



Muriithi v Inspector General of Police & 3 others (Miscellaneous Criminal Application E044 of 2024) [2025] KEHC 534 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E044 OF 2024
FN MUCHEMI, J
JANUARY 23, 2025**

BETWEEN

DERRICK BUNDI MURIITHI APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

DIRECTOR OF THE OPERATIONS SUPPORT UNIT 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 30th May 2024 seeking for the orders of bail pending arrest or charge.
2. The applicant states that he is a family and business man working for gain and residing within Kiambu County and that he is involved in the business of importing motor vehicles for clients.
3. The applicant is apprehensive that he may be arrested by officers from the Directorate of Criminal Investigations (DCI). He states that on the evening of 29/5/2024, individuals claiming to be officers from the Operations Support Unit under the DCI commandeered his apartment in Juja where he resides with the intention of arresting him. The said officers have camped within his apartment compound harassing tenants without any colour of right to give him up and inform them of his whereabouts. The applicant states that a similar occurrence happened back on 7/2/2024, but the officers involved were from the Anti Terror Police Unit (ATPU) which is also under the DCI. The applicant further states that he made a similar application before the court in Thika HC. Misc. Cr.



Application No. E018 of 2024 where he was granted interim unconditional anticipatory bail on 8/2/2024 which was later made substantial on 15/2/2024 and the said file was closed.

4. The applicant avers that he has been forced into hiding again at an undisclosed premise as he is not only afraid of being arrested, but also of being harmed or even killed which is not far fetched given the recent history of murder, kidnapping and false imprisonment carried out by rogue members of our security agencies in the country.
5. The applicant avers that he has not been summoned by any police officer and declined to honour the summons for it to warrant that kind of operation which makes it very suspicious. The applicant is apprehensive that the said operation is being conducted covertly and off the books which would make it illegal. Furthermore, the applicant states that he was recently threatened by a client which he inferred that he would die soon. The said client tried to use the ATPU to accomplish his illegal intentions but they were stopped by this Honourable Court through its said orders issued in Thika HC. Misc. Cr. Appl. No. E018 of 2024. The applicant argues that the client is currently using the Operations Support Unit to do his bidding as a way of circumventing the said orders as they were addressed to the Director of the ATPU.
6. The applicant avers that he faces imminent arrest which he strongly believes is illegal and thus seeks the intervention of this Honourable Court to avoid his arrest and detention.
7. The respondents filed a Replying Affidavit dated August 2024 through CPL Samuel Itegi and states that the allegations against the applicant were first reported at Kamkunji Police Station vide Occurrence Book number 129 dated 26th June 2023 at 1130 hours. The complainant, one Newton Kiragu Kareithi reported that he entered into a sale agreement on 22nd August 2022 with the applicant for the purchase of a white Toyota Prado Chassis number GD150-000xxxx which he said belongs to him. As per the sale agreement, the said motor vehicle was to be purchased for a consideration of Kshs. 5,530,000/- which had been paid as at 22nd August 2022. The deponent avers that Kshs. 2 million was paid as direct deposits to the applicant's bank account while Kshs. 3 million was paid to his company Dee Automobile Company Ltd Account No. 0102xxxxxxxx.
8. On diverse dates between 5th may 2023 and 19th July 2023, the applicant further received Kshs. 2,045,000/- from the complainant through his accounts held at Equity Bank and NCBA Bank respectively. The deponent further states that the applicant later requested and received Kshs. 20,393/- from the complainant through his mobile number 0708xxxxxx that he claimed was meant for fixing of number plates on the vehicle. Despite receiving all the said amounts, the deponent avers that the applicant has never supplied the complainant with the said vehicle prompting him to report the matter to the police for investigations which are currently being conducted by the 3rd respondent.
9. The deponent states that the investigations have shown that the chassis number quoted in the sale agreement is of motor vehicle registration number KDC 789Q and the registered owner is one Dong Xiuping. Following the results of the investigations, the deponent avers that it was necessary to have the applicant record his statement and the investigating officer made efforts to contact him through his phone number but it was switched off at the time.
10. The deponent further states that efforts were made to trace the applicant at his offices but he was out of office and the investigating officer later received a phone call from a person who alleged to have been his advocate and promised to accompany him to the police the next day which did not materialize. Instead the deponent states that the said mobile number sent a copy of the anticipatory bail application and the applicant has never communicated or visited any police station to date.



