



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**MISCELLANEOUS APPLICATION 136 OF 2012**

**KENNEDY WANJALA WAFULA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING:**

The Application is brought by way of Notice of Motion and is made under Section 123 (3) of the Criminal Procedure Code.

The Applicant seeks orders to be admitted bail or bond in anticipation of arrest by the Eldoret Officer in Charge of Station (OCS) or the Crime Investigating Officer or any other police. The Applicant also seeks orders restraining the said Police Officers from arresting him in respect of an act of assault alleged to have been committed at Kasarani in July, 2012.

The Applicant relies on the grounds on the face of the Application and on the Supporting Affidavit deponed on the 16th October, 2012.

The Applicant is the Chairman of the NGO Council. In July, 2012 he had attended a special meeting at Kasarani but upon arrival at the venue of the meeting the Applicant was locked out.

The Applicant thereafter proceeded to file Eldoret HCC NO. 174 OF 2012 and obtained interim orders to prevent his ouster as Chairman of the NGO Council.

He further depones that his current problems with the police was fueled or commenced when the interim orders obtained from court were served upon the parties concerned.

The Applicant annexed a letter written to the OCS Kasarani seeking further and better particulars of the alleged complainant of assault, but to date has not received any response.

The Applicant is apprehensive that he may be arrested and prays for the orders sought and is willing to abide by the terms set by the court.

The application was opposed by prosecuting Counsel for the State.

Counsel submitted that the Applicant was seeking blanket orders to prevent the wheels of justice from operating.

That upon being made aware that he was being sought after by the police, the Applicant ought to have exercised due diligence and ought to have presented himself to the police and recorded his statement.

That if the application is allowed the police will be prevented and also frustrated from carrying out proper investigations. Counsel prayed that the Application be disallowed.

The court has heard the submissions and arguments of both Counsel for the Applicant and the State and has had occasion to peruse the provisions of Section 123 (3) of the Criminal Procedure Code.

The provisions of Section 123 (3) of the Criminal Procedure Code provide 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 hereafter 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.**

It is clear from the provisions of Section 123 (3) that anticipatory bail is not catered for in the Criminal Procedure Code. The section is intended for an Accused person which the Applicant is not as he is yet to be arrested and charged.

The Applicant ought to have moved this court by way of a Petition under the Bill of Rights as set out in the Constitution of Kenya (2010). The Constitution bestows on every Kenyan citizen a right to his or her freedom and liberty but the Applicant or Petitioner must demonstrate to court how his Constitutional rights have been infringed upon by the Police.

For the reasons stated above, this court is unable to grant the prayers sought. The Application is hereby disallowed.

Dated and delivered at Eldoret this 25th day of October 2012.

**A.MSHILA**

**JUDGE**

Coram: Before Hon. A Mshila

CC: Andrew

Counsel for the Applicant: Keter.

Counsel for the State: Wainaina

**A.MSHILA**

**JUDGE**

