



Ndungu v Director of Public Prosecutions & 2 others (Miscellaneous Criminal Application E126 of 2023) [2024] KEHC 4603 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E126 OF 2023
DO CHEPKWONY, J
APRIL 11, 2024**

BETWEEN

FLORENCE WANJIRU NDUNGI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion Application dated 14th December, 2023 filed pursuant to Articles 10, 19, 20, 21, 22, 23, 25, 28, 29, 47, 48, 49, 157, 159, 165(3), 258 and 259, all of the Constitution of Kenya and Sections 123A and 124, both of the Criminal Procedure Code Cap 75 Laws of Kenya.
2. The Application seeks the following orders:-
 - a. Spent.
 - b. That the Honourable Court be pleased to grant the Applicant anticipatory bail pending arrest or charge on such terms the Court may deem fit to impose.
 - c. That the Honourable Court be pleased to issue a conservatory order restraining the Respondents, their servants, agents, junior officers and or anybody from effecting and or anybody from arresting, harassing or otherwise however interfering with the Applicant pending the hearing and determination of this application in the matters related to the subdivision and distribution of the estate of the late James Samuel Gichuru.
 - d. That costs of this application be provided for.



- e. Such further and/or other orders be made as the court may deem fit and expedient.
3. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Florence Wanjiru Ndungi sworn on 14th December, 2023. It is the Applicant's case that she was summoned to appear before Mr. Erick Otieno, Inspector General at the County DCI Office in Kiambu on Friday 15th December, 2023 at 12.30 p.m. The Applicant holds that she is likely to be arrested and charged on an alleged offence of Conspiracy to defraud contrary to Section 317 of the Penal Code which emanates from the distribution of the Estate of James Samuel Gichuru in Nairobi HC P&A No. 20 of 1983 where she is a beneficiary.
 4. It is the Applicant's case that in the event she answers to the summons, she will be arrested and held in communicado which would be a violation of her rights. She holds that it would be in the interest of justice for the application to be allowed.
 5. The application came before court on diverse dates and on 21st December, 2023, the court granted the Applicant anticipatory bail of Kshs 100,000/= pending arrest.
 6. On 8th April, 2024 when the matter was placed before the court, Mr. Gacharia Counsel for the State, informed the court that the Applicant had already been admitted to anticipatory bail and that he was not opposed to the application.
 7. Counsel for the Applicant, Ms Grace Ndinda then holding brief for Mr. Mbabu told court that they were seeking to have Prayer No.(3) of the application allowed and for the anticipatory bail to be discharged and the sum of Kshs. 100,000/= deposited in court released to the Applicant therein. She argued that the issues in question relate to the Estate of James Samuel Gichuru which is pending vide a Succession Matter in Milimani P & A 20 of 1983 and should be dealt with the other pending issues.
 8. In rejoinder, Mr Gacharia, Counsel for the state in reference to Prayer No.(3) of the application as drawn, stated that the court cannot stop investigations from being conducted whether there is a pending civil or family issue. He argued that the state was not opposed to the Applicant enjoying the anticipatory bail and that if there will be need to charge the Applicant, then she will be summoned to attend court.

Analysis and determination.

9. This court has considered the application dated 26th June, 2023 and the request by the Applicant to have Prayer No.(3) allowed and the anticipatory bail discharged so that the Kshs.100,000/= deposited as security to be released to the Applicant.
10. To begin with, it is important to appreciate that the Applicant had urged the court to issue conservatory orders against the Defendants from arresting, harassing, or interfering with the Applicant pending the hearing and determination of the application which relates to the subdivision and distribution of the estate of the late James Samuel.
11. It is trite law that courts should not interfere with the duties of the Respondents as they are all independent offices established under the *Constitution* as explained hereinunder:
12. The 1st Respondent is established under Article 157 of the *Constitution* where its functions are provided for under Article 157 (6) of the *Constitution* which states that:-
 - [6]. The Director of Public Prosecutions shall exercise State powers of prosecution and may—



- a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. Subject to Clause (7) and (8), discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
13. The 2nd Respondent is established under Section 28 of the [National Police Service Act](#), No 11 of 2011 and provides that:-
- “There is established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.
14. The 3rd Respondent is established under Article 245 (1) of the [Constitution](#) and its powers to investigate crimes are stated under Article 245 (4) of the [Constitution](#) which provides that:-
- [4]. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to
- a. The investigation of any particular offence or offences;
 - b. The enforcement of the law against any particular person or persons; or
 - c. The employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service.”
15. The court is persuaded by the High Court in Judicial Review Application No.8 of 2017, [Republic v Director of Public Prosecutions & 2 Others Ex parte Edwin Harold Dayan Dande & 3 Others](#), which held as follows:-
- “A reading of Article 157 of the *Constitution* leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that Article 245(4)(a) of the *Constitution* provides that: 'no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.' Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.”
16. It therefore follows that the court can only interfere with duties of the 2nd and 3rd Respondent under Articles 244 and 245 of the [Constitution](#) and under the provisions of the [National Police Service Act](#), only if the constitutional and statutory provisions are not adhered to or if their actions are illegal and unlawful.
17. From the application that was filed before the court, there is no evidence of any constitutional or statutory provisions having been violated as the 2nd and 3rd Respondents were acting within their mandate to investigate the matter so as to establish whether there is need to arrest the Applicant and have the 1st Respondent Summon and charge the Applicant.



18. With respect to the argument raised by the Applicant that there is a succession case pending vide Nairobi P & A 20 of 1983, The Estate of James Samuel Gichuru which should address all issues raised of concern therein. In arriving at this decision, the court relies on the provisions of Section 193A of the *Criminal Procedure Code* which provides as follows:-

“[193A].Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition, or delay of the criminal proceedings.”

19. In view of all these provisions and holding, by several courts, the court finds that the existence of the succession matter cannot stop investigations from being conducted as criminal and civil proceedings can run concurrently. The court cannot also stop the Respondents from conducting their duties, if there is need of arresting and charging the Applicant. And for those reasons, the court finds that the application herein lacks merit and the same is dismissed with orders that:-

- a. The anticipatory bail granted herein to be discharged.
- b. The Kshs.100,000/= deposited herein as security by the Applicant to be released to the Applicant.
- c. An if there arises need to arrest and charge the Applicant, the 2nd and 3rd Respondents be at liberty to issue Summons in that regard upon the Applicant.

It is so orderly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF APRIL , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:-

M/S Grace Ndunda holding brief for Mr. Mbabu for Applicant

M/S Ndeda counsel for Respondent

Court Assistant - Martin

