd Respondent's conduct and pronouncements in the recent days, the applicant is apprehensive that the 2nd Respondent intends to ambush her with an arrest and hoist her into court on a bogus case which is aimed at harassing, humiliating and disparaging her in utter violation of her rights under Article 28 and 29 of the Constitution.
h. That the applicant is an officer of this court and a flight risk so the prayers sought are deserved.
i. That she intends to co-operate with the 2nd and 3rd Respondents in investigations and undertakes to present herself to the courts as and when directed.
j. That it is therefore in the interest of justice that the prayers sought be granted.

The application is supported by the affidavit of the applicant sworn on the 23rd of April this year. The same basically reiterates the grounds on which the application is brought and this court need not duplicate the same save to add that several annextures have been referred to which the court will make reference to in the ruling.

The application was canvassed by way of oral submissions. Learned counsel Mr. Sifuna for the applicant submitted that the applicant is an advocate of the High Court of Kenya and a former Chief Registrar of the Judiciary. Since her dismissal from employment, she has been subjected to media harassment on account that she has committed some irregularities concerning some procurement procedures.

That currently, the 2nd Respondent is intent on hooding her to court yet it has not informed her of the charges likely to be preferred against her. Specifically, it was submitted that the 2ndRespondent has never at any time contacted the applicant requiring her to appear before it for purposes of investigations and due to the frequent media reports on her case, her reputation has been shredded. She referred to a letter dated 10th December, 2014 written by her lawyers Hamilton Harrison and Mathews (incorporating Oraro and Company) by which she requested to be furnished with confirmation that there indeed investigations are on-going against her. The letter is marked GBS1 annexed to the supporting affidavit.

In response, the 2nd Respondent wrote a letter dated 30th January, 2015 by which it indicated that it would not respond to the Applicant's letter of 10th December, 2014 because it was not the author of the article which the applicant had referred to in her letter. The Applicant had referred to a reporton Daily Nation newspaper which mentioned that there were investigations against her.

By a letter dated 6th February, 2015 the Applicant wrote another letter to the 2nd Respondent asking it once again to confirm whether there were any ongoing investigations against her so that she could consider exercising her right under Article 35 of the Constitution. The 2nd Respondent did not reply to that letter but it released a report dated 20th March, 2015 of the status of corruption matters in which the Applicant was implicated. The applicant states that the release of this report was founded on ***mala fides***as the 2nd Respondent had failed to confirm any investigations ongoing against her. She was therefore apprehensive that she was likely to be arrested and charged.

Mr. Sifuna further submitted that pursuant to the report by the 2nd Respondent, the latter wrote a letter dated 2nd April, 2015 requiring the applicant to attend an interview and record statements with it (See annexture GBS5).

In response to that letter the applicant wrote a letter dated 8th April, 2015 (annexture GBS6) acknowledging receipt of the letter dated 2nd April, 2015 in which she stated that although she had been invited for interview and statement recording, the letter had not specified what she was required to record

her statement on. She thus asked the 2nd Respondent to supply her with such specifics of the interview and statement recording to enable her prepare for a meaningful engagement.

Mr. Sifuna also urged the court to look at annexture GBS7 which is a newspaper cutting dated 21st April, 2015 headed that the 2nd Respondent has already handed over 93 graft files for prosecution. This was indicative that indeed the applicant was likely to be charged in a court of law. Also, because of her status in the society, the 2nd Respondent would arrest her in such embarrassing manner as to shred her reputation. She therefore asked the court to grant her anticipatory bail and pleaded that she would abide by any terms the court may grant.

In urging the orders sought Mr. Sifuna relied on the case of **Richard Makhanu–Vs- Republic Bungoma High Court Miscellaneous Criminal Case No.10 of 2015** where it was held that anticipatory bail will issue where there is breach of law by the state organ. He also cited the case of **Hon. Martin NyagahWambora –Vs- Attorney General, Inspector General of Police and Director of Public Prosecution (DPP), Embu High Court Criminal Miscellaneous Application Case No.3 of 2015** in which the court observed that Article 23 gives wide discretion to the court to grant anticipatory bail.

