

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Miscellaneous Application 71 of 2009

DAN MULINGA MBALUKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application predicated on sections 70, 72, 76 and 84 of the Constitution of Kenya as well as section 123 of the Criminal Procedure Code. The Applicant, Dan Mulinga Mbaluka, an advocate of this court, seeks bail pending arrest in respect of a complaint made against him by one Fredrick Mutie Mutua in Mwingi Police Station's O.B. No. 10/13/08/2008.

2. From the Supporting Affidavit, the Applicant depones that his situation was triggered by instructions he received to recover some money due to one James Lumumba from Zone Holdings and Credit Investment Ltd. He filed suit viz **Yatta SRMCC No. 14/2001** where he obtained a favourable judgment in the sum of Kshs.63,950/=. In execution thereof, he caused plot No. 58 Kithimani belonging to the judgment – debtor to be sold and the buyer was the said Fredrick Mutie Mutua. Sometime after the public auction and before transfer of the plot in his names, the said Mutua changed his mind and demanded a refund of his money.

3. According to the Applicant, he did not receive the proceeds of the sale and therefore he had nothing to refund and he had no legal or other obligation whatsoever to the complainant. That inspite of that fact he has been threatened with arrest by the DCIO and OCPD Mwingi and their actions are therefore illegal and completely unconstitutional.

4. I have considered the Application and I note that it is brought by way of Notion of Motion. Although neither the advocate for the Applicant nor learned Senior State Counsel said anything about that procedure, I think I should begin from there. The Applicant has invoked L.N. 6/2006, viz the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, which Rules were made pursuant to section 84 (6) of the Constitution. Those Rules necessitate that proceedings shall be commenced by way of an “**Originating Notice of Motion**” in Form A if a party is invoking section 65 of the Constitution which is with respect to the supervisory powers of the High Court over courts subordinate to it. If the matter is with regard to the interpretation of the Constitution under section 67 of the Constitution then the originating proceeding is by way of a Petition in Forms B and C. Where the issue relates to alleged violation of the rights of an individual under sections 70 to 83 (inclusive) of the Constitution, then again a Petition in Form D shall be filed. The need to stick strictly to this procedures is what led Dulu J to strike out a Notice of Motion seeking similar orders as the present Applicant in **George Kanyiri Kinyua vs R H.C.Cr. Application 669/2007 (Nbi)**. In that case, the Applicant like in this case also invoked section 123 of the Criminal Procedure which is simply the provision for grant of bail after arrest and arraignment in court and not prior to that fact as is the present situation.

5. And so the Applicant has approached this court by an unknown procedure called “**Notice of Motion**”. However, I take the view that in matters of alleged breach of fundamental rights, once the court can glean from the record what remedy is needed and the remedy is available, it should be granted. In **James Maina Wanjohi vs R (2007) e KLR (H.S.Misc. Cr. Application 706/2007 (Nbi)**, Ojwang J had no problem granting bail pending arrest where the Applicant was living in fear of arrest and detention for offences he allegedly never committed. The Applicant in that case had filed a “**Notice of Motion**”.

6. Similarly, in this case, the Applicant, an advocate alleges harassment for matters that he otherwise says he handled professionally and I agree that in such an instance he deserves what Ojwang J called “**a safety cover...to cover him until he is, if need be, charged in court, whereupon the court in question will ensure his freedom by appropriate bail orders**”. – See **Wanjohi** (supra).

7. In the instant case, the Applicant is deserving those orders for reasons well set out above and so I will order as follows:-

1. The Applicant is hereby granted anticipatory bail, and he will enjoy this bail until such time as a formal charge shall have been laid against him in a court of law, from which moment the trial court shall make any orders as to bail which it may deem appropriate.

2. The Applicant shall meet the bail terms by paying into the High Court Kshs.10,000/= in cash.

3. The Applicant shall appear before the DCIO, Mwingi on Monday, 22/6/2009 or so soon thereafter as the DCIO may be available to record his statement in respect of any intended prosecution and he may, if he so wishes, be accompanied by his advocate.

4. This order to be extracted and served on the DCIO Mwingi forthwith for compliance.

8. Orders accordingly.

Dated and delivered at Machakos this **10th** day of **June** 2009.

ISAAC LENAOLA

JUDGE