



Kilonzo v Director of Criminal Investigations & 2 others (Criminal Appeal E031 of 2023) [2024] KEHC 2622 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E031 OF 2023**

**RK LIMO, J
MARCH 7, 2024**

BETWEEN

EUNICE KAKIVI KILONZO APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

NATIONAL POLICE SERVICE 3RD RESPONDENT

RULING

1. Eunice Kakivi Kilonzo, the applicant has lodged this Miscellaneous application amended on 20th September 2023 citing the following Articles of *the Constitution* of Kenya, 10, 22, 23, 25, 27, 28, 29, 47, 48, 49(I) (h) 50, 165(6) and 259. She has also invoked Section 123 of the *Criminal Procedure Code* and seeks the following prayers;
 - i. Spent
 - ii. That pending the hearing and determination of this application interparties, the applicant be admitted to anticipatory bail or bond at such reasonable terms and conditions that this honourable court may deem fit and just in the circumstances
 - iii. That ex-parte and pending the hearing and determination of this application, this honourable court be pleased to issue a conservatory order restraining the 1st, 4th and 5th Respondents, their servants, agents, junior officers and/or anybody from effecting and/or anybody arresting, charging harassing or otherwise however interfering with the fundamental rights and freedom of the applicant.
 - iv. That this honourable court be pleased to issue a conservatory order restraining the 1st, 4th and 5th Respondents, their servants, agents, junior officers and /or anybody from affecting and/or



anybody from arbitrary arresting, charging, harassing or otherwise however interfering with the applicant without conducting investigations and according her an opportunity to be heard to wit issuing her with summons for her to appear at any offices to record statement(s) if need be.

- v. That the honourable court do issue such further or other orders that in its discretion may deem fair and just in the circumstances.
 - vi. That the costs of this application be provided for.
2. The application is premised on the following grounds;
- a. That the applicant herein is the director of Lokaki Investments Limited pf P.O Box 260-90200 Kitui, a duly registered body corporate under the Company Act with its registered offices in Kitui carrying its business principally in Kitui and generally around the country with an office at Jee Plaza, Kilungya Street within Kitui Town and she is a law-abiding citizen.
 - b. That as per the Kenya Gazette Notice Vol.122 26-5-2023, there is currently ongoing investigation by the 4th Respondent in relation to an inquiry by the Ethics and Anti-Corruption Commission in EACC/MCKS/INQ/F1/2/2019 into allegations that Kitui County Government received a donation of a CT Scan Machine but irregularly paid Kshs 80 Million to Lokaki Investment Limited through Tender No. CGOKT1/127/2017-2018 for supply, delivery and commissioning of CT Scan and its accessories.
 - c. That further to the aforementioned allegations it is also alleged that Lokaki Investments Limited attached a forged credit facility letter purportedly from Equity Bank.
 - d. That further, Lokaki Investments Limited is alleged to have failed to remit taxes payable to the Kenya Revenue Authority for the sum of Kshs 12,800,000/-
 - e. That notwithstanding, the allegations mentioned above remain unfounded, untrue and fictitious as no particular charge has been drawn to that effect since the investigations remain incomplete.
 - f. That further contrary to the allegations made in the inquiry report and at paragraph 3 above, there exists no formal complaint lodged by Equity Bank to verify or support the same.
 - g. That the applicant contrary to the allegations made in the inquiry report and at paragraph 4 above the applicant was served with a demand notice from the Kenya Revenue Authority for tax arrears of Kshs 1,681,128/- dated 11/5/2023 to which the company offers to pay the arrears in instalments as referenced in the debt payment instalment agreements issued on 9/8/2023.
 - h. That pending the ongoing investigations by the 4th respondent, the applicant is apprehensive that she is under imminent threat of arrest by the officers from the 1st and 5th Respondents acting under the instructions/directions of the 4th respondent and is justifiably apprehensive that her constitutional rights are likely to be violated.
 - i. That the powers of arrest by the 1st and 5th respondent officers are likely to be abused or are being abused and misused to harass intimidate and oppress the applicant and to achieve extraneous purposes unconnected to and with upholding the law.
 - j. That as a law-abiding citizen, the applicant is ready and willing to submit herself to a just and fair legal system/process in which her fundamental rights and freedoms are respected and protected.



