



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

Criminal Appli. 232 of 2008

George Karanja KaranguApplicant

And

Republic.....Respondent

RULING

George Karanja Karangu (the applicant) has moved this Court pursuant to the provisions of 123 of the CPC by way of originating summons in which he seeks to be granted bail pending arrest. Further that a day be appointed for the applicant to appear before the appropriate police station or criminal investigations department with his advocate to enable police undertake the normal investigations and a day be given for his Court appearance for purpose of plea.

He also prays that a declaration be made that this matter is civil in nature.

The application is premised in grounds that the powers of police are being used to harass, intimidate and oppress the applicant and that the applicant is entitled to enjoyment of his rights to personal liberty as provided under section 72 (1) of the constitution.

In the supporting affidavit, the applicant depones that he is a businessman in partnership with one Mark Githae Kaburu. The two were directors and signatories to the company account (annexed is a Memorandum of Association and Articles of Association)

On 18/4/2008 they entered in an agreement to transfer all applicants shares in the company to the partner, Mark, in return for transfer of ownership of Motor Vehicle by KAY 725 R, to the applicant – applicant then advertised in the Daily Nation newspaper that he had ceased being the director of the said company.

Meanwhile, Mark Githae Kaburu made a report to Gigiri police station vide OB 10/25/04/8 alleging that on diverse dates between January 2008 and 18th April, applicant stole Kshs.15,548,000 proceeds from the sales of Motor Vehicle by the said company.

Applicant sees that report as malicious and he fears that police might arrest him for no apparent reason. He fears being locked up in cells which he describes as dehumanizing and unhealthy with no beds or beddings, toilet facilities, chairs and tables for reading, no lights or excessive lights.

He claims that his former partners intention is to have him treated as a criminal.

The application is opposed and the learned state Counsel terms it as incompetent because Section 123 CPC does not envisage grant of bail pending arrest. In so doing he seeks to rely on two decisions **TITO**

MUSYOKA VR HCCR APPEAL 143 of 2004 where Makhandia Judge, rejected the application stating that see 123 CPC does not envisage anticipatory bail.

Of course that is correct, indeed Section 123 CPC deals with bail where one has been arrested by police and taken to Court or in custody.

However, I don't think failure to cite the proper legal provisions should be used to deal with a fatal blow to the purpose of the prayers sought.

The principles of granting anticipatory bail were well discussed in the case of **W'Njuguna** VR (2004) page 520 which held:-

1. From section 60 (1) and 84 of the Constitution, the High Court has powers to make such orders that shall enforce and serve the fundamental rights of an individual as provided for in sections 70 to 83 of the constitution.

2. While the right to anticipatory bail pending arrest is not specifically provided for by the statute, the same is envisaged by section 84 (2) of the constitution which provides that

(2) The High Court shall have original jurisdiction.

(a) To hear and determine an application by a person in pursuance of subsection.

(b) To determine any question arising in the case of a person who is referred to it in pursuance of subsection.

(3) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision of section 70 – 85 inclusive.

3 The right to anticipatory bail or bail pending arrest has to be called out where there are circumstances of serious breaches of citizens rights by an organ of the state which is supposed to protect the same.

4 The right to anticipatory bail will NOT give a person a right not to appear before the police in connection with commission of an offence.

Rules of procedure and technicalities are simply provided so as to assist in smooth and easy administration of Justice but should not be a gag to one pursuing certain reliefs.

In any event even Mr. Makura concedes that the State recognizes the fact that High Court may grant anticipatory bail.

Mr. Mukura has submitted that the applicant has not demonstrated that his rights under the constitution are likely to be breached. It is his contention that the applicant admits to there being a complainant about money said to have been stolen by him from the account and that those are issues which police can investigate under the Police Act.

Are there reasons to warrant bail pending arrest? Applicant claims this is a civil matter yet refers to some stolen money which would also give it a criminal element.

Now with the above in mind, what is it that stops the applicant from making the procedural steps of going to the police station in the company of his advocate and presenting himself for questioning by the police officers? Nothing really except the fear of being locked in cells. The applicant has not shown that the police have attempted to frustrate him, in fact all there is, so far is report by Mark Githae.

Applicant is simply apprehensive about the interrogations police will be carrying and I think it would be improper for the Court to curtail the powers opinion of the police in carrying out their operations.

How else should the police establish the basis of a complainant if for every complaint made one rushes to Court, and the Court agrees to stifle their effort, on the basis of a party fearing being placed in police custody?

Applicant has not demonstrated how his constitutional rights have been curtailed, what he has demonstrated is a fear of what he thinks constitutes a police cell.

I think even the rights so well touted have their limitations in the light of the provisions in section 72 (1) of the constitution.

72 (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases.

(e) upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law of Kenya.

My finding is that the right to liberty is not an absolute right and there is the criminal element of the complaint alluded to, which allows the police to carry out the investigations without too many preconditions.

The upshot is that the applicant lacks merit and is dismissed.

Delivered and Dated this 16th Day of June 2008.

H.A OMONDI

JUDGE