



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Namayi & 2 others v Director of Criminal Investigations, Uasin  
Gishu County & 2 others (Miscellaneous Criminal Application  
001 of 2023) [2023] KEHC 18481 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION 001 OF 2023**

**RN NYAKUNDI, J**

**JUNE 5, 2023**

**BETWEEN**

**BEATRICE NAMAYI ..... 1<sup>ST</sup> APPLICANT  
HERODIAN NYAIGO ..... 2<sup>ND</sup> APPLICANT  
HENRY KISSINGER BOSIBORI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS, UASIN GISHU  
COUNTY ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT  
MOI TEACHING AND REFERRAL HOSPITAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

- 1 The applicant approached this court vide a Notice of Motion application dated 5<sup>th</sup> January 2023 seeking the following orders;
  1. Spent.
  2. Pending the hearing and determination of this application the applicants be admitted to anticipatory bail.
  3. The Honourable Court be pleased to make a finding that the respondents should not abuse the letter and spirit of the criminal justice system by pursuing matters arising out of lawful execution of valid court orders arising from Kisumu ELRC No. 359 of 2016; *Edith Kathure Munyua v Moi Teaching and Referral Hospital & Others* which the applicants enjoy immunity from proceedings by dint of section 6 of the *Judicature Act*, Cap. 8 of the Laws of Kenya and



which matters were the subject of an application for contempt to the Court of Appeal in Kisumu CA Civil Application No. 212 of 2019; *Munya Kathure Edith v Moi Teaching and Referral Hospital & Others* and which application was withdrawn.

2 The costs of the motion be sourced by the respondents.

3 The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn by the 1<sup>st</sup> applicant.

### **Applicant's Case**

4 Learned counsel for the applicant set out the brief facts that led up to the application in submissions filed on 27<sup>th</sup> February 2023. He submitted that the applicants were summoned by the Directorate of Criminal Investigations, Eldoret Central Police Station on the 4th January 2023 over matters arising out of the lawful execution of valid warrants of attachment in Kisumu ELRC No. 359 of 2016; *Edith Kathure Munya v Mol Teaching and Referral Hospital & Others*. They honoured the summons on 5<sup>th</sup> January 2023 and were asked to return to the afternoon. They became privy to a letter from the 2<sup>nd</sup> respondent advising that they be charged with the criminal offence of disobeying a lawful order contrary to section 131 of the *Penal Code* and were apprehensive that they would be arrested and charged. The applicants sought refuge in court by filing the instant motion seeking anticipatory bail.

5 Learned counsel for the applicant cited the cases of *Paul Ole Kuyana & another v Director of Public Prosecution & 2 others* [2021] eKLR, *Mandiki Luyeye v Republic* [2015] eKLR and submitted that the applicants' case is that they were issued with valid warrants of attachment of movable property in execution of a money decree on 17<sup>th</sup> December 2021, which warrants they proceeded to execute lawfully. However, the respondents intend to prosecute the applicants over matters arising out of the lawful execution. He stated that the applicants are immune from said prosecution vide section 6 of the *Judicature act* and cited the case of *Zachariah Baraza t/a Siumi Traders v Director of Public Prosecutions & another* [2017] eKLR in support of this submission.

6 Counsel urged that the matters in issue not only fall under the purview of section 6 of the *Judicature Act*, Cap. 8 of the Laws of Kenya, but were also the subject of an application for contempt to the Court of Appeal in Kisumu CA Civil Application No. 212 of 2019; *Edith Kathure Munya v Moi Teaching and Referral Hospital & Others*, which application was withdrawn and an order of the court was annexed to the affidavit in support of the motion.

7 Learned counsel submitted that there was no proof that the order of stay of the execution of warrants of attachment was served upon the applicants and further, that the intended arrest and prosecution of the applicants is devoid of a proper factual foundation and basis and thus constitutes both a breach of the applicants' rights and an abuse of the criminal justice system. He relied on the case of *Republic v. Attorney General exp Kipng'eno Arap Ngeny* High Court Civil Application No. 406 of 2001 in support of this submission. He urged the court to allow the application as prayed.

### **Respondent's Case**

8 The 3<sup>rd</sup> respondent opposed the application vide a replying affidavit sworn on 1<sup>st</sup> February 2023 by its counsel Geoffrey Ochieng Owino. Counsel also filed submissions and skeletal submissions in opposition to the application. It is the 3<sup>rd</sup> respondent's case that the applicants are undeserving of the reliefs sought for the reasons that they have approached the court with unclean hands. The applicants were cautioned by the 3<sup>rd</sup> respondent through a letter dated 21<sup>st</sup> December 2021 against attaching the 3<sup>rd</sup> respondent's property due to existence of Court of Appeal Judgement issued eleven (11) months



earlier on 29<sup>th</sup> January 2021, staying the execution of judgment of the Kisumu Employment and Labour Relations Court Cause No. 359 of 2016. The applicants through their auctioneering firm known as Igare auctioneers acknowledged receipt of the cautionary letter in hard copy by affixing their stamp on the 3<sup>rd</sup> respondents copy and through email communication which they acknowledged receipt. The said evidence is contained in the 3<sup>rd</sup> respondent's replying affidavit. Counsel urged that the applicants have failed to demonstrate the alleged breach/denial of the fundamental rights or freedom under the bill of rights.

