



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 151 of 2009

JOYCE AKINYI OCHIENG
.....APPLICANT

- AND -

THE COMMISSIONER OF POLICE1ST
RESPONDENT

THE HON. THE ATTORNEY-GENERAL2ND
RESPONDENT

RULING

The applicant moved the court by Originating Summons dated 2nd April, 2009 and brought under sections 70, 72, 76, 84 (1) and 123(8) of the Constitution, section 123 of the Criminal Procedure Code (Cap 75, Laws of Kenya), the inherent jurisdiction of the High Court, and all other enabling provisions of the law.

The application carries several prayers, the chief of which are as follows:

- (i) *that, the applicant be granted anticipatory bail or bail before arrest and/or charge;*
- (ii) *that, a day be appointed for the applicant to appear before an appropriate Police Station with her advocate, to the intent that the Police should undertake normal procedures including charge - and - caution if necessary, without being taken into custody;*
- (iii) *that, a day be appointed for the applicant to appear in Court for the purposes of charge and trial if criminal charges are preferred and filed in Court against the applicant;*
- (iv) *that, a declaration be made that the applicant's fundamental rights and freedoms of the individual under sections 70, 72, 76 and 82 of the Constitution have been contravened by the respondents herein, specifically –*
 - *the applicant's right to liberty, security of the person and protection of the law have been transgressed;*
 - *the applicant has been subjected to unlawful and arbitrary search or entry of her premises/property by the respondents;*
- (v) *that, a declaration be made that the applicant has been deprived of the protection of the law by reason of the respondent's failure and/or neglect to charge in a Court of law the persons implicated in offences against the person and property of the applicant.*

The general grounds on which the application is founded, are as follows:

- (i) *the powers of arrest should not be used by the Police to harass, intimidate and oppress the applicant;*

- (ii) bail/bond protects a person from pre-trial punishment, and secures the principles of presumption of innocence;
- (iii) every person is entitled to the enjoyment of fundamental constitutional rights to liberty, privacy, personal dignity, and fair treatment under the law;
- (iv) under sections 84 and 123 (8) of the Constitution, this Court has jurisdiction, power and authority to check and redress arbitrary, oppressive and improper exercise of power by the respondents.

The supporting evidence for the prayers in the application is set out in a 31 - paragraph affidavit sworn by the applicant on 2nd April, 2009. To this affidavit are annexed several illustrative documents, including the certificate of incorporation for a company known as Elegance Investment Limited, as well as the memorandum and articles of association of that company; correspondence with the Registrar of Companies; lease document for a property occupied by the said company; correspondence between the applicant and various Government officials – including the Principal Immigration Officer, the Commissioner of Police, the Director of Criminal Investigation, the Attorney-General; and many other communications, including sms sent on cellphones.

It emerges from the depositions that the said company is a private company registered by shares, and there are only two share-holders, holding equal shares – namely the applicant and one **Anthony Chinedu Ifedigbo**, who is a former husband of the applicant. The company has a lease over a property belonging to Kenya Institute for the Blind, and it runs on that property a hotel business, known as Deep West Resort Club.

The applicant depones that there is a dispute between the two shareholder-directors over the ownership and management of Deep West Resort Club; and, recently, when she was out of the country, her co-director took over the business and phased out the activities that she had been running on the premises. The deponent avers:

“...when I visited the premises on 31st March, 2009 I found the place run down. It had been converted into a storage facility for suspect goods. I reported the matter to Pangani Flying Squad Police for inspection of the premises

“...with the assistance of the Police the premises were inspected and undesirable goods removed. I then, with the assistance of my old employees, embarked on a clean-up of the place.”

That, by the applicant’s deposition, was the beginning of the conflict which has necessitated the instant application. She avers that the co-shareholder came in, with the protection of the OCPD Langata and attempted to arrest her. She depones:

“... the sole purpose for which the Police from Langata Police Station led by the OCPD came to the premises, was to reinstate them back to *Chinedu*, his agents, or the purported sub-tenant – which I resisted.”

