



**Thuita v Ethics & Anti-Corruption Commission & 4 others
 (Miscellaneous Civil Application 1 of 2024) [2024] KEHC 4669 (KLR)
 (Anti-Corruption and Economic Crimes) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4669 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 ANTI-CORRUPTION AND ECONOMIC CRIMES
 MISCELLANEOUS CIVIL APPLICATION 1 OF 2024**

**EN MAINA, J
 APRIL 18, 2024**

BETWEEN

ENG MICHAEL MWANGI THUITA APPLICANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

Introduction

1. This ruling concerns the application for anticipatory bail in the Applicant’s Notice of Motion dated 21st September 2023.
2. The Application was initially filed in the Criminal Division of the High Court on 22nd September 2023 but was later transferred to this court, by an order of the Presiding Judge of that Division, dated 19th March 2024. However, it was not until 9th April 2024 that the file was placed before me.
3. The record shows that while in the Criminal Division, the application was certified urgent and the Applicant was granted an interim order for anticipatory bail in the sum of Kshs. 200,000, pending service of the application upon the Respondents and hearing of the application inter partes. The



Respondents were not to arrest or detain the Applicant until further orders of the court. The interim orders were extended on 21st November 2023.

4. The application was vehemently opposed by the 1st Respondent through a replying affidavit sworn by Carren Meli on 5th October 2023.
5. The other Respondents did not enter appearance or file any pleadings and hence did not participate in the application.

The Parties

6. The Applicant is the immediate former Chief Executive Officer of Athi Water Works Development Agency (hereinafter referred to as “the AWWDA”).
7. The 1st Respondent is a public body established under Section 3 (1) of the [Ethics and Anti-Corruption Commission Act](#), 2011 whose mandate is to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption.
8. The 2nd Respondent is the Office of the Director of Public Prosecutions, an Independent Office established under Article 157 of the [Constitution of Kenya](#) to 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.
9. The 3rd Respondent is an organ under the Kenya National Police Service (NPS), mandated to investigate all serious criminal cases as guided by law. It derives its mandate from Article 247 of the [Constitution of Kenya](#) and through the [National Police Service Act](#) 2011 which establishes the Directorate as an organ of the NPS responsible to the Inspector General.
10. The 4th Respondent is the highest ranked officer of the Kenya Police Force, responsible for commanding and leading the Kenya Police and in charge of overall and independent command and matters of the National Police Service.
11. The 5th Respondent is the Government’s principal legal advisor, responsible for representing the national Government in court or any other legal proceedings to which the national Government is a party (other than criminal proceedings) and for performing any other functions conferred to the Office by an Act of Parliament or by the President; promotion of human rights and implementation of the Constitution.

The Applicant’s case

12. The application is based on grounds that:- the Applicant is the current Chief Executive Officer of AWWDA having been appointed to that office on 30th May 2018; that the 1st Respondent is investigating the award of tenders for the construction, funding, design and building of Karineu II Dam water supply project IFCP NO. AWSB/KDBWS/IFP/04/2013 awarded on 9th May 2014; design and building of RUIRU II DAM water supply project tender No. AWSB/REOI/03/2012-2013 awarded on 30th May 2014 and; construction works for Kitui And Matuu Towns Last Mile Connectivity Of Water And Sanitation In Tanathi Water Works Development Agency Area Contract NO. AWSB/AFDB/KTSWSSP/W/2018 awarded on 18th September 2019; that vide a letter dated 24th May 2023, the 1st Respondent wrote to the AWWDA seeking information relating to the allegations of irregular award of the tenders, to which the AWWDA responded, forwarding all the necessary documentation to aid the investigations; that the subject tenders were awarded way before



the Applicant was appointed as the Chief Executive Officer of the Agency; that the Applicant is apprehensive that he might be arrested over the alleged corruption and mismanagement in the award of the tenders and is entitled to protection of the law as provided in Article 49 and 29 of the Constitution; that this Court has jurisdiction to hear and grant the orders sought by virtue of Article 23, 27, 49 and 165(3) of the Constitution; that the Applicant is ready and willing to cooperate with the Respondents in their investigations, when required to do so and that it is in the interest of justice that the orders sought be granted.

13. In the supporting affidavit sworn on 21st September 2023, the Applicant deposes that in performing his duties and responsibilities, he implemented the resolutions of the Board over which he had no control over; that subjecting him to investigations, intimidation, harassment and threat of possible arrest, charging, conviction and sentencing for acts allegedly committed before his appointment is a violation of his rights guaranteed by Articles 27 and 28 of the Constitution; that he is apprehensive that the investigations are founded on ill motive to hound him out of office; that his right of fair hearing and due process have been violated by the 1st Respondent, and any subsequent charge by the 2nd Respondent, being founded on the investigation would be a violation the Constitution and that the intended arrest would violate his right to liberty without justifiable cause contrary to Article 39(1). Further that the arrest would subject him to physical and psychological torture contrary to Article 29(a), (d) and (f) of the Constitution and that he is willing to attend any police station or offices as required, accompanied by Counsel, for the police to carry out their normal procedures and also to attend any court if any charges are preferred against him.