- k. That the applicant is entitled to the secure protection of the law as guaranteed under Articles 25,27,28,29,47,49,50 & 51 of the Constitution and the Honourable Court is obliged to act to enforce due process of the law and constitutionality.
 - l. That under articles 25 of the Constitution, under no circumstances whatsoever can the applicant's following rights and fundamental freedoms be limited.
 - i. Freedom from torture and cruel, inhuman or degrading treatment or punishment
 - ii. Freedom from slavery or servitude
 - iii. The right to a fair trial and
 - iv. The right to an order habeas corpus.
 - m. That it is therefore imperative and most urgent that this Honourable Court heard and addresses the application filed herewith forthwith to arrest the threatened and continued violation of the applicant's fundamental right and freedoms.
 - n. That unless this application is heard on a priority basis and orders sought granted, the applicant, her clients, her employees, family members and people close to her will continue living in saddening state of fear and anxiety as they are not aware when and how the Respondents would pounce on her.
3. The Applicant swore an affidavit on 12th October 2023 where she has largely reiterated the above grounds.
 4. In her written submissions dated 28.11.23, the applicant submits that the applicant's constitutional rights have been breached or threatened because of the following; firstly, that she has been subjected to strenuous and lengthy interrogations by the Respondents without being informed of her right to remain silent, right to legal representation or being allowed to have legal counsel to guide her in understanding the nature and true intentions of the interrogations. Secondly that the 2nd Respondent intends to use the applicant's statements to institute legal claims while concealing its intentions which she submits makes the exercise procedurally unfair. Thirdly that the investigations by the 4th Respondent lack factual and proper foundation, that the 4th Respondent has assumed the role of an independent body by deeming the applicant a criminal. She faults KRA for reporting that the applicant is guilty for withholding tax and indicating that she has committed an offence of fraudulent acquisitions of public property and using the same to justify its investigations. Fourthly, that by publishing an inquiry report by the 4th respondent has negatively impacted the applicant's company business.
 5. The 4th Respondent has opposed this application vide a Replying Affidavit sworn by one of its investigators, Salad Wato Boru on 6th November 2023 who depones being a member of the team investigating this matter. It is averred that the 4th Respondent received a complaint sometime in February 2019 that the County Government of Kitui had received a donation of a Computerized Tomography (CT) Scan machine but irregularly paid Kshs 80 million to Lokaki Investment Limited through tender No. CGOKTI/127/2017-2018: supply and delivery commissioning of CT Scan and its accessories. That the 4th respondent commenced investigations and the commission established as follows;



- a. That during financial year 2017/2018, the County Government of Kitui planned to secure medical equipment through open tender and advertisement for the same was placed on the Standard Newspaper on 1st February 2017.
 - b. That the applicant's company, Lokaki Investment Limited won the tender and proceeded to supply the aforementioned machine through Meditec Systems Limited and the CT scan machine was installed at Kitui Referral Hospital.
 - c. That thereafter the County Government of Kitui paid the applicant's company the tender sum of Ksh 80 Million in two installments of Kshs 46,747,747 and Kshs 33,252,253 on 19th November 2018 and 6th May 2019 respectively.
 - d. That the investigations also established that while submitting the bid documents, the applicant's company attached a forged credit facility letter Ref. EBL/Credit facility letter/082/0820 dated 13/2/208 purportedly from Equity Bank. It is averred that Equity Bank reviewed the letter and confirmed that it was not genuine. It is averred that the applicant was directly and solely involved in the transaction and that the action of attached an alleged forged credit facility letter amounted to fraudulent practice under the [Public Procurement and Asset Disposal Act](#).
6. The 4th Respondent has also faulted the applicant for failing to declare payment of the tender sum to Kenya Revenue Authority (KRA) which was discovered during the commission's investigations. It is also averred that the applicant was accorded an opportunity to state her case and that she recorded statements with the commission. The deponent avers that the 4th respondent conducted its investigations in accordance with the provisions of sections 35 of the [Anti-corruption and Economic Crimes Act](#) (ACECA). It is also averred that upon delivery of its report to Office of the Director of Public Prosecutions (ODPP), the ODPP returned the commission's file on 19th April 2023 with the recommendation for further investigations which it is alleged are still ongoing. It is averred that the commission is acting within its mandate and that applicant has failed to demonstrate that the investigations and the intended prosecution is illegal, unreasonable, unprocedural or made in bad faith and/ or contrary to [the constitution](#).
7. The 4th Respondent submits that it has no mandate to direct the 1st & 5th Respondent on what to do because the two said bodies have their respective mandates and act independently.
8. It further submits under Section 13(2) of the [Ethics and Anti-Corruption Commission Act](#), the Commission is granted power to conduct investigation on its own initiative or upon a complaint being made by any person or entity. It contends that their investigation revealed that the letter from Equity Bank was forged and that the issue of forgery will be tried in the trial Court.
9. In its written submissions, the 4th Respondent through learned counsel contends;
- a. That the commission gave the applicant an opportunity to be heard and that the commission is mandated to publish quarterly report on Kenya Gazette for the period covering 1st January -31st March 2023 pursuant to Section 36 of [Anti-corruption and Economic Crimes Act](#) (ACECA). It is therefore submitted that the applicant's constitutional rights have been adhered to and that the applicant has failed to demonstrate how they have been violated. It contends that for the orders sought to be granted, the threat to violations constitutional rights must be real and supported by facts which is missing in this case.



