REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC. CRIMINAL APPLICATION NO.179 OF 2015

DAVID AKETCH…….APPLICANT

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

By Notice of Motion filed on 29thJuly, 2015 the applicant prays for the main order against the respondents to have them restrained by themselves, their agents or officers serving under them from arresting and or detaining the applicant or threatening to do the same. He also asks the court to admit him to anticipatory bail on reasonable terms as the court may deem fit. The application is brought under Articles 165(3) (b), 49(1), 23, 29 and 258 of the Constitution and other enabling provisions of the law.

The main grounds upon which the application is brought are that the respondents have threatened to arrest the applicant on a matter that arose out of a commercial transaction that is not strictly of criminal nature, that the parties who are two registered companies have been discussing their dispute with a view to settling the matter and that in view of the foregoing the arrest of the applicant would constitute a contravention of his fundamental rights under the Constitution.

The application was disposed of by way of written submissions which this court has given regard to. But in brief the applicant's contention is that the dispute that is likely to give rise to his arrest emanates from a commercial transaction as opposed to a criminal matter. As such, the ongoing investigations by the police are a blatant abuse of the criminal justice system in the aid of one party in a purely civil dispute. Such investigations, in any event, violates his right to liberty and freedom and amounts to inhuman and degrading treatment and is against the fair administrative process.

On behalf of the 2nd and 3rd respondents, the application was opposed. In submissions learned State Counsel Miss N. K. Atina submitted that the applicant had not demonstrated sufficient reasons to warrant him being granted anticipatory bail.

It is settled law and principle that for anticipatory bail to be granted, the applicant must demonstrate that there exists a serious breach of his or her fundamental rights by a state organ. See the case of **W'NJUGUNA – VS – REPUBLIC NAIROBI MISCELLANEOUS CASE NO.710 OF 2002, (2004) 1 KLR 520** - the court held that anticipatory bail ought to be granted:-

"……when there are circumstances of serious breaches of a citizen's rights by a organ of the state which is supposed to protect the same."

The above case law was cited by Hon. Justice Mabeya in the case **of Richard Mahanu –Vs- Republic, Bungoma High Court Miscellaneous Criminal Case No.10 of 2015** 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 and two others, Nairobi Miscellaneous Criminal Application No.24 of 2013** also cited the W'Njuguna's case emphasizing the circumstances under which anticipatory bail can issue which majorly are serious breach of a citizen's rights by organs of state.

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 of fear of being arrested or in the hope that police ought to be stopped from conducting investigations on a particular matter.

In the present case, it is disclosed that the applicant is a director of Sovereign Oil Limited (Sovereign Oil). The said Sovereign Oil entered into a sale agreement with another company to supply some petroleum products. In the course of their transactions, a dispute arose between the two parties owing to fluctuation of oil prices. Sovereign Oil sought to renegotiate the supply contract which ultimately gave rise to the dispute in which the other company sought a refund from Sovereign Oil to the tune of U.S.D 133, 910. In those circumstances, the applicant alludes that the dispute is purely commercial and the police have no business investigating it. The applicant further contends that under its contract with the other company was drawn a dispute resolution mechanism by which the dispute ought to have been resolved.

However, it is the view of this court that the police have a duty of investigating any complaints that is registered with them. This court has this far not been furnished with a detailed account of the complaint leveled against the applicant. It would then be premature to conclude that the dispute with the police is purely of commercial nature. And even if that were the case, should the applicant be arraigned before a court of law he would be vindicated on account of insufficient evidence if his submissions were to hold.

The court takes notice of the fact that the application was filed in mid May 2015 and the same was canvassed on 31st July, 2015. More than two months down the line the applicant had not been arrested which is indicative that he was belabouring under apprehension of arrest. In addition, even if he were to be arrested, the Constitution safeguards the right of an arrested person from arbitrary detention by the police. That is to say, that he can only be detained for 24 hours only before he is taken to answer to any charges. In my view therefore, the applicant has not demonstrated that the respondents have breached his fundamental rights and freedoms as provided for in the Constitution. I do agree entirely with the applicant as was held in the case of **Hon. Martin NyagaWambora –Vs- The Attorney General and 2 Others (2015) @ KLR** that it is the duty of this court to hear and determine applications for redress of a denial or violation or infringement of, or threat to a right or fundamental freedom in the bill of rights. Such rights as guaranteed under Article 23 of the Constitution include the right to be free from arbitrary arrest. The court as well under Article 165(3)(b) is obligated to make a determination of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In the present case though, the applicant has not demonstrated for the aforestated reasons that any of his rights under Article 23 of the Constitution have been denied, violated or infringed, or threatened.

In the circumstances I find this application without merit and the same is dismissed with no orders of costs.

It is so ordered.

Dated and **Delivered** in **NAIROBI** this 13th August, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Kobia holding brief for Orego for the applicant.

2. Ms. Nduati holding brief Ms. Aluda for the 2nd and 3rd respondents.