



**Cheboswony v DCIO Moiben & 2 others (Miscellaneous Criminal Application E093 of 2023) [2024] KEHC 153 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E093 OF 2023**

**JRA WANANDA, J  
JANUARY 19, 2024**

**BETWEEN**

**GILBERT K. CHEBOSWONY ..... APPLICANT**

**AND**

**THE DCIO MOIBEN ..... 1<sup>ST</sup> RESPONDENT**

**OCS AINABTICH POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Application before this Court is the Notice of Motion dated 2/11/2023 filed by the Applicant through Messrs Seneti & Oburu Associates Advocates. The same seeks the following orders:
  - i. .... [spent]
  - ii. That the Honourable Court be pleased to grant the Applicant anticipatory bail on such reasonable conditions as the Court may determine pending the conclusion of the investigations of criminal charges preferred against the Applicant.
  - iii. That the Honourable Court be pleased to issue such orders as may be fair and just to secure the Applicant's constitutional rights not to be denied, violated or infringed or threatened
2. The Application is expressed to be brought pursuant to Article 22, 49(h) and 50 of the Constitution of Kenya and "all other enabling provisions of the law". The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Applicant.
3. In the Affidavit, the Applicant deponed that he has been the genuine beneficiary/occupier/user/possessor of 1½ points of acre of the parcel of land known as LR Tembelio/Elgeyo Border Block 12/Tuiyoluk/108 having duly and lawfully acquired the same, that on or about 24/02/2014 the Applicant



while in dire need of a friendly loan of Kshs 800,000/- approached one Ken Koima who agreed to lend to the Applicant the entire amount on condition that the loan is repaid within 10 years from the date of lending and the same was to be secured through a lease agreement where the Applicant was to lease 1½ of an acre of the land for a period of 1 year, the said Ken Koima (lender) advanced the Kshs 800,000/- to the Applicant but fraudulently duped, used undue influence or capitalized on the Applicant's desperation and failed to disclose facts, into signing a land sale agreement instead of money lending agreement which should have been the case, on 23/07/2014 before lapse of the 10 years repayment period agreed, in breach of the terms of the money lending/lease agreement, the lender without any colour of right unlawfully encroached into the said parcel of land by destroying the fence, cutting down trees and crops and forcefully occupying the same.

4. The Applicant deponed further that upon the Applicant learning of the intention and actions of the lender, he approached his parents who refused/declined that the lender occupies the parcel of land since it was not for sale or lease, the Applicant then explained to the lender that he could not occupy the land since his parents who are the registered owners had declined the arrangement and that the Applicant was willing and ready to refund the money within 1 year, the lender however declined, it has now come to the Applicant's knowledge that there are criminal investigations that have been levelled against the Applicant by the lender despite the glaring fraud on the lender's part and clear terms of the agreement, that there is no criminal element in the whole issue hence the police should not keep harassing the Applicant, that there is an ongoing civil suit Eldoret CM E&LC No 150 of 2023 over the same issues aforementioned, there are equally pending Summons by the Land Registrar, Uasin Gishu County over the same allegations and a caution is also in place, and that the Applicant has equally made reports to the police against the lender for constant harassment and being forced to transfer the parcel of land.
5. The Applicant further deponed that as a result of the constant police harassment, his health is at risk and he was diagnosed with ulcers, that it is his constitutional right to apply for anticipatory bail pending the logical conclusion of the police investigations, the claims between the Applicant and the lender are purely civil in nature, the charges that are likely to be preferred against him are bailable under the Constitution, it is his right to be presumed innocent until the contrary is proved, he is a Kenyan citizen and has no intention of relocating from the country, he will not abscond, he will not frustrate the police investigations, and he will comply with all terms and conditions as may be set by the Court.
6. The Application was filed under a Certificate of Urgency and came up before the duty Judge ex parte on 3/11/2023 who directed that it be served for inter partes hearing for 8/11/2023. On 8/11/2023, it transpired that the Application had not served the Respondents. Ms. Okok, Prosecution Counsel who happened to be in Court for other matters stepped in. I then directed that the Application be served by close of business of that day and that the Application be canvassed by way of written Submissions. I also gave strict timelines on filing of Responses and Submissions and proceeded to give a date for the Ruling.
7. Looking at the file as at present, I do not find any evidence that the Application was ever served as directed by the Court since there is no Return of Service filed. I am emboldened in this view since there are also no Responses in the file from any of the Respondents. Further, there are no Submissions at all in the file, not even from the Applicant. It is very possible that either the Applicant has lost interest in the Application or the matter may have been overtaken by events and the Applicant has opted not to inform the Court.
8. For these reasons alone, I will strike out the Application for failure by the Applicant to demonstrate any evidence of compliance with the Court's express and strict timelines. However, I will still consider the merits of the Application.