10. This court has considered this application and the response made by the 4th Respondent. The applicant seeks anticipatory bail and some conservatory orders to stop the respondents from what she terms harassment and interfering with her rights including her fundamental rights and freedoms.
11. The dispute revolves around ongoing investigation by the Ethic and Anti-Corruption Commission, the 4th Respondent herein. The investigations pertain to a contract entered between the applicant's company and County Government of Kitui following award of tender No. CGOKTI/127/2017-2018: for delivery of a Computerized Tomography (CT) Scan machine and subsequent payment Kshs 80 million to the applicant's company.
12. The 4th respondent avers that it received a complaint and lodged investigations into alleged irregular payment of the aforementioned amount and that the investigations established two things that first, the credit facility letter from Equity Bank attached to the tender documents by the applicant's company was allegedly forged, secondly, that applicant's company failed to declare payment of the tender sum of Kshs 80 million to Kenya Revenue Authority. The 4th respondents avers that the actions contravened provisions of the [Public Procurement and Asset Disposal Act 2015](#) and the [Anti-Corruption and Economic Crimes Act](#) respectively.
13. On her part, the applicant complains that her constitutional rights entitled under articles 25,27,28,29,47,49 50 & 51 are under threat, that she was not accorded an opportunity to be heard and that there is no formal complaint lodged by Equity Bank pertaining to an alleged forged credit facility letter. With regards to the tax remittance issue, it is the applicant's case is that her company has made arrangement to pay the arrears in instalments.
14. The question raised in this application is whether the applicant has raised sufficient grounds to show that her constitutional rights are likely to be violated or have been violated by the respondent to warrant an anticipatory bail to forestall any such infractions.
15. An anticipatory bail for a person not arrested is not expressly provided for in [the Constitution](#). [The constitution](#) provides for bail to an arrested person under Article 49(1)(h) it states;

“An arrested person has the right to be released on bond/bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released”.
16. The provisions of Section 123 envisages bail/bond to a person charged in Court.
17. The issue of anticipatory bail is therefore a problematic issue because on one hand [the Constitution](#) provides that a person's fundamental rights and bill of rights must be protected by a Court of law while on the other hand, there are no clear or express provisions to deal with the issue where one anticipates that any of his/her rights in the bill of rights is likely to be infringed. It is only upon demonstrating the same that a party can approach a court for anticipatory bail.
18. Courts have grappled with this issue before and jurisprudence have emerged as a result.
19. In the case of [Paul Ole Kuyana & another v Director of Public Prosecution & 2 others \[2021\]](#) eKLR, the court observed as follows;

“In jurisdictions where anticipatory bail is practiced, it is expressly provided. And, it emerges that anticipatory bail is a direction issued by the court to release a person on bail, even before the person is arrested. In other jurisdictions, anticipatory bail is granted to a person who has been arrested by the court.



Anticipatory bail is, therefore, a special relief in criminal law. However, the core, character and scope of anticipatory bail may be problematic, requiring clear and careful stitching of the relief. Some jurisdictions have gone round this dilemma by expressly and specifically providing for anticipatory bail in the law; and its nature, core and effect is regulated in the statute and regulations or rules thereunder. For instance, Indian criminal law has a specific provision for anticipatory bail under Section 438(1) of the Criminal Procedure Code. It is also expressly provided that anticipatory bail in India is issued only by the Sessions Court and High Court. This kind of hemming of anticipatory bail becomes necessary due to the very nature of anticipatory bail to become potentially inhibitive of investigative mandate of the police and other investigative organs of the state. A case is, therefore, made out that, prescription of the core, content and scope of anticipatory bail or whatever other order granted in that genre should be properly set out in law or in the jurisprudence creating or adopting it.”