11. The deponent states that the applicant only served the application at the DCI Headquarters registry on 31st May 2024 but failed to serve the officer in charge Operation Support Unit that is investigating the matter hence due to administrative procedures, the application was directed to the Operation Support Unit Command after considerable lapse of time.
12. The deponent further states that the investigations have nothing to do with the ATPU and previous attempts to arrest the applicant as deponed and the reference made can only be to another distinct and separate investigation on him.
13. The applicant filed a Further Affidavit dated 18th October 2024 and states it is suspicious that an alleged compliant was made at Kamkunji Police Station and instead of the officers who are stationed there to take up the matter, the same is taken up by the Operations Support Unit which ideally has separate and distinct roles under the DCI.
14. The applicant further states that officers from the Operations Support Unit showed up at his apartment building in the evening of 29/2/204 armed to the tooth with some wearing balaclava full face masks yet prior to that they had not contacted him or his advocates, neither had they summoned him to go and record any statement.
15. The applicant avers that he entered into a sale agreement for a motor vehicle with one Newton Kiragu Kareithi for a sum of Kshs. 5,530,000/- which the purchaser paid Kshs. 2,454,000/- into his company Dee Automobile Company Limited and have him Kshs. 3 million. The purchaser, through his sister who resides in the USA paid Kshs. 20,393/- thus making the total sum the applicant received as Kshs. 5,656,393/-.
16. The applicant further states that at the time the suit motor vehicle arrived at the port of Mombasa, due to the rise of the dollar the purchase price had rocketed and on asking the purchaser to top up the amount, he refused which led to a dispute between them with the purchaser insisting that he refund the original price. The applicant avers that he reimbursed the purchaser Kshs. 999,999/- and give him time to sell the motor vehicle but the purchaser refused.
17. The applicant states that after this court issued anticipatory bail orders on 30/5/2024, the said OSU officers have never summoned him to record any statement questioning the intention behind his arrest. The applicant avers that his intended arrest had nothing to do with the investigations and the OSU officers had other instructions from the said purchaser.
18. Parties put in written submissions.

The Applicant's Submissions

19. The applicant reiterates the contents of his affidavit and relies on Article 29, 22(1) and 23(1) of *the Constitution* and the case of Mandiki Luyeye vs Republic [2015] eKLR and submits that the instant matter is one of his rights and fundamental freedoms being threatened by the respondents especially the officers of the 3rd respondent. The applicant submits that he is ready to cooperate with the police as far as investigations are concerned. He further submits that when he was being pursued by the ATPU, he was neither summoned by them nor was he prosecuted in a court of law meaning the intentions of the officers were to hold him incommunicado.
20. The applicant further submits that on 25th October and 30th October 2024, the officers of the 3rd respondents summoned him in a desperate move to show that they were still interested in investigating the matter. He submits that he was accompanied by his advocates to the OSU headquarters on 7th November 2024 where his finger prints were taken and he signed a charge and cautionary statement.



The applicant further submits that after that, no further action has been taken by the said officers to date thus showing that their interest was not to prosecute him but to illegally abduct him with the aim of coercing him to pay the said debt.

21. The applicant submits that he attached photos from cctv cameras from his apartment which show the 3rd respondent's officers who came to arrest him with rifles while some of them were wearing balaclava masks and coupled with the fact that he had been illegally pursued by ATPU officers earlier on the same matter, raised a legitimate fear to his fundamental rights which is real and demonstrable. Furthermore, the applicant argues that he has demonstrated that the police are using their investigation powers to coerce settlement of a civil matter which is illegal. Therefore his rights and freedoms ought to be protected by the court in accordance with Article 23 and 165 of *the Constitution*.
22. The applicant submits that there is no need for the Kshs. 100,000/- he paid as anticipatory bail to be held indefinitely by the court as the respondents have not shown any intention to have him prosecuted in a court of law. The applicant submits that the same should be released to him and he be admitted to personal bond with directions that he avails himself to court for charging or arraignment whenever summoned to do so by the respondents. To support his contentions, the applicant relies on the case of *Olooso & Another vs Inspector General of Police & Another (Miscellaneous Criminal Application E003 of 2023)* [2023] KEHC 25855 (KLR) (22 November 2023) [2023] KEHC 25855.

