



Koros & 2 others v Director of Public Prosecutions & another (Criminal Application E012 of 2024) [2024] KEHC 9574 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPLICATION E012 OF 2024**

F GIKONYO, J

JULY 23, 2024

BETWEEN

WELDON KOROS 1ST APPLICANT

BENSON G SOSO 2ND APPLICANT

EZEKIEL NGENO CHEPKWONY 3RD APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

JUDGMENT

1. Before this court for determination is an application dated 17.04.2024 seeking the following orders;
 - a. Spent.
 - b. That the applicants be admitted to anticipatory bail pending any contemplated arrest or charge and/or action by the respondents and/ or their agents namely; police officers and/ or any other person or persons who may be so instructed by them to undertake any such arrest and/ or adverse action.
 - c. That the application be admitted to anticipatory bail on such terms and conditions as the court may deem reasonable in the circumstances pending any contemplated arrest or charge by the respondents and/ or their gents and/ or any other person or persons that may be so instructed by them to undertake any such arrest.
 - d. That the honourable court be pleased to issue such orders as will be just and proper for the protection of the applicant’s fundamental rights and freedoms.
 - e. That 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 Weldon Koros sworn on 07.04.2024.
3. The applicants averred that their finger prints were taken by the police in an investigation into how land belonging to a living person was processed through a succession cause and sold to third parties. They were some of the people of interest.
4. They however, sought information thereto to no avail. And now are apprehensive that the police may make a decision that may adversely affect them.
5. They claimed that their rights to equal protection of the law, dignity, freedom from arbitrary detention, freedom of movement, fair administrative action and fair trial, have been infringed upon.
6. They therefore, sought for anticipatory bail to prevent their arrest.

Directions of the court

7. The application to be canvassed by way of written submission. None of the parties filed submissions. Nonetheless, the application will be determined on merit.

Analysis And Determination

Court's remit

8. The High Court has authority under Article 22 and Article 165(3) of the [Constitution](#) to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Nature of anticipatory bail

9. There is a general consensus that, anticipatory bail is a special relief directed at investigatory agencies of the state. In other jurisdictions like India, 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 issued where a person is about to be arrested over non-bailable offences. Whilst, in other jurisdictions, anticipatory bail is granted to a person who has been arrested by the court.
10. Traditional anticipatory bail practice attaches conditions for the release, such as; to make oneself available before the investigatory agency concerned; or not to interfere with the investigations; or not to flee the jurisdiction, to mention, a few.
11. But, seldom is anticipatory bail issued to prevent or prohibit investigations unless for a very good reason.
12. In Kenya, in instances where anticipatory bail has been granted, it is on the basis of infringement or real threat of infringement of rights and fundamental freedoms in the Bill of Rights as [article 23](#) appropriate relief.
13. The practice could be as varied as there are jurisdictions. Hence, we see quite different doctrinal, legal and constitutional foundations shaping the kind of anticipatory bail a court may issue. Hence, mechanical borrowing or plucking of a practice from that or other jurisdiction without much thought of adaptation in application of the core content of the anticipatory bail should be discouraged and generally avoided. A country should develop its own relief by whatever name called which is appropriate to its legal system and [Constitution](#). A relief will not be more potent or effective merely because it is called anticipatory bail. Courts be innovative in fashioning a relief which suits the purpose.



14. Be that as it may, Anticipatory bail is ordinarily hemmed by law or by the court. India is a good example for it has hemmed the scope of anticipatory bail in statute and in specific directions issued only by the Sessions Court and High Court. This kind of hemming of anticipatory bail becomes necessary because, by its very nature, anticipatory bail may be abused, be at large and- perhaps most important- is potentially inhibitive of investigative mandate of the police and other investigative organs of the state.

Standard of proof

15. Therefore, the standard of granting anticipatory bail as the appropriate relief under article 23(3) of the Constitution, should be proof of breach or threat of breach of the Bill of Rights in the measure stated in the case of W’Njuguna vs Republic (2004) eKLR (although pre-2010 Constitution decision), that anticipatory bail should be granted only: -

“...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.”

Impeding constitutional mandate of investigation

16. Odunga J (as he then was). appreciated this novel philosophy and the standard required in evaluating the scope of anticipatory bail when he stated in the case of Republic vs Chief Magistrate Milimani & another ex parte Tusker Mattresses Ltd & 3 Others [2013] eKLR that: -

“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.”

Applying the test...

17. The applicants made a claim of threat to or violation of rights and freedoms; right to equal protection of the law-article 27(1); right dignity-article 28; freedom from arbitrary detention- article 29; right to information- article 35; freedom of movement- article 39; right to fair administrative action- article 47; and right to fair trial- article 50 of the Constitution.
18. The applicants have claimed violation and threatened violation of their rights and fundamental freedoms by the Police. They are apprehensive that the police recorded their statements in respect of; a succession cause over the ‘estate of a living person’ was filed, concluded and assets sold to third parties?
19. Anticipatory bail ought not to be granted to prohibit investigations (Richard Mahkanu vs Republic [2014] eKLR) or be sought with the intention of pre-empting the outcome of investigations (Kevin Okore Otieno vs Republic (2013) eKLR), or on mere apprehensions, fear, rumors or mere feeling of inconvenience.
20. The police took the finger prints of the applicants as persons of interest in the investigation; which is part of an investigations into the matter. This action does not *ipso facto* translate into infringement of right.
21. The applicants have stated that they sought for information on the taking of their finger prints to no avail. And concluded that, they ‘are apprehensive that the Respondents are operating in an opaque manner, yet, they are likely to make a decision that may adversely affect the applicants at any time’.
22. The applicants did not show that a decision that may be made in the investigation is unconstitutional or illegal or without authority. Thus, they entertained an assumption and mere apprehension that does not qualify to be infringement of rights and fundamental freedoms of the applicants in the sense of article 22 and 23 of the Constitution.



23. The applicants have not shown how they have been deprived of freedom arbitrarily or without just cause.
24. The applicants have not also established how their right to equal protection before the law, or right to dignity or freedom of movement or fair administrative action or fair trial has been infringed by the police or the investigation.
25. It bears restating that, as the applicants seem to seek prohibition of investigations, much more is required than merely feeling apprehensive or ‘appreciably apprehensive’ [as used in para 9 of the affidavit in support]; to proof of violation, infringement or threat or contravention of a person’s right under the Constitution of Kenya.
26. The Applicants’ claims that they have been subjected to unprecedented phone calls from unknown telephone numbers which has occasioned them great inconvenience, disturbances and mental anguish and torment, remained at generalized level without any factual or evidentiary support.
27. In conclusion, the applicants did not prove threat to or infringement of any rights and fundamental freedoms in the Bill of Rights. There is absolutely no basis for the relief sought.
28. For the foregoing reasons, the Applicant’s Notice of Motion dated 17.04.2024 is without merit and is hereby dismissed.
29. But, in light of the nature of the petition, each party shall bear own costs of the petition.
30. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF JULY, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for Respondent - Present

Mr. Kiprotich for Applicant - Present

