



Nyasuna v Director of Public Prosecutions & 2 others; Sheikh (Interested Party) (Miscellaneous Criminal Application E046 of 2024) [2025] KEHC 6779 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEHC 6779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CRIMINAL APPLICATION E046 OF 2024**

**OA SEWE, J
MARCH 5, 2025**

BETWEEN

ROBERT NYASUNA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

AHMEDSHUKRI SHEIKH INTERESTED PARTY

RULING

1. The Notice of Motion dated 2nd August 2024 was filed by the applicant, Robert Nyasuna, pursuant to Articles 3, 10, 19, 20, 22, 25, 27, 37 and 49 of the Constitution. He prayed for orders, *inter alia*, that:
 - (a) Pending the hearing and determination of the application inter partes, he be granted anticipatory bail and/or bond against detention by the National Police Service and/or their officers and agents on such terms as the Court shall deem fit, for such time as the Court shall direct and/or until such time as a formal charge, if any, may be filed against the applicant in a court of competent jurisdiction.
 - (b) At the inter partes hearing of the application, the 2nd respondent, the Inspector General of Police be directed to show cause why anticipatory bail should not be granted to the applicant as prayed.
 - (c) Costs of the application be awarded to the applicant.



2. The application is premised on the grounds that the 2nd respondent, acting upon the complaint by the interested party that he had reneged on the terms of a verbal agreement, initiated criminal investigations against the applicant with the view of having him arrested, detained and prosecuted; yet the subject matter is purely civil in nature. The applicant explained that he had obtained a loan of Kshs. 4,200,000/= from the interested party for the purpose of performing various obligations; and that he made an undertaking orally to repay the same in monthly instalments of Kshs. 100,000/= with effect from April 2024. According to the applicant, he had already repaid Kshs. 2,000,000/= by the time the complaint was filed.
3. It was further the contention of the applicant that, despite partially repaying the loan, the 2nd respondent's officers have continued to threaten him without any lawful justification over possible arrest unless the outstanding sums are paid in full. The applicant averred that the undue pressure being exerted on him is unwarranted and is outside the constitutional mandate of the 2nd respondent as envisaged by Article 245 of the Constitution. He consequently prayed for anticipatory bail pending further police action, if any. He cited Section 52(1) of the National Police Service Act which provides that:

“A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.”
4. The applicant relied on the averments set out in his Supporting Affidavit, sworn on 2nd August 2024 and the documents annexed thereto.
5. In the 1st respondent's Grounds of Opposition dated 29th August 2024, he averred, inter alia, that:
 - (a) The application is misconceived, frivolous, vexatious, incompetent, improperly before the Court and an open abuse of the court process.
 - (b) The application is intended to curtail the constitutional, statutory functions and mandatory duties of the respondents and to prevent them from exercising their mandates which is unconstitutional.
 - (c) The claims contained in the application are premature, hasty and generalized and do not disclose any constitutional issue under Articles 3, 10, 19, 20, 22, 25, 27, 37, 49, 159 or 259 of the Constitution to warrant the joinder of the 1st respondent.
 - (d) There is no constitutional right and/or provision that has been violated that relates to the mandate and functions of the DPP and IGP.
 - (e) The Office of the DPP is a constitutional independent office which does not act arbitrarily on mere allegations without substantive evidence.
 - (f) The mandate of the 1st respondent is clearly provided for under Article 157 of the Constitution.
 - (g) That anticipatory bail ought not to be granted to prohibit investigations where an applicant labours under apprehension founded on unsubstantiated claims.
 - (h) The allegation that the matter in issue is purely civil does not stop the 2nd respondent from carrying out its mandate of investigation to confirm if there is an offence committed.



