



Ng'ang'a v Director of Public Prosecution & 2 others (Miscellaneous Criminal Application E110 of 2025) [2025] KEHC 10614 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E110 OF 2025**

SM MOHOCHI, J

JULY 22, 2025

BETWEEN

JOSEPH NGWARE NG'ANG'A APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE OCS MOLO POLICE STATION 2ND RESPONDENT

THE OCS CENTRAL POLICE STATION NAKURU 3RD RESPONDENT

RULING

1. Before me is a Notice of motion Application dated 5th July 2025 filed pursuant to Articles 19, 20, 21, 22 and 29 of the *Constitution*, Section 123(1) part 5 of the *Criminal Procedure Act* supported by the evenly dated sworn affidavit by Joseph Ngware Nganga.
2. The Applicant moves this Court for the following relief(s):
 - i. Spent
 - ii. That, this Honourable Court be pleased to order that anticipatory bail be given to the applicant on such terms as the Court may deem appropriate pending the inter-partes hearing of this application and more specifically the applicant shall not be arrested, detained and or tortured by the Respondents and to direct that the applicant present himself to any police station as and when required.
 - iii. That, this Honourable Court be pleased to order that anticipatory bail be given to the applicant on such terms as the Court may deem appropriate pending any investigation, inquiry or preferring criminal charges before a Court of competent jurisdiction and more specifically the applicant shall not be arrested, detained and or tortured by the Respondents and to direct that the applicant present himself to any police station as and when required.



- iv. That cost of this application be provided for.
3. In his sworn Affidavit the Applicant testifies that;
 - i. That, he is the current Member of County Assembly representing Molo ward, he was arrested on 3rd July, 2025 by officers of the 2nd Respondent who proceeded to detain him at Central Police Station Nakuru on allegations that he participated in the national wide protests that were held on 25th June, 2025.
 - ii. That, he was then arraigned in Court on 4th July, 2025, when police officers from Molo Police station filed Miscellaneous Criminal Application Number E660 of 2025 seeking to have him detained at the police station for 21 days pending investigations but which application was dismissed for want of merit on the same day.
 - iii. That, despite the said dismissal, the Respondents have vowed to teach him a lesson and they have been constantly calling him and issuing threats of further arrest more so on Fridays.
 - iv. That, he fears of his potential arrest for malicious reasons as he has never participated in such demonstrations, and his potential arrest is politically motivated as he is the area MCA for Molo ward who has been deemed to have recently changed political affiliations thus politics is at play to have him punished, therefore he stands to be subjected to unwarranted suffering in police custody.
 - v. That, after the said threats, there have been conspicuous and mysterious persons moving around in the area, vowing to have him placed in custody.
 - vi. That, his constitutional rights will be violated if this Court fails to intervene.
 - vii. That, he is apprehensive that the arrest will be done to embarrass, harass and intimidate him and that, it is in the interest of justice that the orders sought herein are granted.
 - viii. That, he shall be highly prejudiced if the application is not allowed, as the police are clearly out to settle personal scores. And that he is ready to abide to any conditions as may be set by the Court.
 4. The Court Certified the matter as urgent and fixed the same for oral hearing.
 5. The Respondents opposed the Application by filing grounds of opposition dated 18th July 2025 to wit;
 - i. That, the Application is frivolous, and an abuse of the Court process, as the Applicant has failed to demonstrate any new or exceptional circumstances to justify the grant of anticipatory bail.
 - ii. That, the Orders being sought for by the Applicant were already granted by Hon. Nyota, SRM in Miscellaneous Criminal Application number E660 of 2025 where he was released on personal bond.
 - iii. That, the Applicant was already arrested and arraigned in Court on 4th July 2025 as per the [*constitution of Kenya 2010*](#) without any of his rights being infringed.
 - iv. That, there is no apprehension of breach of fundamental rights, as the Applicant has already been presented before a Court of law and granted bail pursuant to Article 49(1)(h) of the [*Constitution*](#).



