



Soita v Kantai & 8 others (Miscellaneous Criminal Application E010 of 2024) [2025] KEHC 4758 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CRIMINAL APPLICATION E010 OF 2024**

CM KARIUKI, J

APRIL 3, 2025

BETWEEN

ENOCK SOITA APPLICANT

AND

JEREMIAH KANTAI 1ST RESPONDENT

MESHACK KANTAI 2ND RESPONDENT

EZEKIEL KANTAI 3RD RESPONDENT

MIRIAM WAMBOI 4TH RESPONDENT

DANIEL KIMANO 5TH RESPONDENT

GODFREY OPIYO (POLICE OFFICER) 6TH RESPONDENT

OCS ENOOSAEN POLICE STATION 7TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 8TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 9TH RESPONDENT

RULING

Anticipatory bail

1. Before this court for determination is an application dated 08/04/2024 seeking the following orders;
 - a. That this honourable court be pleased to grant the applicant herein anticipatory bail and/or bond pending the arrest for any bailable offense consequent to or arising from the alleged complaints of Jeremiah Kantai, Meshack Kantai, Ezekiel Kantai, Daniel Kamano & Mirriam Wamboi And Who Enock Soita took shylock loan from them.



- b. That this honorable court be pleased to issue such orders as will be just and proper for the applicant's fundamental right under Chapter Four Articles 19, 20, 21, 22, and 29 of the Constitution of Kenya.
 - c. Spent.
 - d. Spent.
 - e. Spent.
 - f. The costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the application and the supporting affidavit of Enock Soita sworn on 08/04/2024.

Facts of the case.

3. On 04/03/2024, the applicant signed a loan application contract with the 1st, 2nd, 3rd, 4th, and 5th respondents. He contends that he was forced to sign the agreement by the 6th respondent without his consent. The agreement was on the condition to be released from police custody.
4. On 04/03/2023 at around 2.30 hours at the applicant's workplace (Transmara Sugar Company) the 1st, 2nd, 3rd, 5th, and 6th respondents accompanied by 2 police officers arrested the applicant where he spent the day at Enosaen police station.
5. On 09/03/2024, the 1st, 2nd, 3rd, 4th, and 5th respondents made phone calls threatening, harassing, and warning of dire consequences if he fails to pay them the money advanced to the applicant. The threats were also extended to the applicant's wife and children.
6. The applicant is therefore apprehensive of arrests

The replying affidavit.

7. The 1st respondent opposed the application vide replying affidavit sworn on 12/04/2024. The 1st respondent denied entering into any agreement with the applicant pertaining to any shylock loan. The 1st respondent denied making any report on any matter between them and the applicant or visiting the applicant's workplace.
8. The 1st respondent further denied making any threats to the applicant, his wife, or children or forcing him to sign any agreement.

Grounds of opposition.

9. The 6th, 7th, and 8th respondents opposed the application vide grounds of opposition dated 06/05/2024. the grounds of opposition are;
10. That the 4th prayer is opposed since it is the usurpation of the mandate of the 8th respondent to conduct all public prosecution, as no leave has been sought by the applicant to pursue the criminal remedies of a Kshs. 500,000 fine or an imprisonment term of 2 years in default and indeed, no evidence has been tabled to demonstrate a refusal or neglect nor is there an actual refusal or neglect by the 6th to 8th respondents to act on any formal or anonymous complaint, lodged by the applicant or any other person, against any of the 1st to 5th respondents. In any event, given the structure and jurisdiction of courts, a sentence of this sort would be sought in the subordinate court at the first



instance notwithstanding the fact that this court is vested with the original jurisdiction to hear and determine all criminal matters.

11. That no report, official, anonymous or otherwise, has been made by any of the 1st to 5th respondents, to the 6th to 8th respondents regarding any form of dispute, or any cognizable offense committed by the applicant, as against the 1st to 5th respondents to trigger any adverse action against the applicant. The 6th to the 8th respondents are strangers to the allegation that a debt dispute was reported to the 6th and 7th respondents as against the applicant.
12. That there has been no harassment of any kind done by the 6th and 7th respondents against the applicant, nor is there an intention or attempt to arrest him. The contrary allegation made by the applicant is false and shocking and it falsely tarnishes the names and casts doubt on the integrity of the 6th and 7th respondents to serve the applicant's own ulterior motives. It is highly suspect why the applicant is seeking an anticipatory bail where in fact no arrest is imminent, nor a report made against him. Drawing wisdom from the bible in proverbs 28: 1, the wicked run when no one is chasing but the honest is brave as a lion.