- (i) It is in the public interest, and in the interest of the administration of justice that the investigators conduct investigations when a report has been made without fear of harassment, intimidation or undue influence.
6. In like manner, the 3rd respondent also filed Grounds of Opposition dated 26th August 2024, contending that:
 - (a) The application offends the cardinal provisions of Article 156(4)(b) of the Constitution in so far as criminal investigations do not fall within the mandate of the Attorney General as the principal legal advisor of the National Government.
 - (b) In any event, the applicant’s motion does not demonstrate to the required standards that:
 - (a) There is a stifling or threat of infringement of the applicant’s rights, fundamental freedoms by the investigative or prosecutorial authorities.
 - (b) The investigation, arrest and or eventual prosecution of the criminal case, if at all, is not in public interest or in the interest of the administration of justice.
 - (c) The investigations are being undertaken contrary to the provisions of Article 244 of the Constitution.
7. The application was canvassed by way of written submissions. The applicant relied on his written submissions dated 18th October 2024. The applicant reiterated the factual basis of the application and pointed out that, in the absence of replying affidavits as is the case, those facts are uncontroverted. He underscored his apprehension that the respondents will arrest and detain him in custody for what is purely a civil matter before arraigning him in court. He added that he does not seek to stop the investigations or his prosecution but merely seeks protection during the period between his arrest and arraignment.
8. The applicant relied on Olooso & Another v Inspector General of Police & another [2023] KEHC 25855 and Section 52 of the National Police Service Act and prayed to be granted the orders sought. He indicated is readiness to comply with such reasonable bail/bond terms as the Court may order including attendance before the police at a designated police station.
9. The 3rd respondent also filed written submissions and proposed for determination the question whether the 3rd respondent is a necessary party to this application. Counsel for the 3rd respondent relied on Zephir Holdings Ltd v Mimosa Plantations Ltd and others [2014] eKLR to support the assertion that the 3rd respondent is neither a relevant nor necessary party in this suit.
10. There is no gainsaying that, in the exercise of its functions pursuant to Article 165(3)(b) of the Constitution, the High Court has powers to make such orders as are necessary in the interest of justice. Indeed, Article 23(1) of the Constitution is explicit that:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”
11. Applications for anticipatory bail fall in the aforementioned category. Long before the promulgation of the 2010 Constitution, it was plain that anticipatory bail is available as a means of forestalling threatened



violation of the right to liberty. Thus, in *Samuel Muciri W’Njuguna v Republic* [2004] eKLR it was held that:

“...it cannot be said that an individual in the Kenya of today cannot be granted anticipatory bail or bail pending arrest when he is in fear that his fundamental rights as to liberty and freedom has been breached. the *Constitution of Kenya* guarantees that under the provisions of protection of fundamental rights.

The simple reading of provisions of section 84 (1) & (2) of the *Constitution* shall reveal that the High Court while hearing an application wherein contravention or likely (emphasis ours) contravention of provisions of sections 70 to 83 (fundamental rights), may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the above said sections.

If the police have contravened or is likely to contravene the rights of liberty of a citizen for ulterior purpose, an anticipatory bail should be an appropriate order to be granted.”

12. Nevertheless, mere allegation or apprehension of breach will not do. An applicant, in such case as this, must satisfy the Court that, viewed objectively, his apprehension is warranted. Accordingly, in the *Judiciary Bail and Bond Policy Guidelines*, it is suggested thus at Paragraph 4.29:

“The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect his right. Further, the applicant must demonstrate that the apprehension or arrest is “real and not imagined or speculative.”

13. In the instant matter, the applicant averred that he is being pursued for what is purely a civil debt between him and the interested party; He attached to his Supporting Affidavit a copy of a letter written on his behalf to the interested party in connection with that debt by which he proposed to repay by monthly instalments. He further deposed that the respondents have threatened to arrest him with a view of prosecution, yet he is ready and willing to assist the police with investigations if summoned for that purpose as is provided for in Section 52 of the *National Police Service Act*.
14. It is noteworthy that the respondents opted to file Grounds of Opposition and therefore did not contest the factual basis of the application. It is also manifest that the respondents misapprehended the scope of the application and surmised that its object is to curtail their constitutional mandate to investigate and prosecute criminal matters. The applicant made it plain that he is merely seeking protection for the period between arrest and arraignment and nothing more.
15. Indeed, in *Samuel Muciri W’Njuguna v Republic* it was observed that:

The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances therefore anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.

16. It is however plain from the prayers sought that all of them are spent. It is trite that the Court can only award such reliefs as have been sought in the parties’ pleadings. Hence, in *Kenya Airports Authority*



v Mitu-Bell Welfare Society & 2 Others [2016] eKLR, the Court of Appeal, while discussing this point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*” published in [1960] Current Legal Problems, at page174:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

17. In the premises, the application dated August 2, 2024 is hereby marked as spent and the file closed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 5TH DAY OF MARCH 2025

OLGA SEWE

JUDGE