The 1st Respondent's case

14. The 1st Respondent opposed the application on grounds that the 1st Respondent received information on the irregular award of tenders, abuse of office and fraudulent payments by the AWWDA and instituted investigations; that the tenders were awarded during the period 1st July 2017 to 20th September 2023 for Kshs. 720,000,000, 24,000,000,000 and 20,000,000,000 respectively during which period the Applicant was the CEO of the AWWDA; that investigations revealed that the Applicant colluded with Senior officials of the AWWDA to irregularly award the tenders and to make unlawful payments for the same; that as the CEO and Accounting Officer, the Applicant executed documents and approved payments which led to the loss of public funds and it is reasonably believed that he in turn drew financial benefit from the illegal transactions.
15. Further, that it is within the mandate of the 1st Respondent to investigate the Applicant's involvement in corrupt dealings at the Agency and thus the application herein is misconceived, incompetent, bad in law, and an abuse of the court process as it seeks to prohibit the 1st Respondent from investigating the Applicant, which investigations should be done without interference. Further, that this Court should not be called upon by a person of interest, to interfere with investigations because it is in the public interest to deal with corrupt conduct and that in any event there are safeguards in the law and the Constitution to afford the Applicant protection of his rights in the course of the investigations hence the Applicant has not met the threshold for grant of the orders sought and finally, that the orders are unmerited, and the application should be dismissed with costs to the 1st Respondent to give way for completion of investigations.
16. The application was heard by way of oral submissions.

The Applicant's submissions

17. Mr. Muchemi, Learned Counsel for the Applicant, submitted that the Applicant, a public servant, received information that the 1st Respondent was investigating an entity for which he was the



immediate former Chief Executive Officer; the 1st Respondent wrote a letter dated 23rd May 2023, in response to which he forwarded all the required information. Counsel submitted that the Applicant fully cooperated with the 1st Respondent and has been ready to present himself to the 1st Respondent's offices in the last one year; that the Applicant is not seeking to bar the 1st Respondent or the 2nd Respondent from investigating or taking any lawful action against him; that the interim orders in place expressly stated that the Respondents could investigate the Applicant but not and granted him anticipatory bail of Kshs. 200,000. Further, that there was nothing to demonstrate that the Applicant had failed to honour any summons and that the Applicant is a senior public servant who is not a flight risk.

18. Counsel urged this Court to confirm the interim orders issued on 26th September 2023 as the Applicant was willing to abide with the conditions granted. Counsel prayed that should the prayers not be granted, then the bail of Kshs. 200,000 should be released to the Applicant.

The Respondent's submissions

19. Mr. Kisaka, Learned Counsel for the 1st Respondent, submitted that the 1st Respondent has power to conduct investigations under the Constitution and the Ethics and Anti-Corruption Commission Act. He asserted that preliminary investigations established that the Applicant executed documents and approved payments relating to three water projects in a manner amounting to corruption and economic crimes and investigations should be allowed to continue.
20. He further submitted that Prayer 3 of the application seeks to stop the 1st Respondent from summoning and arresting the Applicant, and to this extent, the application was an abuse of court process.
21. He contended that there are sufficient safeguards in the law and the Constitution to protect the Applicant in the Course of investigations and that the Applicant had not demonstrated how his rights had been infringed. Counsel placed reliance on the case of Ololekuyana & Another v Director of Public Prosecutions & 2 Others (2021) eKLR, where it was held that investigations are legal processes which should be allowed to run their course for the proper administration of justice. He urged this court to vacate the interim orders and dismiss the application with costs.
22. The 2nd, 3rd, 4th and 5th Respondents did not enter appearance and did not participate in the proceedings.

The Issue for determination

23. The only issue that commends itself to me for determination is whether the Applicant is deserving of the order sought.

Analysis and Determination

24. The Applicant submitted that the orders issued on 26th September 2023 were express, in that, the Respondents were allowed to investigate the Applicant but not to detain him. Counsel for the Applicant also submitted that since the 1st Respondent had not demonstrated that the Applicant failed to honour any summons, and that being a senior civil servant the Applicant is not a flight risk, this court should confirm the orders granted on 26th September 2023 or in the alternative, release the bond back to the Applicant if the application is not successful.
25. On its part, the 1st Respondent contends that the application is an abuse of court process as it seeks to protect the Applicant against the proper course of investigations.