It emerges from the applicant’s depositions that she apprehends that a civil dispute has been brought under the charge of the Police Force, and she has been inclined to assemble her own force of civilians, to counter the Police interest in Deep West Resort Club. She avers:

“... I accused the Police of bias and [of] acting at the behest of *Chinedu* in a matter in which they have no jurisdiction

“... I had the support of my former employees who resisted any orders from the Police to vacate the said premises vowing to protect the said premises, business and their jobs.

“...The stand-off lasted until 9.45p.m.

“The OCPD Langata then decided to arrest and take me to Langata Police Station to record a statement.

“...I informed the OCPD that since he was already biased in the matter, I did not feel safe accompanying him”

The applicant is apprehensive about her safety because she has made several reports to responsible officers of the Police Force, concerning her safety; and indeed, she has communicated this matter to the Attorney-General, through her advocates; but no action has been taken. To her affidavit, the applicant has attached a large number of received short messages, which she believes to emanate from *Anthony Chinedu Ifedigbo*, and all are of a

threatening character. The deponent perceives threat in not only *Anthony Chinedu Ifedigbo*, but also in the OCPD himself; she deposes:

“...I was threatened by the OCPD and the officers accompanying him, and had to escape from the scene, for my own safety.”

The applicant is concerned that her *property rights* are being infringed, by the OCPD Langata ordering her to leave Deep West Resort Club to *Chinedu*.

The OCPD for Langata, however, contests the applicant's averments, by his replying affidavit sworn on 6th April, 2009. He deposes that he had learnt, on 30th March, 2009 that the applicant herein had stormed Deep West Resort Club and had forcefully evicted one *Mr. Muchina* who was running a business at the said premises. The OCPD's depositions further underline the essentially *civil nature* of the dispute at Deep West Resort Club; he avers:

“Due to the kind of tension manifested by the people around there and given [that] the issue seemed to revolve around [the] running of business premises, I directed the duty officer and other officers patrolling the area to remain within the scene, in order to ensure [that] security, law and order [were] maintained....”

Learned counsel *Mr. Wamwayi* had objections to the tone of the OCPD's affidavit, which referred to the applicant herein as “the aggressor.” The OCPD deposed that there had been a confrontation at the *locus in quo*, during which the applicant and her supporters had caused injury to *Anthony chinedu Ifedigbo* and one *Jack Omondi*; and after the two men had lodged complaints, the deponent went to the scene and requested the applicant to accompany him and his team to Langata Police Station for the purpose of recording a statement. The deponent averred that he had acceded to the applicant's insistence that she be allowed to go with her lawyer to the Police station, but thereafter, she disappeared.

Counsel urged that the said OCPD, in his affidavit, had not controverted the applicant's averment that he was biased in favour of *Anthony Chinedu Ifedigbo*.

Yet another replying affidavit is that of Chief Inspector *Samuel Yagan*, of Langata Police Station; and in his depositions of 31st March, 2009 he says he was investigating, in relation to the applicant, the offences of (i) creating a disturbance in a manner likely to cause a breach of the peace; and (ii) assault causing actual bodily harm – and that for this purpose, he wanted the applicant to come to the Police station to record a statement; the applicant, however, went into hiding, and so it has become necessary to apply in the Subordinate Court for a warrant of arrest.

Counsel contested the candour of the depositions, as the affidavit carried *no annexure* of the said *warrant of arrest*; nor of any *medical document* showing the injuries in question; nor of any *document* showing the applicant to have destroyed any property.

Mr. Wamwayi submitted that the evidence on record shows a genuine *apprehension of danger* posed by *Anthony Chinedu Ifedigbo*, on the part of the applicant who had already expressed her fears to those in public authority; and that she had good cause not to trust the OCPD for Langata, who she believed to be biased in favour of *Chinedu*.

Counsel urged that the High Court had now recognised that an apprehension of such a kind, on the part of the individual, merited the grant of *anticipatory bail*; and he called in aid the decision in *W'Njuguna v. Republic* [2004]1 KLR 520, in which it is stated that (at p. 520):

“While the right to *anticipatory bail* or *bail pending arrest* is not specifically provided for by statute, the same right is envisaged by section 84(2) of the Constitution.”

