



REPUBLIC OF KENYA



**Wilson v Director of Public Prosecutions & 2 others (Criminal Application
E040 of 2023) [2024] KEHC 5692 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPLICATION E040 OF 2023**

F GIKONYO, J

MAY 7, 2024

BETWEEN

SEMEYIOI OLTITIIYA WILSON APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**INVESTIGATIONS OFFICER IN CHARGE OF ENOOSAEN POLICE
STATION 2ND RESPONDENT**

OFFICER COMMANDING ENOOSAEN POLICE STATION 3RD RESPONDENT

JUDGMENT

1. Before this court for determination is an application dated 23/11/2023 seeking the following orders;
 - i. This honourable court be pleased to admit the applicant to anticipatory bail pending arrest and or charge on terms that the court may deem fit.
 - ii. The honourable court issues orders restraining the respondents by themselves or their agents or servants from arresting or pressing charges against the applicant with regard to the matter herein.
 - iii. The cost of this application be provided for.
2. The application is based on the grounds set out on the face of the application and the supporting affidavit of Wilson Oltitiiya Semeyioi sworn on 17/11/2023.
3. The applicant averred that William Tiring'a Puruk has had a long-standing boundary dispute with the applicant herein between parcels of land numbers: Transmara/Oldanyati/357 which is registered in the name of the applicant and Transmara/Oldanyati/652 in the name of William Tiring'a Puruk.



4. The applicant has on several occasions tried to get assistance from the local administration on the best way to solve the boundary dispute amicably but his good intentions have always been frustrated by the said Mr. William Puruk.
5. William Puruk has encroached and continues to encroach into the applicant's parcel of land and as a result he has interfered with the peaceful possession and enjoyment of the applicant's parcel of land.
6. Land issues are quite emotive in this part of the county and most often lead to near-physical confrontations between parties.
7. Sometime in early November 2023, the officer commanding Enosaen police station called the applicant by telephone to summon him to come to the police station that an assault claim had been lodged against him by Mr. William Puruk and that he should report to the station to record a statement.
8. Even before the call from Enosaen police station the applicant received a letter dated 25/10/2023 where he was being invited by Nashon Kerati Muriri auctioneers to attend a reconciliation meeting to address an alleged assault against Mr. William Puruk.
9. The police are now in cahoots with Mr. William Puruk with the intention to arrest the applicant as punishment for a dispute that is purely civil and which touches on a boundary between Transmara/ Oldanyati/ 357 and 652.

Directions of the court

10. The application was canvassed by way of written submission. Both the applicant and the respondents have filed.

The applicant's submissions.

11. The applicant submitted that the right to liberty and security of a person is a unique one to protect one's freedom and security from state actors. the applicant relied on Articles 3 and 9 of the Universal Declaration of Human Rights, article 9(1) of the Covenant in Civil and Political Rights, and Section 123 of the Criminal Procedure Code, *Njuguna v Republic Nairobi Misc. Case No. 710 of 2002 1 KLR*, and *Caroline Kuthie Karanja v Director of Public Prosecutions & 2 Others [2021] eKLR*
12. The applicant submitted that he is agreeable to attend to the offices of the directorate of criminal investigation at Enosaen police station or anywhere he is summoned to do so but the police should not lock him up or detain him purporting to carry out investigations.
13. The applicant submitted that he is ready and willing to cooperate with the investigators but if they arrest and detain him they will unjustifiably infringe on his fundamental rights and freedom enshrined under *the constitution* of Kenya.
14. The applicant submitted that he will not abscond and jump anticipatory bail since he is a man with a fixed abode, and a stable family, and carries out livestock business in all market centers within the jurisdiction of this court.
15. The applicant submitted that he is ready and willing to adhere to all the terms of anticipatory bail which the court may grant.



The Respondents' submissions.

