



**REPUBLIC OF KENYA**

**High Court at Kericho**

**Criminal Miscellaneous Application 16 of 2012**

**ISAIAH KIPNGETICH ROTICH ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

This is a notice of motion dated 25<sup>th</sup> October, 2012, brought pursuant to the provisions of **Section 123** of the **Criminal Procedure Code**. It seeks anticipatory bail as the applicant, one **Isaiah Kipngetich Rotich** is apprehensive of being arrested by the police.

The prayers as set out in the application are that the applicant be arrested by this court and released on bail. It is based on grounds that the applicant who faces imminent arrest will suffer irreparable loss and damage, yet the intended arrest is malicious and scandalous, intended to embarrass him.

It is supported by the affidavit sworn by the applicant.

The application is opposed by the State. Mr. Kiviihya in his response argued that the allegations set out in the affidavit were unfounded. Further, that the affidavit itself did not meet the threshold of an affidavit per the Civil Procedures Rules as it failed to state how the arrest had been threatened.

I have considered the application itself, rival submissions by counsels, the supporting affidavit to the application and the annexure thereto.

The letter dated 10<sup>th</sup> October, 2012 addressed to the Commissioner of police is a notification to the police of the harassment and assault occasioned to the applicant by **one Police Constable Francis Ogembo** and his intention to sue.

In Paragraph 6 of the affidavit the applicant states that the police constable threatened to cause his arrest. This is what has put him into fear. It was his duty to demonstrate the kind of action the officer took that propelled him into a state of fear.

In paragraph 8 of the affidavit he states that he was informed that police officers visited his homestead. The source of information is not disclosed. Nondisclosure of his source of information casts some doubt if it really happened. This allegation as correctly pointed out could not meet the threshold of an affidavit that a court can rely on to grant the order sought.

It is stated that the incident occurred on the 8<sup>th</sup> October, 2012. One month has elapsed since it happened

yet no arrest has been made. It is unlikely that he will be arrested.

I also do take note of **Section 123** of the **Criminal Procedure Code** which stipulate as follows.

***“123. (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”.***

The application was not specific as to the subsection under which it was brought. That notwithstanding, the provision is in respect of bail and it anticipates a situation whereby a person is accused of committing an offence and he appears before the court.

This is a case where the applicant is not accused of having committed any offence. Probably he could have thought of seeking his rights that may have been threatened under the Constitution.

Even if this court were to disregard technicalities in this case, the applicant has failed to demonstrate why an anticipatory bail should issue. The application therefore lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered this 12<sup>th</sup> November, 2012**

**LILIAN N. MUTENDE  
JUDGE**

**Counsel appearing**

Mr. Kivihya for the State Counsel for the Respondent

Ms. Koech advocate for the applicant

Koech – Court Clerk