- 9 Learned counsel for the 3<sup>rd</sup> respondent submitted that under Kenyan law, where anticipatory bail has been considered, courts have applied the threshold for an application for violation or threatened violation of right under article 23 and 165(3) of the *constitution*. He stated that the denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights should be ascertained or demonstrated prior to making a determination whether the relief ought to be granted. Further, that care should be taken not to grant anticipatory bail and perhaps place unnecessary impediment upon constitutional function and mandate of other state organs, placing place reliance rely on the case of *Paul Ole Kuvana & another v Director of Public Prosecution & 2 others* [2021] eKLR.
- 10 It is the respondent's' case that the applicants have not proved through any factual or other evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted illegally, arbitrarily, unjustly, irregularly or oppressively. Neither have they shown that their fundamental rights and freedom are under threat of infringement, violation or denial. Further, that to the extent that the applicants ought to be arraigned in court and take plea, deprivation of their freedom is a likely occurrence based in law and justifiable in an open and democratic society. Thus, the applicants fear of arrest and arraignment in court is misconceived and based on unsubstantiated claims that can only be determined by a court of law. He cited the case of *Eric Mailu v Republic and 2 others* Nairobi Misc. Cr. Application No. 24 of 2013 in support of this submission.
- 11 Citing the case of *Republic v Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others* [2013] eKLR, counsel submitted that the in view of the standard laid down by Honourable Justice Odunga, the court is required to take caution not to make conclusions, findings and orders that may embarrass it, prejudice and/or affect investigations or hearing of the case. The court must be convinced that the interference is really necessary so as to prevent a violation of fundamental rights and freedoms. However, no evidence or compelling reasons has so far been adduced to persuade the court to prohibit the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent from arresting and charging the applicants. He stated that the allegations complained of contains matters that must be determined with certainty before a court of law. Whether the applicants are exempted from criminal action for carrying out their duties must be determined to find out the extent to which they are exempted. If in carrying out their duties, certain violations were committed, they must be held responsible for their acts/or omissions.
- 12 In conclusion, counsel submitted that the grant of reliefs sought by the respondents only serves to prevent the 1<sup>st</sup> and 2<sup>nd</sup> respondents from performing their constitutionally and legally mandated function and urged the court to dismiss the application.

### **Analysis & Determination**

- 13 Upon considering the application, responses thereto and the submissions on record, the following issue emerges for determination;
  1. Whether the applicants should be granted anticipatory bail



## Whether The Applicants Should Be Granted Anticipatory Bail

- 14 Anticipatory bail has been discussed extensively by the courts. Justice Odunga J. set out the standard required in evaluation of application for anticipatory bail when he stated in the case of *Republic v Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR 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.”

- 15 Anticipatory bail applications are treated as a redress for violation of constitutional rights reason being that 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

- 16 Article 29 of the *constitution* of Kenya 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.”

- 17 In the case of *Mandiki Luyeye v Republic* [2015] eKLR, the court held thus;

Similar sentiments were observed in the case of *Eric Mailu v Republic and 2 Others* Misc. Criminal 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 the State.

- 18 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 of fundamental right must demonstrate the breach by acts and facts constituting the alleged breach”.



- 19 It follows that for orders for anticipatory bail to issue one must demonstrate the alleged breach of the constitutional rights. The applicants have not provided any tangible evidence that any of their constitutional rights have been violated.
- 20 There is a growing practice of applications for anticipatory bail which, in my view, are misguided and an abuse of the court process by virtue of the fact that the constitution provides enough protections for the citizens of Kenya. This protection is found under article 48 which states the rights of an arrested person, specifically under Article 49(1)(h) which stipulates as follows;
- (1) An arrested person has the right-
  - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
- 21 It is my strong view that apprehension of intended arrest does not constitute proof of a violation or breach of any constitutional rights. Further, the orders sought will be a breach of the doctrine of separation of powers as the court will be interfering with the respondents' constitutional mandate.
- 22 It's my considered view that in order to have locus standi an applicant to a constitutional petition must not only allege that a fundamental right is violated, or about to be infringed or threatened, but also that in terms of the categories of rights espoused in the Bill of Rights there is sufficient interest in securing a remedy under Article 23 of the constitution. It is not lost that the availability of a constitutional remedy is a matter of jurisdiction in which the courts must apply a purpose of approach provided for in Article 20 (2) (3) & (4) of the constitution which states as follows:
2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
  3. In applying a provision of the Bill of Rights, a court shall:-
    - a. Develop the law to the extent that it does not give effect to a right or fundamental freedom and
    - b. Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
  4. In interpreting the Bill of Rights, a court / tribunal or other authority shall promote
    - a. The values that underlie an open and democratic society based on human dignity, equality, equity and freedom and
    - b. The spirit, purport and objects of the Bill of Rights
- 23 So too the court in *Sanderson v Attorney –General, Eastern Cape* 1998 (2) SA 38 (CC) para 27 stated the flexibility in providing remedies may affect and understanding of the right. Krieger J went further to make the following observations Generally speaking
1. Application is about whether and how the rights in the Bill of Right apply in legal disputes
  2. Interpreting or defining the rights in the Bill of Rights is the task of describing what the rights mean in an open and democratic society based on human dignity, freedom and equality.
  3. Limiting rights is about determining which deviation from the standards set by the Bill of Rights for law and conduct are justified in the circumstances.
  4. Remedies are about what can be done if an unjustifiable violation of rights has occurred.