- v. That, the Honourable Court's jurisdiction under Article 23 is only triggered by actual or imminent threat to fundamental rights, which has not been demonstrated in this case.
- vi. That, granting anticipatory bail in these circumstances would set a dangerous precedent, encouraging duplication of proceedings and undermining the bail jurisdiction of subordinate Courts.

Applicants Submissions

6. Mr Okiro for the Applicant submitted that, having considered the grounds of opposition by the Respondents, the Applicant is not contesting or challenging investigations by the 2nd and 3rd Respondents and “just wants to be admitted to bail” so that he is not “unnecessarily held in police custody”. That, the instant Application is quite different from the Miscellaneous Criminal Application Number E660 of 2025 in that the applicant is alleged to have participated in the June 25th 2025 nationwide “maandamano” in the former while in the latter he was alleged to have committed offences including arson.
7. Mr Okiro further submitted that, no prejudice shall be occasioned upon the Respondents should this Court admit the Applicant to bail and that he (the Applicant) fears of an arrest and that fresh offences have emerged and that there were no facts in support of the Miscellaneous Criminal Application number E660 of 2025 as the supporting Affidavit was disallowed for not being properly commissioned.
8. Mr. Okiro conceded that, the Applicant is already admitted to bail on other charges and not on the charge of “organizing the protest” and thus prays that the Court allows the Application.

The Respondents Submissions

9. Ms Mwaura Principal Prosecution Counsel for the Respondents opposed the Application relying on her filed Grounds of Opposition dated 18th July 2025.
10. Ms Mwaura emphasized that what the Applicant was not telling the Court that he had been arrested on the 3rd July 2025 and arraigned in Court on the 4th July 2025 in Miscellaneous Criminal Application Number E660 of 2025 where the Respondents sought to obtain pre-arraignment police detention orders of twenty-one (21) days and that the Application was considered by Hon Nyota P who admitted the Applicant to a personal bond with condition that he be presenting himself to the DCI Molo whenever he is required of which the Applicant has so far complied with.
11. That having been admitted to bail the Applicant is now abusing the Court process by filing the Application.
12. That there is no breach of or eminent threat to breach of fundamental rights of the Applicant underpinning the Application and as such the Application is not maintainable.
13. That the ODPP is a protector and promoter of human rights and before arraignment of a suspect it ensures that the fundamental rights and freedoms of a suspect are observed as was the case of the Applicant who was arraigned before a judicial officer within twenty-four (24) hours on the 4th of July 2025.
14. The Respondent submitted that the Application should thus be dismissed as the Applicant is already admitted to personal bond.



Analysis and Determination

15. The relief of anticipatory bail is not provided for in statute however it is now settled that the same may be available as a constitutional relief. Courts apply the threshold for an application for violation or threatened violation of rights under Article 23 and 165(3) of the *Constitution* or the invocation of the provisions of Article 29 of the *Constitution*, which assures every person of the right to their freedom and security, which includes the right not to be – “(a) deprived of freedom arbitrarily or without just cause”.
16. To give effect to Article 49(1)(h) of the *Constitution of Kenya*, the National Council on the Administration of Justice (NCAJ) developed the *Bail and Bond Policy Guidelines* (BBPGs) 2015 to guide the police, prosecutors, probation officers, and judicial officers in their application of laws that provide for bail and bond. These policy guidelines were (are) intended to provide practice and procedural guidance in bail and bond administration with a framework for the consistent and uniform application of bail and bond across the country made in a fair manner.
17. Policy 4.29 of the *Bail and Bond Policy Guidelines* (BBPGs) 2015 asserts that 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 this right. Further, the applicant must demonstrate that the apprehension of arrest is “real and not imagined or speculative.”
18. The principles to guide the Courts in considering whether to grant anticipatory bail were set out by Rawal and Kimaru, JJ, in the case of *Samuel Muciri W’Njuguna v Republic* [2004] eKLR, as follows:

“When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution did not provide a remedy to a citizen whose fundamental rights have been breached ... We are of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental right.”
19. The purpose of anticipatory bail was enunciated in the case of *Njuguna v Republic* Nairobi Misc. Cr. Case No. 710 of 2002 1 KLR, the Court spelt out that such bail may 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. It is also the object between the enactments of Article 49(h) of the *Constitution*”
20. The Supreme Court of India in ‘*Bhardresh Bibinbhai Sheth v State of Gujarat and other*’ – 2016 (2) TMI 416 - Supreme Court laid down the principles for grant of anticipatory bail that may equally persuasively enrich our constitutional relief as detailed below: The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The Court should also examine the fact where there is family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law; The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting Officer must



record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the Court; It is imperative for the Courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of available material and the facts of the particular case. In cases where the Court is of the considered view that the accused has joined the investigation and he is fully co-operating the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage; There is no justification for reading into Section 438 of *CrPC* the limitations mentioned in Section 437 *CrPC*. The plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a special case for the exercise of the power to grant anticipatory bail. This virtually reduces the salutary power conferred by Section 438 *CrPC* to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the Court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail; The power of course of action on an application for anticipatory bail ought to be that after evaluating the averments and the accusations available on the record if the Court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor, the Court may either reject the anticipatory bail application or confirm the initial order of granting bail. The Public Prosecutor or the complainant would be at liberty to move the same Court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the Court is misused. The anticipatory bail granted by the Court should ordinarily be continued till the trial of the case; It is settled legal position that the Court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or by the complainant, on finding new material or circumstances at any point of time; In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial Court, then it would be unreasonable to compel the accused to surrender before the trial Court and again apply for regular bail; Discretion vested in the Court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly the discretion vested with the Court under Section 438 *CrPC* should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations; No inflexible guidelines or straitjacket formula can be provided for grant or refusal of the anticipatory bail because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of the case;

21. In considering breach of or eminent threat of breach of fundamental rights Courts must consider tangible evidence as held in the case of *Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 others* [2016] eKLR that: -

“Effectively, the justifiability dogma prohibits the Court from entertaining hypothetical or academic interest cases. The Court is not expected to engage in abstract arguments. The Court is prevented from determining an issue when it is too early or simply out of



apprehension, hence the principle of ripeness. An issue before the Court must be ripe, through a factual matrix, for determination”

22. This Court has keenly considered the Applicant’s supporting affidavit noting that the same is full of conjecture and fails to qualify assertions made or allegations raised.
23. The Applicant identifies his alleged participation in the June 25th 2025 nationwide “maandamano” as underpinning the investigations subject to Miscellaneous Criminal Application number E660 of 2025 and not other charges including arson as is orally submitted by the Applicant’s Counsel.
24. I hasten to observe that we do not have in our criminal law an offence of participation in public protest/ procession, or participation in any public protest is not in itself illegal or criminal.
25. This Court is unable to find evidence in support that;
The Respondents have vowed to teach the Applicant a lesson and they have been constantly calling him and issuing threats of further arrest more so on Fridays. When he was called? by who and specific threats or arrest evidence and or detail is provided.
That there have been conspicuous and mysterious persons moving around in the undisclosed area, vowing to have the Applicant placed in custody.
And that is the Applicant is subjected to an arrest he shall be subjected to embarrassment.
26. This Court finds the Application to be on stilts without constitutional underpinning, if the arrest of the Applicant on the 3rd July 2025 and subsequent judicial process was unrelated to the instant Application then there was no need to annex the pleadings and that the Applicant under oath identifies the said investigations to relate to the 25th June 2025 “maandamano” and alleged crimes that occurred thereon.
27. While there is a belated attempt by the Applicants to distinguish and distance the investigations subject to Miscellaneous Criminal Application number E660 of 2025 urging that the Applicant is admitted to bail in relation to other charges and not on the charge of “organizing the protest”.
28. That being the case, I am unable to locate any merit in the Application that the Applicant faces eminent breach of his fundamental right and freedoms or that the said rights are threatened with breach.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 22ND DAY OF JULY,2025

MOHOCHI S.M.

JUDGE

