



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 786 of 2007

NIZAR HASSANALI KASSAM..... APPLICANT

V E R S U S

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF POLICE2ND RESPONDENT

R U L I N G

This is a notice of motion dated 12th November, 2007 wherein the applicant is seeking anticipatory bail. It is premised on grounds that one of the joint owners of a commercial plot known as L.R. 209/665 situated along Tom Mboya Street has made a complaint to the Criminal Investigation Department Nairobi Area and police are looking for him. The applicant is apprehensive that police will lock him in custody for excessively long time there by violating his rights.

The applicant is apprehensive that the police officers may hide under the powers of arrest and investigation to harass and intimidate the Applicant. Applicant alleges that the police are acting in a high handed manner to harass and intimidate the Applicant. The application is supported by an affidavit sworn by the Applicant whose late mother was a joint owner to the said plot. The other joint owner Lekh Singh, Ram Singh and Karta Singh Abdul A. Gulam have since died. He says letter of administration are yet to be obtained by the beneficiaries – the suit premises is let out to several tenants and the rental income has been used to pay rates. On 13/9/07, one of his tenants telephoned him that there were some two gentlemen claiming to be CID officers who had visited the suit premises demanding for Tenancy Agreements and the tenants were threatened that if they did not produce the same then their doors would be closed and they would be locked up. So applicant contacted his advocate to follow up and establish what the policemen were upto. It turned out that one of the partners (had complained that he was not receiving his share of the rental income) and had sought police assistance so as to recover the money.

His counsel agreed with a Sergeant Murunga, of Provincial CID to meet on 17/9/07 and avail all the documents relating to the communication between the partners and expenditure of the rental income. However on 15/9/07, applicant received a call on his cell-phone from a person who did not identify himself demanding that he avails himself to CID immediately and he has continued to receive calls on his cell phone from persons who have refused to identify themselves, demanding to know where he is.

Applicant is now apprehensive that police officers are acting on instructions of one partner, demanding to know his whereabouts so as to lock him up. Further it is his allegation that the said partner has

threatened to teach him a lesson by locking him up at the police station for an unduly long time.

Prior to the “*storming*” of the suit premises by the police, a tenant had complained of harassment and intimidation by a Mr. Asif, who claimed to be the owner and demanded that the Tenants pay him rent or be evicted – this is supported by NK3 which are protest notes from tenants.

That the behaviour and conduct of this said Mr. Asif has been a subject of numerous correspondences as shown by NK4 (*between their respective advocates*). He complains that it is the son of the partner who is turning what is, in essence a civil matter into a criminal one.

Mr. Khalwale, counsel for the Applicant submits that the dispute between partners as to how the property should be managed is not a criminal offence and police have no role to play, whatsoever. He says that even if police have the mandate to investigate a crime, the complaint is not properly before the police and complainant is using police to score a purely civil claim – that is why Applicant is apprehensive about his liberty. Mr. Khalwale further point out that applicant is willing to attend the police station and record his statement on a date the court deems fit and that the court do grant him anticipatory bail.

The application is opposed – the learned State Counsel submits that the application is incompetent as the section under which it is made i.e section 123 (3) Criminal Procedure Code deals with granting of bond where an accused person has been admitted to bond by a lower court or is on police bond – which is not the situation here. Secondly, he submits that no proper basis has been established by the applicant to warrant granting anticipatory bail as the fears he refers too are baseless. Mr. Makura further points out that if the Applicants fears were that his Constitutional rights are likely to be violated he should have moved the court under Section 84 of the Constitution to have his fears addressed.

He explains that right now police are carrying out investigations and no violation has taken place – so this would amount to directing and hampering police in their work. Does the applicant’s fears have any basis. Who is the tenant who called to tell the applicant that CID officers were looking for him? He remains nameless and did not swear any supporting affidavit. Then in his affidavit he says that the joint owners had died and now there is this unnamed partner who is using police to harass him. But isn’t the applicant the very one who said that no letter of administration had been taken up by the beneficiaries? So how does the partnership arise? The applicant has never spoken to police and it is not clear why his advocate did not go back to the police as agreed for a return date on 17/9/07 – nor has the advocate sworn any affidavit to state that subsequent to that police have repeatedly asked him to avail the applicant.

From what the applicant has presented, the harassment seems to be by his unnamed partner and the partner’s son plus unidentified people whom he can’t confirm to be police officers. Indeed the correspondences confirm the acrimony which exists between the applicant and his partner whose name he does not disclose, but who from the annexures might be a Mr. Asif or could he be Gulam Singh or Mrs Gulam as reference to in annexure marked 20?

Really this appears to be a situation of misguided fears, there is no Warrant of Arrest against the applicant, there is no note from police officers summoning applicant to go to the police station or that they are intent on locking him up – those threats and intimidation emanate from his purported partner or partner’s son, not the police and in fact his remedy lies in him reporting the matter to police.

But what if there is some real reason taking into account that his advocate had been to the police station and met a Sergeant Murunga over the issue, would that justify the fears applicant has? I say no, because subsequent to that, there is no evidence that his advocate returned to the police station as agreed to establish the intention of the police. Which would then justify why Mr. Makura says police are simply carrying out investigations and no violation of rights has taken place – I agree.

Simply because police request an individual to report to their offices over a complaint is not prima facie proof that the individual will be arrested and locked up – those fears are unfounded.

Is the application brought under the wrong provision?

Section 123 (3) of the Criminal Procedure Code reads as follows:-

***“The High Court, may in any case, direct that an accused person be admitted to bail or that bail required by a sub-ordinate court or police officer be reduced.*”**

In my view that provision is appropriately cited and so this limb of objection by the learned State Counsel cannot hold.

My finding is that there is really no reason whatsoever to grant anticipatory bail. The applicant's fears are misplaced. If so the application is dismissed.

Orders accordingly.

Dated and Delivered at Nairobi this 11th day of March, 2007.

H. A. Omondi

Judge