REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appli. 669 of 2007

GEORGE KANYIRI KINYUA………………………………………..APPLICANT

VERSUS

REPUBLIC…………………………...……………………………..RESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 20th September 2007 filed by M/S Muriuki & Co. Advocates on behalf of the applicant GEORGE KANYIRI KINYUA. The application seeks for the following orders, that –

1. This Honourable Court be pleased to admit the applicant to bail or bond pending arrest by the police.

2. In the event of the applicant being arrested by police, he should be released on the terms of the said bail/bond.

The application was filed under certificate of urgency. It is supported by the affidavit of the applicant sworn on 20th September 2007.

At the hearing of the application on 8th October 2007, Mr. Kariu appeared for the applicant, while Ms. Gateru appeared for the State. Though the application does not cite the sections of the law under which it was brought, counsel for the applicant submitted that it was filed under section 123 of the Criminal Procedure Code (Cap. 75), as well as section 70, 72(1), and 84 of the Constitution.

This application cannot succeed. In my view it is fatally defective and has to be struck out. I say so because of the following reasons.

Firstly, though section 123(3) of the Criminal Procedure Code (Cap. 75 Laws of Kenya) confers on this court powers to grant bail or bond, or to vary bail or bond terms imposed by a police officer or a subordinate court, is presumes that the applicant has already been retained by the police or released by the police on bail or bond, or has already been charged in court and has either been refused or been admitted to bail or bond by a subordinate court. I will cite here the provisions of section 123(3) of the Criminal Procedure Code, which are as follows-

“123(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.

In my view, the above provisions of the law do not cover what is called “anticipatory bail”, as in our present case. The applicant, not having either been in police custody or charged in court, the above section of law cannot be used to bring an application to the High Court for grant of bail or bond.

There could be situations in which a person’s fundamental Constitutional rights and freedoms are either being contravened or are threatened with contravention. In that event, if the allegation is on contravention of those fundamental Constitutional rights and freedoms, an application for anticipatory bail can be considered and orders granted by the High Court. In my view, however, the correct procedure with which to invoke the jurisdiction of this court is Legal Notice no. 6 of 2006. The relevant rules of procedure applicable are rules 11, 12, and 13, of the Legal Notice, which provide –

“**11. Where contravention of any fundamental rights and freedoms of an individual under section 70 to 80 (inclusive) of the Constitution is alleged or apprehended an application shall be made directly to the High Court.**

12. An application under rule 11 shall be made by way of petition as set out in FORM D in the Schedule to these Rules.

13. The petition under rule 12 shall be supported by an affidavit”.

The application herein has been brought by way of Notice of

Motion, while under rule 12 above, such an application on an alleged or apprehended contravention of fundamental rights and freedoms of an individual is to be brought by way a petition. Rule 12 in couched in mandatory terms. I am aware that rules of court are handmaidens of justice and should not be used as an impediment to courts doing substantive justice in any cause before the courts. However, it is only where default in complying with the rules of procedure is curable that the court will indulge an applicant and determine the matter on the merits, in order to do substantive justice. In my view, that indulgence should not be availed when an application if fatally defective.

In our present case, the application is fatally defective and incurable. It contravenes the mandatory provisions of rule 12 of Legal Notice No. 6 of 2006. It is brought by Way of Notice of Motion rather than by way of petition as required under rule 12 (above). An application by way of petition is totally different and distinct from an application by way of Notice of Motion. One cannot be substituted for the other. I therefore find that the application herein is fatally defective and have to strike out the same.

Consequently, I strike out the application. For the avoidance of doubt, I wish to state that the applicant is at liberty to file a proper application in accordance with the provisions of Legal Notice No. 6 of 2006, if he so desires.

Dated and delivered at Nairobi this 31st day of October 2007.

George Dulu

Judge

In the presence of –`

Mr. Kariu for applicant

Ms. Gateru for State

Eric - court clerk