The Court's attention was also drawn to its own earlier decision in *John Maina Kaibere vs. Republic & Two Others*, Nairobi High Ct. Misc. Crim. Application No. 289 of 2007, which carries the principle that a *genuinely-held fear of unchecked Police restrictions on an applicant's personal liberty, at the pre-arraignment stage, is good reason for granting anticipatory bail*; and the pertinent paragraph in that decision runs as follows:

“All these considerations, it appears to me, could be expected to place the applicant under considerable fear for his own safety, privacy and personal dignity. From such a conclusion, it then follows that there is, indeed, an objective

basis for seeking anticipatory bail by the [applicant]. It is the duty of this Court to grant such bail, where appropriate, as part of the judicial mandate to render justice to those who come knocking on the door, for good cause.”

Mr. Wamwayi urged that the applicant in the instant case was not running away from the Police, but, just as she states in her affidavit, she is ready at any time to present herself for Police investigations, and even to answer to a charge, if one is duly brought against her.

Learned respondents’ counsel, Mr. Muriithi, however, contested the application, and maintained in the first place that there was, in point of form, no proper application before the Court: for in the applicant’s supporting affidavit, the *jurat* appeared on a separate page from the main body of the document. But more importantly and in substance, counsel urged, the applicant had not shown any harassment of her by the Police. Counsel submitted that both replying affidavits had shown that, on the material occasion and at the *locus in quo*, the applicant had shown herself to be both violent and destructive, and that the disturbance occasioned was brought under control only through physical measures taken by the Police officers present. The presence of the Police at the *locus in quo*, counsel submitted, was for the purpose of providing security, and not that of harassing the applicant.

It cannot be doubted that the basis of the Police interest in the *locus in quo* and in the players thereat, was an essentially *civil condition* entailing, firstly, *competing property claims*, and secondly complications arising from *defunct conjugal relations*. Such questions must ultimately be solved through civil litigation, arbitration, or some related process, and, as far as possible, the process of the criminal law should not intervene save when it is truly essential. Since it is alleged that, in this instance, there was violence and destruction of property at the *locus in quo*, it may well be that there was a case for Police intervention. Such intervention if it becomes necessary, should not bear the appearance of an effort to resolve the primary civil dispute.

Precisely because of the disturbed and emotive civil context to the situation here, the Court takes judicial notice that the applicant would entertain fears for her own safety, and she was likely to doubt the good faith of Police officers who came along after being invited by Anthony Chinedu Ifedigbo. The moment such fears are entertained by the applicant, this is an objective condition which justifies pre-arraignment protection for the applicant, through the grant of *anticipatory bail*.

While the applicant’s prayers have been broadly cast, the orders of this Court must be more narrowly defined, if they are to serve a practical purpose.

I will make orders as follows:

(1) (a) I admit the applicant to anticipatory bail in the sum of Kenya Shillings Fifteen Thousand (Kshs 15,000/=), which shall immediately be paid into the Cash Office of the High Court.

(b) In the alternative, I grant the applicant an anticipatory, free personal bond in the sum of Kenya Shillings Fifty Thousand (Kshs. 50,000) which she shall forfeit in the event of failure to comply with these orders, pending her being lawfully charged before a Court, with a bailable offence.

(2) The applicant, accompanied by her counsel, shall

appear before the DCIO Langata on Thursday, 9th April, 2009 at 10.00 am to record a statement as may be necessary and to assist with investigations into the suspected offence, in any lawful manner.

(3) The DCIO Langata may if he considers it proper, lay a charge against the applicant, and have the applicant brought before the Court in accordance with the law, for plea-taking.

(4) The anticipatory bail/bond hereby granted shall remain in force until such time as the applicant is arraigned before a Court; and thereafter the question of bail/bond shall be regulated by the trial Court.

(5) If the applicant shall fail to comply with the terms of these orders, the Subordinate Court may issue a warrant for her arrest.

Orders accordingly.

DATED and DELIVERED at Nairobi this 8th day of April, 2009.

J.B. OJWANG

JUDGE.

Coram: Ojwang, J.

Court Clerk: Huka

For the applicant: Mr. Wamwayi

For the Respondent: Mr. Muriithi