The 4th Respondent's Submissions.

23. The 4th respondent relies on Section 438 of the Criminal Procedure Code, Articles 23, 29 and 165(3) of *the Constitution* and the case of *Mandiki Luyeye vs Republic* [2015] eKLR and submits that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what *the Constitution* envisages constitutes protection of fundamental rights and freedoms of a citizen. Thus, an applicant must prove that there is an infringement on constitutional rights. In the instant case, the 4th respondent argues that the application is based on apprehension and thus cannot meet the threshold for the orders of anticipatory bail to issue.
24. The 4th respondent submits that the mandate of the respondents is a constitutional mandate and therefore due to the doctrine of separation of powers, the courts should seldom interfere with the said constitutional mandates. The 4th respondent argues that the court should strike a balance between protecting the rights of Kenyans and refraining from curtailing the other organs of the state from carrying out their constitutional duties. The 4th respondent further submits that the applicant has not demonstrated that the administrative action affecting him falls short and further that he has been deprived of his fundamental rights and freedoms. The indictment of an applicant does not contravene the right to liberty and freedom. The 4th respondent further submits that the affidavit evidence of the applicant is wholly incompatible and incapable of a remedy under Article 23 of *the Constitution*.
25. The 4th respondent submits that the it has already made a decision to charge and only awaits arraignment of the applicant to court. The applicant is not cooperating with the investigative agencies as he promised and thus the current application should not be entertained.

The Law

Whether the applicant has met the threshold for granting bail pending arrest.

26. The right to bail is constitutional as provided in Article 49(1)(h) of *the Constitution* which provides:-
An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.



27. In Kenya, in instances where anticipatory bail has been granted, it is on the basis of infringement of rights and fundamental freedoms in the Bill of Rights as Article 23.
28. The courts have stated the terms under which a person may be granted anticipatory bail. In Gladys Boss Shollei vs Attorney General & 3 Others [2015] eKLR, the court held:-

Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated. This is also in the footsteps of my brother Justice Mabeya in his ruling in the case of Richard Mahanu (supra) where he stated as follows:-

With regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches of a state organ. In the case of W’Njuguna vs Republic, Nairobi Miscellaneous Case No. 710 of 2002 (2004) 1KLR 520 the court held that anticipatory bail can be granted:-

.....when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.

The case of Eric Mailu vs Republic (supra) also cited the W’Njuguna case emphasizing the circumstances under which anticipatory bail can issue which majorly are serious breach of a citizen’s rights by organs of state. In that respect I need not say more than is outlined in the said W’Njuguna case. It is then salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what *the constitution* envisages constitutes protection of fundamental rights and freedom of a citizen. It cannot issue where an applicant labours under apprehension founded on rumours or unsubstantiated claims.

29. In Peter Mutua Kanyi vs Director of Public Prosecutions & 2 Others [2019] eKLR the court stated:-

In the case of Richard Makhanu vs Republic [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of preempting the outcome of investigations a position that was also held in the case of Kevin Okore Otieno vs Republic (2013) eKLR. Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person’s right under Article 49 of *the Constitution*.

30. From the foregoing, it is evident that in an application for bail pending arrest, the court must consider whether circumstances exist that would occasion a serious breach of the applicant’s fundamental right. In the instant case, the applicant has stated that officers from the 3rd respondent invaded his residence without summoning him before hand with the intention of arresting him regarding a sale agreement of a motor vehicle between him and one Newton Kiragu Kareithi. The applicant argues that the said officers are using their investigative powers to coerce settlement of a civil matter. on perusal of the record, it is not in dispute that the applicant entered into a motor vehicle purchase agreement for a white Toyota Prado Chassis number GDJ150-0004602 with one Newton Kiragu Kareithi. It is further not disputed that the said Newton paid the purchase price of the suit motor vehicle. The parties later disagreed and the agreement failed. The said purchaser reported the matter to the police station and



upon the police carrying out their investigations, they state that they found that the motor vehicle did not belong to the applicant and neither did he give possession to the purchaser of the suit motor vehicle despite the purchaser paying the purchase price. The respondents have averred that they summoned the applicant to record a statement to enable them forward the file to the 4th respondent to approve or not approve the charges. The 4th respondent submits that she already made a decision to charge and only awaits the arraignment of the applicant in court.

