



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Misc Crim Appli 126 of 2005

**IN THE MATTER OF AN APPLICATION BY ERASTUS WAWERU GITHUNGA FOR
AN ORDER ANTICIPATORY BAIL OR BAIL BEFORE ARREST AND/OR CHARGE**

AND

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

BETWEEN

ERASTUS WAWERU GITHUNGA.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF POLICE.....2ND RESPONDENT

R U L I N G

The Applicant herein **ERASTUS WAWERU GITHUNGA** has brought this **NOTICE OF MOTION** dated 11th March 2005 in which he prays for orders in pertinent: -

- (c) The Applicant be granted anticipatory bail or bail before arrest and/or charge.
- (d) That a day be appointed for the Applicant to appear before an appropriate Police Station together with his counsel to enable the police undertake the normal procedures including charge and caution if necessary without being taken into custody.
- (e) That a day be appointed for the applicant to appear in court for purposes of charge and trial if criminal charges are preferred and filed in court against the applicant.
- (f) That the costs of this application be provided for. (g) Any further or other orders or directions this Honourable Court deems fit and just to grant.

The application is based on the grounds: -

1. The powers or arrest cannot and should not be used by the police to harass, intimidate and oppress any person including the applicant.
2. An arrested person must be informed on arrest or immediately following the arrest the reasons for arrest including the crime committed or alleged to have been committed.
3. Police powers of arrest must be exercised in accordance with the law or other principles thereof and not arbitrarily.
4. The applicant is entitled to the enjoyment of fundamental constitutional rights and freedoms including the right to liberty, fair treatment under the law.

The Application was filed on 11th March 2005 and duly served on the Attorney General who is the 1st Respondent on 15th March 2005. Despite being served, the Attorney General has not filed any replying affidavit. The Application is basically unopposed. When the application came up for hearing on 18th July 2005 the Respondents, despite being served did not appear.

MR. BEGI learned Counsel for the Applicant therefore argued his application ex-parte.

MR. BEGI submitted that the Applicant was seeking anticipatory bail pending arrest.

He submitted that the police visited the Applicant's home and left a note. That as a result the Applicant was fearful that he may be arrested interfering with his Constitutional rights.

I have gone through the affidavit in support of the application. In it, the Applicant details that on 10th March 2005 at 9.00 p.m. the police from Central Police Station visited his home in Thika wanting to search his house. That on resisting their attempts, they left him a note marked "E.A.G.2". In that note the Applicant was summoned to appear before the OCS Central Police Station on 14th March 2005 at 11.00 a.m. Also the Applicant said that he did not know why the police were seeking him but that he was apprehensive that he may be arrested because of having been followed by a police car on 11th March 2005.

This application is brought under Chapter five of the Constitution without quoting any section. The Applicant also invoked Section 123 of the Criminal Procedure Code and the inherent jurisdiction of this court to seek orders prayed. I have carefully considered the prayers sought and the grounds upon which the Application is made. It clearly occurs to this court that the real basis of the Applicant's application is merely an apprehension that he may be arrested. There is no evidence adduced before me or proof that the police have any intention to arrest the Applicant. In any event, it is within the power of the police to investigate cases including summoning persons to the police station and to effect arrest where necessary. Appreciated that such powers should be exercised with due regard to the Constitutional rights of individuals as enshrined in Chapter five of the Constitution. However, it is the duty of the Applicant to show that the police or persons in authority had breached their powers and or had trampled on his rights. All the Applicant has said is that police visited his house once. The purpose of the visit was disclosed as a "search" which the Applicant did not allow. The Applicant was then summoned to the Police Station but filed this application before the date the police required him.

Having considered the Applicant's affidavit and this Application I find that the Applicant has not proved that the Respondent herein have trampled on his Constitutional right or that the Respondent has acted arbitrarily. I find no grounds upon which to justify the granting of this Application and the same is dismissed accordingly.

Dated at Nairobi this 22nd day of July 2005

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LESIT, J.

JUDGE