26. By the ruling delivered on 26th September 2023, the Judge of the Criminal Division where this matter was initially filed, found that the Applicant's right to freedom and security as guaranteed in Article 29 of the Constitution of Kenya is threatened; that the Applicant's apprehension that his liberty would be infringed was triggered by the broadcast on Citizen TV where the 1st Respondent called for the immediate suspension and arrest of the Applicant on allegations of corruption and mismanagement in the award of the mentioned tenders. The Judge found it necessary at the ex parte stage, to grant anticipatory bail of Kshs. 200,000 and made an order that whereas the Respondents were at liberty to investigate or charge the Applicant for any criminal conduct, they were not to arrest or detain him until further orders of the court. The ruling went further to order that upon investigation, the 2nd Respondent was at liberty to present any charge against the Applicant in any court, in which case, the orders granted would lapse, and such trial court would be at liberty to set any new terms of bail/bond or determine whether or not to grant it. She then directed the Applicant to serve the application upon the Respondents so that they could respond.
27. My reading of the ruling, is that the anticipatory bail granted on 26th September 2023 would only lapse upon further orders or in the event the 2nd Respondent commenced criminal proceedings against the Applicant, in which case, the trial court would determine whether to give bail/bond to the Applicant, and on what terms. Indeed, the Judge giving the order directed that the Application was to be served upon the Respondents so that they could file their responses before the matter went before the Judge for directions. In effect therefore the anticipatory bail granted was just in the interim pending hearing of the application inter partes.
28. I have carefully considered the application, the grounds thereof, the affidavits and rival submissions and the law. The Applicant alleges that an arrest would be a violation of his constitutional rights as the subject tenders were awarded before he was appointed as the CEO of the Agency, and because he is willing to cooperate with the Respondents. The 1st Respondent, on the other hand, has submitted that prayer 3 of the application seeks to stop the Respondents from summoning and arresting the Applicant which is an abuse of the court process, as the law provides safeguards to protect the Applicant during the investigations and arrest.
29. Prayer 3, which is the main prayer in the application seeks the following order: -
- “THAT this Honourable Court be pleased to issue a conservatory order restraining the Respondents whether acting by themselves, their servants, agents, junior officers and/or anybody from summoning, arresting, holding, detaining, incarcerating and/or in any other way interfering with the Applicant's liberty and/or in any other way without following the due process of the law and in matters related to.”
30. Anticipatory bail is in the discretion of the court. Unlike the right of an accused person to be released on bond, anticipatory bail is not provided for in statute or in the Constitution but is granted pursuant to the court's inherent jurisdiction to protect the rights and fundamental freedoms of the people of Kenya. Being a discretionary remedy it is not granted as of right but on merit. The discretion of the court must also be exercised judiciously.
31. From a reading of the prayer set out above and the submissions of Counsel for the Applicant, the Applicant is apprehensive that he may be apprehended as a result of the investigations being carried out by the Respondents. While this court has granted anticipatory bail to other Applicants, I find this case very different from those others in that the Applicant herein seeks not to be summoned or to be arrested and seeks bail to restrain the 1st Respondent and the other Respondents only if they do not follow due process. In effect if due process is followed then he has no problem with him being arrested or detained



or being summoned. It is also instructive that in this case there is no imminent threat or danger of him being summoned or arrested. It is therefore as if the Applicant is saying “give me anticipatory bail just in case the Respondents come for me” and they do so without following due process. A court cannot act on speculation. There must be a real threat of or violation of the Applicant’s rights for an order to issue. In the case of *Mandiki Luyeye v Republic* [2015] eKLR citing the case of *Eric Mailu v Republic and 2 Others* Misc. Criminal Application No. 24 of 2013 [2013] eKLR Ngenye J (as she then was) stated: -

“Similar sentiments were observed in the case of *Eric Mailu v Republic and 2 others* Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue 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 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.”

32. The investigations in this case begun way back even before 23rd May 2023 when the 1st Respondent first wrote to the Applicant seeking information, yet there has been no attempt to arrest the Applicant which is a clear manifestation that the Applicant is merely acting on a misapprehension. There is no real or imminent threat of his arrest or detention. There is also nothing to warrant this court to believe that due process shall not be followed during his arrest. In any event the 1st Respondent and indeed all the Respondents know only too well that failure to follow due process shall invite the wrath of the court and that the Applicant has a recourse in law in that regard.
33. The upshot, however, is that this court cannot grant an order in vacuum just so that the Applicant can have it in his pocket “just in case”. I am in agreement with the decision of the court in the case of *Richard Makhanu v Republic* [2014] eKLR that anticipatory bail ought not to be sought with the intention of pre-empting the outcome of investigations which is the exact thing the Applicant in this case has done.
34. Accordingly, I find that the application lacks merit and dismiss it and it is hereby ordered that the exparte order granted on 26th September 2023 be and is hereby set aside and the bail already posted, if any, shall be refunded to the Applicant forthwith.
35. The costs of the Application are awarded to the 1st Respondent noting that the other Respondents did not participate in the proceedings.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF APRIL, 2024.

E. N. MAINA

JUDGE