Learned Counsel Mr. Opondoappeared for the 2nd Respondent. He relied on a preliminary objection dated 23rd April, 2015. The 2nd Respondent urged the court to dismiss the entire application on two points of law namely:-

1. That the application is fatally and incurably defective as it offends the provisions of Article 22(3) of the Constitution.
2. That the application fundamentally offends Sections 4(1) and 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and as such was incompetently brought before this court.

The 2nd Respondent also filed grounds of opposition dated 23rd April, 2015 in which it raised the following issues:-

1. That the application is grossly defective and a clear abuse of the court process.
2. That the application as drafted cannot stand the constitutional test.
3. That the applicant has rushed to court with a misreading of the law.
4. That the applicant anchors her application on newspaper cuttings and reports that hold no probative value whatsoever.
5. That the application is premature and incompetent.

Mr. Opondo in his oral submissions in emphasis to the preliminary objection and the grounds of opposition submitted that under Article 22(3) of the Constitution the Chief Justice is mandated to make rules providing for the court proceedings referred to in the Article. The Article provides for enforcement of theBill of Rights. Those rules were gazetted in the Kenya Gazette Supplement No.95 of 28th June, 2013. Under Rule 4 (1**) "where any rights or fundamental freedom provided for in the constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."**And under Rule 10(1), "**an application under Rule 4 shall be made by way of a petition set out in form A in the Schedule with such alterations as may be necessary."**

In this respect Mr. Opondo argued that the applicant having brought her application under Articles 22 and 23 of the Constitution ought to have sought the orders in a petition. He referred the court to a ruling in Supreme Court's **Petition No. 27 of 2014 Yusuf GitauAbdallah –Vs- the Building Centre (K) td & Four Others** in which Hon. Justice Ibrahim stated that it was mandatory that prayers sought under Article 22 of the Constitution must be sought by way of a petition.

He submitted that the applicant has come to court based on media rumours and is prosecuting her case through the media whereas it is only the 2ndRespondent who is mandated to investigate her case.

Further, he submitted that the 2nd Respondent's investigations are of a covert nature and cannot be revealed until such a time it has found a concrete case against a suspect. The rational for this is the risk of interference with investigations should the same be disclosed when they are not complete. In this regard the 2nd Respondent could not have contacted the applicant in regard to the investigations ongoing until the same were complete and the file handed over to the DPP who then elects to prosecute the case. As at now, that point has not been reached and is therefore presumptuous of the applicant that she is likely to be arrested and hooded to court. He referred the court to Section 35 of the Anti-Corruption and Economic Act 3 of 2003 (ACECA) in this regard. He urged the court to dismiss the application.

Learned State Counsel Mr. Mureithi submitted on behalf of the 3rd and 4th Respondents. He associated himself with the 2nd Respondent's preliminary objection, grounds of opposition and the oral submissions. In addition he submitted that the application is premature and so far the 3rd Respondent has not undertaken any prosecution against the applicant as required by Section 35 of the ACECA.

He submitted that the applicant has not demonstrated that she has been harassed by the respondent and that she is rushing to court based on unfounded rumours.

Mr. Mureithi argued that anticipatory bail could only issue where an applicant demonstrates that her fundamental rights have been infringed. And even if she is entitled to equal protection of the law, the investigations of the 2ndRespondent are lawful and cannot therefore be deemed to amount to any harassment. He urged the court to look at the rulings in the **Richard Mahanu –Vs- Republic (Supra) and Nairobi Miscellaneous Criminal Application No. 24 of 2013 – Erick Mailu – Vs – Republic and 2 others.**

It was Mr. Mureithi's contention that if the application is allowed the same will pre-empt the outcome of the incomplete investigations the 2ndRespondent is undertaking. Even if the investigations were complete, there was still another process to be undertaken through the office of the DPP before the applicant is arraigned in court. He submitted that the fact that the applicant has never been contacted by anybody is indicative that no one is harassing her.

Further, Mr. Mureithi submitted that the applicant had not demonstrated a serious breach of her fundamental rights and referred the court to the case of **Samuel MuciriW'Njuguna –Vs- Republic Nairobi High Court Miscellaneousapplication No.710 of 2002** in which **Hon. Rawal and Hon. Kimaru, JJ** held that for an anticipatory bill to be granted an applicant must demonstrate serious breach of fundamental rights.