9. The issue that has been placed before this Court is “whether the Applicant should be granted anticipatory bail”.
10. In answering the said issue, I may mention that in Kenya, there is no specific provision of law expressly providing for or addressing the matter of grant of anticipatory bail. It is however generally agreed that various constitutional provisions under the Bill of Rights envisage and allow for grant of anticipatory bail by the High Court. Thus, anticipatory bail is a creature of judicial craft in Kenya. In regard to this judicial craft, a 2-Judge bench of the High Court (Rawal J and Kimaru J as they then were) in the case of *Samuel Muciri W’Njuguna v Republic* [2004] eKLR held as follows:

“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.

In the present case, we agree with the applicant that his rights of liberty have been breached and the applicant has reasonable apprehension that it is likely to be violated by the police authorities.

When the statute is silent, this Court cannot become a toothless watchdog of the *Constitution* which we have sworn to defend. Furthermore, the *Constitution* itself has granted wide discretion to the High Court presumably to fill in gaps which the statutes have left. This in our humble view is not usurping the powers of parliament or to violate the sacrosanct separation of powers”

11. On the issue of anticipatory bail, the first constitutional provision that comes to mind is Article 29(a) of the *Constitution* which 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.”

12. There is also Article 49(1)(h) which 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.”

13. Further, Articles 23, 29 and 258 of the *Constitution*, empower the Courts to hear and determine applications relating to denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

14. Regarding application of the remedy of anticipatory bail, Gikonyo, J, in the case of *Paul Ole Kuyana & another v Director of Public Prosecution & 2 others* (Misc. Criminal Application No 2 of 2021), sounded a warning and emphasized the need for the Courts to exercise utmost care and caution so as to prevent imposing of unnecessary impediments upon constitutional function and mandate of other state organs. He stated as follows:

“[5]. I am nevertheless, aware that where anticipatory bail has been considered, courts have applied the threshold for an application for violation or threatened violation of right under article 23 and 165(3) of the *Constitution*. As we engage with this phenomenon, I only find it instructive that the core of orders under article 23 and 165(3) should be properly-fashioned as to be in accord with the *Constitution* of Kenya, 2010 as redress of a denial, violation or infringement



of, or threat to, a right or fundamental freedom in the Bill of Rights should be ascertained. Thus, care should be taken not to adopt an amorphous practice in the name of anticipatory bail which may be a less austere approach for redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended in the *Constitution*, and perhaps make it a toll to place unnecessary impediment upon constitutional function and mandate of other state organs.”

15. For the same reasons as those set out above, it is agreed that anticipatory bail should be granted only when an Applicant sufficiently demonstrates that his Constitutional rights have been violated or is likely to be violated. In regard thereto, Odunga J (as he then was) in the case of *Republic v Chief Magistrate Milimani & another Ex parte Tusker Mattresses Ltd & 3 others* [2013] eKLR 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 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.”

16. I agree with the said reasoning that anticipatory bail should only issue where it has been demonstrated that there has been a serious breach of a citizen’s rights by organs of the State. It should not issue where an applicant simply cites apprehension founded on unsubstantiated grounds. The fear of breach of fundamental right must demonstrate the breach by acts and facts constituting the alleged breach.
17. In my view, the Applicant has not demonstrated that the present Application is merited. There is no evidence that his fundamental rights and freedoms have been infringed or are under threat of being infringed. The Applicant contends that the matters that he is apprehensive of being arrested for are civil in nature. Other than making these mere allegations, the Applicant has not provided any proof to demonstrate how that alone infringes his constitutional rights. There is no rule to the effect that concurrent criminal and civil proceedings based on similar set of facts or circumstances cannot proceed at the same time. The only time that the criminal case will be stopped is where it is demonstrated that continuance thereof will result to infringement of the rights and fundamental freedoms of the accused persons or contravention of the *Constitution*.
18. Accordingly, having considered the matters deponed in the Applicant’s Affidavit, I do not find any evidence that the Applicant’s fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are legal processes aimed at fact finding of commission of crime and do not, per se amount to infringement on the rights or fundamental freedoms of the person under investigations. As long as investigations are carried out in accordance with the law, the same must be allowed to proceed (see decision of Gikonyo J in *Parmet Ole Kiseet v Director of Public Prosecution & 2 others* [2021] eKLR).



19. In any case, apart from merely the Summons to enter Appearance, the Applicant has not even exhibited copies of the pleadings filed in the civil, suit to enable the Court study the same and form an opinion. Even the alleged agreements forming the subject of the investigations has not been exhibited. On what material therefore is the Court supposed to base its findings?
19. Under our laws, the police are empowered to conduct investigations against any complaint that may be raised against a suspect. The Applicant is not an exception and investigations can be conducted against him. Should the police find it necessary to arrest him, the *Constitution* provides for safeguards against arbitrary incarceration in custody thus should his rights be violated after arrest, he will be at liberty to seek redress in the legal justice system (see decision of Ngenye-Macharia J (as she then was) in the case of *Chaitanya Amrital Sevek & another v Republic* [2016] eKLR.

### **Final Orders**

21. The upshot of my findings above is as follows:
  - i. The Application is struck out for failure by the Applicant to demonstrate compliance with the Court's directions given on 8/11/2023
  - ii. The Application also fails on merits.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19<sup>TH</sup> DAY OF JANUARY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

