REPUBLIC OF KENYA

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

Criminal Appli. 667 of 2007

NIZAR HASSANALI KASSAM …….APPLICANT

VERUS

REPUBLIC……..…….RESPONDENT

RULING

This is a Notice of Motion dated 19th September 2007 filed by M/S Khalwale & Company advocates, on behalf of the applicant NIZAR HASSANALI KASSAM. The application is purported to be brought under Chapter 5 section 70 (a) and 72 of the Constitution of Kenya and Section 123 of the Criminal Procedure Code (Cap. 75). It seeks for the following orders that –

1. the application be certified as urgent and be heard ex-perte in the first instance.

2. The applicant granted anticipatory bail or bond before arrest and or charge .

3. A day be appointed by the Honourable Court for inter-partes hearing.

4. Any further or other orders or directions this Honourable court deems fit.

The application has grounds on the face of the Notice of

Motion. It is also supported by the affidavit of the applicant NIZAR HASSANALI KASSAM.

At the inter-partes hearing of the application, the learned State

Counsel, Mrs. Gakobo, submitted inter alia that the application is incompetent, as it was not brought in compliance with the provisions of Legal Notice No. 6 of 2006. Learned State Counsel urged me to strike out the application.

Mr. Khalwale, learned counsel for the applicant, on the other hand, argued inter alia, lication was properly before the court. Learned counsel argued that, in any case, the court should not determine the application on procedural lapses, as the rules of procedure are handmaidens of justice.

I will address this preliminary legal point first. This application clearly cites section 70(a) and section 72 of the Constitution, in addition to section 123 of the Criminal Procedure Code (Cap. 75). It is basically an application for anticipatory bail. It is opposed by the State on technical grounds, among other grounds. Section 123(3) of the Criminal Procedure Code (Cap. 75) which flows from section 72(5) of the Constitution confers on the High Court jurisdiction to grant bail, or vary bail/or bond terms that

have been granted by a subordinate court or a police officer. Section 72(5) of the Constitution presumes that the applicant has already been arrested or detained.

Section 123(3) of the Criminal Procedure Code (Cap.75), which was amended by Act No. 85 of 2003, in my view, also presumes that someone has been detained by the police or has been charged in court and has either been refused the grant of bond or bail, or has alreadybeen admitted to bail by the subordinate court or a police officer. The sector provides –

"**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. They cover situations where a person has either been put in custody by the police, whether or not the police have granted that person bail; they also cover situations where someone has been charged in court, whether or not that person has already been released on bail by a subordinate court.

In my view, the correct procedure applicable in an application for anticipatory bail is Legal Notice No. 6 of 2006. The relevant rules on the procedure to be followed are rules 11, 12, and 13, which provide as under –

"**11. Where contravention of any fundamental rights and freedoms of an individual under sections 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 a 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."

In my view, the allegations in the application herein are for anticipatory bail in the nature of alleged or apprehended contravention of the fundamental rights and freedoms of an individual. Indeed, that is why, in my view, the applicant has clearly cited section 70(a) and section 72 of the Constitution. Both those sections are covered in applications to be made under rule 11 and 12 of Legal Notice No. 6 of 2006, as the rules apply to alleged or apprehended contravention of an individual's fundamental rights under section 70 to 80 (inclusive) of the Constitution.

The application herein has been bought by way of Notice of Motion, while under rule 12 above, an application for an alleged or apprehended contravention of fundamental rights of an individual is to be brought by way of a petition. Rule 12 is couched in mandatory terms.

I have been told that the court should not determine this application on the basis of technicalities, as rules of court are meant to be handmaidens of justice. Indeed, rules of court are handmaidens of justice. However, it is only where default in complying with the procedures is curable that the court will indulge an applicant and determine the matter on the merits, in order to do substantive justice. That indulgence, in my view, should not be availed when an application is 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. An application by way of petition is different and distinct from an application by way a Notice of Motion. One cannot be substituted for the other. I therefore find that the application 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 terms of Legal Notice No. 6 of 2006, if he so wishes.

Dated and delivered at Nairobi this 4th October 2007.

George Dulu

Judge

In presence of –

Mr. Khalwale for applicant

Mrs. Gakobo for respondent