In rejoinder, Mr. Sifunasubmitted that anticipatory bail can issue by virtue of the provisions of the Constitutionaforestated as well as Section 123 of the Criminal Procedure Code. He restated that it cannot be further from the truth that what the applicant is apprehensive of has been published by the media and referred the court to the newspaper cutting attached to the supporting affidavit asannexure GBS1. He confirmed that the applicant is reacting to rumours and innuendos because the respondents have declined to respond to her requests as demonstrated earlier and due to those rumours and innuendos her reputation has been ruined by the media.

On the issue of covert investigations, he submitted that all the applicant is seeking is a confirmation of any investigations being undertaken against her.

He stated that so far the respondents have not demonstrated that the issuance of anticipatory bail will cripple any investigations being undertaken. In this respect he urged the court not to dismiss the real fear that the applicant is likely to be arrested. He urged the court to grant the application as prayed for.

Having carefully considered the application, the preliminary objection, the grounds of opposition and the respective submissions for the parties I take the following view of the application:-

Suffice it to say, the 1st Respondent neither entered appearance nor filed any reply upon service of the

application on grounds that he found no basis for doing so. The court will later on comment on this aspect in the ruling.

Is the application defective and incompetent in law?

This application is brought under Articles 22 and 23 of the Constitution of Kenya,2010, Section 123 of the Criminal Procedure Code and Rule 3 Sub Rule 3A and 19 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013. According to the Respondents the application offends the provisions of Article 22 because it ought to have been drafted under the prescribed form provided for in Section 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013 – hereafter the rules. That is to say, the applicant ought to have brought before this court a petition as opposed to Notice of Motion application.

The crux of this application is that anticipatory bail should be granted because the applicant's fundamental rights under Article 35 have been violated; the rights under Article 35 being access to information fall under the Bill of Rights in Chapter 4 of the Constitution. Therefore, if the applicant were only seeking redress for the breach of her fundamental rights under chapter 4, then a petition ought to have been filed. I am therefore in total agreement with the Supreme Court ruling in the **Petition No.27 of 2014** in the case of **Yusuf GitauAbdalla –Vs- The Building Centre Kenya Ltd (KLtd) and 4 others** in which Hon. Justice Ibrahim delivered himself as follows:-

"He filed his "petition" to this Court on the 23rd of July, 2013 under what he terms as a petition under a certificate of urgency. It is worth noting that from the onset this matter took a peculiar trajectory for despite invoking what can onlybe termed as a unique jurisdiction of the court; the pleadings have a unique bearing. Ordinarily, one will file a petition and an application which application could then be accompanied by a certificate of urgency. I do not intend to dwell on this issue but parties at this stage who come to courts seeking justice should follow the legal channel provided for when accessing courts and should not by way innovation craft pleadings unknown in law."

That holding of the Supreme Court vindicates the provision of Rule 10(1) of the Rules which are coached in mandatory terms and so if the applicant were instituting proceedings claiming breach of fundamental freedoms as enshrined in the Bill of Rights having been denied, violated or infringed, or threatened she mandatorily could have come to court by way of a petition.

In respect of this application, the applicant has referred to Section 123 of the Criminal Procedure Code. The Section reads as follows:-

"(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided beafter in this part.

(2)The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced."

This provision implies that for bail to issue, an offender ought to be under arrest or detention without warrant of an in charge of a police station or is brought before a court and at that point has not been granted bail. It is at that point while in the custody of either a police station or court that the offender

should seek the bail. The provision also gives the court the discretion with respect to the terms of the bail or bond it can grant. The section outlines three circumstances under which the bail can be granted;

a. **When a person is arrested or detained without warrant by an officer in charge of a police station, or**
b. **the person appears, or**
c. **the person is brought before a court**.

The heading under (b) "or appears" is ambiguous in that it does not spell out where the person should appear and does not therefore meet the threshold for a party to apply for anticipatory bail under Section 123 of the Criminal Procedure Code. In effect Section 123 should not be invoked in an application of this nature.