- 24 As a constitutional court one must adopt a purposive interpretation in order to give content and meaning of the constitutional rights. It was emphasized by the Canadian Supreme Court in *R v Big M Drug Mari Ltd* 1985 DLR which states that: “ The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee, it was to be understood, in other words in the light of the interest it was meant to protect. In my view this analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the charter (of Rights and freedoms) itself to the language chosen to articulate the specific rights or freedom to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedom with which it is associated within the text of the charter. The interpretation should be .....a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.” (See also *R v Oakes* ) (1982) 1 SCR 860
- 25 These decisions espouses the requirement that a right may be limited only to the extent that the limitation is reasonable and justifiable based on human dignity, equality and freedom. The courts must therefore weigh-in the doctrine on proportionality test.
- 26 The situation in this case deals with pre-arrest legal process as expressly enacted under Article 49(1) of the constitution. The class of questions raised by the Applicants can safely be answered if the National Police Service and its subsidiary investigating agency adhered to the provisions clustered as Rights of arrested persons. However, what is observed by the avalanche of anticipatory bail applications, there is imminent fear or anxiety on the part of the citizenry whenever someone files a complaint with the police. Just as a reminder, the functions and duties of the National Police Service are anchored in the constitution.
- 27 While I agree that the constitutional court is the last bastion to protect and guarantee enjoyment of the Bill of Rights, the sole consideration then must be to balance the competing interests of the constitution organs with a mandate to drive and deliver the outcomes in the Criminal justice system. First it must be determined whether the evidence available supports a prima facie case of infringement or a violation of any of the rights captured in the Bill of Rights. In my view the provisions under Article 49 (1) should be more comfortably accommodated by the National Police Service while discharging the mandate specified in Article 244 as read conjunctively with Article 245 of the constitution. This is because in Article 27 (1) & (4) the principle of equality does not require everyone to be treated the same put simply but people of the same position should be treated the same manner without discrimination. It is not every differentiation that can amount to unequal treatment. The scheme of *Criminal Procedure Code* and the *National Police Service Act* nuances the power of arrest by the police. The only exception I find is the exercise of that power being invoked in every case without recourse of establishing whether it’s a fit case for summons requiring attendance of a suspect in connection with the alleged complaint. The power of arrest and custody seems to be the norm in Kenya the reason why the scrutiny of the courts is called upon to strike a further balance between the power of arrest and the rights of the suspect within the ambit of Article 19, 20, 21, 22, 23, 27, 28, 29, 47, & 49 of the constitution. That intervention takes the queue of the supervisory jurisdiction under Article 165 (6) & (7) of the constitution.
- The constitution provides safeguards on fair trial rights in Article 50 of the constitution. In the event a suspect is prosecuted maliciously a remedy on constitutional tort for damages under Article 23 of the constitution comes in handy to compensate the victims of injustice by the criminal justice system of Kenya. Therefore, the constitution being a living soul of our nationhood must be read, construed and interpreted as a whole. This means that a person or applicant seeking grant of anticipatory bail must establish a prima facie case for the court to exercise such residual powers to protect and guarantee



fundamental rights and freedoms. That power though not expressly provided for in the Criminal Procedure Code, must be exercised sparingly and in exceptional cases only.

28 Why do I say so? The Respondents have both constitutional and statutory duty and powers to investigate criminal complaints by parties. It is noteworthy to appreciate the substantive due process clauses in Article 49 & 50 of the *constitution*. Whether a given situation presents a legitimate field to the exercise of the National Police Service Power to place restrained upon the right to liberty and fundamental freedoms depends upon whether the circumstances presented themselves a reasonable necessity for the imposition of that restraint in order to promote public good. The issues confronting this court are far from clear to answer the question that the police overstepped their mandate affecting the Bill of Rights of the petitioner as guaranteed by the *constitution*. Naturally, many of the police power cases deal with the issues filed in their respective police stations by victims of an offence or third parties in need of preventing crime for reason of enhancing security and dignity of other citizens. That is the very reason for the courts to exercise restraint from interfering with the exercise of discretion at whim or caprice. The limited role of a court reviewing the exercise of administrative discretion must constantly be borne in mind on legality and substance to grant or decline anticipatory bail to an applicant. As has been noticed earlier this is one case I decline to grant a remedy of anticipatory bail in favour of the Applicants.

29 In the premises, I dismiss the application with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5<sup>TH</sup> DAY OF JUNE 2023**

.....

**R. NYAKUNDI**

**JUDGE**

