



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISC CRIM APPLI 265 OF 2005**

**MRADULA SURESH KANTARIA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant has moved this Court by way of Chamber summons dated 17th May, 2005 and filed in Court on the same day. In the said Application, the Applicant, Mradula Suresh Kantaria prays that she be arrested by the Honourable Court as may deem fit pending any charges that the commissioners of Police may desire to prefer against her. Secondly that the matter be mentioned on a date that the Honourable Court may so direct. The Application is expressed to be brought under Sections 39, 123 of the Criminal Procedure Code and Section 84 of the Constitution of Kenya.

The Application is based on the following grounds:-

1. **THAT** the Applicant's right to liberty is likely to be abused.
2. **THAT** the Applicant has been unnecessarily harassed by the Police after a divorce case with her former husband and is likely to be held in Police custody for long without bond.
3. **THAT** the impending arrest and detention of the Applicant will be an abuse of her Constitutional rights.

The Application was further supported by the Affidavit of the Applicant in which in the main she depones that following the conclusion of the divorce proceedings involving herself and her former husband, Suresh Nanalal Kantaria, the latter was ordered to pay her a sum of Kshs,80,000 000/= together with interest and some properties by Lady Justice Ang'awa n 10th May, 2005.

That following the Judgement aforesaid, Mr. Kantaria has bragged that he would ensure that the Applicant would never get a penny of the settlement. That since then, the Applicant's house has been raided by anti-narcotics squad pursuant to some orders purportedly issued by the Chief Magistrate. That following the raid a complaint was made by the Applicant to the Commissioner of Police, C.I.D. Director and Kenya Anticorruption Authority. This notwithstanding on 12th May, 2005 a C.I.D. Officer, one Ernest Agina jumped over the gate and entered her compound and left a document compelling her attendance on a Police Officer under Section 22 of the Police Act. When contacted by Counsel for the Applicant, the said Mr. Ernest Agina, stated that the Police Officers acted on the basis of complaints filed by Suresh Kantaria's family. The Applicant fears that the harassment she is being subjected to as

aforesaid is yet another ploy by her estranged husband to have her arrested and detained by the C.I.D. The Applicant depones that she has never threatened to kill Suresh Nanalal and his family as claimed by the Suresh Kantaria's family in their complaint. The Applicant further depones that her daughter's studies have been rudely disrupted by the Police actions complained of. That this interference by C.I.D. has seriously disrupted her daughter's preparation for "O" level examinations and is likely to effect her results. The Applicants further depones that she is suffering form hypertension and Insomnia and has to see a doctor on regular basis.

Mr. Owino Opiyo teaming up with Harith Seth appeared for the Applicant and orally submitted in support of the Application that there is apprehension on the part of the Applicant that she may be arrested. That the Applicant has been constantly harassed by the Police. That though statements by the Complainant were recorded in April, 2005, to date no charges have been preferred against the Applicant.

In response to the Application the Respondent filed a replying Affidavit sworn by one Che-Guevara Ernest Ochieng Agina. He deponed that on 14th April, 2005 he received a complaint from Keval Kantaria that the Applicant had been making threatening phone calls to him. Following the complaint he recorded statements from both Keval and Naila Kantaria respectively. That on two occasions when he tried to reach the Applicant to record her statement, she was uncooperative. It was then that he opted to proceed to whispers Gigiri Estate on 12th May, 2005 where the Applicant resides to compel her attendance for purposes of recording her statement. The Applicant's statement under inquiry was eventually recorded on 18th May, 2005. The Respondent further deponed that the C.I.D. do not act on the instructions from Surecsh Kantaria but do independent investigations. He further deponed that the High Court has no powers to arrest the subject. That the Applicant has not proved that the Police have or are likely to contravene her rights of liberty for ulterior motives or purposes. Ms. Okumu Learned State Counsel who appeared for the Respondent orally submitted in opposition to the Application that the Application having been brought under Sections 39 and 123 respectively of the Criminal Procedure Code, the remedies sought are not available. Section 39 deals with arrest by a Magistrate whereas Section 123 deals with situations where the Applicant has already been arrested and charged. As for Section 84 of the Constitution, Counsel submitted that it is inapplicable as well as the Applicant's complaint is against her former husband, son and her former husband's current wife. Counsel further submitted that the Applicant had not shown that the Police had abused their powers. That the replying Affidavit of Mr. Ochieng Agina clearly showed that there was a complaint lodged which the Police which they were duty bound to investigate. That Section 84 comes into play where there is serious breaches of fundamental rights of the Applicant by an organ of State. That was not the case in the instant case. The Police received a complaint on which they acted. That cannot be said to amount to a breach of the Applicant's fundamental rights. Counsel further submitted that the Court has no jurisdiction to arrest the Applicant. For this submission Counsel relied on the case of **SAMUEL MUCIRI NJUGUNA VS REPUBLIC MISC. APPL. NO. 710/2002 (UNREPORTED)**.