I have not seen any other provision under the Criminal Procedure Code where bail ought to issue before an arrest or detention by either the police or the court. However, the court has such wide discretion and jurisdiction to determine the application in that under Article 22(1) of the Constitution of Kenya 2010 every person has the right:-

"to institute proceedings claiming her rights or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

Furthermore, under Article 165 of the Constitution any person may seek redressfor a denial or violation, or infringement or threat to a right to fundamental freedoms as envisaged in the Bill of Rights. Therefore, notwithstanding that a petition was not filed in this case, the application before the court is nonetheless competent. Respectively, I dismiss the preliminary objection.

Is the application merited?

Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated. This is also in the footsteps of my brother Justice Mabeya in his ruling in the case of **Richard Mahanu (Supra)** where he stated as follows:-

"With regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches of 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."

The case of **Eric Mailu –Vs- Republic (Supra)** also cited the **W'Njugunacase** emphasizing the circumstances under which anticipatory bail can issue which majorly are serious breach of a citizen's rights by organs of state. In that respect I need not say more than is outlined in the said W'Njugunacase. 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 freedom of a citizen. It cannot issue where an applicant labours under apprehension founded on rumours or unsubstantiated claims.

In the instant case, the applicant seeks anticipatory bail on grounds that she is being harassed by the media and that she is likely to be charged for offences which particulars have not been furnished to her. Further that her arraignment in court is aimed at embarrassing her thus tarnishing her reputation. She also claims that the 2nd Respondent is concocting the would-be charges against her. She concedes that her reaction is in light of the much heightened media publicity of her intended prosecution. That being the case, the onus lay on her to demonstrate that such media publicity is factual. And notwithstanding that a report of the status of corruption in the country was released which adversely mentioned her, it is also her onus to demonstrate that that report has crystallized into a concrete case for which she is about to be charged with and moreso that her likely arrest would result to breach of her fundamental rights. These

contentions were not demonstrated.

At that point,the court is not in a position to ascertain that she is likely to be charged in court in the next week as alluded. Again, the mere fact of her being summoned to record statements with the 2nd Respondent does not amount to any form of harassment but is a core process of investigations of any allegations against her. The media publications do not also comprise evidence. As the Counsel for the applicant rightly conceded, they are rumours which the applicant has opted to rely on rather than seek a proper confirmation of the intention to charge her in court.

I wish to emphasis that investigations as being carried out by the 2nd Respondent must be rubberstamped by the 4th Respondent pursuant to Section 35 of the ACECA. It provides that upon conclusion of investigations by the 2nd Respondent, the 4th Respondent must peruse the file and make a finding of the need to prosecute the suspect. This far, the applicant did not demonstrate that her file has become ripe under the hands of the 4th Respondent for her to be brought to court to answer any charges. I am therefore unable to fathom how the fact of summoning of the applicant to record statement amounts to harassment.

Furthermore, under Section 36 of the ACECA the report on status of corruption cases being investigated by the 2nd Respondent is released for publication in the Kenya Gazette. Upon such publication the report becomes a public document and the media can thereafter pick it up for further publication. The media is at liberty to publish the report in the manner that they so wish. If the media publication does not please the applicant or in the opinion of the applicant amounts to harassment, she is at liberty to seek redress appropriately.In the same spirit of Section 36 of ACECA, the president did nothing illegal in publishing the report for public consumption.

Under the Constitution, the incarceration period is of 24 hours only. The short period is targeted in curtailing arbitrary use of police powers and the Constitution having provided for that period means that an arrested person is at liberty to seek redress for abuse or infringement of her rights to freedom. I therefore see no reason to order that the applicant be not arrested whereas there are checks and balances in the Constitution to prevent abuse of arbitrary arrests. In my view then, the applicant has not demonstrated that any of her fundamental freedoms and rights have been infringed as to warrant the granting of anticipatory bail.

Finally, the Attorney General is neither an investigator nor a prosecutor to the allegations against the applicant. He thus rightly declined to enter appearance to these proceedings and no orders may issue against him.

In the result, this application must fail and the same is dismissed. I give no orders as to costs.

DATED and **DELIVERED** at **NAIROBI** this 24th day of April, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1 Mr. Sifuna for the Applicant.

2 Mr. Opondo for the 2nd Respondent

3 Mr. Mureithi for the 3rd and 4th Respondents