



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Miscellaneous Application 67 of 2013

APPLICATION BY IBRAHIM GICHUHI MUGO FOR BAIL PENDING ARREST

BETWEEN

IBRAHIM GICHUHI MUGO.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICERESPONDENT

R U L I N G

1. The Applicant herein has come to court by way of a Chamber Summons under a Certificate of Urgency dated 28th February 2013, supported by the Affidavit of the Applicant, Ibrahim Gichuhi Mugo.
2. The Application is brought under **Articles 20, 22, 23, 29 (c) and 47** of the **Constitution**, and **Section 3(1)(a)**, Judicature Act, the inherent jurisdiction of the honorable court.
3. The Applicant is seeking the following orders:
 - i. *A declaration that the applicant's fundamental rights and freedom under **Article 29(c)** have been violated.*
 - ii. *A declaration that a remedy/grant and/or relief of anticipatory bail pending arrest or charge is lawfully available to him under **Article 47** of the Constitution;*
 - iii. *Order to enable him to appear at the CID headquarters at an appointed time to record a statement.*
 - iv. *Cost of the application.*
4. The back drop of the application as submitted by Mr. Webala the learned counsel for the applicant was that the applicant was an employee of the East African Portland Cement working as the Financial Accountant and the Treasury Accountant. That his duties included confirmation of the customer deposits made through Real Time Gross Settlement (RTGS) before the receipts are issued by the company.
5. That on 4th November 2012 it came to his notice that parties were using RTGS to defraud the company. The company was informed and it was discovered that a sum of Kshs. 80 million had already been lost in the fraud. The CID were called in to investigate the matter and they recorded a statement from the applicant, who supplied all the information he had including all the names of the persons involved in the fraud.

6. On 20th December 2012 he was interdicted for suspected involvements in fraudulent acts against the company before independent investigations by the forensic team were done. To date he has not been informed of the result of the audit but that from the letter of interdiction it appears that police are preparing to charge him. He seeks the orders prayed for in the application so that he can continue to enjoy his life as a law abiding citizen without having to worry about if or when the police are going to arrest him, and charge him for the crime committed against the company.

7. In opposing the application, Miss Ndombi the learned state counsel raised two points in response. First that anticipatory bail is usually granted where there are serious breaches by a state organ, and that from the affidavit it has not been stated how the rights of the applicant under **Article 29(c)** of the Constitution have been violated.

8. Secondly, **Article 29(c)** of the **Constitution** which talks of freedom of liberty is not absolute, and it has not been demonstrated how the applicant's rights to liberty have been violated by the CID. Further that in any event should the allegations of fraud be confirmed and the applicant be arrested he would be arraigned in court and be afforded bail under **Article 49** of the **Constitution**. Miss Ndombi therefore, asked me to dismiss the application.

9. The issues that I am called upon to determine are:

(i) Whether the actions of the respondent amount to violation of the Applicant's fundamental rights as provided under **Article 29 (c)** of the **Constitution**.

(ii) Whether the High Court under the provisions of **Article 47** of the **Constitution** is empowered to grant anticipatory bail;

(iii) Whether the applicant ought to be granted anticipatory bail as prayed based on the set of facts and circumstances of this case.

10. I have considered the submissions of the applicant through the learned counsel Mr. Webala, that the delay by the CID officers in either inviting the applicant to formally record a statement with them or preferring charges against him while not informing him whether he will be charged or not, is causing him a lot of mental anguish. That he is a family man and is not able to concentrate on his other commitments because of this uncertainty. I note that as at the time of filing the application three months had elapsed from the time the fraud came to light. At the time of the applicant's interdiction on 20th December 2012, Forensic audit investigations had not yet commenced according to his own averment.

11. There is no specific provision on grant of anticipatory bail to a person who is in fear of imminent arrest. **Article 49(1) (h)** of the **Constitution** provides that:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

This Article envisages a situation where a person has already been arrested or has been arraigned in court after criminal charges are preferred.

12. The High Court however, 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.”

Further, 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.

13. I am of the humble view that the above provisions of the constitution allow for the granting of anticipatory bail, or bail pending arrest in fitting circumstances. The fitting circumstances would be such as those adverted to in the case of **W’Njuguna versus Republic, Nairobi Misc. Cr. 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. “

14. Taking all matters in the case before me into consideration, while the Applicant has submitted that he has suffered mental anguish because of the suspense, 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. Indeed the Applicant is entitled to equal protection before the law under the Constitution, but the actions of the police in investigating the complaint of an alleged fraud at East African Portland Cement is a lawful one, and cannot be said to violate his rights.

15. 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 although understandable, does not meet the threshold of serious breach of his rights by a state organ.

16. It is also my humble view that the Director of Criminal Investigation should have been joined as a respondent since it is that office which is the custodian of state powers of prosecution, and which has power to direct the Inspector General of National Police Service to investigate any information or allegations of criminal conduct. However the law is silent on this issue.

17. The Attorney General who is the principle legal adviser to the Government, is mandated as follows in matters of representation by virtue of **Article 156(4)(a) of the Constitution**:

“The Attorney-General shall represent the national government in court or in any other legal proceedings to which the national government is a party; other than criminal proceedings.”

There however, appears to be a lacunae in the manner in which an applicant may approach the court in an application such as this one, where what is pleaded is a violation of an individual’s fundamental rights and freedom yet the basis of the application stems from criminal investigations.

18. The issue that begs an answer is whether such an application should be brought against the Inspector General of National police alone, or either of the Attorney General and the Director of Public Prosecution should be enjoined as parties along with him.

19. That is something for the legislative drafters to ponder and bring some clarity and uniformity in the manner in which these applications are brought before the court.

All in all the application before me is lacking in merit and is therefore dismissed.

SIGNED DATED and DELIVERED in open court this 30th day of April 2013.

L. A. ACHODE

JUDGE