20. The applicant’s grievance is based on alleged violations and for threatened violation of her rights and fundamental freedoms by the 4th Respondent, the Ethics and Anti-Corruption Commission. In her supporting affidavit, the applicant claims that she was never summoned to appear before any police station or investigative agency and no arrest warrant has been issued against her and she is apprehensive that her arrest may be arbitrary. So, as it stands, there hasn’t been any threats of arrest contrary to the applicant’s allegation. The 4th Respondent through the Replying Affidavit of Salad Wato avers that the applicant was accorded an opportunity to state her case as she was invited and recorded a statement with the Commission which was not denied by the applicant. The submissions by counsel for the applicant were a bit hard but that notwithstanding, it seems that the applicant is complaining about being subjected to lengthy interrogations by the 4th Respondent which contradicts the applicant’s contention that she was not invited to any investigative agency. It is alleged that the investigations lack proper basis particularly due to the communication from KRA on the question of withholding tax which came out in the investigations by the 4th Respondent. Again, the applicant confirmed in her own affidavit that she had procured funds and her company was looking into settling the arrears in instalments. She cannot therefore complain that the issues raised by K.R.A. are in bad faith or oppressive.
21. It is not contested that the 4th Respondent’s mandate emanates from *the Constitution*. Article 252(1) states;

- “ 1. Each commission, and each holder of an independent office
- a. may conduct investigations on its own initiative or on a complaint made by a member of the public;
 - b. has the powers necessary for conciliation, mediation and negotiation;
 - c. shall recruit its own staff; and
 - d. may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.”

Flowing from the above it is difficult to understand why the applicant feels unfairly treated when the respondents appears to be simply carrying out its statutory and constitutional mandate.



22. It is also apparent that parliament in order to give effect to the above legislated *Ethics & Anti-corruption Commission Act* Section 11 (c) states that the 4th Respondent has the mandate to;
- (a) receive complaints on the breach of the code of ethics by public officers
 - b. investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
23. The Applicant complains that she was not accorded the right to legal representation by the 4th Respondent when the investigations are going on but that issue only cropped up in her written submissions. She did not state on oath and explain when and who denied her the right to legal representation which is a right to any arrested person under Article 49 (c) of *the Constitution*. This court is not persuaded that the applicant was or has been denied right to legal representation. There is no demonstration on her part to back up this claim.
24. The other complaint raised here is publishing of an inquiry report on Kenya Gazette which the applicant alleges has affected her company's reputation. However, a look at Section 36 of *A.C.E.C.A* shows that 4th Respondent is given a duty to public periodic reports. The Section states;
- “(a) The Commission shall prepare quarterly reports setting out the number of reports made to the Director of Public Prosecutions under section 35 and such other statistical information relating to those reports as the Commission considers appropriate.
- a. A quarterly report shall indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted.
 - b. The Commission shall give a copy of each quarterly report to the Attorney- General.
 - c. The Attorney-General shall lay a copy of each quarterly report before the National Assembly.
 - d. The Commission shall cause each quarterly report to be published in the Gazette.”

It was therefore legal, within duty and mandate for the 4th Respondent to have its reports published in the Kenya Gazette. The applicant has no basis to complain on matters that are factual and legal.

25. The applicant contends that she is apprehensive that she is under imminent threat of arrest by officers from the 1st and 5th Respondents but she has failed to substantiate these claims and in any event, investigations are still ongoing and there is no telling what the outcome will be. In the case of *Mandiki Luyeye v Republic [2015]* eKLR, G Ngenye J (as she was then) held as follows when dealing with the same issue;

“Accordingly, it is 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 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”.

This court finds that the applicant has failed to substantiate her allegations and demonstrate that any of her constitutional rights have been infringed or likely to be infringed.

26. This court further finds that the prayer sought under para (iii) & (iv) cannot be hinged on the prayer for anticipatory bail. The prayers/reliefs touch on *the constitution* and can only be sustained if there is a pending suit/petition filed seeking the intervention of this court under Article 165 (3) of *the Constitution*. The application before me is lacking substratum and prayers as framed are unsustainable.

In the premises, this court finds no merit in the application dated 20.9.23, the same is dismissed with costs to the 4th Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF MARCH, 2024

Hon. Justice R. K. Limo

JUDGE