16. The respondents submitted that they were not involved in harassing the applicant due to any civil dispute. The respondents recognize their mandate as delineated in the relevant statutes and other legal instruments and have not, nor do they intend to act outside the law against the applicant.
17. The respondents submitted that are pursuing a criminal case reported by one William Puruk on 26/09/2023 vide OB No. 04/26/2023 against the applicant for which investigations are complete and charges are to be preferred against the applicant for the offense of assault causing actual bodily harm contrary to section 251 of the Penal Code.
18. The respondents submitted that while they are not necessarily required to arrest the applicant for the purpose of arraigning him in court, the respondents pray that an order is issued that the applicant liaises with the respondent with a view to fixing a date for plea taking forthwith.

Analysis And Determination

19. This court has considered the application by the Applicant in this case. The main issue for this court's determination is whether anticipatory bail and conservatory orders are deserved.
20. The relief of anticipatory bail is problematic especially where it is being sought to prohibit investigation or charging of a person. The nature of the relief is also problematic.
21. Some practitioners posit that anticipatory bail should be treated under Article 49(1)(h) of *the Constitution* of Kenya. But, the article deals with rights of an arrested person.
22. But, courts in Kenya seem to treat the relief under article 23 of *the Constitution* in exercise of 'Authority of courts to uphold and enforce the Bill of Rights', and more specifically as 'appropriate relief'.
23. The approach of treating anticipatory bail as an application for redress of violation or threat to violation of a right or fundamental freedom under article 23 of *the Constitution* is appropriate. Except, determining the existence and content of anticipatory bail requires much thought for consistent application of the relief.
24. Be that as it may, orders sought herein are meant to prevent arrest and investigation of the applicant. In relation thereto, see the case of Republic v Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR Odunga J (as he then was) 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.”



25. The court is aware of Article 29 of *the Constitution* of Kenya, which provides, inter alia, that: -
- “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;
26. Before *the Constitution* of Kenya, 2010, courts granted anticipatory bail ‘...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.’ (W’Njuguna v Republic [2004] eKLR)
27. The law at the time had declared some offences not to be bailable such as treason, murder, robbery with violence. Notably, in jurisdictions where anticipatory bail is provided, one of the major considerations is that a person may be arrested for an offence that is not bailable. See section 148 of the Indian Criminal Procedure Code.
28. Under *the Constitution* of Kenya, 2010, courts have granted anticipatory bail ‘when there was serious breach of a citizen’s rights by organs of state’
29. And, the aim of anticipatory bail was explained in the case of Mandiki Luyeye vs Republic [2015] eKLR, Ngenye J (as she then was) thus: -
- “... anticipatory bail is aimed at giving remedy for breach or 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.”
30. Court have also stated anticipatory bail ought not to be granted to prohibit, inter alia, investigations or prosecution of a person unless for compelling reason. See Republic v Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others (Supra), Richard Mahkanu vs Republic [2014] eKLR, and Kevin Okore Otieno v Republic [2013] eKLR.
31. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted relief. Relief which will interfere or stop investigation or prosecution should only be granted in the clearest of situations that point to a violation, infringement or threat, or contravention of a person’s right under Article 49 of *the Constitution* of Kenya.
32. The Applicant herein had contended that the Respondents had been harassing him with investigations for assault claim, and accordingly, having carefully considered the affidavit evidence, the written submissions, and the case law that was relied upon by the parties herein, this court does not find any iota of 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 known legal processes in our justice system and do not amount to an infringement on the fundamental rights and freedoms of any person. The said processes must be allowed to run their full course for proper administration of justice unless it is shown to violate or threaten to violate rights.
33. Should the Applicant’s rights under Articles 49 and 50 of *the Constitution* of Kenya be infringed upon, denied, or contravened, he has the liberty of seeking a review of this court’s decision. In this regard, this court comes to the firm conclusion that the application herein has not met the threshold for the granting of anticipatory bail to the Applicant herein as sought.



34. In the same breath, the court is unable to grant prayer 2 in the application, and since this was a criminal matter; the court cannot make any determination on costs.
35. For the foregoing reasons, the upshot is that the Applicant's Notice of Motion application dated 23/11/2023 is without merit and is hereby dismissed.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 7TH DAY OF MAY, 2024.**

.....
Hon. F. Gikonyo M

Judge

In the presence of:

Applicant

Maito for applicant

Okeyo for DPP

Leken C/A