Supplementary affidavit

13. The applicant, Enock Soita filed a supplementary affidavit in support of the application sworn on 25/06/2024.
14. The applicant averred that the replying affidavit sworn on 12/04/2024 is defective as no authority has been attached/annexed to the said reply.
15. The applicant averred that on 12/06/2024 while at Enoosaen Sugar factory he received a message on his phone number 0708XXX261 from the 1st respondent whose no. Is 0713XXX316 demanding Kshs. 104,000 which money is the shylock loans. He produced an m-pesa statement identifying that 0713XXX316 is registered in the names of the 1st respondent.
16. The applicant averred that on 02/05/2024, the 2nd respondent called him around 16.28 demanding the alleged shylock loans and threatening to take him to Mitenkuar prison if the said loan is not repaid promptly. He produced a CD of the conversation and a certificate of evidence.
17. The applicant averred that his attempts to access the police occurrence book were futile.

Directions of the court

18. This court (Hon. Gikonyo J) orders that the policy of law is that criminal process should never be used to compel payment of a civil debt. Therefore, in so far as it relates to a civil debt, the applicant shall not be arrested or prohibited from his place of work or be threatened by any person on the basis of unpaid debt. This does not, however, stop the police from carrying out investigations on any aspect they deem constitute criminal liability.
19. The application was canvassed by way of written submission.

The applicant's submissions.

20. The applicant submitted that the 4th respondent was served with the application but has failed to file a reply therefore the averments in the application are deemed as uncontroverted, unchallenged, and stands unopposed.



21. The applicant submitted that this court has jurisdiction to grant anticipatory bail. The applicant relied on article 29, 165 of the *Constitution*, Miscellaneous Criminal Application E125 of 2022[2022] KEHC 10651(KLR)(CRIM) (28 June 2022), Mandiki Luyeye v Republic [2015] eKLR, and Eric Mailu V Republic and 2 Others Nairobi Misc. Cr. Application No. 24 Of 2013
22. The applicant submitted that the applicant would suffer irreparable harm if the court declined the application as the respondents would continue to harass him. The applicant relied on Article 165 of the *Constitution*, and Giella Vs Cassman Brown [1973] EA 358.
23. The applicant submitted that the replying affidavit sworn by the 1st respondent on behalf of the 2nd, 3rd and 5th respondents is defective as there is no authority from the respondents filed before the court. The applicant relied on Ileri Njeru Vs Embu Nyangi Ndiri Proposed Society Chairman & Others Versus Daniel Nganga Kangi & Another [2015] eKLR, and Order 1 Rule 13 of the Civil Procedure Rules
24. The applicant submitted that the grounds of opposition filed are contrary to the dictates of Order 51 Rule 14 of the Civil Procedure Rules. Further, the grounds of opposition contained matters of general averments without any supporting evidence. The applicant relied on Civil Appeal No. 95 Of 2016 In The Case Of Daniel Kibet Mutai & 9 Others V Attorney General [2019] eKLR, Peter O. Nyakundi & 68 Others V Principal Secretary, State Department Of Planning, Ministry Of Devolution and Planning & Another [2016] eKLR, and Kennedy Otieno Odiyo & 12 Others V Kenya Electricity Generating Company Limited [2010] eKLR

The 1st, 2nd 3rd, and 5th Respondents' submissions.

25. The respondents submitted that the applicant has not met the threshold to earn him anticipatory bail since his claims are unsubstantiated and founded on deliberate falsehood. The respondents relied on Oloo V Director of Public Prosecution & 3 Others (Miscellaneous Criminal Application E004 of 2024[2024] KEHC 4836(KLR) (24 April 2024), Article 29 Of the *Constitution*, and Mandiki Luyeye V Republic [2015] eKLR.
26. The respondents submitted that there is no requirement that an authority to swear affidavits be in writing or be filed. Further, the other respondents have not challenged the authority to swear on their behalf. Therefore, the replying affidavit cannot be deemed to be defective. The respondents relied on Savala & Another V Ndanyi (Environment & Land Case 248 Of 2021)[2023] KEELC 20204(KLR) (25 September 2023), Mohamed Bwana Obo Athman & 24 Others Vs Kenya Airport Authority [2014] eKLR, and Nokia Corporation & 3 Others V Technoservice Limited & 2 Others [2022] eKLR, Criminal Miscellaneous Application Case No. E052 Of 2021.

The 6th, 7th, and 8th respondents' submissions.

