



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**IN THE MATTER OF AN APPLICATION BY JACK WYCLIFFE MAKOYI**

**WANYONYI FOR AN ORDER OF ANCITPATORY BAIL OR BAIL BEFORE ARREST AND/OR CHARGE**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, THE CRIMINAL  
PROCEDURE CODE, CHAPTER 75 OF THE LAWS OF KENYA, THE PRINCIPLES OF NATURAL JUSTICE AND THE  
RULE OF LAW**

**BETWEEN**

**JACK WYCLIFFE MAKOYI WANYONYI.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

This application is brought by a notice of motion dated 5<sup>th</sup> October, 2009, and is made under Chapter 5 of the Constitution of Kenya, Sections 123(1) and 124 of the Criminal Procedure Code; the inherent jurisdiction of this Honourable Court; and all other enabling provisions of the law. The Applicant seeks the following substantive orders –

1. THAT the Applicant be granted anticipatory bail before arrest and or charge.
2. THAT this Honourable Court be pleased to arrest the Applicant and release him on his execution of bond without sureties or on the terms that this Honourable Court deems reasonable and just for his presence, if required.
3. THAT the warrant of arrest, if any in force, be lifted and the Applicant be summoned to appear in Court to answer charges, if any, against him.
4. THAT the District Criminal Investigation Officer, or the Central Police Station, Nairobi, be ordered to file criminal charges, if any, sooner or before and/or close the subject file forthwith.

The application is supported by the Applicant's own affidavit, and is based on the grounds that –

- (a) The Applicant is a bona fide purchaser of the subject motor vehicle.
- (b) It has come to the Applicant's knowledge that there is another party claiming ownership of the said motor vehicle, and the Applicant has already recorded a statement with the police.
- (c) THAT the Police Officers from Migori and the Central Police Station, Nairobi, are becoming increasingly hostile, and the Applicant is apprehensive that on his next visit to the Central Police Station, he will be arrested and incarcerated.

At the hearing of the application inter partes, Mr. Ongicho appeared for the Applicant while Mr. Nyakundi appeared for the Respondents. Mr. Ongicho relied exclusively on the Applicant's supporting affidavit and the grounds set out on the face of the record. On his part, Mr. Nyakundi opposed the application and submitted that Chapter 5 of the Constitution does not make any provision for anticipatory bail, and Sections 123 and 124 of the Criminal Procedure Code provide for bail after arrest. There was no evidence of any harassment by the Police, and the Applicant was only apprehensive that he will be arrested. He finally submitted that the application had no merit and ought to be dismissed.

In reply, Mr. Ongicho submitted that the Applicant's apprehension was real and it was well known that the Police will certainly arrest him for having bought stolen property. However, he had exercised due diligence and did a search before buying the subject motor vehicle. That was why the Applicant was apprehensive.

I have considered the application and the submissions of both counsel. Every case should be considered and determined on its own peculiar facts and circumstances. In a bid to demonstrate that he exercised due diligence in this matter, the Applicant herein has exhibited a copy of an agreement pertaining to the sale and purchase of the subject motor vehicle. It is dated 7<sup>th</sup> September, 2009. On the same date, he paid for a copy of records (motor vehicle), and the copy which he obtained reads that the owners of the subject motor vehicle were **BOLPAK MOTORS LTD** of P. O. Box 94063 – 80100, Mombasa. But he proceeded to buy the same motor vehicle from one John M. Kamau of Box 103 – 00100, Nairobi. And in paragraph 4 of his supporting affidavit, he deposes that according to the Log Book shown to him by the seller, John M. Kamau, which was confirmed by the search at the Registrar of Motor Vehicles, the original Logbook showed that the registered owner of the vehicle was **BALPACK MOTORS LTD**. This information was subsequently confirmed by one Mr. Malik, a director of that company, who said that his company was still holding the Original Logbook.

On these facts, did the Applicant exercise due diligence? It depends on whether he obtained the copy of records from the Registrar of Motor Vehicles before or after signing the Sale Agreement. If he obtained it before signing the agreement, then he would be held blameworthy as he already knew the rightful owner of the vehicle. But if he obtained that information after signing the agreement then he did not exercise due diligence. Either way, the Police have smelt a rat, and they have the right to probe the matter to the bottom.

For these reasons, I find that the Police should not be obstructed in their work, and the application therefore lacks merit. It is accordingly dismissed.

Dated and delivered at Nairobi this 13th day of October 2009.

**L. NJAGI**

**JUDGE**