



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO. 392 OF 2015**

**MANDIKI LUYEYE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By Originating Motion dated 5<sup>th</sup> November, 2015 brought under Articles 22, 23, 49 and 65 of the Constitution of Kenya, Section 123 the Criminal Procedure Code and all other enabling provisions of the law, the Applicant prays for the following orders:

1. That he be granted anticipatory bail before arrest and/or charge.
2. A day be appointed for him to appear before a Police Station with his advocate to enable the Police undertake the normal procedures of investigations without taking the Applicant into custody.
3. A day be appointed for the Applicant to appear in court for purposes of charge or trial, if criminal charges are preferred and filed in court against him.
4. Costs be provided for.
5. Any other orders, directions or writ the Honourable Court considers appropriate in the circumstances to grant.

The application is premised on grounds that the Police are being used to harass, intimidate or oppress the Applicant, that the Applicant is entitled to secure protection by the law, that the Applicant is entitled to enjoyment of his right to freedom of movement and that the intended arrest/prosecution of the Applicant is an abuse of the law and is oppressive.

The application is supported by the affidavit of the Applicant sworn on 5<sup>th</sup> November, 2015. The gist of the Supporting Affidavit is that sometime in the month of April, 2015, the Applicant was introduced to a businessman only known to him by the name Mohamed. He learnt that the said Mohamed was a broker dealing with precious stones. Thereafter, one of the persons who was in company of Mohamed and was known to the Applicant was arrested and taken to Kilimani Police Station on allegations that he and others had defrauded the said Mohamed of some money. Police have since been visiting the Applicant's premises and have been making enquiries about the persons who defrauded Mr. Mohamed. The Applicant contends that he does not know those persons and therefore the action of the Police amounts to

harassment, intimidation and a breach of his Constitutional rights to freedom. He thus prays for anticipatory bail pending arrest in the event that the police intend to charge him.

The Respondent opposed the application by way of Grounds of Opposition dated 9<sup>th</sup> December, 2015. It is prayed that the application be dismissed on the following grounds:

1. The same is misconceived as the Applicant's rights have not been breached by any State organ.
2. The application is an abuse of the court process and intended to waste the court's time and defeat investigations by the Police as mandated by the law.
3. The orders sought are unattainable in law as they are based on unsubstantiated fears.

The application was canvassed before me on 9<sup>th</sup> December, 2015. Learned counsel for the Applicant Mr. Kang'ahi submitted that the police have been visiting the residence of the Applicant who believes that they are looking for him with regard to a fraud case which he has no relation with. As a result, the Applicant is unable to stay in his house or if he does, live in comfort which ultimately infringes on his fundamental rights to freedom. It was submitted that the Applicant is not opposed to police carrying on any investigations, but given the harassment he has undergone in the hands of the police, he fears that if he is arrested, he would be held incommunicado. Mr. Kang'ahi submitted that the law ought to protect persons who are harassed by the Police as provided for under Article 149(1)(h) of the Constitution and Section 123 of the Criminal Procedure Code.

Learned state counsel Ms Atina for the Respondent submitted that the Applicant had not demonstrated that his rights have been infringed on by any state organ. In any case, the police are mandated by the law to conduct investigations of whatsoever nature if a complaint is filed with them. Furthermore, the Applicant was only speculating that he would be arrested and held incommunicado whereas the law protects him against arbitrary harassment in case he is arrested. It was not obvious that he would be charged by the mere fact that the police were conducting investigations. She submitted that she had called the DCIO Kilimani Police Station who confirmed that there were investigations ongoing but the same did not involve the Applicant. As such, it was difficult to ascertain that the persons who were visiting the Applicant's residence were police officers.

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:*

*“.. 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.”*

Similar sentiments were observed in the case of **Eric Mailu vs Republic and 2 others Nairobi Misc. Cr. 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 organs of state. Accordingly, it is 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 freedoms of a citizen. It cannot issue where an Applicant labours 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, the Applicant contends that some police officers have been visiting his home with an

intention of arresting him. The identity of the said police officers was not given, thus making it difficult for this court to ascertain that the persons who are allegedly harassing him are Police Officers. Be that as it may, the Applicant concedes that there are some fraud investigations being carried on by the police. This was vindicated by the learned state counsel for the Respondent. But according to the state counsel, the investigations do not touch on the Applicant. Therefore, unless the Applicant is certain on the identity of the officers allegedly visiting him, this court will not be in a position to ascertain that the harassment exists. His application in my view, given those circumstances is based on unsubstantiated fears which do not amount to infringement of his personal freedoms and rights as enshrined under the Constitution.

I have said it before that the police are mandated by law to conduct investigations once a complaint is filed with them. Depending on the outcome of the investigations, a person may be arraigned in court. So far, the Applicant has not demonstrated that the police would arrest him for no apparent reason. That being the case, this application is not merited. Moreover, should the Applicant be arrested by the police, the Constitution has provided for safeguards against arbitrary incarceration beyond 24 hours. And should the contrary happen, the same Constitution provides that a person can seek redress for breach of abuse of fundamental rights and freedoms. Since the Applicant has submitted to the process of justice; that is to say, that he is ready to be investigated and charged if found culpable, he should voluntarily, in the presence of his counsel submit himself to a police station and make an enquiry on whether any investigations are being conducted against him. Thereafter, the due process of the law can follow. I am certain that the police are aware of the Constitutional provision that they cannot hold a suspect in custody for more than 24 hours. The same would apply if the Applicant is arrested. On the whole, it is my view that the Applicant has not demonstrated that his Constitutional rights have been violated or are likely to be violated to warrant the grant of anticipatory bail. Accordingly, the application is dismissed with no orders on costs.

**DATED and DELIVERED** this 14<sup>th</sup> day of **December, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Mr. Kang'ethe for the Applicant*
- 2. M/s Atina for the Respondent.*