



Mutembei v Director of Public Prosecutions & another (Miscellaneous Criminal Application E052 of 2024) [2024] KEHC 12431 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E052 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

**IN THE MATTER OF CHAPTER 4 AND ARTICLES 20, 22, 23(1), 27(1), 29(A) & 49(1)
(H) OF THE CONSTITUTION OF KENYA 2010 AND THE CRIMINAL PROCEDURE CODE**

BETWEEN

ANDREW MUTEMBEI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION - EMBU 2ND RESPONDENT

RULING

1. The applicant filed notice of motion dated 07th August 2024 on the grounds appearing on the face of it and in the supporting affidavit. The application was filed and under certificate of urgency, seeking orders that:
 - a. The honourable court be pleased to admit the applicant to anticipatory bail on reasonable terms pending the hearing and determination of this application;
 - b. The honourable court be pleased to grant the applicant anticipatory bail pending arrest or charge on such terms as the court may deem fit to impose;
 - c. The honourable court be pleased to issue a conservatory order restraining the respondents, their servants, agents, junior officers and/or anybody from arresting, harassing or otherwise howsoever interfering with the applicant herein pending the hearing and determination of this application;
 - d. The costs of this application be provided for; and
 - e. Such further orders as the court deems fit in the circumstances.



2. The applicant's case is that he is a businessman running an Mpesa outlet in Maua, from which Safaricom PLC pays him commissions. That the 2nd respondent has been summoning him to explain transactions amounting to Kshs 2,000,000/= he has received over time, yet the money is his commission earned. That he has received several threats from the 2nd respondent who has also been following him and his family members around, threatening to abduct him and take him to undisclosed location.
3. He deposed that following the Gen-Z antigovernment protests in June 2024 and the outcomes that left scores injured and dead, he is apprehensive that the 2nd respondent will actualize its threats against him and his family. Being aware that the court should not interfere with investigative processes, the applicant stated that the court is still under obligation to ensure that his constitutional rights and fundamental freedoms are protected. He stated that the 2nd respondent can exercise its mandate without necessarily abusing his constitutionally guaranteed freedoms. He urged the court to grant him bail pending arrest as provided under Article 49(1)(h) of the Constitution.
4. The 1st respondent filed a replying affidavit stating that the applicant was summoned by the 2nd respondent under section 52 of the National Police Service Act because they had good reason to believe that the applicant had information that would be useful to investigation of a crime. That criminal complaints investigation is within the purview of the 2nd respondent's mandate as provided under the National Police Service Act. That the applicant sought for similar orders through Meru High Court Misc. Application No E055 of 2024 and the order was granted hence the application herein is an abuse of the court process.
5. The court directed the parties to file written submissions but none of them complied.
6. The issue for determination is whether or not the application has merit.
7. In my view, for us to determine whether or not the reliefs sought can be granted by this court, it is important to understand the circumstances under which the relief is sought. To begin with, it is noteworthy that besides the Constitution, there is no express legislation governing application of anticipatory bail. Article 29 of the Constitution of Kenya 2010 provides as follows:

"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;
 - b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
 - c. subjected to any form of violence from either public or private sources;
 - d. subjected to torture in any manner, whether physical or psychological;
 - e. subjected to corporal punishment in a cruel, inhuman or degrading manner."
8. We are also not blind on the subject as previous courts have spoken on the matter of anticipatory bail. I am guided by the case of Coroline Kuthie Karanja v Director Public Prosecutions & 2 others [2021] eKLR where the court held thus:

"In Kenya, there are no specific provisions on anticipatory bail save for the constitutional provisions under the Bill of Rights.



The Constitution of Kenya 2010 provides for;

- a) Bail of arrested person under Article 49(1)(h)
- b) Appropriate relief under Article 23(3) for breach of the Bill of Rights

In India a common law jurisdiction upon which our criminal procedure code is premised has a specific Section 438 on anticipatory bail which states as follows;

- (1) where any person has a reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, inter alia the following factors namely;
 - 1) The incident and gravity of the accusations
 - 2) The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence
 - 3) The probability of the applicant to flee from justice and
 - 4) Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.”

9. The applicant is apprehensive that the 2nd respondent will arrest him for a misunderstanding regarding credit transactions to his name. He stated that the 2nd respondent has been intimidating him and his family and they have issued threats to abduct him and take him to an undisclosed location. In rebuttal, the 1st respondent has deposed that the 2nd respondent is simply carrying out investigations into a complaint received, which investigation is within its mandate under the National Police Service Act. It was also the 1st respondent’s case that the application herein is a waste of the court’s time since the orders sought were already granted by the High Court in Meru.
10. The 2nd respondent is yet to make an arrest or charge the applicant with any offence. They are investigating a potential crime for which the applicant may be a suspect. The applicant stated that he has been summoned severally to give information regarding the transactions in question but with every summoning, came a threat to his freedom, which threat, if actualized, will deny him his fundamental rights under the Constitution. However, it must be demonstrated that the impending violation is very likely to occur, or has been attempted before, or that the applicants have substantial proof that the 2nd respondent is indeed intending to act in violation of his fundamental rights. In the case of Henry Kaskon Mwachi & 2 others v Republic & another [2020] eKLR it was held:

“The courts have stated the terms under which a person may be granted anticipatory bail. In Gladys Boss Shollei v Attorney General & 3 others [2015] eKLR, it was said that: “Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated...”



11. In the same case, the court ended up denying this relief to parties who were merely fearing arrest and nothing else. The court in its determination went on to say:

“..As properly submitted by the respondents, if the applicants were to be arrested they would be arraigned in court, as required by the law, before the lapse of 24 hours, and would be afforded an opportunity to seek for bail or bond from the court. The police can also bail them out if need be. In any event, the mere fact that they are required at the police station does not mean that they will have to be arrested. The applicants have not demonstrated that the police are looking for them with a view to arresting and charging them in court with some offence. The applicants are merely apprehensive that they will be arrested. I am not persuaded, in the circumstances, that the applications meet the required threshold for grant of anticipatory bail, and I hereby dismiss them.”

12. In applying this relief, the court is urged to apply it cautiously as stated in the case of *[Shakeel Ahmed Khan & another v Republic & 5 others](#)* [2019] eKLR the court held:

“...An applicant must however demonstrate to the Court existence of circumstances that give rise to serious breaches of, or threat to, his fundamental rights. Only then will this Court exercise its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. While considering this application for anticipatory bail, the Court must ask itself whether the Respondents have abused their powers to the detriment of the Applicants and whether the intervention of this Court in exercise of its supervisory powers is necessary to prevent the abuse.”

13. The respondents have argued that there is an active investigation into a possible criminal offence. In the case of *[Republic v Chief Magistrate Milimani & another Exparte Tusker Mattresses Limited & 3 others](#)* [2013] eKLR states 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 other 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...., the High Court ought not to interfere with the investigative process conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.”

14. It is my view that the applicant’s apprehension is not valid to warrant granting of anticipatory bail given the circumstances of the case. I have taken the liberty of perusing the court record in Meru High Court Misc. Application No E055 of 2024 and I have learned that on the same date when the applicant filed the application in that matter, he also filed the one herein and the 2 applications are identical. The honourable judge allowed the application in the Meru application but granted anticipatory bail to last for 7 days.
15. I note the seriousness of the allegations in this application but I am not persuaded that the application should be granted in the circumstances. In any event, if the applicant will be eventually arrested, the opportunity to apply for bail will still be available to him as provided in the *[Constitution](#)*.
16. In the upshot, I find that the application lacks merit and is hereby dismissed.



17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