31. Under article 157 of *the constitution*, the 4th respondent has the powers to charge the applicant with any criminal offence provided it has evidence against him. However, the 4th respondent can only recommend charges for offences under criminal law or any other relevant law. The applicant says he has been harassed by officers from the Director of Criminal Investigation (DCI) as well as units under the same office who are intentional of turning the Civil dispute between the applicant and the complainant into a criminal case. The office of the 4th respondent is empowered to charge any person where the investigating authority has gathered sufficient evidence and where such offences fall within the law.
32. It is not in dispute that the applicant was granted interim anticipatory bail in an earlier matter HC Misc. Criminal Application No.18 of 2024 on 8th February 2024 due to similar threats to violate his rights of freedom. He was directed to report to the Director of Criminal Investigation officer to record a statement and be charged with any criminal offence he may have been found to have committed. Upon service of the orders, it was said, which was not denied that a certain officer disclosed the reason why the DCI officers wanted to arrest the applicant. The excuse that service was initially effected on DCI and not to the unit dealing with the said investigations is neither here nor there. The buck stops at the DCI since all the units mentioned work under that office. The court later closed the file in HC Misc. Criminal Application No. 18 of 2024 since no charges were preferred against the applicant over a period of six (6) months since the orders were issued.
33. The current application relates to the same transaction as the earlier matter and between the same parties that took place three months after the first court file was closed. The applicant told the court that the heart of the matter is that one of the parties still owes the other money relating to the same agreement. If what the applicant says is true this is purely a civil matter that ought to be determined by a civil court.
34. The applicant states that during the 1st instance, his vehicle KDC 789 Q had been detained by officers working at the office of the DCI as a unit known as Anti-Terrorism Police Unit (ATPU) and was only released after a court order was served on them.
35. The deponent therefore opposes the application that applicant be granted anticipatory bail on the alleged grounds that his life is in danger because he has refused to co-operate with the investigators who are lawfully conducting proper investigations and thus this is an attempt to circumvent the legal process by seeking protection from the court without stating the truthful facts. The law enforcers cannot be herd to say that the life of a suspect is in danger. The applicant by seeking anticipatory bail cannot be said to have refused to cooperate with the investigators.
36. The deponent avers that the investigations into the matter have not been concluded because the applicant who is the main suspect is yet to record his statement to allow the investigating officer forward the resultant file to the Office of the Director of Public Prosecutions for a decision on whether to charge him or not.
37. It is said by the respondent that the allegations against the applicant were made on 26th June 2023 by the complainant and it is believed that in the course of the transaction between the complainant and the parties, the applicant is suspected to have committed an offence. If that be the case, the applicant ought



to have been charged with the offence in 2023 following the report made to the police. Or better still, after the court directed the applicant to appear before DCI for further investigations. It is in 2024 that the applicant was threatened again with being locked in by the DCI. He said he was also threatened by other people that “his mother would cry soon”. During the pendency of the first application HC Misc. Criminal Application No.E018 of 2024 the respondent was at liberty to charge the applicant since anticipatory bail does not prevent the relevant authority to charge a suspect should they have evidence. The purpose served by anticipatory bail is to prevent abuse of fundamental rights and freedoms of an individual under *the Constitution*.

38. I am convinced that due to the prior harassment of the applicant by DCI officers, he has a right to be accorded protection of his freedom under the law. However, the 4th respondent has the right to charge the applicant should it be convinced that there is evidence to support a criminal charge.
39. I therefore allow this application on the following terms:-
- a. That the applicant is hereby granted anticipatory bail.
 - b. That the applicant do present himself before the Director of Criminal Investigation Officer within ten (10) days.
42. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF JANUARY 2025.

**F. MUCHEMI
JUDGE**