27. The respondents submitted that the applicant has not laid before this court any iota of proof of infringement or threat to his rights and fundamental freedoms by the 6th to 8th respondents. Therefore, the applicant has failed to discharge the burden of proof of harassment and arrest as against the 6th to 8th respondents. The respondents relied on sections 107, 108, and 109 of the *Evidence Act*.

Analysis and Determination

28. This court has considered the application, the supporting affidavit thereof, the replying affidavit, the grounds of opposition, the supplementary affidavit, and the respective parties' submissions.
29. The main issue for this court's determination is whether the application has met the threshold of being granted anticipatory bail and conservatory orders.



30. In the case of Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR Odunga J stated as follows: -

“However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”

31. Article 22 (3)(b) of the Constitution of Kenya provides as follows: -

“The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that: -

- (b) Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.”

32. Article 29 of the Constitution of Kenya provides as follows: -

“Every person has the right to freedom and security of the person, which includes the right not to be-

- a. deprived of freedom arbitrarily or without just cause;
- b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
- c. subjected to any form of violence from either public or private sources;
- d. subjected to torture in any manner, whether physical or psychological;
- e. subjected to corporal punishment in a cruel, inhuman, or degrading manner.”

33. The High Court therefore has authority under Article 23 and Article 258 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. Indeed, every person acting in his own interest or on behalf of another person has the right to institute court proceedings claiming that this Constitution of Kenya, has been contravened, or is threatened with contravention. In the same vein, the Applicant herein has instituted proceedings on his own behalf claiming that the Constitution of Kenya had been infringed or contravened or was threatened with contravention.



34. Grant of anticipatory bail is provided for in Article 49 of the Constitution of Kenya. The said Article 49 (1) (h) of the Constitution of Kenya provides as follows: -
- “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.”
35. The terms under which a person may be granted anticipatory bail are more or less settled in several cases that have been decided by various courts. In the case of *W’Njuguna vs Republic* (2004) eKLR where the court therein stated as follows: -
- “...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.”
36. In the case of *Mandiki Luyeye vs Republic* [2015] eKLR, Ngenye J held as follows: -
- “Similar sentiments were observed in the case of *Eric Mailu vs Republic and 2 others* Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only be issued when there was serious breach of a citizen’s rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach or infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”
37. In the case of *Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others* (Supra), Odunga J held that anticipatory bail ought not to be granted to prohibit investigations, a position that this court wholly associates itself with. Indeed, despite having the authority to grant anticipatory bail, courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the Constitution of Kenya and/or to prevent such bodies or institutions from carrying out their mandate.
38. In the case of *Richard Mahkanu 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 pre-empting 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 of Kenya.
39. The Applicant herein contends that on 04/03/2024, he was arrested and forced to execute a loan application form with the 1st -5th respondents by the 6th respondent. He was arrested by the 1st-6th respondents at his place of work where he was taken to Enoosaen police station and forced to sign a loan application form. Further on 09/03/2024, he received calls from the 1st to 5th respondents who threatened with dire consequences through a phone call, if he did not repay the loan advanced to him and that the threats have continued and have been directed to his wife and children.



40. The respondents have denied the applicant's allegations in toto.
41. The applicant has not produced an occurrence book extract to show that the applicant was arrested after the report was made. The applicant has not produced a copy of the agreement he alleged he was coerced to sign. The applicant has not produced any evidence of threats directed at him, his wife, or his children.
42. This court finds that the applicant seems to labour under apprehension founded on unsubstantiated claims. The applicant has not proved that his fear of breach of a fundamental right is real and demonstratable or demonstrated the breach by acts and facts constituting the alleged breach.
43. In the circumstances anticipatory bail cannot issue.
44. Should the Applicant's rights under Articles 49 and 50 of the *Constitution* of Kenya be infringed upon, denied, or contravened, he has the liberty of seeking a review of this court's decision. In this regard, this court comes to the firm conclusion that the application herein has not met the threshold for the granting of anticipatory bail to the Applicant herein as sought. In any case, there is no evidence that the Applicant once arrested is not likely to be granted bond and if such occurs he is at liberty to approach the court over the same.
45. In the same breath, the court is unable to grant prayer f in the application, and since this was a criminal matter; the court cannot make any determination on costs.
46. For the foregoing reasons, the upshot is that the Applicant's Notice of Motion application dated 08/04/2024 is without merit and the same is hereby dismissed.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 3RD DAY OF APRIL, 2025.**

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**HON. CHARLES KARIUKI
JUDGE**

