



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 24 of 2013

ERIC MAILU.....APPLICANT

VERSUS

REPUBLIC.....1st RESPONDENT

COMMISSIONER OF POLICE.....2nd RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT.....3RD RESPONDENT

R U L I N G

1. The Applicant herein has come to court by way of a Notice of Motion under a Certificate of Urgency dated 28th January 2013, supported by the Affidavit of the Applicant, Eric Mailu.
2. The Application is brought under **Articles 19, 20, 21, 22, and 29** of the **Constitution, Section 123(1) Part 5** of the Criminal Procedure Code, Cap 75, Inherent Jurisdiction of the honourable court and general principles of natural justice and the rule of law.
3. The Applicant is seeking grant of anticipatory bail pending arrest or charge on terms that the Court may deem fit to impose. The back drop to this Application was business dealings between the applicant and one Serah Mutua the alleged complainant in the allegations leveled against the applicant.
4. The first business dealing involved land in which Serah Mutua instructed the applicant to undertake topographical survey works on her behalf, as a result some fees accrued and are due and owing to the applicant from the said Serah Mutua.
5. The second business deal involved a motor vehicle sale agreement in which the said Serah Mutua offered to buy the applicant's motor vehicle registration No. KBJ 103K. Serah Mutua took possession of the motor vehicle in December 2006, but failed to make payment of the purchase price as agreed. She instead offered to pay for daily usage of the motor vehicle at kshs.3000/- per day.
6. That too did not happen prompting Auctioneers of Family Bank where the applicant had a loan facility which was secured by the motor vehicle in question to move to repossess the car. Serah Mutua took the motor vehicle to CID Headquarters where it remains to date. Since then the applicant has been receiving calls from persons purporting to be from the CID alleging that Serah Mutua lodged a complaint against him for threatening her life.
7. The applicant avers that the CID officers have visited his office severally seeking to arrest him without success. This state of events led to the apprehension by the applicant that he may be arrested any

time and subjected to inhuman and degrading treatment by the police. He feels harassed and intimidated especially noting that the situation arose out of contractual matters and now the police are being used to harass him to release the documents that he has.

8. It is was urged on behalf of the applicant by the learned counsel Miss Nyawira that his fundamental rights have been infringed, since he is a businessman and his business has been interrupted. Secondly that his family life has also been interrupted since he is on the lookout all the time, and is living in fear of arrest and detention for offences he has not committed.

9. The applicant is ready and willing to avail himself for investigation but is apprehensive to do so under unclear circumstances where he does not know what the police might do.

10. Mr. Kadebe, learned State Counsel responded that the application itself and the affidavit in support by the applicant demonstrated at great length what forms the basis of this application, but had not proved the said threat of arrest from the police. That infact applicant has not disclosed who has threatened him with arrest.

11. Secondly, Mr. Kadebe contended that it is deponed in paragraph 7 of the supporting affidavit that the calls were mysterious and from unknown persons claiming to be CID officers. There is therefore no proof that the calls came from CID officers since anyone can make such calls.

12. Thirdly, Mr. Kadebe submitted that the applicant's averments were that communication has always been by phone and there is no mention of actual visit by the CID officers. In the opinion of the learned state counsel it is absurd to claim that an individual civilians, Serah Mutua, has control over the affairs of the police or that the police are acting under her directions.

13. The question therefore, is whether the Applicant ought to be granted anticipatory bail as prayed, based on the reasons advanced his the Application and the submissions by his Counsel. The Applicant states that he has been threatened by one Serah Mutua for refusing to hand over her documents.

14. There is no specific provision on grant of anticipatory bail pending arrest or charge. However, this Court has jurisdiction to determine this matter for reasons that the **Constitution of Kenya, 2010** in **Article 22(1)** affords every person the right:

“...to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

15. Under **Article 165** of the **Constitution** the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

16. I have considered the case of **W’Njuguna versus Republic, High Court of Kenya at Nairobi, Miscellaneous Criminal Case No. 710 of 2002, [2004] 1 KLR 520**, where 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. “

17. Taking all matters in the case before me into consideration, while the Applicant has submitted that he faces threats from Serah Mutua, I am not persuaded that the Applicant has demonstrated the presence of serious breach of his rights by any organ of state which is supposed to protect these rights, to warrant the granting of anticipatory bail. The Applicant is entitled to equal protection before the law under the Constitution, and ought to exercise that right by reporting any threats to his person to the appropriate authorities.

18. Furthermore, if the matters in question are still under investigation the outcome of those

investigations cannot be pre-empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and per se do not amount to infringement on the fundamental rights and freedoms of the appellant. In any case he will be entitled to bail as provided by the Constitution. To my mind, the apprehension by the Applicant does not meet the threshold of serious breach of his rights by a state organ.

I therefore dismiss the Application.

SIGNED DATED and DELIVERED in open court this 19th day of *March* 2013.

L. A. ACHODE

JUDGE