I have carefully considered the Application, the Affidavits sworn in support and in opposition thereof. I have also carefully considered the submissions made in support of and opposition to the Application. I think that what calls for determination by this Court is whether the remedy of anticipatory bail is available to the Applicant in the circumstances of this case.

It is now trite law that the remedy of anticipatory bail or bail pending arrest as is commonly referred to nowadays can in certain circumstances be available to an Applicant.

In my view such remedy is available under Section 84 of the Constitution of Kenya only. The other provisions relating to bail are ofcourse Section 72 (5) of the Constitution of Kenya, Section 123, 356 and 357 of the of the Criminal Procedure Code. There is also Section 22 of the Police Act. It should however be noted that Section 72 (5) of the Constitution deals with the grant of bail after and not before the arrest of a suspect and his arraignment in Court. Similarly Section 123 of the Criminal Procedure Code deals with a situation where a suspect has been arrested and brought before Court. That is when the issue of bail may arise. As for Section 356 and 357 of the Criminal Procedure Code, they deal with situations where a person having been convicted of an offence and is desirous of appealing to High Court, can make an Application for bail pending the hearing and determination of the Appeal either in the Court which

convicted him or in the High Court. As for Section 22 of the Police Act, it gives powers to a police officer investigating an offence to give bond to a suspect to procure his attendance at the Police station or Court. It would appear therefore that apart from the aforesaid provisions of the Law, there is no other clear cut or specific provision of law for a person who fears that he is in imminent danger of being arrested as in the instant case can access the High Court for anticipatory bail.

In the instant case, the Applicant has moved the Court under Section 39 and 123 of the Criminal Procedure Code as well as Section 84 of the Constitution. However as already stated Section 39 of the Criminal Procedure Code is clearly inapplicable to the circumstances of this case. The Section provides:-

**“A Magistrate may at anytime arrest or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.....”**

This provision can only be invoked by a Magistrate and in the above circumstances and not by this Court. As for Section 123 of the Criminal of the Criminal Procedure Code, it deals with the issue of bail once a suspect has been arrested and arraigned in Court. This is not the situation here. That leaves us with Section 84 of the Constitution of Kenya.

There is a clear procedure provided for under Rule 11 (a) of the Constitution of Kenya (Protection of Fundamental Rights and freedoms of the Individual) Practice and Procedure rules, 2001. The Applicant’s complaint would appear to be catered for under rules 9 of the aforesaid rules which provide that:-

**“Where contravention of fundamental rights and freedoms is alleged otherwise than in the course of proceedings in a subordinate Court or the High Court, an Application shall be made directly to the High Court....”**

And rule 11 (a) of the same rules provides that:-

**“Application under rules 5 and 9 of the Rules shall be made by originating summons and the procedure laid down under Order XXXVI of the Civil Procedure Rules shall, as far as practicable, apply.”**

Clearly then, a party invoking the provisions of Rule 9 of the rules aforesaid as appears to be the case here can only approach or access the High Court by way of originating summons, and not by a mere Chamber Summons. What has the Applicant done in the instant case? The Applicant has moved this Court by way of Chamber Summons and not originating summons. The Applicant is therefore clearly in breach of Rule 11 (a) of the Rules aforesaid. Is the breach fatal to the Application? It would appear to be so since the rule is couched and or worded in mandatory terms. Further it is provided that once an Application is made under Rule 9, the Procedure laid down under order XXXVI of the Civil Procedure Rules shall as far as practicable, apply. This did not happen in the instant Application. I am of the view that the practice of making an omnibus Application ought to be discouraged in particular in situations where as under Section 84 there are specific rules made guiding an Applicant on how to access the High Court in the event that he/she complains of breach or threat of breach of his or her fundamental rights. It was therefore wrong for the Applicant to have invoked both the provisions of the Criminal Procedure Code alongside the provisions of Section 84 of the Constitution of Kenya. Both have different procedures of invoking the jurisdiction of the Court. I find the Application fatally defective with the consequence that he same is dismissed.

Further I would still have dismissed the Application on the basis of the prayers sought in the Application. The main prayer is couched in the following terms.

**“.....The subject Mradula Suresh Kantaria be arrested by the Honourable Court as may deem fit pending any charges that he Commissioner of Police may desire to prefer against her....”**

Obviously this Court cannot arrest the Applicant. What it can do is to grant her anticipatory bail or bail pending arrest to forestall her possible arrest and confinement. Secondly even if this Court had those powers, the way the prayer is worded would not seem to assist the Applicant. Once arrested, what happens thereafter? I would have imagined that the Applicant would go further and pray that upon arrest she should be released on bail pending any further action by Police in preferring Criminal Charge or charges against her. As framed therefore the prayer if granted will be an exercise in futility.

For all the foregoing reasons the Application is deemed incompetent and is consequently dismissed with no order as to costs. The interim order issued on 19th May, 2005 are hereby vacated.

Dated at Nairobi this 3rd of October, 2005.

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**M. S. A. MAKHANDIA**

**JUDGE**